Masthead Logo

DePaul Law Review

Volume 14
Issue 2 *Spring-Summer 1965*

Article 10

Choice of Law in a Physical Tort

Floyd Krause

Much of this activity can be traced to the direct effect of the automobile on increasing crime and its side effects on urban and commercial patterns. The law has had to evolve special rules so as to put vehicles in their logical place in the overall pattern of the Constitution. Some of the older law had been very successful, but newer libertarian ideas as to the rights of the individual have brought about even greater changes in this field. Further changes must still take place before it can truly be said that public safety and private rights are in balance.

Eliot Landau

---

means more than nonconfinement in jails; it means the right to enjoy one's life uninterruptedly and uninterfered with so long as the laws of the land are not violated in any way that will not evidence probable cause of such violation. *The conscientious and tactful officer must know that these characteristics do not always exist and that sometimes power produces harsh disregard of the rights of others and recklessness in the exhibition of such power. Fundamental rights must not depend upon the varying characteristics of officers.*" (Emphasis added.)

CHOICE OF LAW IN A PHYSICAL TORT

Assume hypothetically that a California resident, while driving through Illinois on a trip to New York, was involved in a collision wherein his car was struck by a truck, driven by a resident of New Hampshire. The truck belonged to a Florida corporation and was on a haul to North Dakota. The California resident sued the Florida corporation in California. At this point, a question is raised before the California court as to which state law should govern the substantive rights of the parties: that of California, the forum (*lex fori*) and residence of the plaintiff, that of Florida, the place of incorporation of the defendant or that of Illinois, the situs of the tort and the place of injury? It is the purpose of this comment to analyze the possible legal concepts and doctrines the California court may choose to apply in deciding this question.

Until the mid-nineteenth century the early common law concept to the effect that tort actions were a part of the law of remedies prevailed in the United States. Under this doctrine, all causes of action sounding in tort were governed by the law of the *lex fori*.[1] The doctrine was applied as late as 1875, when the Wisconsin Supreme Court stated that the application of the law of the *lex fori* to foreign torts was a rule "almost too familiar . . . for discussion or authority."[2] Following this early line of reasoning the law that would be applied in the hypothetical prob-

[1] STORY, CONFLICT OF LAWS 357 (2d ed. 1841).

[2] Anderson v. Milwaukee & St. Paul Ry., 37 Wis. 321 (1873).

lem presented above would be that of California. The fact that the defendant was not a resident of California, and that the injury occurred in Illinois would not be considered.

During this same period in American history, another rule in the field of choice of law in cases of foreign torts by the *lex fori* was developed by some courts.[3] Simply stated, it required the *lex fori* to apply the law of the place where the legal injury was suffered in determining the substantive rights of the parties. Early support of this *lex loci delicti* (place of injury) rule is found in a passage in Justice Story's work on Conflict of Laws which states that "the true doctrine . . . proceeds upon the broad ground of the right of action governed by the laws of the foreign state."[4]

This historical background served as the basis and foundation from which the *lex loci delicti* rule developed during the first half of the twentieth century. In 1934, the original *Restatement of Conflict of Laws* adopted this rule by providing that, "The law of the place of wrong determines whether a person has sustained a legal injury."[5]

The present status of the *lex loci delicti* rule is that it represents the overwhelming weight of authority in the United States;[6] the cases which

[3] Holbrook v. Bowman, 62 N.H. 313 (1882); Torrance v. Third National Bank, 70 Hein. 44, 23 N.Y.S. 1073 (1893); Barclay v. Thompson, 2 Pen. & W. 148 (Pa. 1830).

[4] STORY, CONFLICT OF LAWS 845 (8th ed. 1883).

[5] RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

[6] Pound v. Goulding, 237 Ala. 387, 187 So. 468 (1939); Lillegraven v. Tengs, 375 P.2d 139 (Alaska 1962); Dobbins v. Martin Buick Co., 216 Ark. 861, 227 S.W.2d 620 (1950); Gallegos v. Union-Tribune Publishing Co., 16 Cal. Rptr. 185 (1961); United States National Bank of Denver v. Bartges, 122 Colo. 546, 224 P.2d 658 (1950); Bissonnette v. Bissonnette, 145 Conn. 733, 142 A.2d 527 (1958); Park v. Beech Aircraft Co., 132 A.2d 54 (Del. 1957); Astor Electric Service v. Cabrera, 62 So. 2d 759 (Fla. 1952); Record Truck Lines Inc. v. Harrison, 109 Ga. App. 653, 137 S.E.2d 65 (1964); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Slinkard v. Bable, 233 Ind. 680, 112 N.E.2d 876 (1953); Cardamon v. Iowa Lutheran Hospital, 128 N.W.2d 226 (Iowa 1964); Workman v. Hargadon, 345 S.W.2d 644 (Ky. 1961); Nicholson v. Atlas Assurance Corp., 156 So. 2d 245 (La. 1963); Pungle v. Gibson, 135 Me. 297, 195 Atl. 695 (1937); Commercial Credit Corp. v. Stan Ross Buick Inc., 343 Mass. 622, 180 N.E.2d 88 (1962); Leebove v. Rovin, 363 Mich. 569, 111 N.W.2d 104 (1961); Lowrey v. Dingmann, 251 Minn. 124, 86 N.W.2d 499 (1957); Russell v. Kotsch, 336 S.W.2d 405 (Mo. 1961); Morin v. Letourneau, 102 N.H. 309, 156 A.2d 131 (1960); Marshall v. George M. Brewster & Son Inc., 37 N.J. 176, 180 A.2d 129 (1962); Farmer v. Ferrea, 260 N.C. 619, 133 S.E.2d 492 (1963); Mann v. Policyholders' National Life Insurance Co., 78 N.D. 724, 51 N.W.2d 853 (1952); Nadeau v. Power Plant Engineering Co., 216 Ore. 12, 337 P.2d 313 (1959); Ewell v. Cardinal, 53 R.I. 469, 167 Atl. 533 (1933); Oshick v. Oshick, 244 S.C. 249, 136 S.E.2d 303 (1964); Parsons v. American Trust & Banking Co., 168 Tenn. 49, 73 S.W.2d 698 (1932); C.I.T. Corp. v. Geary, 170 Va. 16, 195 S.E. 651 (1938); Maag v. Voykovich, 46 Wash. 2d 302, 280 P.2d 680 (1955); Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1937); Hamschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Ball v. Ball, 73 Wyo. 29, 269

have supported it involving most every type of tort cause of action. Its one great advantage is that of simplicity of application. Given any type of tortious injury, all the court or attorney need do is determine where the legal injury was incurred and the law of that state will be applied in determining the substantive rights of the parties. Of course the other advantage which flows from this simplicity of application is the uniformity of result achieved, especially where all the states follow the same rule.

Ironically the rule's greatest advantage has also become its greatest disadvantage. Severe criticism has been directed toward the application of this rule by legal scholars over the past several decades.[7] Their general criticism is that the rule has been applied too automatically or axiomatically by the courts. That, given any set of facts in which a foreign tort had occurred, the forum would automatically and without apparent reflection of the particular situation of the parties, apply the substantive law of the situs of the tort. In essence they argue that application of this rule, which is based upon a "vested rights" theory, cannot solve the complex problems which arise in modern litigation, and may often yield harsh and unjust results.[8] Professor Stumberg states that the choice of law problem in the field of foreign torts should be approached from a point of view relating to the social policy of the forum or local rules of law. This, he argues, will lead to more desirable results than those achieved by an automatic reference to the situs of the tort, especially where the problems involved have no direct connection to that place.[9] By this he seems to imply that in certain cases the place where the injuries were suffered may only be an incidental factor to be considered in the particular cause of action before the court. Several recent cases which have followed to some degree this line of reasoning will be discussed below.

It seems that there is a significant degree of feeling among legal scholars,

---

P.2d 302 (1954). See also Herr v. Holohan, 131 F. Supp. 777 (D.Md. 1955) where the federal court followed the original *Restatement* because Maryland had no reported decisions in this area. Other decisions by federal courts, Adams v. Greeson, 300 F.2d 555 (10th Cir. 1962); Hearne v. Dow-Badische Chemical Co., 224 F. Supp. 90 (D.Texas 1963); W. W. Clyde & Co., v. Dyers, 126 F.2d 719 (10th Cir. 1942) *cert. denied*, 317 U.S. 638 (1942).

[7] See generally Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Currie in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233 (1963); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959).

[8] See Carter v. Tillery, 257 S.W.2d 465 (Tex. Civ. App. 1953).

[9] STUMBERG, CONFLICT OF LAWS 198–212 (3rd ed. 1963).

interested in the choice of law problem, to the effect that there should be a breakaway from the strict, axiomatic application of the *lex loci delicti* rule and the adoption of more flexible rules based upon a policy analysis by the court in each case.[10] They advocate that the place of injury should be considered just one of several factors which the court must consider in determining the law to be applied.

It should not be inferred from the above discussion that the courts have applied the *lex loci delicti* rule in every foreign tort action without reference to or consideration of other factors. Cases have been decided in this field which either do not directly discuss the place of injury rule, or while paying lip service to the rule, decide that in the particular case other factors outweigh application of the rule. Before looking at several of the more recent decisions that have not strictly applied the *lex foci delicti* rule, it should be made clear that they do not specifically repudiate the place of injury rule. While they just seem to "side step" application of the rule in the particular case, they are nevertheless important since they do mark a "breakaway" from the automatic application of the *lex loci delicti* rule.

The case of *Gordon v. Parker*[11] involved an action by a Pennsylvania husband in a Massachusetts federal court against a Massachusetts resident, in which he alleged alienation of his wife's affections in Massachusetts. This cause of action had previously been abolished in Pennsylvania, the matrimonial domicile and the apparent place of injury; however, Massachusetts allowed this action. If the court had strictly applied the *lex loci delicti* rule, the plaintiff's action would have been barred since he could not have maintained the action in Pennsylvania, the place where the legal injury was suffered. However, because of the nature of the cause of action the court, rather than discussing where the injury occurred, weighed the interests of the two states in the outcome of the litigation. The court noted that "this is not a situation in which the interests of Pennsylvania plainly outweigh those of Massachusetts."[12] While Pennsylvania as the matrimonial domicile was concerned with the conduct of its domiciliaries, Massachusetts, as the place of the alleged misconduct and the place of the defendant's residence, was also interested. Massachusetts did have an interest with regard to the "conduct within

[10] See articles *supra* note 7. See also Cheatham in *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1229 (1963); Leflar in *Comments on Babcock v. Jackson, Id* at 1247 (1963); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW AND CONTEMP. PROB. 679 (1963); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963).

[11] 83 F. Supp. 40 (D.Mass. 1949).

[12] *Id* at 42.

her borders which in her view lowers the standards of the community where they occur."[13] The court therefore avoided application of the *lex loci delicti* rule by determining that, in this case, the interests of Massachusetts outweighed those of Pennsylvania, and that Massachusetts law should be applied.

In *Grant v. McAuliffe*,[14] a collision occurred in Arizona between two California automobiles driven by California residents. The defendant's decedent, who was the driver of one of the automobiles, died as a result of the crash, and suit was brought by the passengers and driver of the other automobile. Arizona law bars actions brought after the death of an alleged tort-feasor, while California does not. The Supreme Court of California avoided application of the *lex loci delicti* rule by characterizing the question of survival as part of the administration of decedent's estates in California and therefore procedural, and governed by the law of the *lex fori.*

In *Schmidt v. Driscoll Hotel, Inc.*,[15] the defendant sold liquor in Minnesota to an intoxicated person whose automobile was later involved in a collision with another Minnesota automobile in Wisconsin. No liability to the defendant would have resulted if the law of Wisconsin, the situs of the tort, was applied, however under the Minnesota "dram shop" statute and Civil Damage Act, the defendant was held liable by that state for his illegal sale. Since the defendant's liability was fixed by the illegal sale, the fact that the injury occurred in another state was immaterial. The court chose to avoid the application of the *lex loci delicti* rule on the basis that the forum's interests in punishing violations of its liquor laws, and in providing an injured party with a remedy, must override the application of the place of injury rule. The fact that the injury occurred in Wisconsin was not considered of controlling import.

Hamschild v. Continental Casualty Co.[16] is another decision which sidestepped the policy of strict application of the place of injury rule. In this case, a Wisconsin husband and wife were involved in an automobile accident in California as a result of which the wife was injured. Suit by the wife against her husband was brought in Wisconsin. The Wisconsin court was confronted with the problem of interspousal immunity in the field of Conflict of Laws. California, the place of injury, bars suits between spouses in tort, while Wisconsin, the forum and domicile of the parties does not. The Supreme Court of Wisconsin held that the laws of the place of injury should not control in determining the capacity of one spouse to sue the other. Rather, the court specifically

[13] *Ibid.*

[14] 41 Cal. 2d 859, 264 P.2d 944 (1953).

[15] 249 Minn. 376, 82 N.W.2d 365 (1957).

[16] 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

stated that the law to be applied in determining capacity is that of the state of domicile, because it is more interested in suits between spouses than is the state where the injury occurred. The court clearly stated that the decision in the instant case was not to be considered a rejection of the *lex loci delicti* rule, which under ordinary circumstances will still govern the rights of the parties.

The last case to be noted in which the court, due to the particular factual situation, avoided the effect which would have resulted from application of the place of injury rule is *Kilberg v. Northeast Airlines Inc.*[17] In that case, a New York resident was killed when the plane in which he was a passenger crashed in Massachusetts. Suit was brought in New York for negligent breach of the contract of carriage. Massachusetts, the situs of the tort, limits the amount of damages recoverable in this type of action, while the forum, New York, places no such limitation on the amount of recovery. Since there were no prior New York decisions in point, the court of appeals was faced with the problem of characterizing the question of damages as being either a procedural matter or a substantive right. By choosing to characterize the problem of the amount of damages recoverable as a procedural or remedial right, and therefore governed by the law of the *lex fori*, the court of appeals indirectly avoided the effect of the *lex loci delicti* rule. If the court had characterized the question of damages as substantive, then, as the court at that time followed the place of injury rule, it would have been compelled to apply Massachusetts law as to damages, because under the place of injury rule substantive rights of the parties must be determined by the law of the *lex loci delicti.*

These cases represent what Professor Stumberg was referring to when he stated that in various situations the mere fact that the injury occurred in one state should not be a compelling reason for applying the law of that state. Referring to the hypothetical presented in the beginning of the comment, by strictly applying the *lex loci delicti* rule, the California court would be required to apply the law of Illinois in determining the substantive rights of the parties. In that factual situation, it would be fairly difficult for the court to side-step the application of the rule unless the law of Illinois for some reason would yield a result substantially dissimilar to that of the forum, and which the forum could determine was unfair and unjust.

In summary, prior to 1963 five states,[18] while not specifically repudiating the *lex loci delicti* rule, had expressed a willingness to break away

[17] 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

[18] California, Massachusetts (federal court), Minnesota, New York and Wisconsin.

from automatic application of the rule in given factual situations; mainly where the court decided that the forum had a greater interest in the ultimate outcome of the case than did the state where the injury occurred.[19]

The question is then raised: have any courts expressly abandoned the *lex loci delicti* rule, and if so, what other rules have they adopted? Prior to 1963, this question would have had to be answered in the negative. In that year, the case of *Babcock v. Jackson*[20] was decided in New York. In this suit, a New York resident, who was a guest in a New York automobile, was injured in an accident that occurred in Ontario. The law of Ontario denies recovery by a guest from the owner of an automobile. The New York court specifically rejected the *lex loci delicti* rule, concluding that its application operated in a manner contrary to the interests of the other interested jurisdictions, and that its application often yielded unjust results. The court adopted a rule which held that "justice, fairness and the best practical result . . . may best be achieved by giving controlling effect to the law of the jurisdiction which because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."[21]

One year after the *Babcock* case was decided, *Griffith v. United Airlines, Inc.*[22] was decided by the Supreme Court of Pennsylvania. The decedent in that case, a Pennsylvania resident, purchased an airline ticket in Philadelphia for a flight to Phoenix, Arizona. The plane crashed while landing in Denver, Colorado, and the decedent was killed. The executor of his estate brought an action against the airline in Pennsylvania for negligent breach of the contract of carriage. Under the law of Colorado, the situs of the tort, the amount of recovery is greatly limited, but Pennsylvania allows a more liberal recovery. The court thoroughly analyzed the history of the *lex loci delicti* rule and its own recent decisions supporting the rule.[23] It then went on to specifically repudiate the place of injury rule stating "we are of the opinion that the strict *lex loci delicti* rule should be abandoned in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before

[19] STUMBERG, CONFLICT OF LAWS 198–212 (3rd. ed. 1963).

[20] 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). See also Lowe's North Wilkesboro Hardware Inc. v. Fidelity Mutual Life Insurance Co., 319 F.2d 469 (4th Cir. 1963) which adopted the law of the state that had "the most significant relationships with events constituting the alleged tort and with the parties." *Id.* at 473.

[21] *Id.* at 481, 240 N.Y.S.2d at 749, 191 N.E.2d at 283.

[22] 416 Pa. 1, 203 A.2d 796 (1964).

[23] The most recent of which was Vant v. Gish, 412 Pa. 359, 365, 194 A.2d 522, 526 (1963).

the court."[24] It determined that Pennsylvania's interest in this particular litigation was greater than that of Colorado where the injury occurred and that, therefore, the law of Pennsylvania should determine the measure of damages. The court cited the *Babcock* case and its determination that the law of the place most intimately concerned with the outcome of the litigation should be applied.[25]

Before looking to some of the reasons given for the departure from the place of injury rule, the position of the proposed new *Restatement of Conflict of Laws* should be noted.[26] The *Restatement* now provides that foreign torts should be governed by the local law of the state which has the most significant relationship with the occurrence and the parties,[27] although separate rules are to be applied to different types of torts. Those contacts that are to be considered most vital in determining the state of most significant relationship include the place of conduct, the place of injury and the domicile of the parties. If we apply the rules adopted by the Restatement and by the *Babcock* case and the *Griffith* case to the hypothetical presented in the beginning of this comment, the California court might well determine that the *lex fori* has the greatest interest in the outcome of the litigation, since one of its residents, the plaintiff, had been injured. Therefore, California law rather than Illinois law (the place of injury) could be applied. The *Babcock* and *Griffith* cases seem to have adopted the doctrine that the law to be applied should be that of the state having the most significant contacts or relationships with the particular issues involved in the litigation.[28]

Another view adopted by some authors would place greater emphasis on the law of the forum.[29] The forum should apply its own law unless it finds some compelling reason to apply the laws of another jurisdiction.[30] With the emergence of this line of thinking, it is noted that the theories advocated in choice of law problems in the field of foreign torts have made a complete circle. It should be remembered that the early common law also was to the effect that the law of the *lex fori* governed determination of foreign tort problems.

[24] *Supra* note 22, at ——, 203 A.2d at 805.

[25] *Supra* note 22.

[26] RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 *supra* (Tentative Draft No. 9 1964).

[27] See note 26, § 379a, to the effect that the new *Restatement* possibly still retains the *lex loci delicti* rule with regard to personal injury cases.

[28] See *op. cit. supra* notes 7 and 10. See also Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW AND CONTEMP. PROB. 700 (1963).

[29] *Ibid.*

[30] *Ibid.*

There is little doubt that most of the new doctrines, to various degrees, allow the one thing that the strict application of the *lex loci delicti* rule specifically avoided—that of forum shopping. Under the place of injury rule as strictly applied, it did not matter where the case was brought since the substantive law to be applied would be the law of the place of occurrence of the tort. Most authors who have criticized the *lex loci delicti* rule and advocated the adoption of the rules discussed above do not discuss the possible drawbacks of a policy allowing a potential plaintiff to shop for the forum whose laws are most favorable to him.[31] It would seem, however, that this is an important factor, to be considered before any court abandons the place of injury rule.

The reasoning advanced for breaking away from the *lex loci delicti* rule and the adoption of a form of the "most significant relationship" doctrine was stated by the Supreme Court of Pennsylvania in the *Griffith* case:

> It must be emphasized that this approach to choice of law will not be chaotic and anti-rational. "The alternative to a hard and fast system of doctrinal formulae is not anarchy. The difference is not between a system which purports to have, but lacks, complete logical symmetry and one which affords latitude for the interplay and clash of conflicting policy factors."[32]

The court further reasoned that although adherence to the principle of stare decisis is generally a wise course of judicial action, where a rule does not adequately serve the best interests of justice it should not be followed merely to adhere to stare decisis.[33] The court then cited Cardozo to the effect that:

> When a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.[34]

This reasoning, advanced in the most recent case to abandon the place of injury rule, clearly leaves an open door through which other states may follow. In addition to the *Babcock* and *Griffith* decisions which have specifically abolished the *lex loci delicti* rule in their respective states,[35] there have been five cases, discussed above, which have "avoided" the strict application of the rule.[36] Whether other states will elect to follow these decisions only time will tell.

Floyd Krause

[31] See generally *supra* notes 7, 10 and 28.

[32] Supra note 22, at ——, 203 A.2d at 806. [33] *Ibid.*

[34] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 150–51 (1921).

[35] New York and Pennsylvania. [36] See *supra* note 18.