

# ANNUAL SURVEY OF CANADIAN LAW

## PART 1

### CONFLICT OF LAWS

Stuart G. MacKinnon\*

This survey has taken the form of a commentary on three significant happenings in the conflict of laws. Two are judicial decisions<sup>1</sup> and the other an act of Parliament.<sup>2</sup> It will be noted that neither of the judicial decisions is Canadian—both are English. They are, however, of such significance to the development of Canadian conflict of laws that I believe their treatment is warranted in a survey of Canadian law.

#### I. DIVORCE

The most significant recent developments for the conflict of laws in Canada occurred in the field of recognition of foreign divorce decrees.

##### A. *Indyka v. Indyka*

The most important judicial development is the decision of the House of Lords in the case of *Indyka v. Indyka*,<sup>3</sup> where that august body saw fit to overturn common-law rules for the recognition of foreign divorce decrees that had been accepted as gospel for the better part of a century. The implications of *Indyka* are far-reaching and the case has already made its presence felt in subsequent English decisions. It is beyond the scope of this survey to attempt a detailed analysis of the judgments in the case.<sup>4</sup> It will be necessary, however, to summarize the case and attempt to fit it into the context of the law of divorce recognition as it has developed in recent years.

In 1895 the Judicial Committee of the Privy Council in the case of *Le Mesurier v. Le Mesurier*<sup>5</sup> decided that the domicile of the parties was

---

\* B.Sc., 1955, LL.B., 1960, Dalhousie University; LL.M., 1962, University of London. Associate Professor of Law, Faculty of Law (Common Law Section), University of Ottawa.

<sup>1</sup> *Indyka v. Indyka*, [1967] 3 W.L.R. 510, [1967] 2 All E.R. 689 (H.L.), *Boys v. Chaplin*, [1968] 2 Q.B. 1, [1968] 1 All E.R. 283 (C.A. 1967).

<sup>2</sup> Divorce Act, Can. Stat. 1968 c. 24.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> The case has been the subject of considerable comment. Williams, Comment, 5 ALTA L. REV. 328 (1967). R.L.W., *The House of Lords Blazes the Trail*, 112 SOL. J. 59 (1968); Lipstein, Comment, (1968); Webb, *Recognition of Foreign Decrees—Post Indyka Position*, 17 INT'L & COMP. L.Q. 209 (1968). Lipstein, *Recognition of Foreign Divorces: Retrospects and Prospects*, 2 OTTAWA L. REV. 49 (1967).

From a Canadian viewpoint the most useful and detailed contribution is that of Professor Gordon Bale, Comment, 46 CAN. B. REV. 113 (1968).

<sup>5</sup> [1895] A.C. 517, 72 L.T.R. (N.S.) 873 (P.C.).

the only basis for divorce jurisdiction at common law. That decision dealt with the question of domestic jurisdiction only, *i.e.*, whether the trial court had the right in the first instance to hear the case. *Le Mesurier* was not a recognition case. Nevertheless it was considered by later authorities to lay down a rule by implication as to the recognition of foreign divorces.<sup>6</sup> Such a rule followed the domestic rule, *i.e.*, the court of the forum would not recognize a foreign decree unless that decree was given by a court of the domicile.<sup>7</sup> This basic rule as to recognition was subject only to the exception that there would be recognition of a foreign divorce decree even though it was not granted by a court of the domicile, if the domicile itself would recognize the foreign decree.<sup>8</sup>

The rule that domicile was the only common-law basis for divorce jurisdiction, when combined with the rule that the domicile of the wife was the domicile of the husband, led to unfortunate results. For example, a wife, having valid grounds, could not obtain a divorce from a court of the law district where she resided if her husband had left the law district without intending to return.<sup>9</sup> With the common law backed into a corner from which it seemed incapable of extricating itself, it was left to the legislators to find a solution that would avoid such undesirable results. There developed in most common-law countries legislation which gave divorce jurisdiction to the forum in cases where the petition was brought by a deserted wife when the husband had been domiciled in the forum at the time of desertion, and a certain period of time, normally two or three years, had elapsed from the date of desertion.<sup>10</sup>

As deserted wives' divorce jurisdiction statutes became widespread, it was only a matter of time until the courts had to face the question of whether they would recognize a divorce decree of another law district having similar legislation. The English Court of Appeal gave an affirmative answer to the question in the much heralded case of *Travers v. Holley*.<sup>11</sup> The effect of that decision was that England would recognize a foreign divorce decree granted on a jurisdictional basis other than domicile where an English court would exercise jurisdiction itself on a similar basis. The substantial similarity of the deserted wives' divorce jurisdiction legislation of New South Wales and England, was the basis of the court's recognition of the New South Wales decree in *Travers v. Holley*. Later cases have expanded this rule of recognition by holding that the similarity of legislation is not necessary

---

<sup>6</sup> See, DICEY & MORRIS, *THE CONFLICT OF LAWS* at 309, 319 (8th ed. 1967). Also Bale, *supra* note 4, at 118, 119.

<sup>7</sup> Domicile being determined by the forum—*In re Annesley*, [1926] Ch. 692—and that domicile being the domicile of the husband because the wife's domicile is dependent upon his. See, *Attorney-General for Alberta v. Cook*, [1926] A.C. 444.

<sup>8</sup> *Armitage v. Attorney-General*, [1906] P. 135, 75 L.J.P.D. & A. 42.

<sup>9</sup> *Attorney-General for Alberta v. Cook*, *supra* note 7.

<sup>10</sup> *E.g.*, The Divorce Jurisdiction Act, CAN. REV. STAT. c. 15 (1952) (enacted in 1930).

<sup>11</sup> [1953] P. 246, [1953] 3 W.L.R. 507 (C.A.).

as long as the forum where the decree is sought to be recognized would have exercised jurisdiction had similar facts connected the case with the forum and had the matter arisen in the forum in the first instance.<sup>12</sup>

*Travers v. Holley* caused a good deal of excitement in legal circles. I suspect that the lay observer, being apprised of the decision in the case, would be surprised and amused by all the fuss. It seems eminently sensible after all to apply the "golden rule" in the recognition of foreign judgments. If country *A* gives a judgment having exercised jurisdiction on the same basis as we in country *B* would exercise in a similar case, why should we in country *B* not recognize that judgment? This point of view should hold true particularly in the field of divorce where the parties are already regarded as no longer married by a place with which one or both of the parties has been substantially connected. Viewed, however, in the light of previous judicial attitudes, the excitement over *Travers v. Holley* is understandable. Take for example the leading case of *Schibsby v. Westenholz*.<sup>13</sup> There an English court refused to recognize a French judgment even though, had the same facts arisen in England and had the action first been brought in England, the English court would have exercised jurisdiction. It is true that *Schibsby v. Westenholz* was dealing with the enforcement of a money judgment, a matter of *in personam* jurisdiction rather than jurisdiction over marital status, but the Court of Appeal in *Travers v. Holley* could well have followed the *Schibsby v. Westenholz* precedent on the question of recognition of decrees dealing with marital status. Fortunately, in the interests of preventing limping marriages, where couples are considered single in one country and married in another, *Travers v. Holley* blazed a new trail to wider recognition.<sup>14</sup>

All this is merely simplified background to the *Indyka* case which originally dealt with the question of whether the *Travers v. Holley* rule could be applied retrospectively. In *Indyka* the divorce had been granted to the wife in Czechoslovakia. Since the wife had always been resident in Czechoslovakia, the *Travers v. Holley* rule normally could be applied to give recognition to the decree because the English Matrimonial Causes Act<sup>15</sup> gives an English court jurisdiction in cases where the wife had been

<sup>12</sup> E.g., *Robinson-Scott v. Robinson-Scott*, [1958] P. 71, [1957], 3 All E.R. 473.

<sup>13</sup> L.R. 6 Q.B. 155, 40 L.J.Q.B. 73 (1870).

<sup>14</sup> Unfortunately, in *in personam* matters, *Travers v. Holley* does not seem to have gained currency in the courts. See, *Re Trepeca Mines Ltd.*, [1960] 1 W.L.R. 1273, [1960] 3 All E.R. 304 (C.A.); *Société Co-opérative Sidmetal v. Titan International Ltd.*, [1965] 3 W.L.R. 847 (Q.B.). Cf. Denning, L.J., in *Re Dulles*, [1951] Ch. 842, at 851. It seems churlish, for example, for the courts of Alberta to refuse to recognize money judgment of a British Columbia court made under the rules for service *ex juris*, when Alberta would have exercised jurisdiction had the facts arisen in Alberta. *Wedlay v. Quist*, [1953] 4 D.L.R. 620, although *Travers v. Holley* was not cited. See, Read, *Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada*, 37 PROCEEDINGS CAN. B. ASS'N 133 (1954).

<sup>15</sup> Matrimonial Causes Act, 1965, c. 72.

resident in England for three years. The problem in *Indyka* was that the Czech court had granted the divorce before the English three-year residence provision came into effect in December, 1949.<sup>16</sup>

Mr. Justice Latey was not prepared to apply *Travers v. Holley* to these facts.<sup>17</sup> The majority of the Court of Appeal reversed his decision and applied *Travers v. Holley* retrospectively so as to recognize the foreign decree.<sup>18</sup>

The judgment of the Court of Appeal on this issue was upheld by the House of Lords. This fact is almost eclipsed by what the Law Lords had to say in general about the basis of divorce jurisdiction. They rejected the long-standing assumption that the domicile of the parties was the only common-law basis for the recognition of foreign divorce decrees. The real difficulty with the case is in trying to extract and state the common denominator of the variety of views expressed in the individual judgments. Each of the three judges<sup>19</sup> who gave the retrospective operation of *Travers v. Holley* as one of the reasons for recognizing the Czech decree went on to search for a wider and more fundamental basis for recognition.

Lord Morris of Borth-y-Gest stated :

While in the present case I would support recognition of the Czech decree on the basis adopted by the majority in the Court of Appeal I would also support it on a wider basis. The evidence was that the Czech court accepted jurisdiction on the ground that both the parties were and always had been Czechoslovakian citizens. The first wife at the time when she presented her petition in Czechoslovakia undoubtedly had a real and substantial connection with that country. I see no reason why the decree of the Czech court should not in those circumstances be recognized. There may, in other cases, be further and different bases for recognition.<sup>20</sup>

It should be noted that it is possible to interpret Lord Morris of Borth-y-Gest's use of "real and substantial connection" in at least two different ways. First, it may be taken to mean that the petitioner must have a real and substantial connection with the country granting the decree and that nationality, and perhaps residence, amounts to a real and substantial connection. This is the more obvious interpretation. The second interpretation is that nationality will be an alternative basis of recognition if there is a real and substantial connection between the petitioner and the decree granting country. This latter view would correspond with the test proposed by Lord Pearson. He states :

---

<sup>16</sup> Law Reform (Miscellaneous Provisions) Act, 12, 13 & 14 Geo. 6, c. 100, § 1 (1949). The act was repealed by the Matrimonial Causes Act, 14 & 15 Geo. 6 c. 25 (1950), but § 18(1)-(6) re-enacted the former § 1. This § has now been repealed and re-enacted as § 40(1)(6) of the Matrimonial Causes Act, 1965, c. 72.

<sup>17</sup> [1966] 1 All E.R. 781 (P.D. & A.); also, R.L.W., *supra* note 4.

<sup>18</sup> [1966] 3 W.L.R. 603, [1966] 3 All E.R. 583 (C.A.). See also comments of Williams, R.L.W. and Lipstein, *supra* note 4.

<sup>19</sup> Lord Morris of Borth-y-Gest, Lord Pearce, and Lord Pearson.

<sup>20</sup> [1967] 3 W.L.R. at 534, [1967] 2 All E.R. at 708.

It seems to me that subject to appropriate limitations, a divorce granted in another country on the basis of nationality or on the basis of domicile (whether according to English case-law or according to a less exacting definition) should be recognized as valid in England. Also if the law of the other country concerned enables a wife living apart from her husband to retain or acquire a separate qualification of nationality or domicile for the purpose of suing for divorce, and the jurisdiction has been exercised on the basis of that qualification, that would not, normally at any rate, be a reason for refusing recognition.

One obvious limitation is that a decree obtained by fraud or involving grave injustice should not be recognized. In addition there is a limitation which can only be indicated in rather general terms . . . . In the words of my noble and learned friend Lord Wilberforce, there must be a real and substantial connection between the petitioner and the country or territory exercising jurisdiction.<sup>21</sup>

Lord Pearson is using real and substantial connection as an ancillary or secondary test. In his view, nationality and domicile are the basis of recognition, subject to the stipulation that there must be a real and substantial connection.<sup>22</sup>

In summing up, Lord Pearson indicated what he envisaged as being included in the wife's real and substantial connection with Czechoslovakia.

The first wife had lived there all her life, and had been married there, and had her matrimonial home there and was left there by the husband. There is no suggestion that she had any intention or desire to go to any other country. The husband had originally Czechoslovakian domicile and presumably also nationality. There is a finding that he acquired an English domicile of choice in 1946, but there is no finding or evidence that he acquired any new nationality.<sup>23</sup>

Lord Pearce was the third judge who expressly decided that the *Travers v. Holley* rule should be applied retrospectively. However, he too felt that the law should go beyond *Travers v. Holley* and regarded "our own jurisdiction as only an approximate test of recognition with a right in our courts to go further, when this is justified by special circumstances in the petitioner's connexion with the country granting the decree."<sup>24</sup>

---

<sup>21</sup> *Id.* at 563-64, [1967] 2 All E.R. at 731.

<sup>22</sup> In view of the continental practice of granting divorce decrees on the basis of nationality even when the parties are not residents, the qualification has some significance. In so far as domicile is concerned Lord Pearson said: "An alleged domicile can be fictitious: the petitioner may have declared his intention to settle permanently in the country concerned, but the evidence may show that he was only resorting there temporarily to obtain a divorce." *Id.* at 564, [1967] 2 All E.R. at 731. I submit that Lord Pearson was not making any exception to the recognition rule in the case of a validly determined domicile. It is true that a domicile may be highly fictitious in certain circumstances, e.g., when a domicile of origin revives. However, domicile is well established as a basis of divorce recognition and there is no evidence that the lords wanted to narrow the bases of recognition—quite the reverse. Lord Pearson's example clearly deals with an attempted evasion of law where as a practical matter the issue would be solved by a finding that there was in fact no domicile established.

<sup>23</sup> *Id.* at 565, [1967] 2 All E.R. at 731-32.

<sup>24</sup> *Id.* at 542, [1967] 2 All E.R. at 715.

Later he observed that "decrees of the court of nationality, when jurisdiction is taken on the ground of nationality, should be recognized."<sup>25</sup> He concluded :

There are further reasons which, in my opinion, compel the recognition of the decree. Both parties to the marriage were nationals of Czechoslovakia (and incidentally domiciled there as well until 1946), the matrimonial home was there, the petitioning wife resided there all her life, and their courts took jurisdiction there on the ground of nationality. Undoubtedly the country of the nationality was the predominant country with regard to the parties to this marriage, and as such its decree ought to be recognized in this country.<sup>26</sup>

The remaining two judges, Lord Reid and Lord Wilberforce, did not rely on the retrospective application of *Travers v. Holley* as a basis for their decision to recognize the Czech decree. Lord Wilberforce, having stated that the basic rule for recognition was founded on domicile, said that there should be recognition of "divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction."<sup>27</sup> He continued : "I use these expressions so as to enable the courts, who must decide each case, to consider both the length and quality of the residence and to take into account such other factors as nationality which may reinforce the connexion."<sup>28</sup>

Lord Reid, having accepted domicile as the basic test, found his broader basis for divorce recognition in the old idea of the matrimonial home. He recognized the Czech decree "because the first wife, to whom it was granted, had had her matrimonial home in Czechoslovakia and had continued to reside there after her husband left, and . . . the fact that he acquired a domicile of choice in England before the wife raised proceedings in her country does not prevent that recognition."<sup>29</sup>

What is the common denominator of this judicial search for an additional basis for recognition of foreign divorce decrees? This is a question with which judges, lawyers and commentators will grapple for some time to come. The answer is by no means clear.

A majority of the Court emphasized nationality as another basis for recognition.<sup>30</sup> A fourth, Lord Wilberforce, considered nationality to be relevant but was less emphatic. Only Lord Reid did not deal with nationality

---

<sup>25</sup> *Id.* at 545, [1967] 2 All E.R. at 717.

<sup>26</sup> *Id.* at 546, [1967] 2 All E.R. at 717-18.

<sup>27</sup> *Id.* at 558, [1967] 2 All E.R. at 727.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 527, [1967] 2 All E.R. at 703.

<sup>30</sup> Lord Morris of Borth-y-Gest, Lord Pearce, and Lord Pearson.

as a ground for recognition. Though the factor of residence entered into the considerations of most of the Law Lords, it received, on balance, less emphasis than nationality.

It is said that the test established in the *Indyka* case is that where it can be shown that there is a real and substantial connection between the petitioner and the country that granted the decree, the decree will be recognized. I submit that a close examination of the use of that convenient phrase in the *Indyka* judgments does not clearly support such a conclusion. Only Lord Wilberforce used the expression "real and substantial connection" unequivocally in that sense.<sup>31</sup> As noted above,<sup>32</sup> the sense in which Lord Morris of Borth-y-Gest used "real and substantial connection" is not clear. Lord Pearson's use of the phrase is clearly as a subsidiary test.<sup>33</sup> Lord Reid and Lord Pearce do not use the phrase at all.

Even if, in a strict sense, it cannot be said that the phrase "real and substantial connection" was relied upon by the majority as the ratio of the *Indyka* case, it may nevertheless epitomize the spirit of the judgments. The phrase is a felicitous one in that it suggests a return to first principles—that in order to have either jurisdiction or recognition of a foreign decree there should be some meaningful relationship between the person whose status is in question and the law district in which the matter is adjudicated. It is then perhaps not too surprising that commentators and at least one subsequent judicial decision have seized upon "real and substantial connection" as the touchstone of *Indyka* and the key to subsequent development.

If "real and substantial connection" is to be the magic phrase in the further development of our rules of divorce recognition, it should be pointed out that the phrase in itself does not help us to decide cases because its content is not clearly defined. If it is to be anything more than a convenient slogan, its meaning will have to be developed judicially. What, for instance, is the significance of such well-defined concepts as nationality, residence, and matrimonial home in relation to "real and substantial connection?" Already there have been judicial developments following *Indyka* and dealing with "real and substantial connection."

Only a week after it was handed down, the *Indyka* decision was followed by Mr. Justice Ormrod in the case of *Angelo v. Angelo*.<sup>34</sup> That case dealt with the recognition of a German divorce decree. The marriage took place in England, the husband being domiciled there, and the wife being of German nationality. Near the end of 1962, while the parties were living in France, the wife left the husband and, taking their only child with her, returned to her family in Germany. The wife refused to return and in

---

<sup>31</sup> See discussion of Lord Wilberforce's judgment, *supra*.

<sup>32</sup> See discussion of Lord Morris of Borth-y-Gest's judgment, *supra*.

<sup>33</sup> See discussion of Lord Pearson's judgment, *supra*.

<sup>34</sup> [1968] 1 W.L.R. 401, [1967] 3 All E.R. 314 (P.D. & A.).

April, 1963 she was granted a divorce by the local German court. Prior to *Indyka* the divorce was not one which would have been recognized. Germany was not the domicile of the parties, and in order to invoke *Travers v. Holley*, three years of residence in Germany would have been required. In the facts the wife's residence was more of the order of three months.<sup>35</sup> Mr. Justice Ormrod pointed out that "the law as to recognition of foreign decrees underwent rather an abrupt change a week ago when the House of Lords gave their decision in *Indyka v. Indyka*."<sup>36</sup> Later referring to the *Indyka* case, he said :

All that I must do is to ascertain, if I can, with counsel's assistance, what the ratio decidendi of that case is. Each of their lordships expressed much the same broad view of what should be the new recognition rule, although stating it in quite different terms. Counsel submits that the real ratio decidendi of that case probably is to be found in Lord Morris of Borth-Y-Gest's speech, in which he speaks of it being necessary for the party obtaining the decree to have a 'real and substantial connexion' with the country pronouncing the decree.<sup>37</sup>

After quoting from each of the *Indyka* judgments, Mr. Justice Ormrod concluded : "In this case, the wife is a German national and she is clearly habitually resident within the jurisdiction of the German court granting the decree. In those circumstances, she seems to me clearly to fall within the test proposed by all their lordships in *Indyka's* case . . . ." <sup>38</sup>

---

<sup>35</sup> From the facts given one cannot be precise about the length of the wife's residence in Germany. We are not told exactly when she arrived in Germany, only that "towards the end of 1962 . . . the wife returned to Germany . . . and in December, 1962, the husband went to see her . . . ." *Id.* at 403, [1967] 3 All E.R. at 315. In addition we are not given the date of the commencement of the German divorce proceedings, the relevant date for the determination of jurisdiction, *Singh v. Rajah of Faridkote*, [1894] A.C. 670. We are told only that the German decree was dated April 9, 1963.

<sup>36</sup> *Id.* at 402, [1967] 3 All E.R. at 314-15.

<sup>37</sup> *Id.* at 403, [1967] 3 All E.R. at 315.

<sup>38</sup> *Id.* at 406, [1967] 3 All E.R. at 317-18.

While Justice Ormrod quoted counsel's submission that the ratio in the *Indyka* case was a "real and substantial connexion," he did not expressly adopt that view of the ratio. Professor Bale, *supra* note 4, at 124, observes that "Ormrod J. appears to accept counsel's formulation of the ratio decidendi." That is about as far as one can go—by inference he *appears* to accept it. Justice Ormrod quoted each of the law lords in turn and then concluded that the facts in this case "fall within the test proposed by all of their lordships in the *Indyka* case." The difficulty is that their lordships did not all say the same thing. See discussion, *supra*. The search for a definitive judicial pronouncement as to what is the sum total of the *Indyka* speeches leads us to the latter part of the judgment. Referring to *Indyka*, Ormrod said:

Those speeches, setting out as they do an entirely new test or tests of recognition, contain a striking echo of the words used by Lord Westbury in the early part of his speech in the well-known case of *Shaw v. Gould* (L.R. 3 H.L. 55 at 81 (1868) in which he said :

"The first essential for the validity of a foreign decree is, that it should be pronounced by a court of competent jurisdiction between parties who are bona fide subject to that jurisprudence. In the present case two English subjects who had married in *England* being desirous of obtaining a divorce, crossed the border into *Scotland* for the purpose of getting it. The wife sued the husband for a divorce in a court which was competent to exercise jurisdiction for such a purpose over those who were subject to it. But could this court, consistently with true principles, assert such jurisdiction over those who were not permanently residing within the limits of its authority?



Whether either nationality or residence alone will be sufficient is still unsure, but the place of marriage, by itself, has been rejected as a sufficient basis for recognition. This was the decision in *Peters v. Peters*.<sup>30</sup> In that case the parties were married in Yugoslavia, being domiciled there and nationals of that country. They moved to England where the husband acquired a domicile of choice and they became British subjects. The parties separated and the wife eventually went to Yugoslavia where she got a divorce decree after a few days. She returned to England shortly after being granted the decree. She later sought to have the decree recognized in England. Expert evidence indicated that the Yugoslav court exercised jurisdiction on the basis that the marriage had been celebrated there. In addition, the fact that the parties had been Yugoslav both by nationality and by domicile at the time when the marriage took place reinforced jurisdiction, though it was not necessary to it. In refusing to recognize the decree, Mr. Justice Wrangham said :

Then he went on to say :

But if the court of a foreign country permits the subject of a bordering nation to resort to it for the purpose only of getting rid of the personal status and obligations of husband and wife, which release they cannot obtain in the courts of their own country, it is plain that such foreign court is in reality, by its tribunals, usurping the rights and functions of sovereignty over the subjects of another country who still retain, and, as soon as the purpose is answered, intend to return to their native country and resume, their original position. Can this be done without injury to the authority of such bordering power and to the rights of its subjects?"

Then Ormrod said of Lord Westbury's judgment : "He continued on those lines, suggesting what might then have been the test, which is what the House of Lords, I think, have now established." A search of the remainder of Lord Westbury's speech is disappointing however. Here is the balance of that speech :

Social rights depend in very many cases upon the personal status and relations of individuals; that is to say, upon the relation of husband and wife, father and child, and all the relations which are consequent upon marriage, and if these relations as they exist cannot be altered by the tribunals and domestic law of the country where they were formed, are not the institutions of the country prejudiced, and its subjects injured, by permitting a foreign Court to be invoked for the purpose of altering social rights and duties, which cannot be changed under their own laws, and their own Courts of justice.

It is true that persons commorant in a foreign country, but without any intention of remaining there, are, whilst they are so commorant, subject to the laws of that country, and must yield obedience to them; but that is a very different thing from a country permitting foreigners to resort to it for the sole purpose of getting released from the most solemn of all contracts, and the most important social obligations. Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, dissolving the marriage contract.

No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicile are entitled, or even bound, to reject such judgment, as having no extra-territorial force or validity. They are entitled to reject it if pronounced by a tribunal not having competent jurisdiction; and they are bound to reject it, if it be an invasion of their own laws and policy.

This does not appear to be a positive summation of the *Indyka* judgment. It has grave doubts that, for example, the term "common denominator" will provide the present dispute with the clue to the common denominator.

<sup>30</sup> [1967] 3 All E.R. 318 (P.D. & A.); *Indyka v. Indyka*, [1967] 3 All E.R. 318 (P.D. & A.).

I am faced first with the question whether an English court will accord jurisdiction to a foreign decree of dissolution of marriage in a case in which the foreign court has assumed jurisdiction solely on the ground that the marriage was celebrated in that jurisdiction. I have been referred to the recent decision of the House of Lords in *Indyka v. Indyka* and to the decision of Ormrod J. following that case. From the point of view of the petitioner seeking to assert the validity of a foreign decree, it seems to me that the highwater mark of those decisions is the proposition that an English court will recognize the validity of a foreign decree wherever there is a real and substantial connection between the petitioner and the court exercising jurisdiction. I do not pause to enquire whether the decision in *Indyka v. Indyka* went quite as far as that, because I am satisfied that the mere fact that a marriage is celebrated in a particular jurisdiction is not enough to create a real and substantial connection between a petitioning spouse and that jurisdiction.<sup>40</sup>

In the case of *Brown v. Brown*,<sup>41</sup> we find the first judicial acceptance of the proposition that the *Indyka* judgment laid down the test of real and substantial connection. In the course of recognizing a Swedish decree granted to the wife, a Swedish national who had resided there for three years immediately preceding divorce proceedings, Mr. Justice Cumming-Bruce said :

The only matter that gave me any occasion for real consideration is whether having regard to the speeches in *Indyka v. Indyka*, the rule in *Travers v. Holley* applied in *Robinson-Scott v. Robinson-Scott* was still an appropriate test of recognition in cases to which it would apply. Having looked at the speeches in *Indyka v. Indyka*, I take the view that a majority of their lordships approved the decision in *Robinson-Scott*, so that the principle there stated by Karminski J. remains one on which petitioners may rely in appropriate cases though it is no longer the only test of recognition where domicile will not avail a petitioner. The second test which clearly emerges from the speeches of their lordships is that where a wife can show a real and substantial connection between herself and the country exercising jurisdiction thereto, this court will recognize the validity of the decree.<sup>42</sup>

and

The grounds of my decision are that I am satisfied (a) that recognition should be granted upon the principle of *Robinson-Scott v. Robinson-Scott*, which is still a valid test : and (b) that it has been shown that the wife, by the date of her petition for divorce in Sweden, had a real and substantial connection between herself and that country, and that that connection has persisted ever since.<sup>43</sup>

---

<sup>40</sup> *Id.* at 320.

<sup>41</sup> [1968] 2 W.L.R. 969 (P.D. & A.).

<sup>42</sup> *Id.* at 972.

<sup>43</sup> *Id.* In the intervening case of *Tijanic v. Tijanic*, [1967] 3 All E.R. 976 (P.D. & A.), Sir Jocelyn Simon, in recognizing a Yugoslav decree granted to a woman who had lived there all her life, specifically relied on *Travers v. Holley* but : "There may be other grounds on which we should accord recognition : see *Indyka v. Indyka*." *Id.* at 977.

While the foregoing discussion may be of considerable general interest, what is crucial to the student of Canadian conflict of laws is how the *Indyka* decision will affect Canadian rules. The following points indicate the probable significance of *Indyka* for Canada.

1. At the very least it should strengthen the position of *Travers v. Holley* in Canada. Though that case has established a firm foothold, having been applied in several cases and never rejected where it was applicable,<sup>44</sup> it has only once been applied by an appellate court.<sup>45</sup> The House of Lords' approval of *Travers v. Holley* is bound to improve the credentials of that case in the eyes of a Canadian court.

2. It will be a strong precedent for Canadian courts to follow should they be called upon to apply *Travers v. Holley* retrospectively.<sup>46</sup>

3. It is likely that Canadian courts will follow the view of the House of Lords which shook our notions of divorce recognition to the foundation. That is, we may expect to see Canadian courts broadening the basis for divorce recognition rather than limiting their search to a determination of whether the parties were domiciled in the foreign law district.<sup>47</sup> This prediction is reinforced by the fact that the courts in following *Indyka* will have justice as well as precedent on their side. Its application would tend to prevent "limping" marriages, those unions which are considered to be dissolved in one law district but in existence in another.

4. The acceptance of *Indyka* may have significance in the application of the *Armitage* rule.<sup>48</sup> If domicile is no longer the exclusive basis of recognition, then it should follow that we would recognize a foreign divorce decree if that decree would be recognized by a law district with which the

---

<sup>44</sup> It was applied in *Bednar v. Deputy Registrar General of Vital Statistics*, 31 W.W.R. (n.s.) 40, 24 D.L.R.2d 238 (Alta. Sup. Ct. (1960)); *Allaire v. Director of Vital Statistics*, 44 W.W.R. (n.s.) 568, 41 D.L.R.2d 553 (Alta. Sup. Ct. 1964); *Re Capon*, [1965] 2 Ont. 83, 49 D.L.R.2d 675; and *Januszkiewicz v. Januszkiewicz*, 55 W.W.R. (n.s.) 73, 55 D.L.R.2d 727 (Man. Q.B. 1966). There was implicit application of *Travers v. Holley* in *Re Summers*, [1958] Ont. W.N. 73, 13 D.L.R.2d 454 (Treleaven J., in High Ct. Chambers). See Read, *Judicial Decisions Affecting Uniform Acts 1958*, [1959] PROCEEDINGS OF THE CONF. OF CAN. COMM'RS UNIFORMITY OF LEG. IN CANADA 58, at 65. It has been mentioned with apparent approval in *Buehler v. Buehler*, 18 W.W.R. (n.s.) 97, 4 D.L.R.2d 326 (Sask. Q.B. (1956) and in *Needham v. Needham*, [1954] 1 Ont. 645, 43 D.L.R.2d 405 (High Ct.) Only Mr. Justice Riley in the Supreme Court of Alberta in *La Pierre v. Walter*, 31 W.W.R. (n.s.) 26, 24 D.L.R.2d 483 (1960), has voiced disapproval of *Travers v. Holley*. In that case, as in the *Buehler* and *Needham* cases, *Travers v. Holley* was not applicable on the facts of the case and so the observation is merely obiter dicta. In the *Allaire* case, *supra*, decided later in the same court, Mr. Justice Kirby noted the opinion of Justice Riley in *La Pierre*, but went on to apply *Travers v. Holley*.

<sup>45</sup> In *Re Capon*, *supra* note 44, which was a nullity, rather than a divorce case. See Castel, Comment 43 CAN. B. REV. 647 (1965) and MacKinnon, *Nullity Jurisdiction and Problems of Domicile*, 1 OTTAWA L. REV. 216 (1966).

<sup>46</sup> See discussion, *supra*, p. 133.

<sup>47</sup> See discussion, *supra*, p. 137.

<sup>48</sup> *Supra* note 8.

parties (or one of them) had a connection sufficient to satisfy the *Indyka* test. This brings to mind the case of *Mountbatten v. Mountbatten*<sup>49</sup> where the argument was raised that there should be recognition by England of a Mexican divorce because New York, the wife's place of residence, would recognize that divorce. The argument was an ingenious attempt to combine the *Armitage* rule and *Travers v. Holley*. If England would recognize a foreign divorce in cases where the domicile would recognize it, so should England recognize the decree if the place where the wife had been resident for three years or more would do so, because English legislation allowed a wife to bring a divorce in England when she had been resident there for at least three years. Mr. Justice Davies refused to extend the *Armitage* rule and the Mexican divorce was not recognized. It must be noted that any extension of *Armitage* in the light of *Indyka* will have to hurdle the obstacle left by Lord Pearce in his judgment. As the only Law Lord to comment on *Mountbatten* he said: "In *Mountbatten*, however, Davies, J. rightly refused to apply the principle of *Armitage* to the wife's court of residence, since, though we acknowledge its right to grant her a divorce, in appropriate cases there seems no adequate reason to regard it as the arbiter on her personal law in other respects."<sup>50</sup>

5. The *Indyka* decision should have the effect of broadening recognition of foreign nullity decrees and adoption orders.<sup>51</sup> In nullity, for instance, while the jurisdictional bases have traditionally been broader than those in divorce, the residence of the petitioner alone has not been considered a valid jurisdictional basis in the absence of the domicile of either party or of the marriage having been celebrated there.<sup>52</sup> Since the *Indyka* decision, the habitual residence of the petitioner, at least if the petitioner is a national (a fact formerly considered to be irrelevant), should constitute a real and substantial connection so as to permit recognition. In view of the use that the courts have made of *Travers v. Holley* in the nullity recognition field,<sup>53</sup> one would not foresee any substantial bar to the use of *Indyka* here also.

6. *Indyka* may also have a long range effect on our thinking on the proper basis for domestic jurisdiction in divorce, both common-law and statutory. It is true that the Law Lords in *Indyka* were at pains to point out that domestic jurisdiction and recognition are separate concepts, but it

<sup>49</sup> [1959] P. 43.

<sup>50</sup> [1967] 3 All E.R. 545, [1967] 12 All E.R. 217. See discussion in Bale, *supra* note 4, at 126-29.

<sup>51</sup> For further discussion of these topics see Bale, *supra* note 4, at 129-31.

<sup>52</sup> *De Renneville v. De Renneville*, [1949] Rom 100, [1948] 1 All E.R. 56 (C.A.).

<sup>53</sup> *Travers v. Holley* has been extended to the recognition of foreign nullity decrees in *Re Capon*, *supra* note 44; and in *Merker v. Merker*, [1963] P. 283, [1963] 3 All E.R. 928. In *Lepre v. Lepre*, [1965] P. 52, [1963] 2 All E.R. 49, its use was approved of, but the foreign nullity decree was not recognized because of a resort to the public policy reservation. For comments on *Re Capon*, see authorities cited in note 45 *supra*.

is difficult to uphold their total separation. We have always looked to domestic jurisdiction cases and reasoned by analogy in recognition cases where there were no recognition precedents on point. As long as *Travers v. Holley* is accepted, recognition will depend in certain cases upon the scope of domestic jurisdiction. The trend in the past has been for the recognition of foreign decrees to widen in response to an ever-widening statutory basis of jurisdiction. Perhaps *Indyka* will mark the point at which the recognition of foreign decrees sets the place for domestic jurisdiction in divorce. It would seem strange to accord greater credence to a foreign court than we give to our own. Could we go on indefinitely, recognizing foreign decrees granted on the basis of nationality and some residence—not amounting to domicile—when we do not allow our own courts to have jurisdiction in similar cases? If the concept of domicile was really designed to provide some meaningful attachment between a person and the law district adjudicating the matter, perhaps it is time to return to first principles in domestic divorce jurisdiction. As long as there is a real and substantial connection between one of the parties and the law district where the divorce decree is sought, then the court of that law district should have jurisdiction.

#### B. *Divorce Act, 1968*

The Divorce Act, 1968, which came into effect on July 2, 1968 marks the first general legislation by the Canadian Parliament in the field of divorce. While the act deals mainly with the substantive law of divorce<sup>54</sup>, several provisions are important from a conflict of laws point of view.<sup>55</sup>

Section 6(1) allows a wife to acquire her own domicile for the purposes of divorce jurisdiction: "For all purposes of establishing the jurisdiction of a court to grant a decree of divorce under this Act, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority."

This is a significant departure from the common-law rule that the wife had the domicile of the husband. The Divorce Jurisdiction Act of 1930<sup>56</sup> which was in force prior to the Divorce Act, 1968 did not change the common-law rule. It merely changed the relevant time for determination of domicile from the time proceedings were instituted to the time of desertion. Thus a court would have jurisdiction if the husband had been domiciled in that law district at the time he deserted his wife and a period of at least two years had elapsed between the desertion and the time of the wife's petition for divorce.<sup>57</sup> It is interesting to note that the *Attorney-General*

---

<sup>54</sup> For discussion, see Hubbard, *Domestic Relations*, *infra* at p. 172.

<sup>55</sup> See Mendes Da Costa, *Some Comments on the Conflict of Laws Provisions of the Divorce Act, 1968*, 46 CAN. B. REV. 252 (1968).

<sup>56</sup> Can. Stat. 1930 c. 15; CAN. REV. STAT. c. 84 (1952).

<sup>57</sup> CAN. REV. STAT. c. 84, § 2 (1952).

for *Alberta v. Cook* case,<sup>58</sup> which is said to have precipitated the passing of the Divorce Jurisdiction Act, would not have been resolved in favour of the wife had the case arisen *after* the passage of that act because it could not be proved that the husband had ever been domiciled in Alberta. Under the 1968 act, Mrs. Cook would have relief because she could acquire her own domicile and would meet the domicile and residence requirements of section 5.

The new act should do much to alleviate the hardship on the deserted wife who was not able to prove that her husband was domiciled in the forum at the date of desertion.<sup>59</sup>

As if to provide insurance against the failure of the judge-made *Travers v. Holley* rule, the legislators have taken the trouble to include a recognition rule in subsection 2 of section 6 :

For all purposes of determining the marital status in Canada of any person and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act, recognition shall be given to a decree of divorce, granted after the coming into force of this Act under a law of a country or subdivision of a country other than Canada by a tribunal or other competent authority that had jurisdiction under that law to grant the decree, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained her majority.

Note that the provision has a saving clause to preserve the existing common-law rules as to recognition—something that was absent when the bill was introduced in Parliament.<sup>60</sup> Thus the important recognition rules of the *Armitage*, *Travers v. Holley*, and (presumably) *Indyka* cases will operate in Canada along with the limited rule in section 6(2).

Within its limited sphere the subsection is merely stating what *Travers v. Holley* already states, *i.e.*, that our courts will recognize decrees given on the same jurisdictional basis as they exercise themselves, subsection 1 having provided that Canadian courts can exercise divorce jurisdiction on the basis of a wife's separate domicile.

The *Armitage* rule<sup>61</sup> may here provide yet another string to the bow of counsel for the recognition. By combining it with subsection 1 of sec-

---

<sup>58</sup> *Supra* note 7.

<sup>59</sup> Note that under The Divorce Jurisdiction Act, the wife had the additional burden of proving that she had been deserted. The act did not apply to those cases of separation falling short of desertion.

In certain cases, however, it would appear that the wife will be in a less favourable position under the new act than before. The wife, who comes to Canada seeking a divorce decree from her Canadian-domiciled husband, must first establish her domicile in Canada under the new act. Previously, if she went to her husband's domicile, she could bring divorce proceedings immediately. It seems reasonably clear from § 6(1) that the wife is not given an option as to the domicile that will be most favourable to her case.

<sup>60</sup> See Bill C-187 1967-68, § 6(2).

<sup>61</sup> See *supra* p. 142, text accompanying note 50.

tion 6, it may be possible to recognize a foreign decree even though it is not granted by the court of the domicile of the parties or domicile of the wife—if the law of the domicile of the wife would recognize the decree. This is a variation of the unsuccessful argument in the *Mountbatten* case. However, it would seem that the *Indyka* case has rendered that argument quite acceptable.

Section 6(2) provides for recognition of non-Canadian decrees. Presumably for Canadian decrees the assumption is that, despite the lack of a “full faith and credit” clause in Canada, they will be recognized by sister provinces because they have been made under the same federal statute which now covers the field of divorce.<sup>62</sup> Even if this assumption proved to be incorrect, the *Travers v. Holley* rule could always be called upon to ensure that one province’s decree was recognized by another province.

Another question raised by section 6(2) is whether recognition could be given to a foreign decree granted before the coming into force of the act on the jurisdictional basis of the wife’s separate domicile. At first glance the phrase “after the coming into force of the Act” would seem to preclude the solution offered by the House of Lords in the *Indyka* case, i.e., that the *Travers v. Holley* rule may be applied retrospectively so as to recognize a divorce granted before the English legislation had come into effect. However, the general saving clause “without limiting or restricting any existing rule of law applicable to the recognition of decrees granted otherwise than under this Act” should override the particular phrase “after the coming into force of this Act.” Assuming that the *Indyka* case is followed in Canada<sup>63</sup> and that it is an “existing rule of law applicable to the recognition of decrees,” it follows that the *Indyka* rule is preserved by this subsection so that recognition could be given to a foreign decree, granted before the Divorce Act came into force on the jurisdictional basis of the wife’s domicile.

Section 5(1) provides :

The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

(a) the petition is presented by a person domiciled in Canada; and

---

<sup>62</sup> While the provisions of the Divorce Act dealing with domicile may come under attack as being ultra vires the federal Parliament because they deal with private law, a provincial matter within the “property and civil rights” head of § 92 of the B.N.A. Act, it seems reasonable to assume that these provisions will be considered necessarily incidental to the federal power over marriage and divorce in § 91. Domicile *per se* is a provincial matter and its general reform has been treated as such by the Conference of Commissioners on Uniformity of Legislation in Canada. [1960] See PROCEEDINGS OF THE CONF. OF CAN. COMM’NRS ON UNIFORMITY OF LEG. IN CANADA 104.

One of the most significant proposals of their draft Domicile Bill would allow a “person” (which would of course include a married woman) to acquire a separate domicile for all purposes. A major difficulty with such a solution was that unless the legislation were adopted by all provinces, the different concepts of domicile that would result would lead to a recognition jungle that might be far more undesirable than the evil sought to be cured. The Divorce Act, which applies to all law districts in Canada, has alleviated the problem in so far as domicile for the purpose of divorce is concerned.

<sup>63</sup> See *supra* p. 15.

- (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

The most significant innovation here is the concept of a "person domiciled in Canada." The former rule was that the parties must be domiciled in a province for the purposes of divorce jurisdiction. The idea of a Canadian domicile was urged by counsel for the petitioner in *Attorney-General for Alberta v. Cook*<sup>64</sup> but was rejected by the Judicial Committee :

Uniformity of law, civil institutions existing within ascertained territorial limits, and juristic authority in being there for the administration of the law under which rights attributable to domicile are claimed, are indicia of domicil, all of which are found in the Provinces. Unity of law in respect of the matters which depend on domicil does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicil in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the Provinces.<sup>65</sup>

While the B.N.A. Act gave legislative power to Parliament under section 91(26), with minor exceptions, that power had not been exercised. At the time of the *Cook* case there was no unity of divorce law in Canada. Each province had its own pre-Confederation law on the subject and there were differences in these provincial laws. Whatever the merits of the *Cook* decision may be on this point, Parliament has finally occupied the field, given a complete set of rules for divorce and thus destroyed the basis of the Judicial Committee's reasoning in requiring a provincial domicile.

How will the courts interpret "domiciled in Canada?" Will it be necessary to be domiciled in a province in order to be domiciled in Canada, or will it merely be necessary to show a domicile in Canada without showing an attachment to any particular province beyond the residence requirements of section 5(1)(b)? It is to be hoped that the latter view will prevail. Take as an example Mrs. A who immigrated to Canada after her marriage to a Canadian serviceman. She has remained in Canada but has not stayed in one province long enough to acquire a domicile of choice. There is no question that she has the intention to remain in Canada and has been resident in Canada for several years, yet she cannot claim a domicile in any province. Under the first interpretation of "domiciled in Canada" she would be unable to obtain relief. Under the second interpretation (always assuming she has grounds for divorce) she would be able to obtain relief.

The words "domiciled in Canada" suggest that Canada as a whole is the relevant law district. It is not impossible, however, in view of our long

---

<sup>64</sup> *Supra* note 7.

<sup>65</sup> *Id.* at 450 (per Lord Merrivale).



tradition of thinking in terms of provincial domicile only, that a cautious court might require a domicile in a province in order to be domiciled in Canada. In this regard it is interesting to note that the *Report of The Special Joint Committee of the Senate and House of Commons on Divorce* contained the following recommendation :

(i) A husband or wife domiciled in Canada may institute proceedings praying for the dissolution or annulment of the marriage, and for ancillary relief, in any province with a court having jurisdiction to provide such relief, if the petitioner or the respondent has resided continuously in that province for a period of at least one year immediately preceding the presentation of the petition.

(ii) For this purpose "Canadian Domicile" is defined as follows :

- a) a husband has Canadian Domicile if he is domiciled, in accordance with the existing rules of private international law, in any *province* of Canada; and
- b) a wife has Canadian domicile if she would if unmarried, be domiciled in accordance with the existing rules of private international law, in any *province* of Canada."<sup>66</sup>

The point is not that this is the authoritative definition of "domiciled in Canada" (I do not believe that it is) but rather that this is a possible acceptable interpretation. This recommendation in fact flies in the face of what was proposed to the committee and which was dealt with on the same page : "The other suggestion is to abandon the concept of provincial domicile in favour of that of national domicile. This is premised on the fact that Canada is one country and should be regarded for divorce purposes as such. This would be to follow the precedent set by Australia which introduced the law of Australian domicile in matrimonial proceedings to overcome the difficulties encountered in that country due to separate state domicile."<sup>67</sup> The Australian experience should prove useful to Canadian courts on this question. The Australian Matrimonial Causes Act of 1959 referring to "a person domiciled in Australia" has been interpreted as meaning a domicile in Australia as a whole rather than in any particular state.<sup>68</sup>

## II. TORT

The decision of the English Court of Appeal in *Boys v. Chaplin*<sup>69</sup> has significance for Canadian conflict of laws in two major respects. It marks the first reliance by a judge in a Commonwealth court on the "proper law of a tort" theory, that is, that the applicable law should be the law of the country with which the parties and the act done have the most sub-

---

<sup>66</sup> June, 1967, at 31 (emphasis added).

<sup>67</sup> *Id.*

<sup>68</sup> See Cowen & Da Costa, *The Unity of Domicile*, 78 L.Q.R. 62 (1962). See also the decision of Mr. Justice Barry in *Lloyd v. Lloyd*, [1962] Vict. 70 (Austl.).

<sup>69</sup> *Supra* note 1.

stantial connection. In addition, a majority of the court rejected the *Machado v. Fontes*<sup>70</sup> rule that an act done abroad, which might give rise to criminal (but not civil) liability there, and which would be actionable if it had occurred in England, would give rise to civil liability in England.

The facts of the case are simple. The plaintiff, Boys, was injured in a motor vehicle accident in Malta caused by the negligence of the defendant Chaplin. Both were British nationals, domiciled and normally resident in England and serving with the British forces in Malta. Both the vehicle on which the plaintiff was riding and the defendant's vehicle were insured by the same English insurance company. The issue arose as to whether English or Maltese law should apply. According to English law the plaintiff would recover not only for his expenses and money loss (special damages) but also general damages for his pain and suffering and loss of amenities. His recovery would be £2,303. Under Maltese law, however, nothing could be recovered for pain and suffering and loss of amenities. If Maltese law applied the plaintiff would recover only fifty-three pounds. The trial judge, Mr. Justice Milmo, held that damages should be assessed according to the law of England.<sup>71</sup>

It is perhaps some indication of the confused and unsatisfactory state of our choice of law rule in tort that the three judges in the Court of Appeal took three quite different approaches to the solution of this problem.

Lord Denning took the position that the law to be applied was the "proper law of the tort." He began with an examination of the leading case of *Phillips v. Eyre*<sup>72</sup> and the famous (and vexing) dictum of Mr. Justice Willes, formulating the two conditions which, as a general rule, must be fulfilled in order to found a suit in England for a wrong committed abroad: "First the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done."<sup>73</sup> Lord Denning commented:

Once those two conditions are fulfilled, the English courts determine the actionability of the wrong according to the law of England, and determine also the heads of damages and the measure of them by English law. Those two conditions have long been treated as good law . . . But those conditions are not of universal application. Willes J. was careful to say that "as a general rule" those two conditions must be fulfilled. Like every general rule, it is subject to exceptions . . .<sup>74</sup>

---

<sup>70</sup> [1897] 2 Q.B. 231.

<sup>71</sup> [1967] 2 All E.R. 665 (Q.B.). See Kahn-Freund, Comment, 46 CAN. B. REV. 137 (1968).

<sup>72</sup> L.R. 6 Q.B. 1 (1870).

<sup>73</sup> *Id.* at 28-29.

<sup>74</sup> *Supra* note 1, at 21-22, [1968] 1 All E.R. at 287.

Next, Lord Denning looked to the case of *Machado v. Fontes* in which the *Phillips v. Eyre* rule had been applied. There the plaintiff had recovered damages from the defendant in a libel action in England even though the libel was not civilly actionable in Brazil where the publication had taken place. Mr. Justice Willes' first condition was fulfilled because the libel was of such a character that it would have been actionable if committed in England. The second condition was met because it was not an innocent act but one which might be made the subject of criminal proceedings and was therefore not justified by the law of Brazil. Lord Denning remarked :

I think the court was in error in applying the two conditions so literally. They treated them as if they were contained in a statute; but if there was ever to be a case where an exception should be made to the "general rule", it was *Machado v. Fontes*. Those two gentlemen were, I suppose, Brazilian citizens. Their names suggest it. The libel was in Brazil : and I suppose, in Portuguese. It was an entirely Brazilian affair. If the plaintiff could not recover damages in Brazil, he ought not to be allowed to recover damages in England.<sup>75</sup>

He went on to find that *Machado v. Fontes* was not binding on the Court of Appeal because that case had been an interlocutory appeal heard by only two lords justices.

The Master of the Rolls then turned to the idea of the proper law of the tort :

These two young men [plaintiff and defendant] were not Maltese citizens resident in Malta. They were two English servicemen stationed in Malta on duty. Does this make any difference? I think it does. It goes far to show that English law is the proper law of the tort. They were insured in England by an English company. The plaintiff was brought back for treatment in England, his native land. Quite naturally, he seeks his remedy in the courts of England : and he is enabled to bring his action here, not by any chance visit to England by the defendant, but as of right, because the defendant is regularly here. It is the defendant's home, too, as well as the plaintiff's. Why should not the plaintiff bring his action here and have it determined by English law? I see no reason why he should not do so. He gets justice here in that he gets fair compensation. The two conditions stated by Willes, J., in *Phillips v. Eyre* are fulfilled. The first is fulfilled because the wrong done in Malta (negligent driving) was of such a character that it would have been actionable if committed in England. The second is fulfilled because the act was not justifiable by the law of Malta.<sup>76</sup>

He concluded : "I am of opinion that in these cases we should apply the law of the country with which the parties and the act done have the most significant connexion. This has been called 'the proper law of the tort.'"<sup>77</sup>

---

<sup>75</sup> *Id.* at 22-23, [1968] 1 All E.R. at 288.

<sup>76</sup> *Id.* at 24-25, [1968] 1 All E.R. at 289.

<sup>77</sup> *Id.* at 26, [1968] 1 All E.R. at 290.

Lord Upjohn, while agreeing with Lord Denning that English law should be applied, took a more orthodox approach to the problem. For him it was simply a question of the application of the rule in *Phillips v. Eyre*: "I . . . can see nothing in the circumstances of this case which would justify a departure from that general rule; indeed, the facts seem to me to support its application in this case."<sup>78</sup> In his view, this meant that "if the only test of actionability is actionability as if the tort were committed in this country, then the rules of English law must surely follow not only in relation to procedure but also in respect of all substantive law, once non-justifiability by the place of the delict is established . . ."<sup>79</sup> He rejected Lord Denning's proposal that the applicable law should be the proper law of a tort:

It has not been suggested in argument that our courts should adopt any such principle which, however convenient in a vast country like the U.S.A. which has fifty States with no system of law of torts common to all and an enormous network of internal airlines, would, I think, in this country give rise to much practical difficulty, and, that bugbear of the law, enormous uncertainty in its application. I would reject any idea that such a principle should be introduced in this country. There is no relevant analogy between the proper law of the contract and a similar concept in tort, for while contracting parties can choose the law by which their relationship shall be governed, the victim of a tort cannot; damages too are assessed on entirely different principles.<sup>80</sup>

Lord Justice Diplock dissented on the main point in the case. He would have applied the Maltese rule concerning damages. According to this view of the *Phillips v. Eyre* rule, the courts must look to the law of the place where the act occurred in order to determine whether the act is a "wrong,"<sup>81</sup> *i.e.*, whether it is actionable *or not*, and it is that law which determines what the "heads of damages" are. "The heads of damage," as distinct from the "quantification of damages" sustained under each head, are matters of substantive law rather than procedure and are therefore to be determined by the law of the place of wrong.

He rejected the application of a proper law of the tort. In doing so, he said: "[A]ny development of our rules of conflict of laws in the direction of making civil liability for wrongs dependent on the nationality or . . . the domicile of the wrongdoer or the victim would seem to me to be a retrograde step in the latter half of the twentieth century."<sup>82</sup>

<sup>78</sup> *Id.* at 29, [1968] 1 All E.R. at 292.

<sup>79</sup> *Id.* at 30-31, [1968] 1 All E.R. at 293.

<sup>80</sup> *Id.* at 32, [1968] 1 All E.R. at 294.

<sup>81</sup> *Id.* at 38-39, [1968] 1 All E.R. at 299.

<sup>82</sup> *Id.* at 44, [1968] 1 All E.R. at 301. He continued in the same vein, *id.* at 45, [1968] 1 All E.R. at 302:

That the defendant was stationed in Malta as a member of the Royal (*i.e.*, British, not English) Navy, of which a Maltese citizen might be a member, and not as a visitor, does not seem to me to impose on him any higher duty or greater liability than a visitor to other users of the Maltese roads; nor does the fact that the plaintiff was

While Lord Justice Diplock dissented on the main issue, he agreed with Lord Denning that the first proposition in *Machado v. Fontes* is wrong in so far as it decided that an act committed abroad was actionable in England, if it gave rise to criminal, although not to civil, liability under the law of the country where it was committed. Lord Upjohn was the lone upholder of *Machado v. Fontes*.

For all the logic of Lord Justice Diplock's judgment, it is difficult to support the justice of his proposed result. It seems unjust that an English plaintiff should be denied general damages for pain and suffering and loss of amenities against an English defendant (and an English insurance company) in an English court. Lord Denning's approach appears much more satisfactory—one flexible enough to enable a court to do justice in the case and yet requiring some meaningful connection between the facts of the case and the applicable law.<sup>83</sup>

It remains to be seen what the House of Lords will do with *Boys v. Chaplin*. In view of the return to first principles made by the House of Lords in *Indyka*, it may not be too optimistic to expect some light to be shed on this dark and dismal corner of the conflict of laws. Just as the lords in *Indyka* released the law from the bondage of *Le Mesurier* in divorce recognition, so they may, in *Boys v. Chaplin*, release choice of law in torts from its captivity by *Phillips v. Eyre*. At the very least it is to be hoped that the majority of the Court of Appeal will be upheld in its rejection of *Machado v. Fontes*.

Even though the Supreme Court of Canada has followed *Phillips v. Eyre* and *Machado v. Fontes* in *McLean v. Pettigrew*,<sup>84</sup> the idea of a proper law of a tort may yet bloom in Canada. If it does so, it will have been the result of several trans-Atlantic transplants. The seed was first planted in the United States by an Englishman, Professor Morris, in his article "The Proper Law of a Tort."<sup>85</sup> After a long dormant period, it sprang fully

---

a member of the Royal (i.e., British, not English) Air Force, of which a Maltese citizen might also be a member, appear to me to give him any greater rights than other persons as a user of the Maltese roads. Whether the plaintiff was insured at all must surely be irrelevant, and I can see no grounds on which the fact that he has entered into a policy of insurance against civil liability in Malta with an English insurer instead of Scottish, American, or Maltese one can alter the rights against the defendant of a stranger to the contract of insurance. Finally, I cannot accept that his coming to England for treatment after the event which gave rise to the defendant's liability can ex post facto alter the legal nature of a wrong which was already complete.

<sup>83</sup> Note however the reservation expressed by Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: 'Mechanical Jurisprudence' versus Groping for Contracts*, 16 BUFFALO L. REV. 537 (1967). For general discussion, see the report by Read, *Foreign Torts*, [1967] PROCEEDINGS OF THE CONF. OF CAN. COMM'NS ON UNIFORMITY OF LEG. IN CANADA 153 and Hancock, *Canadian-American Torts in the Conflict of Laws: The Revival of Policy-Determined Constitution Analysis*, 46 CAN. BAR. REV. 226 (1968).

<sup>84</sup> [1945] Sup. Ct. 62, [1945] 2 D.L.R. 65.

<sup>85</sup> 64 HARV. L. REV. 881 (1951), where he develops the idea from his previous article, *Torts in the Conflict of Laws*, 12 MODERN L. REV. 248, at 252 (1949).

grown in the *Babcock v. Jackson*<sup>86</sup> decision of the New York Court of Appeals when that court applied the law of the place, "which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."<sup>87</sup> It has become firmly established in the United States and appears in the draft *Second Restatement on the Conflict of Laws*, as "the law of the place . . . which has the most significant relationship with the occurrence and with the parties . . . ."<sup>88</sup> The idea, having taken root in the fertile mind of Lord Denning, was expressed by him in *Boys v. Chaplin*, and has now been relied upon in British Columbia in the very recent case of *Gronlund v. Hansen*.<sup>89</sup>

In that case County Court Judge Smith had to contend with the argument that the British Columbia Families Compensation Act<sup>90</sup> did not apply to a tort committed nine-and-a-half miles off the coast of British Columbia. In rejecting this contention, the judge relied upon "the conventional view of the conflicts problem,"<sup>91</sup> citing several authorities which upheld the extra-territorial application of similar legislation. What is significant in the judgment, however, is that he used in addition the proper law of a tort theory as a basis for tort liability :

I am fortified in this conclusion by the knowledge that it accords also with what Diplock, L.J., referred to in *Boys v. Chaplin* . . . as " . . . a still embryonic and much debated doctrine of the 'proper law of the tort'." The learned Lord Justice found himself, however, in a minority in that case, and the doctrine referred to, given its utterance by the New York Court of Appeals in *Babcock v. Jackson* . . . and followed in that country by a Pennsylvania Court in *Griffith v. United Air Lines* . . . was accepted and adopted by Lord Denning, M.R., in the same case, at p. 290, where he said :

"I am of opinion that in these cases we should apply the law of the country with which the parties and the act done have the most significant connexion. This has been called 'the proper law of the tort'."

In the case at bar, the deceased prior to his death was, and the plaintiffs and the defendant were then and are now, resident and domiciled in this Province. The vessel "Aleutian Queen" was owned by a British Columbia company, and registered in the Port of Vancouver . . . There

<sup>86</sup> 12 N.Y.2d 473, 191 N.E.2d 279 (1963). Morris's article in the *Harvard Law Review*, *supra* note 85, was cited in the majority opinion.

<sup>87</sup> *Id.* at 477, 191 N.E.2d at 283.

<sup>88</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Ten. Draft No. 9 1964).

<sup>89</sup> 69 D.L.R.2d 598 (B.C. Sup. Ct. 1968). Note also the comment made in a dissenting opinion by Mr. Justice Currie in *Abbott-Smith v. Governors of Univ. of Toronto*, 45 D.L.R.2d 682, at 691 (N.S. 1964) :

If one day there is to be effective clarification of Order XI(1) [service ex juris] or if the opportunity is taken to apply a new doctrine. Then I should prefer that the doctrine be that of the proper law of the tort as propounded by Professor J. H. C. Morris in "Proper Law of a Tort" (1951), 64 Harv. L. Rev. 886.

<sup>90</sup> B.C. REV. STAT. c. 138 (1960).

<sup>91</sup> *Supra* note 89, at 602.

is, and indeed could be, no suggestion that any law other than that of this Province (or country, if applicable) should govern the situation; and the suggestion that no law whatever applies because the sinking occurred some miles off the coast, rather than in the Fraser River or Vancouver Harbour is one which is repugnant alike to the concepts of a just society, on the one hand, and the oft invoked rule of law, on the other hand. On both conventional and embryonic theories of tort liability in the field of private international law, therefore, I conclude that the defendant is liable by the applicable law of this Province for the consequences of his negligence.<sup>92</sup>

Even if the *Gronlund* case does not herald the judicial adoption in Canada of the "proper law of the tort" view, the same result might be achieved through the work of the Canadian Commissioners on Uniformity of Legislation and the proposed draft Foreign Torts Act which states that the applicable law should be "the local law of the state which has the most substantial connection with the occurrence and with the parties . . . ."<sup>93</sup>

---

<sup>92</sup> *Id.* at 603.

<sup>93</sup> The drafting committee is under the chairmanship of Dean Horace E. Read. See further Hancock, *supra* note 83; also, J.-G. CASTEL, *CONFLICT OF LAWS* 915-18 (2d ed. 1968).

The text of the proposed draft is the following :

1. When deciding the rights and liabilities of the parties to an action in tort, the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties, regardless of whether or not the wrong is such a character that it would have been actionable if committed in this Province.
2. When determining whether a particular state has a substantial connection with the occurrence and the parties the court shall consider the following important contacts :
  - a) the place where the injury occurred;
  - b) the place where the conduct occurred;
  - c) the domicile and place of business of the parties; and
  - d) the place where the relationship, if any, between the parties is centered.
3. When deciding which state, among the states having any contacts within section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied.