PHILLIPS v EYRE AND ITS APPLICATION TO MULTI-STATE TORTS IN NIGERIA: A CRITIQUE[1]

Abstract

Choice of jurisdiction and applicable law are two questions that usually confront both litigants and the courts. Both have different rules guiding their application. What determines the jurisdiction of a court is different from what informs which law is applicable to a matter. In multi-state tort actions, it is a general principle of traditional English common law that a forum court applies the forum law to such actions provided 'double liability' of the defendant is proved. This is what is known as the rule in Phillips v Eyre. As straightforward as the double liability rule is, a critical appraisal of Nigerian case law reveals that Nigerian courts including the Supreme Court have continuously misconstrued and misapplied the rule as a rule of jurisdiction rather than that of applicable law. The misapplication of this rule in some cases has resulted in obvious miscarriage of justice; further compounded the problem of choice of jurisdiction rules of the courts and at the least portrayed the judicial ineptitude of Nigeria courts in the area of conflict of laws.

Key words: *multi-state torts, jurisdiction, applicable law, Phillips v Eyre.*

1. Introduction

The rule in *Phillips v Eyre*[2] is an English *locus classicus*[3] in the area of choice of applicable law to foreign (or multi-state) torts in England. The rule, being a pre-1900 decision of the English court, applies in Nigeria by virtue of various reception laws[4]. The rule has featured in a number of Nigerian cases and has been applied by the courts right from *Amanambu v Okafor*[5], *Benson v Ashiru*[6] and so on till date. Private international law[7] is not a new area of law in Nigeria[8], even though its development has stagnated for some time now.[9] It is a field of law that has been with

[1] By **Lateef OGBOYE, Ph.D**, Department of Jurisprudence & International Law, Lagos State University, Nigeria. The corresponding author could be reached via drogboye@yahoo.com; and **Abubakri YEKINI, LL.B (Hons), B.L, LL.M,** Department of Jurisprudence & International Law, Lagos State University, Nigeria.

[1] (1870) LR 6 QB I.

[2] (1870) LR 6 QB I.

[3] Although, *The Halley* (1868) Law Rep. 2 P. C. 193, was relied upon by Willes J in arriving at the decision in this case, his exposition is generally regarded as laying the foundation for the choice of applicable law in foreign torts in England. It should be noted also that the rule in *Phillips v Eyre* has been abolished in a number of commonwealth countries particularly those outside Africa. The High Court of Australia abolished it in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, (for inter-state torts) and *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, (for international torts). In Canada, it was abolished by the Supreme court in *Tolofson v Jensen* [1994] 3 SCR 1022. In the United Kingdom where the rule originated, it has been largely modified. See *Boys v Chaplin* [1971] AC 356; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14; and *Red Sea Insurance Company Limited v Bouygues SA* [1995] 1 AC 190. Consequently, Phillips v Eyre is now largely a piece of legal history.

[4] See s.32 Interpretation Act, CAP I 23 Laws of the Federal Republic of Nigeria, 2004; The High Court Laws of various states in Nigeria also have similar provision.

[5] (1967) NMLR. 118.

[6] [1967] NSCC 198.

[7] By this we mean, the branch of law that deals with causes having foreign elements. It is also called conflict of laws in some jurisdictions. Although, the two names have been criticised as not properly describing the subject matter, both have found general acceptance among legal practitioners, judges and the academia. See I.O Agbede, *Themes on Conflict of Laws*, (Ibadan, Shaneson Publishers, 1989), p.3. Other names that the subject is called include; interregional law, non-international conflict of laws, internal private international law, inter-provincial law and inter-territorial law. See R.F Oppong, infra, p. 684.

[8] For a historical account of the development of the subject in Nigeria, see R. N. Nwabueze, Historical and Comparative Contexts for the Evolution of Conflict of Laws in Nigeria, 8 *ILSA J. Int'l. & Comp. L*. 31 (2001).

[9] This assertion applies to other countries in the continent. As one author observed, this may not be unconnected with the isolation of Africa from key determinants of the development of private international law vis-international trade and investment, large-scale immigration, technological advancement, global transportation,

us for over a century and as such, one expects the bar and bench to have grasped the rudiments of the subject matter. The misconception and misapplication of the rule in *Phillips v Eyre* depict lack of basic understanding of rules of private international law by Nigerian courts. A critical appraisal of the decisions of the courts reveal that *Phillips v Eyre* has been adopted as a rule of jurisdiction in Nigeria rather than that of choice of applicable law in foreign tort actions.

This paper seeks to analyse *Phillips v Eyre* with a view to seeing what it has decided, what it has not decided, and how it has been seen by academic writers, judges and legal practitioners within and without the common law jurisdictions. An attempt will be made to review as many as Nigerian cases wherein the rule was applied and how same has been totally misconstrued and misapplied by the courts. It is concluded that the Nigerian courts' understanding of the rule is a misnomer. This anomaly has the effect of further complicating the choice of jurisdiction rules, stultifying the development of choice of applicable law in torts and also producing unjust decisions in some cases.

2. Legal Problems Posed by Multi-State Torts

The world is now a global village; it is usually said. Globalization and the success in technological advancement all over the world have led to a change in the nature of tortious actions. Before the era of globalization and modern technological advancement, tortious acts have predominantly remained a matter of local concern. Today, with the advent of the internet and the virtual absence of interstate barriers that now allow people to move and intercourse freely across the globe, there is now an increase in multi-state torts[10]. A water course may be polluted in State A and the damage is suffered in State B; colleagues of a State C may decide to spend their leave abroad in State D and a fortuitous tortious act is committed by one against the other; a libelous statement may be made in Nigeria and published all over the world via the internet; a defective product may be produced in China, and sold in Nigeria by a retailer based in UK; an American may be injured in an air accident in Lagos which aircraft was bought in India and manufactured in Hong Kong and *et cetra.*

Torts are in the realm of private law and as such, it is expected that the law in one state may be different from another state that equally has connection with a tortious act. Hence, there may be potential conflict in the laws that may be applicable to such a tortious claim. Where a tort has connection with two different legal districts or states, it poses at least two conflict of laws questions. The first one is - which of the states' court has jurisdiction over the action and the second, which of the states' law is applicable to the action.

In Nigeria, apart from the choice of jurisdiction rules in the various High Court Laws, generally, a court has jurisdiction over a matter if the writ of the court was validly served on the defendant within the jurisdiction of the court. This has been described as the writ rule[11]. It is a rule of jurisdiction of the English court that has been received in Nigeria by the various reception laws[12]. This is however, subject to the 'subject matter' jurisdiction prescribed by the

and communication and so on. See R.F Oppong, 'Private International Law in Africa: The Past, Present and Future', 55 *American Journal of Comparative Law*, (2007).

[10] D. McClean & k. Beevers, *The Conflict of Laws*, 7th ed., (London, Sweet & Maxwell, 2009), p.394.

[11] See H.A Olaniyan, 'Nigerian Conflict of Laws through the Cases: A Researcher's Critical Comments (Part 1)', *African Journal of International and Comparative Law*, Vol. 20, No.3, Oct. 2012.

[12] Some of the Nigerian laws that received English conflict rules include: section 29 of the various High Court Law of the states of the northern states, section 10 High Curt Law of Lagos State, CAP H3, Laws of Lagos State, 2003; section 23 of the High Court Law of the Federal Capital Territory, Abuja; s.23 of the Interpretation Act, Cap I 23, LFN 2004.

Constitution[13]. High Courts also have nation-wide jurisdiction over out-of-state actions provided the requirements of the Sherriff and Civil Processes Act are met[14]. It does not matter where the subject matter arose from. Service of the writ of the court is enough as a basis for exercising jurisdiction. The court also has jurisdiction over any person that submits to the jurisdiction of the court[15]. In other countries, jurisdiction of courts is based on physical presence of the defendant[16], domicile of the defendant[17], contact of the subject matter with the forum state[18], presence of property of the defendant[19], nationality[20] etc.

Having expressed the choice of jurisdiction rules of the Nigerian courts, it is apt to now consider what law a forum court will apply to a multi-state tort. In addressing this, it is necessary to have an overview of different rules that have been adopted or applied by judges and academic writers as well. This will enable us appreciate better, the purport of the rule in *Phillips v Eyre*.

3. Various Approaches to Choice of Applicable Law in Torts

Traditionally, the dominant principle applied in the UK and other common law jurisdictions is the *lex fori*[21]. By this, it means that irrespective of where a tort is committed, if the plaintiff decided to sue in England, the English Law will be applied to the case even if the result would be different had a foreign law were to be applied. The rationale for this is that, tortious liability is seen more as a penal sanction (crime) than civil liability (contract)[22]. Coupled with the fact that issues of penal sanctions do not have extra-territorial effects, the *lex fori* advocates form the opinion that applying foreign tort laws may undermine the public policy of the forum state as what is objectionable in the foreign state may not be objectionable in the forum state[23]. *Lex*

[13] The 1999 Constitution of the federal Republic of Nigeria (as amended) assigns some specific subject matters to some courts and it is only those courts that have the jurisdiction to hear such matters. For instance, labour and industrial related disputes go to the National Industrial Court; matters like Company and allied matters, copyright, and other issues that are on the exclusive legislative list go to the Federal High Court. All matters not specifically assigned to these courts fall under the unlimited jurisdiction of the State High Courts.

[14] The Act allows every State High Court to exercise jurisdiction over any subject matter once it has close connection with the forum state. These connections may include the fact that the defendant is resident within the forum court, the subject matter, if contract, is formed or to be performed within jurisdiction etc. see generally; section 101, Sheriffs and Civil Processes Act, CAP S6, Laws of the Federation of Nigeria, 2004.

[15] *Bank of Ireland v UBN Ltd* [1998] 10 NWLR (PT. 569) 178.

[16] E.g United Kingdom under the traditional common law rules. See; *Colt Industries v Sarlie* (No.1) 17(1966) 1 WLR 440 (CA); *Maharanee of Baroda v Wildenstein* (1972) 2QB 283.

[17] This now generally applies in the EU. See the Council Regulation (EC) 44/2011, Official Journal of the European Communities, 2001 L 12/1 16.1.2001.

[18] This is the approach in the United States. See, *International Shoe Co. v Washington* 326 US 310 (1945); *Helicopteros Nacionales de Colombia, SA v Hall* 466 US 408 (1984); *Goodyear Dunlop Tires Operations, SA v Brown* 131 S Ct. 2846 (US 2011); *McIntyre Machinery Ltd. v Nicastro* S.Ct. 2780 (U.S. 2011).

[19] See Art 241 of the Civil Procedure Law of China for instance.

[20] See Art 14 of the French Civil Code. See also *L'Union des Étudiants Juifs de France v. Yahoo Inc*, T.G.I. Paris, Apr. 12, 2000 (No. 00/05308).

[21] In the United Kingdom as well as most of the common law countries, the rule in *Phillips v Eyre* used to be the applicable choice of law rule in tort before its modification in the recent time. In the Uk, it was modified by Boys v. Chaplin [1971] A.C. 356., *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, the Private International Law (Miscellaneous Provisions) Act 1995; In Australia, see the High Court decision in *Breavington v. Godleman* (1988), 80 A.L.R. 362. (for interstate torts) *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; for Canada see, *Tolofson v. Jensen and Lucas v. Gagnon* (1995), 100 B.C.L.R; For Singapore, see *JIO Minerals FZC v. Mineral Enterprises Ltd* [2010] SGCA 41.

[22] Savigny, *System des heutigen Roemischen Rechts*, 1st ed., vol.8, p.278 cited by L. Collins & et. al., *Dicey and Morris on Conflict of Laws*, 12th ed., supra, p.1361.

[23] O'Brien made allusion to this when he submits that 'this may be a reflection of the self-confidence of Victorian England, which manifested itself in the view that the quality of justice available in England was superior to that available in other less fortunate lands' see J. O'Brien, Conflict of Laws, 2nd ed., (London, Cavendish Publishing, 1999), p.382, n.61.

fori has been criticised to be an infringement on territoriality principle and also invites forum shopping on the part of litigants in the quest for the most beneficial place to litigate an issue[24]. On the other hand, the proponents of *lex loci delicti commisi* posit that the law of the place where a tort occurs should be the applicable law. For instance, let us assume two Nigerian soldiers are on a short holiday in Germany and one negligently knocks down the other, even if both parties eventually returned to Nigeria and are before a Nigerian court in respect of the action, the German Law should apply to the case because, that is the law of the place of the wrong. It is thought that, that is the law that assigns liability to that very conduct. This approach has been criticised as it may in some instances negate the reasonable expectation of the parties[25]. Those two Nigerian soldiers, who were in Germany, could not have expected that their relationship would be governed by German law, especially if the tortious act was fortuitous. The proponents argue to its advantage that 'it promotes uniformity of results, achieves certainty and predictability, is easy to apply, discourages forum shopping, and is neutral since it does not favour the victim or the wrongdoer'.[26]

Morris has advocated for the 'proper law approach'[27]. By this, he posited that the applicable law should be the law that has the most significant connection with the chain of events. Taking the two Nigerian soldiers hypothetical scenario, the only relationship that Germany has with the subject matter is that the act occurred there. However, both parties are Nigerian; they are both officers of Nigerian Army, they work and live in Nigeria and are only in Germany on a short visit. One may therefore say that Nigerian law has more significant connection with the action than German law. Hence, the proper law according to Dr. Morris could eventually be *lex fori* or *lex loci delicti*. Currie advocated for the 'governmental-interest' approach[28]. According to him, the underlying interest behind the various applicable legislation should be analysed. In doing so, one may discover that there is really no conflict between the competing laws. One state may not have interest in the application of its law to the case at hand while the other State may so have. In this case, Currie opined that there is no real conflict. However, where both States have interest in the application of their respective laws to the case at hand, then there is a real conflict. In such circumstance, the *lex fori* should be applicable. Currie's governmental interest analysis may be easily explained by the 'guest-statutes' cases. Where an accident occurs in State A, for instance, while the driver and the passenger are resident of State B., assuming the law of State A does not provide remedy in such an instance, the court may found out that the State A statute is only meant to apply to its residents only and was not intended to cover guests in the state. Therefore, if the law of the State B (guests) allows for remedy in such a case, then the State A court can then apply the law of the State B based on the governmental policy behind both statutes[29].

As a result of the injustice that may be occasioned by a mechanical application of some of the choice of law rules highlighted above which may eventually result in no justice especially to

[24] See La Forest J. decision in *McLean v. Pettigrew* [1945] S.C.R. 62.
[25] For instance in *Walton v Arabian American Oil Co* (1956) 233 F (2d) 541, the suit was instituted in the US by an employee who sustained personal injury in his US employer's property in Saudi Arabia. The court applied the law of Saudi Arabia on the basis of *lex loci delicti commisi*. See also P. Rogerson, 'Foreign Tort. Exception to Double Actionability', *The Cambridge Law Journal*, Vol. 51, No. 3 (Nov., 1992), p.440.
[26] J.G Castel, Q.C, Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?. 36 *Osgoode Hall Law Journal* [Vol. 33 NO. 1, 1995], pg 47.
[27] H.C Morris, The Proper Law of a Tort, *Harvard Law Review*, Vol. 64, No. 6, 1951, p.881.
[28] B. Currie, *Selected Essays on the Conflict of Laws*, (Durham, NC, Duke UP., 1963)
[29] Y.T Min, Tort Choice of Law Beyond the Red Sea: Whither the Lex Fori? *Singapore Journal of International & Comparative Law*, (1997) 1 pp 100-101.

the wronged party, Caver offered the 'principle of preference' theory[30]. To Caver, the duty of the court is to do justice to a case before it. By this, Caver posits that the court should apply any of the otherwise applicable law that seeks to do more justice to the issue at hand. Where the *lex fori,* for instance, gives more remedy than the *lex causea*, then the *lex fori* should be applied and vice versa.

4. What *Phillips v Eyre* Decides

The rule in *Phillips v Eyre* was formulated by the House of Lord in 1870. It laid the foundation for the English court approach to choice of applicable law in multi-state tort cases. The facts of the case are as follows: Edward John Eyre was the governor of the island of Jamaica. Several persons in the island of Jamaica had conspired by force to overthrow the constitution and government in the island. In pursuance of the conspiracy, great numbers of the inhabitants of the island had broken out into open rebellion, and had committed many burglaries, robberies, arsons, murders, and other felonies, and the civil power of the island had been overpowered by the rebels. As a result of this anarchy, defendant, with the assistance and co-operation of the military and naval forces of the Queen had, by force of arms, arrested the progress of the rebellion. After the rebellion, the government passed the Indemnity Act[31] for the purpose of indemnifying the defendant and all other officers and persons concerned in arresting the rebellion in the island and legalising all their actions. Soon after the expiration of the term of the defendant, he relocated to England. The plaintiff was among those imprisoned and he sued the defendant in England for the assault and false imprisonment committed against him by the defendant in Jamaica.

The defendant objected to the claims of the plaintiff and raised a defence that his actions were justified under the Jamaican law. On the other hand, the plaintiff asked the court to nullify the Act as it amounted to an *ex post facto* law and prayed the court not to allow it deprived the plaintiff of a cause of action in England. The court affirmed the defence of the defendant and affirmed the validity of the Act on the basis of reasonability and public policy. The court justified the position as follows:

> an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. It means therefore, that once an action is justified under the law of the place of the action, such an action continues to carry same character everywhere except where a forum law specifically intended otherwise.

In stating the position of the English court on the nature of foreign cause of actions particularly with respect to torts, Wills J puts it succinctly as follows:

[30] D. F. Cavers, 'The Proper Law of Producer's Liability', *The International and Comparative Law Quarterly*, Vol. 26, No. 4, Essays in Honour of John Humphrey Carlile Morris (Oct., 1977), pp. 703-733.

[31] Particularly, the Act enacted that all personal actions, suits, indictments, prosecutions, and proceedings, present or future, against any persons for acts done in good faith after the proclamation of martial law in the suppression of a rebellion which had broken out in the island, should be discharged and made void, and that any person by whom such acts had been done should be acquitted and indemnified against the Queen and all other persons; and that the defendant, the governor of the island, and all acting under his authority, were indemnified in respect of all acts done in order to put an end to the rebellion, and such acts were made and declared to be lawful; that the grievances complained of were acts done within the scope of the Act.

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; therefore, in *The Halley* (1), the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore in *Blad's Case* (2), and *Blad v. Bamfield* (3), Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark - a matter proper for remonstrance, not litigation.[32]

Therefore, Willes J dismissed the plaintiff's action because, although the requirements of English tort law had been met, the defendant's acts were justifiable under Jamaican law. Willes J proposition was later popularly called the 'double actionability' rule. It simply means that before a plaintiff could succeed in a tortious act committed abroad before the English court, he has to prove that such tort is recognised in England (*lex fori*) and there is no justification for such conduct under the law of the place that it was committed (*lex loci delicti*).

Two years before Willes J decided Phillip's case, the Privy Council had already formulated as a rule that a plaintiff that brings a claim of foreign tort before the forum court can only claim redress under the forum law in *The Halley*[33]. In other words, the forum tort law in terms of what to prove to succeed, defences and remedies applies to such a case. The assertion above was confirmed subsequently by the House of Lord per Lord Wilberforce in *Boys v Chaplin* as follows:

> I would, therefore, restate the basic rule of English law with regard to *foreign torts as requiring actionability as a tort according to English law*, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done.[34]

To further demonstrate that what *Phillips v Eyre* decided was a choice of law rule, it is apt to offer the explanation of Brennan J of the High Court of Australia in *Breavington v Godleman* on this issue as follow:

> A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if —
> 1. The claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and

[32] (1870) LR 6 QB 1.
[33] (1868) LR 2 PC 193.
[34] [1971] AC 356. At 389.

> 2. By the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce[35]

Outside the bench, majority of academic writers[36] opine that *Phillips v Eyre* was a choice of law rule in foreign tort claims. For instance, the authors of Dicey and Morris conclude that the proposition that the first leg of Willes J formulation relates to jurisdiction is wrong because the Judge 'would hardly have cited *The Halley* as his sole authority for the proposition if he had intended to lay down a rule of jurisdiction since no question of jurisdiction was involved in that case'[37]. They finally conclude by maintaining that there is no support for the view that the rule is a jurisdictional rule in English case law[38].

Collins in his own words adds that 'the traditional starting point for any consideration of the law to be applied where a tort was committed in one jurisdiction but sued upon in another was Willes J's classic statement of principle in *Phillips v Eyre'.*[39] Keyes, while contributing to this point also asserts that 'the law of the forum has historically had an explicit and primary role in the choice of law rule for multistate torts. This is because of the rule in *Phillips v Eyre*, which required plaintiffs to establish that their claims were actionable under both the law of the forum and the law of the place of the delict. The rule in *Phillips v Eyre* was central in tort choice of law in England and Australia until recently'.[40] Among the practitioners as well, it is agreed that *Phillips v Eyre* is a choice of law rule. Castel, Q.C in his contribution posits that 'the English common law choice of law rule for torts combines the law of the forum and the law of the place where the wrong was committed. It has its origin in the following passage in the judgment of Willes J. delivered in 1870 in *Phillips* v. *Eyre'.*[41]

5. What It Does Not Decide

Following from what has been discussed above it is indisputable that there is almost unanimity of opinion that Willes J proposition of double actionability means nothing more than the application of forum law to foreign tortious claims. However, does the decision have anything to do with jurisdictional rule of the English court? The answer to this question appears to be in the negative[42]. As the authors, Dicey and Morris, have suggested and we agree with them, the issue before Willes J., was not one of jurisdiction but rather the liability or otherwise of the

---

[35] *Breavington v Godleman* (1988) 169 CLR 41, 110–11.

[36] For suggestions that the first leg of the rule is jurisdiction, see Hessel E *Yntema*, 'Essays on the. Conflict of Laws' (*1949*) *27 Canadian Bar Review* 116; Donald B Spence, 'Conflict of Laws in Automobile Negligence Cases' (1949) 27 Canadian Bar Review 661; P Gerber, 'Tort Liability in the Conflict of Laws' (Pt 1) (1966) 40 *Australian Law Journal* 44.

[37] L. Collins & *et., al*., *Dicey & Morris- The Conflict of Laws* (12th ed, 1993), Rule 203, pp. 1366-1367.

[38] Ibid.

[39] M. Collins, Choice of law in defamation after *John Pfeiffer Pty Ltd v Rogerson*, (2001) 6 *Media & Arts Law Review* 171.

[40] M. Keyes, Substance and procedure in multistate tort litigation, (2010) 18 Torts Law Journal, p.202. For similar view from other authors, see; P. North, and J. Fawcett, *Cheshire & North's Private International Law,* 12th edn, (London, Butterworths, 1992), ch.20; R. Mortensen, Homing Devices in Choice of Tort Law: Australian. British and Canadian Approaches, *ICLQ* vol. 55, October 2006, pp. 839-878; M. Pryles, 'The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?' (1989) 63 *Australian Law Journal* 158,181; A. Gray, *Conflict of Laws in International Torts Cases: The Need for Reform on both Sides of the Tasman.* Yearbook of New Zealand Jurisprudence, 9, (2006).

[41] J.-G. Castel, 'Back to the Future! is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated? *Osgoode Hall Law Journal* [Vol. 33 No. 1), 1995, p.53.

[42] Although, H. E Yntema ('Essays on the Conflict of Laws' (1949) 27 *Canadian Bar Review* 116) has argued to the contrary. With respect, recent scholarship from the bar, bench and academics do not agree with his position.

defendant over the torts committed in Jamaica. The court's reliance on *The Halley* in arriving at his postulation further laid credence to this. The English conflict of laws rules as regards the jurisdiction of the English court is well settled. The English court exercises *in personam* jurisdiction over any causes irrespective of the origin of the action where the writ is served on the defendant personally in England, or outside England with leave of court and in other cases where the defendant submits to the jurisdiction of the court[43]. Hence, Willes J could not have intended to introduce a fundamental change to the long established English jurisdictional rules in such an equivocal manner.

6. Application of the Rule by Nigerian Courts

Phillips v Eyre was first applied in the Nigerian case of *Benson v Ashiru*. In this case the plaintiff sued in the High Court of Lagos on behalf of himself and dependant relatives of Adetutu Ashiru deceased, under the English Fatal Accidents Act of 1846. He claimed damages representing the pecuniary loss sustained by Adetutu's death. The accident which resulted in the death of the plaintiff's wife occurred in Ijebu Remo, Western Nigeria. The Judge found that the plaintiff has proved negligence against the defendant and also that the Fatal Accident Act, 1846 applied. This finding of the court on the applicable law was contested by the defendant. It should be noted that the Fatal Accidents Acts, 1846 applied in Lagos as an English Statute of General Application while the Torts Law applied in the Western Nigeria. The trial court found that both laws applied to the death in Ijebu Remo concurrently. The defendant contended the Supreme Court should dismiss the action as it had earlier decided in *Amanambu v Okafor*[44] that the laws applicable in a region could not apply in another region. Counsel to the defendant argued that by the Law of England (Application) Law (cap. 60), English statutes of general application ceased to apply as such in Western Nigeria from 1st July, 1959. In resolving this controversy[45], the Supreme Court noted as follows:

---

[43] For a detailed discussion of the English rules of jurisdiction in conflict of laws situations, see; A.O Yekini, Comparative Choice of Jurisdiction in Cases having a Foreign Element: Are there Any Lessons for Nigerian Courts? *Commonwealth Law Bulletin*, 2013; L. Collins, *Dicey and Morris on the Conflict of Laws*, 13th edn, (London, Sweet & Maxwell, 2000), p. 263; *Halsbury's Laws of England* (4th edn reissue), vol. 8(3), pp.94-95.

[44] *Amanambu v Okafor & Anor*. In this case, the plaintiff is the widow of one Stephen Amanambu who died as a result of injuries he received in a motor accident in March 1960 at a location between Lokoja and Okene in Northern Nigeria. The action was brought to recover damages under the Fatal Accidents Laws of Northern Nigeria, 1956 at the High Court in Onitsha, Eastern Nigeria. The defendants, who were the driver and the owner of the offending vehicle, were residing in Asaba, in Mid-Western Nigeria and Onitsha, in Eastern Nigeria respectively.

The defendants objected to the jurisdiction of the Onitsha High Court on the basis that the plaintiff had sued under the Northern Region Law and that the deceased died in northern Nigeria. The plaintiff then sought to amend the processes to read Fatal Accident Law of Eastern Nigeria and same was granted. The amendment was challenged. The court held that 'In our view that Law of Eastern Nigeria confers a right to sue for compensation in respect of a fatal accident which occurred in Eastern Nigeria and not outside it: for the Legislature of Eastern Nigeria could only legislate for compensation in regard to such an accident. Therefore, the claim, which is based on the Fatal Accidents Law, Eastern Nigeria, cannot stand, and the appeal must be dismissed.'

[45] Another issue that came up in the case was whether the plaintiff had the capacity to sue in this case having not clearly show the capacity in which he had sued and his relationship with the deceased as required by both the Torts Law of Western Nigeria and the Fatal Accident's Act. On the question of capacity, the court found that an amendment was not necessary as both laws allow the plaintiff to institute the action as presently constituted. However, the action failed because the plaintiff was not able to prove his marriage with the deceased. The Supreme Court turned down the damages granted the dependant (not plaintiff) by the trial court holding that since the plaintiff has no interest in the matter, he could not sue on behalf of those that had interest.

One important issue discussed in this case that is of paramount concern to conflict of laws practitioners is the question of applicable law to the tort in question. It appeared both counsel and the apex court were totally at lost with choice of law rules in foreign torts cases as postulated in the cases cited by the Supreme Court. The lower court held that the Fatal Accident Act of Lagos applied concurrently with the Torts Law of Western Nigeria. This is an obvious error as rightly pointed out by the Supreme Court. Although, the trial court applied the correct law

> The rules of the common law of England on questions of private international law apply in the High Court of Lagos. Under these rules an action of tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos; and secondly it must not have been justifiable by the law of the part of Nigeria where it was done: Phillips v. Eyre (1870) L. R. 6 Q.B. 1. These conditions are fulfilled in the present case.

Another issue that came up in the case was whether the plaintiff had the capacity to sue in this case having not clearly show the capacity in which he had sued and his relationship with the deceased as required by both the Torts Law of Western Nigeria and the Fatal Accident Act. On the question of capacity, the court found that an amendment was not necessary as both laws allow the plaintiff to institute the action as presently constituted. However, the action failed because the plaintiff was not able to prove his marriage with the deceased. The Supreme Court turned down the damages granted the defendant (not plaintiff) by the trial court, holding that since the plaintiff has no interest in the matter, he could not sue on behalf of those that had interest.

One more important issue discussed in this case that is of paramount concern to conflict of laws practitioners is the question of applicable law to the tort in question. It appeared both counsel and the apex court were totally at lost with choice of law rules in foreign torts cases as postulated in the cases cited by the Supreme Court. The lower court held that the Fatal Accident Act of Lagos applied concurrently with the Torts Law of Western Nigeria. This is an obvious error as rightly pointed out by the Supreme Court. Although the trial court applied the correct law (forum law), being the Fatal Accident Act, His Lordship's reasoning was however, not in tandem with established rule of law. On the other hand, the Supreme Court's reasoning was not better with due respect. The apex court thought that there was no need to grant an amendment to bring the claim under the Torts Law simply because both laws have similar provisions. The court was of the opinion that it was wrong to have brought the action under the Fatal Accident Act simply because the accident did not occur in Lagos. The court seemed to have indirectly ruled that the *lex loci delicti* applied while relying on *Phillips v Eyre* and *Koop v. Bebb.*[46]

As it would be seen later, this decision is wrong. Were the court to apply *Phillips v Eyre* in reality, then the Fatal Accident Act would have applied and not the Torts law of the Western Nigeria since the former is the *lex fori*. The differences in the two laws would have mattered if the plaintiff had proved marriage with the deceased because funeral expenses are recoverable

(forum law), being the Fatal Accident Act, his lordship's reasoning was however, not in tandem with established rule of law. On the other hand, the Supreme Court reasoning was not better with due respect. The apex court thought that there was no need to grant an amendment to bring the claim under the Torts Law simply because, both laws have similar provisions. The court was of the opinion that it was wrong to have brought the action under the Fatal Accident Act simply because the accident did not occur in Lagos. The Supreme court seemed to have indirectly ruled that the lex loci delicti was the applicable law while relying on *Phillips v Eyre* and *Koop v. Bebb* (1951) 84 C.L.R. 629.

As it would be seen later, this decision is wrong. Were the court to apply *Phillips v Eyre* in reality, then the Fatal Accident Act would have applied and not the Torts law of the Western Nigeria since the former is the lex fori. The differences in the two laws would have mattered if the plaintiff had proved marriage with the deceased because funeral expenses are recoverable under the Torts Law but not under the Fatal Accident Act and the court would have awarded that under the Torts Law wrongly.

[46] (1951) 84 C.L.R. 629.

under the Torts Law but not under the Fatal Accident Act and the court would have awarded that under the Torts Law wrongly. To the best of our knowledge, this is the first time that the rule in *Phillips v Eyre* would be cited with approval by the apex court[47]. Although the Supreme Court quoted this rule without clearly stating its purport as it relates to the case, however, subsequent decisions of the lower courts have understood the Supreme Court to have laid down a general rule of jurisdiction in foreign torts claim. *In Herb & Ors v Devimco*[48], Eko Hotels Limited is co-owned by the Lagos State Government and the appellants. The respondent, Devimco International B.V was engaged to manage the Hotels. After some time, there was a change in the ownership structure and the appellants became the majority shareholder of the Company. This necessitated the review of the management contract between Eko Hotels Limited and the respondent company. When the renegotiation of the contract was not successful, EKo Hotels Limited terminated the contract between it and Devimco International BV. The respondent claimed at the lower court that the appellants had induced the termination of the agreement between it and the Hotel based on the letters written by the 1st appellant in London and received by the respondent in Cedex, France. The appellants were not resident in Nigeria and hence were served the writ outside Nigeria.

In addressing the issues of exercise of personal jurisdiction over non-resident defendants by a Lagos High court, the court reasoned that the rule in *Phillip v Eyre* permits a forum court to exercise such jurisdiction in tortious case over non-resident defendant once the criterion of double actionability is met. The court held that:

> Similarly, there is no gainsaying that the cause of action giving rise to the instant suit relates to tort issue governing exercise of jurisdiction by our courts on matters relating to tort is not without decided authorities in our laws. For example, in the case of *Benson v. Ashiru* (supra) the Supreme Court had cause to make pronouncement on the issue when it relied on the English case of *Phillips v. Eyre* (1870) LR 6 QB 1 and said as follows:
> "The Rules of Common Law of England on questioning of Private International Law apply in the High Court of Lagos. Under these rules an action of tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled. First the wrong must be on (sic) such a character that it would have been actionable if it had been justifiable by law of the part of Nigeria where it was done."
> Although the learned counsel for the appellants opined that the above pronouncement of the Supreme Court does not apply to the situation of the instant case since the appellants are based or resident outside Nigeria, I hold a different view on that. My understanding of the pronouncement is that it attempts to resolve issue on jurisdiction over parties living in places other than within the jurisdiction of a trial court. For that reason alone, the authority *of Benson v. Ashiru* is apposite.

[47]Although, the case has been cited in some earlier decisions but, only in respect of the status of retroactive legislation. See *Eshugbayi Eleko v Frank Morrish Baddeley & Anor.* NLR VI [1926] 65 and much later LORD *Chief Udensi Ifegwu v Federal Republic of Nigeria* [2001] 13 NWLR (PT. 729) 103; *Festus Ibidapo Adesanoye v Prince Francis Gbadebo Adewole* (2000) 9 NWLR (Pt. 671) 127 SC; *Salami Afolabi v Governor of Oyo State* [1985] 2 NSCC 1151.
[48] [2001] 52 WRN 19.

A similar reasoning was adopted by the same Court of Appeal in *Zabusky & Ors. v Isreali Aircraft Industry Ind.*[49] In this case, the plaintiffs sued the defendant over libellous publication published in the Isreali Embassy in Lagos. The trial court declined jurisdiction on the ground that the alleged tort was committed in a foreign land. The Court of Appeal set aside the decision of the lower court and held that the court had jurisdiction. In the opinion of the court:

> By virtue of sections 10 and 11(1)(a) of the High Court Law, Cap. 60, Laws of Lagos State, 1994, the High Court of Lagos State has co-ordinate jurisdiction with the High Court of England. In other words, the High Court of Lagos State, like the High Court of England, is entitled to enforce principles of private international law. Thus, the rules of the common law of England on questions of private international law apply in the High Court of Lagos State. Under those rules, an action in tort will lie in Lagos, Nigeria, for a wrong alleged to have been committed in another part of Nigeria or outside of Nigeria if two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos State; and secondly, it must not have been justifiable by the law of the part of Nigeria, or the place outside Nigeria where it was done. Accordingly, in every action brought in Nigeria upon a foreign tort, the plaintiff must prove that the defendant offended the law of both *lex loci delicti commissi* and of Nigeria. [*Benson v. Ashiru* (1967) NSCC 198]

In *Nigerian Tobacco Company Ltd. v. Agunanne*[50], the Supreme Court approved the lower court's ratio that the *lex loci delicti* governs multi-state tort action. In this case, the respondent sued his employer, Nigerian Tobacco Company Ltd at the High Court of Anambra State in Enugu in Eastern part of Nigeria in respect of injuries he sustained in an accident that occurred in Plateau State, Northern Nigeria. The accident occurred as a result of the negligent act of the driver of the Company. When the lower court was faced with the choice of applicable law in this case, the learned trial judge held that:

> Upon a careful consideration of all the relevant authorities on this matter, it appears clear to me that where as in this case, an accident happened in a foreign State and an action is properly instituted in another State in respect of the said accident the proper law that must be applicable for the determination of the suit will be the *lex loci*, that is to say, the law of the foreign State and not the law of the State in which the suit is instituted. See *Olayiwola Benson & Anor. v. Joseph Ashim* [1967] 1 All N.L.R. 184, *Grace Amanambu v. Alexander Okafor & Anor.* [1966] 1 All N.L.R. 205 and *A.O. Ubanwa & 4 Ors. v. C. Afocha & Anor.* (1974) 4 E.C.S.L.R, 308. See too *Morocco Bound Syndicate Limited v. Harris* (1895)1 Ch. 534 at page 537. I therefore hold that it is the law applicable in the Benue State of Nigeria that must be applicable in the determination of this action

The trial court eventually found negligence proved against the Company and awarded damages against it accordingly. The Company's defence of the common law doctrine of common employment which though have been expressly abolished by statutes in Western and Eastern

[49] (2008) 2 NWLR (pt. 1070), 109.
[50] (1995) 5 NWLR (Pt. 397) 571.

but not Northern Nigerian States was rejected by the court. The court was prepared to accept and apply it because the doctrine has not been abolished in northern Nigeria; nevertheless, it was rejected as the driver and the plaintiff were not in the same category of employment[51].

7. Problems Posed by Mis-Application of the Rule

What is evident from the foregoing discussions is that the Nigerian courts have wrongly misconstrued and misapplied the rule in *Phillips v Eyre* as a rule of jurisdiction rather than that of choice of applicable law in torts. This misconception and misapplication have posed a number of problems as identified below. One needs to sympathise with Their Lordships, perhaps, they were misled by the expressions used in the formulation of Willes J. As O'Brien has submitted, 'a review of the language indicates that three possible interpretations can be advanced: (a) that it provides a double barrelled choice of law rule and has nothing to say about jurisdiction; (b) that it is a double barrelled jurisdictional rule leaving open the choice of law; and (c) that the first part of the rule is jurisdictional, whilst the second part constitutes a choice of law rule in favour of the *lex loci delicti*'[52]. Be that as it may, it is now indisputable that the first interpretation is the correct one.

First, the misinterpretation of the rule creates uncertainty in the choice of applicable law to foreign tort claims. It is not in doubt that the current state of the law does not take into consideration the correct interpretation of the rule in *Phillips v Eyre* which is the locus classicus in this area. Hence, one cannot satisfactorily say that the last has been heard of choice of applicable law for multi-state torts. In my opinion, the Nigerian courts decisions analysed above are arrived at *per incuriam*. The courts have not heard the opportunity of being presented with a position that will advance the correct interpretation of *Phillips v Eyre.* Perhaps, the courts might make a u-turn and approve the application of the *lex fori* accordingly[53].

Apart from the uncertainty that is created by the misinterpretation of the rule, the state of the law concerning choice of applicable law for multi-state torts has remained in crisis owing to the misconception of *Phillips v Eyre* as a choice of law rule and the presumption against extra-territorial application of tort laws. According to the Supreme Court in *Anamanbu v Okafor*, it was clearly stated that the tort law of a state cannot apply in another state[54]. The same Supreme

[51] The doctrine of common employment was applicable in England up to 1948 when it was abolished by the Law Reform Personal Injuries Act of 1948. The doctrine has also been abolished in the Eastern States of Nigeria by virtue of section 4 of the Torts Law (Cap. 125), Laws of Eastern Nigeria 1963, and in the Western States of the country. However, the Supreme Court by a majority of 4:1 decided that the doctrine has been abolished in the Northern State as well by virtue of Section 28 of the High Court Law Cap. 49 Laws of Northern Nigeria 1963. The Supreme Court reasoned that since the High Court Law came into effect in 1965, it could only have received the Common Law as it stood on that date. If the doctrine of common employment had been abolished as part of the Common Law in 1948, then same was not received under the High Court Law and no special legislation is needed for that purpose.

[52] J. O'Brien, supra, p.385.

[53] However, this writer strongly believes that this reversal may be a difficult one considering the fact that the Nigerian Supreme Court is always very reluctant of overruling itself. For instance, the Supreme Court ought to have seen that some of its positions in *Nigerian Tobacco Company Ltd. v. Agunanne* were contrary to what has been decided in *Anamanbu v Okafor* and *Benson v Ashiru* and yet, none of the decisions overruled the other. Apart from this, one can also speculate that the Court may not approve the automatic application of lex fori because of its discontinuance by vast majority of states.

[54] This erroneous conclusion is neither supported by law nor logic. It is trite in law that it is criminal laws that generally has territorial limitation. This erroneous believe was echoed by the same Supreme Court in *Dairo v UBN* (2007) 16 NWLR (pt.1059) 99, where Alooma Muhktar JSC opined that Nigeria is a federal state and that the constitution has clearly demarcated the jurisdiction of each state. Therefore, a State High Court does not have jurisdiction over causes that arose in another state, be it contract or tort. I have succinctly argued somewhere else that this decision of the Supreme Court is wrong. See A.O Yekini, Comparative Choice of Jurisdiction in Causes

Court approved the application of the law of Benue State in a tortious claim before Enugu State High Court. Also, while some decisions of the Supreme Court clearly state that the *lex loci delicti* applies, *Benson v Ashiru* allowed an action to be sustained under the lex fori simply because it is materially similar with the *lex loci delicti*. These entire crises would have been averted if the apex court has given a proper interpretation to *Phillips v Eyre.* By that, we would know clearly that the *lex fori* applies; otherwise it could have been rejected as done in other jurisdictions. That, itself, would have rested the matter in favour of *lex loci delicti.*

Lastly, applying *Phillips v Eyre* as a jurisdictional rule rather than that of choice of law further compounds the crisis in *in personam* jurisdiction rules of Nigerian courts[55].Basing double actionability as a jurisdictional rule may lead to exorbitant jurisdiction in some cases. One of the attendant consequences of this is that the resulting judgment may not be enforceable outside Nigeria. For instance, in *Zabusky & Ors. v Isreali Aircraft Industry Ind*., the alleged tort was committed outside Nigeria[56]. The Court assumed jurisdiction on the basis that the said tort was wrongful under the Israeli and Nigerian law. This conclusion was reached not minding the fact that the defendant was neither resident nor doing business in Nigeria. By extension therefore, a Nigerian court can on the basis of double actionability rule assume jurisdiction even where the parties or subject matter has little or no connection with Nigeria, provided the plaintiff can show that the tort is actionable under the foreign and Nigerian law. This no doubt, will amount to exorbitant basis of jurisdiction.

8. Conclusions and Recommendations

There is no doubt that the Nigerian law on choice of applicable law in tort is in crisis. The current state of the law is not farfetched from what Oppong has described as a neglect of the subject area generally in Africa. Only very few practitioners and judges are in tune with the subjects of private international law. It appears that the judges and the practitioners as well do not really appreciate the difference between the question of jurisdiction and that of law. It is assumed that the law of the forum court automatically applies to a tortious claim before it, thereby, merging the question of jurisdiction and choice of law together. However, this does not necessary follow. Different criteria apply to choice of jurisdiction and that of applicable law. The misunderstanding of this area of law by Nigerian courts is borne out of the conception of the rule in *Phillips v Eyre* as a rule of jurisdiction rather than that of choice of law. While choice of jurisdiction rule of Nigerian courts in matters having foreign element is itself problematic, adding *Phillips v Eyre* as a jurisdiction rule has no doubt, further compounded the problem. It has also stagnated the development of the choice of law rule for torts. It is therefore recommended that the judges should have a rethink in the construction of the proposition of Willes J. Particularly; the Supreme Court should overrule itself whenever it has the opportunity to do so and reaffirm the true purport of the rule. It is further recommended that it is time the Nigerian judges noted the developments on this subject matter in other jurisdictions as the rule no longer applies in its traditional sense even in England that it originated. Hence, the matter really goes beyond construction as it is but needs a total reappraisal by the courts.

Having a Foreign Element: Are there any Lessons for Nigerian Courts, *Commonwealth Law Bulletin*, Volume 39, No. 2, 2013, pp. 333-358; G. Bamodu, In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence, *Journal of Private International Law* Vol. 7 No. 2, 2011.

[55] For a detailed discourse on the problems of jurisdictional rules in Nigeria, see H.A Olaniyan, *Conflict of Laws in Nigerian Appellate and Apex Courts: A Biennial Critical Assessment* (2009-2010), pp. 297-329; A. O. Yekini, Comparative Choice of Jurisdiction Rules in Cases Having a Foreign Element: Are there any Lesson for Nigerian Courts?', *Commonwealth Law Bulletin,* Volume 39, No. 2, 2013, pp. 333-358.

[56] It was committed in the Israeli Embassy in Nigeria and the court considered that the Israeli Embassy is a foreign land in the eyes of the law.