

Neutral Citation Number: [2018] EWCA Civ 2167

Case No: B3/2018/0238

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT

QUEEN’S BENCH DIVISION

THE HONOURABLE MR JUSTICE KERR

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/10/2018

**Before:**

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE

THE RIGHT HONOURABLE LORD JUSTICE HAMBLEN  
and

THE RIGHT HONOURABLE SIR STEPHEN RICHARDS

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**Between:**

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|  | **ATHANASIOS SOPHOCLEOUS & OTHERS** | Claimants/  Respondents |
|  | **- and -** |  |
|  | 1. **THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS** 2. **THE SECRETARY OF STATE FOR DEFENCE** | Defendants/Appellants |

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**Mr Martin Chamberlain QC & James Purnell** (instructed by **Government Legal Department**) for the **Appellants**

**Mr Zachary Douglas QC & Mr Malcolm Birdling** (instructed by **KJ Conroy & Co**) for the **Respondents**

Hearing dates: 19th July 2018

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Approved Judgment

**Lord Justice Longmore:**

**Introduction**

1. The common law private international rule used by the courts to determine liability in an English court in respect of foreign torts (usually referred to as the double actionability rule) was prospectively abolished by the Private International Law (Miscellaneous Provisions) Act 1995 (“the 1995 Act”) for all torts except defamation. But it casts a long shadow because section 14(1) of the 1995 Act expressly provides that its provisions do not apply to “acts or omissions giving rise to a claim which occur before the commencement” of the relevant Part of the Act. The 1995 Act has itself been largely superseded by the provisions of the Rome II Convention but that likewise only applies to events occurring after its entry into force.
2. The present appeal from Kerr J relates to alleged torts committed during the Cyprus Emergency sixty years ago between 1956 and 1958. Accordingly the old common law rule of double actionability applies. In the last edition of Dicey and Morris, Conflict of Laws published before the 1995 Act (12th edition (1993)) the double actionability rule was stated as follows in rule 203:-

“(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both

* + 1. actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
    2. actionable according to the law of the foreign country where it was done.

1. But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.”

This is the rule which governs the issues arising on this appeal. It is derived from Phillips v Eyre (1870) LR 6QB 1 and Boys v Chaplin [1971] A.C. 356.

1. The Secretaries of State appeal, with permission from Kerr J, from his decision determining (as a preliminary issue) that English law alone (rather than both English law and Cyprus law) governs the personal injury proceedings brought in this country by 34 individuals.
2. The claimants seek damages for personal injuries sustained in Cyprus, as a result of alleged assaults perpetrated in Cyprus by members of the UK armed forces, seconded British police officers and servants or agents of the then Colonial Administration, including the Cyprus Police Force (together “the Security Forces”). The appellants are the defendants to those claims. They are the successors to the Secretaries of State for the Colonial Office and the War Office and are said to be:-
3. vicariously liable and/or
4. jointly liable with the Colonial Administration for acts committed by members of the Security Forces; and/or
5. liable in negligence for allowing or failing to prevent the alleged assaults.
6. The parties agreed that four preliminary issues could usefully be determined before the main trial:-
7. As a matter of private international law, which law (or laws) applies (or apply) for determining limitation?
8. If Cyprus law applies, whether alone or in addition to English law: what is the relevant limitation period in respect of each of the causes of action?
9. In the event that any of the claims have been brought outside the relevant limitation period under Cyprus law, should such limitation period be disapplied pursuant to section 2 of the Foreign Limitation Periods Act 1984 (“the 1984 Act”)?
10. Are the facts as alleged by the claimants capable of constituting the fraudulent concealment of the civil wrong by the defendants within the meaning of article 68(d) of the Civil Wrongs Law of Cyprus?
11. This appeal is from Kerr J’s determination of the first preliminary issue only. If the judge was right and only English law applies to determine limitation, preliminary issues 2-4 fall away. The importance of the issue lies in the fact that it is the defendants’ case that Cyprus limitation law imposes a non-extendable limitation period of two years and that therefore, if Cyprus law applies (whether alone or in conjunction with English Law), the claims will be time barred (unless the claimant can make out a case for fraudulent concealment or persuades the court to disapply Cyprus limitation pursuant to the 1984 Act). This is because it is said that the alleged assaults are foreign torts and must by reason of the “double actionability rule” be actionable under both English and Cyprus law. If they are not actionable under Cyprus law, the claims must fail.

**Factual Background**

1. It was agreed between the parties that the first preliminary issue was to be determined on the basis of assumed facts, as alleged in the amended particulars of claim. The Judge therefore proceeded on that basis. The assumed facts were as follows:-
   1. The claimants were all resident in Cyprus during the Emergency and all but five are still resident there.
   2. The acts of violence were committed from 1956 to 1958 by the Security Forces. The acts of violence included assaults, shooting in the ear, striking with rifles, rubbing salt into wounds, deprivation of water, sleep deprivation, subjection to electric shocks, being left naked in a small dark space alone for days and, in the case of one claimant, rape.
   3. The British Army soldiers were deployed by the UK government from the UK; they answered to their military commander in the British Army, not to the Governor of Cyprus. The British Army had the power to discipline and dismiss its soldiers through the court-martial system.
   4. The seconded British police officers were paid by the UK government and were nominated by the Colonial Secretary to carry out police duties in Cyprus under his control. The seconded British police officers could be discharged by the UK government.
   5. The Governor of the Colonial Administration in Cyprus was appointed by the UK government, which had the power to remove him and the power “to issue instructions to the Governor of the Colonial Administration on all aspects of the administration of Cyprus, including the conduct of security operations”. There was constant dialogue between the Colonial Office, (based in London) and the Colonial Administration (based in Cyprus) including dialogue on important matters of security policy, which required the consent of the UK government. The British Treasury controlled the budget for counter-insurgency operations in Cyprus during the Emergency.
   6. Security operations in Cyprus at the time were coordinated by local “District Security Committees”, each comprising a senior British Army officer and a senior police officer, usually a seconded British police officer.
   7. The UK government “knew, or ought to have known, that interrogation techniques amounting to assault, battery and torture were being used to obtain intelligence from detainees in Cyprus”. Further, the UK government and the Colonial Administration “carefully coordinated their responses to allegations of ill-treatment by the Security Forces in Cyprus”. Some of those detained in Cyprus were removed to the UK under statutory authority (the Colonial Prisoners Removal Act 1884).
2. No defence was filed before the hearing but, following his judgment, the Judge directed the defendants to file a Defence. Consistently with the Judge’s judgment, that defence is pleaded by reference to English law; it is, however, expressly stated as being without prejudice to the defendants’ arguments on this appeal that the law of Cyprus should also govern the liability of the defendants.
3. On 13th April 2018 the Judge gave directions leading to trial with a provisional time estimate of 115 days between 2nd October 2019 and 8th April 2020.

**The Law**

1. The Foreign Limitation Periods Act 1984 (“1984 Act”) governs limitation in claims where the law of any other country is to be taken into account. Section 1 provides that where foreign law falls to be taken into account in English proceedings that includes the foreign law of limitation, unless the law of England and Wales also falls to be taken into account, in which event the limitation laws of both countries apply, the effective limitation period being the shorter of the two. However, section 2 provides an exception: where the outcome under section 1 would conflict with public policy, section 1 is disapplied to the extent that its application would so conflict. By section 2(2) the application of section 1 conflicts with public policy “to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings …”. It is therefore necessary to determine whether foreign law falls to be taken into account; this has to be determined in accordance with rules of private international law.
2. The parties agree that in order to determine the first preliminary issue it is necessary to decide where in substance the cause of action arose in the case of each of the three torts alleged. It is agreed that if the cause of action arose in England, then the law of England and Wales applies and no other law. However, if the answer is that the cause of action arose in Cyprus, then a second issue arises, that being whether the double actionability rule applies and whether the court should apply the recognised exception to the application of that rule set out in Rule 203(2) of the 12th edition of Dicey and Morris. This is commonly known as the “flexible exception” in cases where it is considered just to apply it. The exception is not to be lightly applied and there is no mechanical rule determining when to apply it. Lord Wilberforce in Boys v Chaplin [1971] AC 356, 391 said there was:-

“great virtue in a general well-understood [double actionability] rule covering the majority of cases provided that it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present.”

1. It is this provision or exception which was applied by the judge in determining that only English law applied to the claims. He held first that the causes of action arose in Cyprus so that in principle the double actionability rule applied but then, for six separate reasons, he applied the “flexible exception” (para 25), as described in Boys v Chaplin.
2. It has been recognised that, in spite of the varying ways in which the other Law Lords expressed themselves in Boys v Chaplin, it is the speech of Lord Wilberforce that is to be treated as authoritative, see Armagas Ltd v Mundogas SA [1986] A.C. 717 per Robert Goff LJ at 740G. But the formulation of the exception has proved elusive.
3. The exception was applied in Boys v Chaplin itself in which a traffic accident occurred in Malta between two British citizens temporarily stationed there as part of Her Majesty’s Armed Forces. Maltese law provided that damages could not be recovered for pain and suffering but only for losses actually incurred: English law, of course, has long awarded damages for pain and suffering and the majority of the House saw no reason why the local law (which would be applicable as between two Maltese residents) should apply to persons ordinarily resident in England. They therefore segregated the issue of pain and suffering from the general rule of double actionability and applied English law to that issue. Lord Wilberforce described this segregation (and consideration of what law should be applied to the segregated issue) as a development from English seed, citing Westlake, Private International Law 7th ed. (1925) page 281. Professor Westlake was seeking to refute the suggestion that a defendant who committed a tort in a foreign country automatically submitted himself to the law of that country and said:-

“The truth is that by entering a country or acting in it you submit yourself to its special terms only as far as science selects them as the rule of decision in each case.”

1. Lord Wilberforce emphasised that double actionability was to be the general rule saying (391E):-

“Given the general rule, as stated above, as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained from that principle which represents as least a common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet. This technique appears well adapted to meet cases where the lex delicti either limits or excludes damages for personal injury: it appears even necessary and inevitable. No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what rule, should be preferred. If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice. Even within these limits this procedure may in some instances require a more searching analysis than is needed under the general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical.

I find in this approach the solution to the present case. The tort here was committed in Malta; it is actionable in this country. But the law of Malta denies recovery of damages for pain and suffering. Prima facie English law should do the same: if the parties were both Maltese residents it ought surely to do so; if the defendant were a Maltese resident the same result might follow. But in a case as the present, where neither party is a Maltese resident or citizen, further inquiry is needed rather than an automatic application of the rule. The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case, negligence or otherwise, related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties so circumstanced.

So segregated, the issue is whether one British subject, resident in the United Kingdom, should be prevented from recovering, in accordance with English law, against another British subject, similarly situated, damages for pain and suffering which he cannot recover under the rule of the lex delicti. This issue must be stated, and examined, regardless of whether the injured person has or has not also a recoverable claim under a different heading (e.g. for expenses actually incurred) under that law. This Maltese law cannot simply be rejected on grounds of public policy, or some general conception of justice. For it is one thing to say or presume that domestic rule is a just rule, but quite another, in a case where a foreign element is involved, to reject a foreign rule on any such general ground. The foreign rule must be evaluated in its application.

The rule limiting damages is the creation of the law of Malta, a place where both plaintiff and defendant were temporarily stationed. Nothing suggests that the Maltese state has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties. No argument has been suggested why an English court, if free to do so, should renounce its own rule. That rule ought, in my opinion, to apply.”

1. There are, accordingly, two essential issues which must be decided in this appeal. Logically the first issue is the place of commission of the alleged torts. If it was England, no question of Cyprus law arises; if it was Cyprus, the rule of double actionability will in principle apply. The claimants by their respondents’ notice appeal the judge’s decision that the torts were committed in Cyprus. If the judge was right about that, then the question of the application of the flexible exception arises. The Secretaries of State appeal the judge’s decision that the exception applies. It is more appropriate to deal first with the place where the torts were committed, although it is only raised by the respondents’ notice.

**Place of commission of the alleged torts**

1. Since I agree with the judge that the torts were committed in Cyprus rather than in England, I can deal with this comparatively briefly. The acts of violence relied on all occurred in Cyprus. The fact that it is said that the defendants are vicariously liable for the acts of the perpetrators of that violence (as to which there may no doubt be some argument) cannot make any difference to the place of commission of those violent acts. Mr Zachary Douglas QC for the claimants submitted that it was the English law of vicarious liability that would determine whether the defendants would be liable for the acts of the perpetrators and the question whether the defendants’ predecessors exercised control over the relevant personnel was an exclusively English law question. That may be true but as the judge said (para 66) vicarious liability is not in itself a tort. It is a legal rule which imposes liability for someone else’s tort. It is where that tort is committed that must be decisive, namely Cyprus.
2. The allegation that the Colonial Administration was responsible for the acts of violence likewise makes no difference to the place of commission of those violent acts since the Colonial Administration acted in Cyprus. The allegation that the defendants are jointly liable with the Colonial Administration similarly makes no difference to the fact that acts of violence were committed in Cyprus. Any assistance (or other source of joint liability), emanating from the defendants’ predecessors in England or those in Whitehall for whom those predecessors were responsible, was (if proved) an act of assisting the Colonial Administration to do something in Cyprus. The most that can be said is that those for whom the defendants are responsible were (secondary or accessory) parties to torts committed in Cyprus.
3. The most recent authority on joint liability is Fish & Fish Ltd v Sea Shepherd UK [2015] A.C. 1229 in which the Supreme Court were divided as to the result on the facts but agreed about the law. Lord Toulson JSC as part of the majority said (para 21):-

“To establish accessory liability in tort it is not enough to show that D did acts which facilitated P’s commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further.”

1. To similar effect Lord Sumption JSC in the minority summarised the law as being (para 37):-

“that the defendant will be liable as a joint tortfeasor if (i) he had assisted the commission of the tort by another person (ii) pursuant to a common design with that person (iii) to do an act which is, or turns out to be, tortious.”

Lord Sumption added the important point (for the purpose of the present enquiry):-

“It is now well established that if these requirements are satisfied the accessory’s liability is not for the assistance. He is liable for the tortious act of the primary actor, because by reason of the assistance the law treats him as party to it.”

1. This makes it clear that there is only one tort. If that tort was committed by the primary actor in Cyprus, the fact that a person jointly liable for the commission of the tort was elsewhere when he gave the relevant assistance makes no difference to the fact that the tort was committed in Cyprus.
2. Any negligence on the part of those for whom the defendants may be responsible might have had its origin in England in the sense that, if there were reason to suppose that someone in England should have appreciated that the Security Forces were committing acts of violence in Cyprus and should have taken action to prevent the continuation of such violence but failed to appreciate the existence of that violence and/or failed to take appropriate action, such failure related to acts of violence committed in Cyprus. The failure to take preventive action was a failure to take action in Cyprus.
3. The general approach of the private international law of negligence is to ask where in substance the cause of action arose, see Distillers Co. (Biochemicals) Ltd v Thompson [1971] A.C. 458, 468E per Lord Pearson. In personal injury cases this is, in general, the place where the injury is suffered. Thus, in the Distillers case, although the drug thalidomide was manufactured and sold in England to the relevant Australian company who distributed it in Australia, the Privy Council held that the courts of New South Wales had jurisdiction to try the case because under the Common Law Procedure Act of 1899 of New South Wales there was “a cause of action which arose within the jurisdiction”.
4. The context of the Distillers case was the rule giving jurisdiction to the court to implead a foreign defendant rather than the double actionability rule which applies to acts done in a foreign country. But cases on jurisdiction provide an apt analogy.
5. Moreover, Durham v T & N Plc (unreported 1st May 1996) was a case which did have to consider the double actionability rule. In that case Mr Durham had in 1955 emigrated to Quebec and worked for a year at the factory of Atlas Asbestos, a wholly owned subsidiary of another wholly owned subsidiary of T & N Plc. The factory manufactured asbestos products and proper precautions to protect Mr Durham against the inhalation of asbestos dust were not taken. From 1992 he lived in England where he died from mesothelioma as a result of inhalation of asbestos dust 38 years earlier. The defendants were permitted to plead the Quebec law of limitation and the court had to consider the significance and effect of that Quebec law. If the wrongful act occurred in England there was no need to consider the double actionability rule or Quebec law. This court held, however, applying Distillers and other authorities, that it would be artificial to hold that, because the defendants might have in England caused or permitted the existence of injurious conditions at the Atlas factory, the tort was committed in England. As Sir Thomas Bingham MR, giving the judgment of the court, put it:-

“The plaintiff was working at the Atlas factory in Montreal when he inhaled the dust which caused the injury from which, 38 years later he unhappily died. It was the lack of appropriate precautions in that factory which was the immediate cause of death … looking back over the series of events constituting the tort once completed, we have no doubt but that in substance the plaintiff’s cause of action arose in Quebec.” (Page 6 of the transcript)

1. This was followed in the similar case of Connelly v RTZ Corporation [1999] CLC 533 in which the plaintiff had inhaled uranium ore dust in Namibia but later fell ill in Scotland. Wright J said that the allegedly negligent decisions taken in London “require to be considered in the light of conditions in Namibia” where alone they “produced any concrete results”.
2. Mr Douglas sought to distinguish these authorities and rely on cases of conspiracy to defraud and negligent misstatement such as Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah (24th June 1999 per Mance LJ) and Base Metal Trading Ltd v Shamurin [2004] All ER (Comm) 159 (Tomlinson J), [2005] 1 WLR 1157. But these cases do not afford any true analogy and even they rely to a large extent on considerations such as “the reality of where the loss was felt” to use the phrase of Tomlinson J at first instance.
3. Mr Douglas submitted that in Durham and Connelly there was nothing which pinned responsibility on the parent company in England. But, whether that was so or not, the question of the place where the tort had been committed had to be considered first in order to decide whether it was relevant to look only to English law. The courts’ decisions on that question are compelling and I would follow them.
4. I turn therefore to the question whether, as the judge (para 185) held to be the case, it is appropriate to apply the flexible exception identified in Boys v Chaplin and hold that only English law applies to the claims in their entirety. The judge, also held that, if limitation was segregated from the general question of actionability, then Cyprus law should apply. The claimants, by respondents’ notice, say that, if Cyprus law applies to the claims in general, then the issue of limitation should be segregated and English law only should apply to that issue.

**Application of “flexible exception” to the claims in their entirety**

1. The width of the flexible exception has never been defined. But it seems that, despite the formulation in the twelfth (1993) edition of Dicey and Morris it can apply to a whole claim rather than just a particular issue, with the result that the entire claim is governed solely by either the lex fori or the lex loci delicti. In Red Sea Insurance Co Ltd v Bouygues S.A. [1995] A.C. 190 the Privy Council held that it was in principle possible for a counterclaim, brought by an insurer by virtue of its rights of subrogation against some of the claimants (a consortium called PCG), who had supplied allegedly defective precast building units and would thus be liable to the other claimants who were making claims against the insurers for loss and expense incurred in relation to a building project in Saudi Arabia, to be governed only by the law of Saudi Arabia and not (also) by the law of Hong Kong, where proceedings had been brought. Hong Kong law, like English law, provided that an insurer could only exercise rights of subrogation once it had paid its insureds (which had not happened). PCG applied to strike out the counterclaim on the basis of this technical rule of English law and the insurer then applied to amend its counterclaim to allege that the only relevant law was that of Saudi Arabia under which the insurer was entitled to sue PCG without having paid the claim. The Hong Kong Court of Appeal had held that, by reason of the double actionability rule, the insurer could not rely solely on the law of Saudi Arabia but the Privy Council said that there was no conceptual problem with the amendment and that there should be a full hearing below of the application to amend without any room for argument below that the amendment should be rejected solely because application of the double actionability rule would mean that the amended claim would fail. The Privy Council could not itself determine whether leave to amend should be granted since the insurer had “not fully formulated its claim based on Saudi Arabian law” (207F).
2. This case is hardly an authoritative example of the flexible exception as it decided merely that an application for leave to amend should proceed but it does show that the judge’s decision that only English law applies to the claims in their entirety cannot be criticised on the basis that the flexible exception only applies to particular issues rather than whole claims. I would not, therefore, accept the defendants’ first ground of appeal (that the judge was, in any event, wrong to disapply Cyprus law in its entirety) insofar as they seek to say that the exception can only apply to “issues”, rather than to claims as a whole.
3. Nevertheless, some caution must be exercised. It is one thing to say that an otherwise valid claim should not be entirely defeated by a technical rule of the forum, if the forum has no close connection with the subject-matter of that claim; it is quite another to say that the law of the place of the tort should be completely disregarded. No case has gone as far as that.
4. There is, moreover, high authority that the flexible exception should not be too readily available. Lord Wilberforce said at 319H of Boys v Chaplin that the double actionability rule should apply

“unless clear and satisfying grounds are shown why it should be departed from.”

In Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5) [2002] 2 A.C. 883, 1115 (para 164) Lord Hope said:-

“unless a rigorous approach to this question is adopted, the application of the exception is at risk of giving rise to much uncertainty and the criticism alluded to in the Australian cases that it has become instinctive and arbitrary.”

The exception was nevertheless applied in that case in which Iraqi Airways were held to be unable to rely on a confiscatory law of the Iraqi Government to excuse its conversion (or more crudely, theft) of Kuwait’s aircraft.

1. With these admonitions in mind I turn to the six reasons given by the judge for the application of the exception and the five grounds of appeal.

**Absence of any concession by the defendants that the claims are, in the absence of limitation, actionable under Cyprus law (First reason, second ground of appeal)**

1. The judge said (para 186):-

“That is only the starting point but it is relevant because if the defendants had made that concession, the choice of substantive law would not make any practical difference except to the issue of limitation which is a subsequent issue to that of choice of substantive law.”

This is difficult to understand. The first preliminary issue is “which law (or laws) applies (or apply) for determining limitation?” In order to determine that question it is necessary to decide (1) where the torts were committed (2) if committed in Cyprus, whether they are actionable as a matter of Cyprus law and (3) if not actionable, whether the flexible exception should be applied. The stance of the defendants on other possible matters of Cyprus law is not relevant to these questions.

1. Even if that were to be wrong, the current position is that the parties have asked the court to determine the preliminary issue before the defendants have pleaded any provisions of Cyprus law on which they rely (para 180 of the judgment). The defendants can hardly be criticised for failing to make any concession before they have even pleaded their case.
2. The judge only treated this consideration as the starting point and it is not central to his decision.

**“Superiority” of English law, meaning that responsibility should be assessed by that law (Second reason, ground 5 of the appeal)**

1. The judge said that the defendants represent the state which made the very law which would absolve them from liability. It was therefore fair to judge the defendants by reference to (as he put it) the “superior” law of the United Kingdom which made the Cyprus law rather than by reference to the “inferior” local law of Cyprus made by one of the parties to the dispute.
2. It is not, in my judgment, appropriate to describe the local law of Cyprus as “inferior” or the law of the United Kingdom (or more accurately) England and Wales as “superior”. Each law has full force and effect in the country in respect of which the law was enacted. Nor is it correct to say that the United Kingdom (or England and Wales) “made Cyprus law” without making it clear that the law was not made in the United Kingdom Parliament to which the defendants are responsible but rather by the Queen in Council in right of her position as sovereign of Cyprus. No doubt the Queen in so doing acts on advice of whichever Secretary of State for the Colonies was in office at the material time but the law so made is in no way “inferior” to English law. It may indeed well be (although there is no evidence about this, since Cyprus law has not even been pleaded) that any non-extendable limitation provision of Cyprus law may have been enacted before English law enabled English courts to disapply limitation in appropriate cases.
3. If authority is needed for the above proposition it is provided by Lord Bingham in R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2006] 1 A.C. 529 at para 9:-

“… it is now clear, whatever may once have been thought, that the Crown is not one and indivisible … The Queen is as much the Queen of New South Wales and Mauritius … and territories acknowledging her as head of state as she is of England and Wales, Scotland, Northern Ireland or the United Kingdom.”

For this purpose, it makes no difference whether the relevant territory is a colony (whose laws are made by the Queen in Council) or a colony or dominion with its own home-grown legislature. The law of the colony of Cyprus is as much a foreign law for the purposes of the double actionability rule as the law of France or the United States. Indeed, in Phillips v Eyre the original case which set out the double actionability rule, the local law of the place of the tort which ensured the defendant was not liable was that of the colony of Jamaica.

1. Mr Douglas submitted that the judge was entitled to have regard to the de facto subordination of the colonial administration in Cyprus to the government of the United Kingdom and that, in any event, Quark had been doubted in R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2016] A.C. 1355. But, on what is essentially a legal point, the de jure position is the position which should govern and I do not read Keyu, which concerned the jurisdiction of the English court, as overruling the reasoning contained in para 9 of Lord Bingham’s speech in Quark which must remain authoritative for this court.

**Close connection with London (Third reason)**

1. The judge described this reason as related to the second reason and it is not the subject of any specific ground of appeal. The fact is that anything which may have happened in London translated to acts of assailants who, as the judge recognised, were in many cases acting on behalf of the Colonial Administration rather than directly on behalf of the Crown. Moreover, even to the extent that they may have been acting on behalf of the Crown, they were acting on behalf of the Crown in right of the government of Cyprus and the same considerations apply as apply to the judge’s second reason.

**Deliberate infliction of harm (Fourth reason)**

1. The judge’s fourth reason for applying the flexible exception is that all three pleaded torts (vicarious liability, joint liability and negligence) engaged “the special responsibility of the state where violence is deliberately inflicted on its citizens”. Although there is no specific ground of appeal challenging this reason, it falls within the first ground of appeal which contends that the judge was wrong to disapply Cyprus law in its entirety.
2. The judge cites no authority for the proposition that intentional torts should be treated differently from other torts and the tort of negligence is anyway not an intentional tort. In the absence of authority, it is impossible to discern the principle on which the judge relies. It must, of course, be recognised that the intentional infliction of harm by the state on its own citizens is inherently repugnant but that is of itself not a reason for ignoring the double actionability rule and holding that the law of the place where the torts were committed has no relevance at all.
3. It will be recalled that in Phillips v Eyre itself the torts were torts of intention; yet the local law of Jamaica sufficed to exclude liability for the acts for which it was said that Governor Eyre was responsible.

**Lack of interest of Cyprus in application of its law (Fifth reason and fourth ground of Appeal)**

1. There is no doubt that, when the flexible exception has been applied, it has been material to ask whether the foreign state has any interest in the application of its own law. Thus in Boys v Chaplin itself Lord Wilberforce (392E) pointed out that both the claimant and the defendant were stationed in Malta only temporarily and that the Maltese state had no interest in applying its rule (that pain and suffering were not to be compensated) to persons resident outside Malta.
2. Similarly in Johnson v Coventry Churchill International Ltd [1992] 3 All ER 14 the claimant was permitted to recover for a tort committed in West Germany although there was no cause of action for mere negligence in German law since there were statutory provisions for automatic compensation for accidents at work. The claimant English joiner worked for an English company and was only in Germany for a temporary assignment. There were obvious parallels with Boys v Chaplin, none of which exist in the present case. But Mr John Kay QC sitting in Manchester cited Lord Wilberforce 391F to the effect that it was necessary to identify the policy of the relevant foreign rule and

“enquire to what situations … it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet.”

Mr Kay explained (24h-25b) that the rule was introduced in Germany as part of the social security legislation to improve benefits payable to injured workmen whilst avoiding the need to inquire into questions of fault and added:-

“It would seem therefore that there is nothing in the policy underlying the foreign rule that was ever intended to have any application to the case of an English citizen working for an English employer … I thus conclude that not applying the West German rule “in the circumstances of the instant case would” not “serve any interest which the rule was devised to meet”.”

(Mr Kay’s double negative does not seem to sit easily with Lord Wilberforce’s single negative, but the sense is clear, if one has in mind the passage at 392E of Lord Wilberforce’s speech).

1. In the light of these authorities Kerr J held (para 193):-

“The fifth reason for my conclusion is that the current independent state of Cyprus has no interest in the application of its law to the issues in this litigation, any more than did Malta in Boys v Chaplin or West Germany in Johnson v Conventry Churchill International Ltd. Any post-independence modern developments in Cyprus tort law (about which I am not informed) would have no intrinsic relevance to the rights and wrongs of this litigation.”

1. Insofar as the mistreatment of the claimants was perpetrated by personnel of the Colonial Administration or actual Cypriots, it is by no means obvious that the current independent state of Cyprus would have no interest in the application of its own law. If the Secretaries of State were to seek an indemnity for any vicarious liability they might have, the independent state of Cyprus would have a very real interest in the application of its own law.
2. Insofar, moreover, as the defendants seek to rely on limitation, any state whether pre- or post-independence has an interest in ensuring its relevant limitation provisions apply. I will deal with this more fully below when dealing with the final paragraph of the respondents’ notice.
3. More generally it cannot be right to have regard to the position 60 or more years after the assaults were committed. The defendants should be entitled to rely on the law of Cyprus at the time when liability arose. At that time Cyprus would have every interest in maintaining its own laws; the fact that the defendants were English and some alleged acts of omission may have taken place in England cannot mean that it would be right to ignore the law of Cyprus.
4. The rationale of the double actionability rule is partly that persons conducting themselves in a particular country should not be liable if by the law of that country there is no liability for such acts or if they are excused or released from liability for such acts, see Boys v Chaplin at 398E per Lord Pearson. Another way of putting the same concept is to say that comity of nations ordinarily requires that a person who is given protection by the law of one country in respect of acts done in that country should be protected against legal proceedings in other countries in respect of those acts, at any rate if they cause damage in that country, see Metall & Rohstaff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB, 391, 445H-446A per Slade LJ. This rationale must be borne in mind when determining whether it is in that country’s interest to apply its own laws. To my mind, it would not be right to impose liability on the Secretaries of State if there would be no such liability if they were sued in Cyprus. The fact that the law of post-independence Cyprus might also excuse them on the grounds of sovereign immunity (see judgment para 139) does not militate against that consideration, rather the opposite.
5. I would therefore disagree with this fifth reason of the judge and uphold the fourth ground of appeal.

**English law well suited to determine the issues (Sixth reason and third ground of Appeal**

1. The judge said (para 195) that English law is well equipped to address the difficult issues that will arise in determining the claims because it has “refined and sophisticated reasoning techniques that are well suited to deal with the liability issues in the case”.
2. No doubt that is so and I would not for a moment detract from this paean to the qualities of English law. But I fear I cannot see how this can possibly be a factor in favour of invoking the flexible exception to the double actionability rule. It has the flavour of a time when English courts regularly ignored foreign law, a fashion that has been outdated since The Atlantic Star [1974] A.C. 436, 453F in which Lord Reid said of a similar approach by Lord Denning in the Court of Appeal:-

“… that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races.”

**Overall conclusion on the flexible exception**

1. In respectful disagreement with the judge I do not consider the reasons he gives for saying that this case comes within the flexible exception amount to the “clear and satisfying grounds” required by Lord Wilberforce at page 391H of Boys v Chaplin for departing from the general rule of double actionability. There is a danger that if the exception is invoked too often it will become the general rule to give primacy to English law rather than law of the place where the tort was committed. That would not be right.
2. The judge said that the case was like no other cited, but it certainly has echoes of Phillips v Eyre in which, it is true, the defendant was the Governor of Jamaica rather than the then Secretary of State for the Colonies. On one view, Governor Eyre had treated a small-scale eruption of violence in Jamaica as if it had been the Indian Mutiny and, in the course of suppressing the uprising, 439 people had been killed, 600 were flogged and 354 were court-martialled, see Cannadine, Victorious Century (2017) pages 365-6. His conduct was applauded by the white settlers in Jamaica but caused much division in England with John Stuart Mill, Charles Darwin and T H Huxley calling for a private prosecution while Dickens, Tennyson, Ruskin and Carlyle headed the Eyre Defence Committee in his support, see James Morris (as she then was) Pax Britannica Folio Society (1992) Volume 1 chapter 15. It was in this maelstrom that Mr Phillips initiated civil proceedings for false imprisonment and assault and that the principle of double actionability was first enunciated. That principle was upheld in Boys v Chaplin with the qualification of the flexible exception and, to the extent that it still matters in the common law, it must remain the general rule; 21st century revulsion at the allegations in this case (if proved) cannot justify an “instinctive or arbitrary” (to use Lord Hope’s words in the Kuwait Airways case) departure from it.

**Flexible exception as applied to the issue of limitation (Respondents’ Notice, final paragraph)**

1. Lastly it is necessary to consider whether, if it is not right to say that only English law applies to the claims as it whole, the flexible exception applies solely to the issue of limitation. This submission has the merit of adhering more closely to Dicey and Morris rule 203 by segregating limitation as an issue but the judge said (para 199):-

“…if I am wrong in my decision that the flexible exception should be applied in this case and [that] the substantive law of the colony of Cyprus should be applied to determine these torts, the issue of limitation should also be that of the colony of Cyprus. I see no reason why any question of disapplying Cypriot limitation law should not be decided by applying the bespoke statutory provisions in the 1984 Act.”

1. Mr Douglas submitted that, despite the apparently mandatory terms of the 1984 Act (which applies to proceedings brought after it came into force) to the effect that, if foreign law falls to be taken into account (as on this hypothesis it does), that will include the foreign law of limitation, nevertheless the flexible exception can apply to exclude the foreign law of limitation. That is a surprising submission in view of the express terms of the 1984 Act. But Mr Douglas relied on Ennstone Building Products Ltd v Stranger Ltd [2002] 1 WLR 3059 where it does appear that this court was prepared to apply the flexible exception and disapply the foreign (Scottish) period of limitation which was shorter than the English limitation period. This part of the judgment is very shortly expressed since it was doubly obiter. The court had already decided that there was a contract whose proper law was English and that, therefore, the contractual claim was not time-barred; there was no need therefore for the claimant to rely on an alternative action in tort; the court also decided that any tort was an English tort because the relevant negligent advice had been received and acted on in England. There was therefore no question of the double actionability rule applying. Nevertheless the court expressed its view on the position that would have arisen if it had been a foreign tort, Keene LJ (with whom Potter LJ agreed) saying (para 50):-

“I cannot see that clear and satisfying grounds have been shown for applying Scottish law to this tortious claim or to the issue of the limitation period.”

1. With great respect there are two fundamental difficulties with this sentence. In the first place there is no reference to the 1984 Act and secondly, as Lord Wilberforce had made clear in Boys v Chaplin at 391H, there have to be clear and satisfying grounds for disapplying the foreign law on the particular issue, not as Keene LJ says for “applying” it.
2. In these circumstances I do not think para 50 of Ennstone can be treated as authoritative and this may well be why Professor Richard Garnett in his Substance and Procedure in Private International Law (2012) prefaces his observation, that a possible issue which could be displaced pursuant to the flexible exception could be a foreign limitation period, with the word “conceivably”.
3. There is another reason why the judge is right apart from his reference to the 1984 Act. It will be recalled that an important point in Durham v T & N Plc was that the limitation period in Quebec was shorter than the limitation period in England. Once the court had decided that the tort was substantially committed in Quebec, the question arose whether that shorter limitation period could be ignored. Sir Thomas Bingham MR cited rules 202 and 203 of the 12th (1993) edition of Dicey and Morris, referred to possible exceptions as shown by the facts of Boys v Chaplin and Red Sea v Bouygues S.A. to the effect that it may be proper to give effect to the proper law of the tort or the law with which the tort had the closest connection and continued:-

“On the relatively straightforward facts of this case, we can see no reason to apply any rule other than the ordinary rule of double actionability.”

That meant that it was necessary to apply the law of both Quebec and England. He then turned to the provisions of the 1984 Act and held that Quebec law should apply as the shorter limitation period and that the application of the limitation period allowed by Quebec law could not be said to come within the public policy exception contained in section 2(2) of the Act. He explained this by saying:-

“It would in our judgment be wrong to treat a foreign limitation period as contrary to English public policy simply because it is less generous than the comparable English provision in force at the time.”

1. For these reasons it seems to me that the judge was right to hold that, if it was relevant to look at the issue of limitation on its own, the flexible exception would not apply. I would accordingly not accede to this part of the respondents’ notice any more than to that part which challenged the judge’s decision that the torts were committed in Cyprus.

**Overall conclusion**

1. I would therefore allow this appeal and set aside the judge’s decision that the law of England and not Cyprus should be applied to the claims. I would answer the first preliminary issue by saying that both the law of Cyprus and the law of England and Wales apply for the purpose of determining limitation. If I have understood the position correctly, this will mean that preliminary issues 2, 3 and 4 remain to be determined, whether at trial or otherwise.

**Lord Justice Hamblen:**

1. I agree.

**Sir Stephen Richards:**

1. I also agree.