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Long Distance Torts

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the judgment conclusive upon the merits? Apparently the federal court would be duty bound to follow the decisions of the state courts respecting the idea of reciprocity, and must of necessity hold the judgment to be conclusive upon the merits.

In a state where reciprocity has been received with favor, the decision, of course, would be exactly opposite. Here the federal court, for the very same reasons, would be duty bound to apply the doctrine of reciprocity.

Some difficulty arises where a judgment obtained in France is sought to be enforced in a federal court in a state wherein the reciprocity idea has never been considered. For instance, in Louisiana it is the law that in the absence of the well-settled exceptions, that is, fraud or lack of jurisdiction, a judgment obtained in a foreign country is conclusive upon the merits. Since this is the law of Louisiana, under the *Erie Railroad Company* doctrine it must be applied as such. In the absence of circumstances showing a probable reception of reciprocity, what reason would a federal court sitting in Louisiana have to interject the reciprocal comity doctrine? That would not be the law of Louisiana, but clearly federal general common law, and under the *Erie Railroad Company* case, "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' . . . And no clause in the Constitution purports to confer such a power upon the federal courts."[69] Hence, the federal court would also be duty bound to hold the judgment conclusive upon the merits.

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LONG DISTANCE TORTS

In the field of torts, as in any other field of law, it is necessary in order for the injured party to bring a successful suit that he be given by some law a cause of action. The question immediately arises as to which law the injured party will look in determining whether he has a cause of action against the defendant. The courts have had little difficulty when all the events giving rise to the action occur in one jurisdiction,[1] whether the forum

69. 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 118, 119, 114 A.L.R. 1487, 1493 (1938). See Meredith v. Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

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1. See 15 C.J.S. 897, note 63, for collection of cases. See also Hunter v. Derby Foods, Inc., 110 F.(2d) 970, 133 A.L.R. 255 (C.C.A. 2d, 1940), and annotations following case.

be within the jurisdiction where the action arose or in a foreign state or country. In this simple factual situation the well-settled rule in the United States is that the decision will be in accord with the law of the place where the injury occurred.[2]

A more complicated problem is presented, however, in the case where there is conduct in one state causing harm in another, or activity in several states causing harm in one, or action in one state causing harm in several states. Because a tort usually consists of two elements, conduct and harm, it is obvious that both need not occur within one jurisdiction. In such cases the court must become selective and determine in which state the wrong shall be localized. The prevailing American view is that the law of the place of the harm determines liability, rather than the law of the place where the defendant acted.[3] The primary proponent of this theory was the late Professor Beale, who set out the stereotyped rule that "the place of wrong is the place where the person or thing harmed is situated at the time of the wrong."[4] This rule was adopted as Section 377 of the Restatement of the Conflict of Laws. In support of this proposition, Professor Beale cited several cases[5] which purport to represent the prevailing opinion of the American courts. In a recent article,[6] Professor Max Rheinstein has shown that the cases cited do not conclusively support the stated rule, where the acts and consequences occur in different jurisdictions.

Professor Rabel, speaking of the basic concept of tort law, suggests:

> " 'A primary purpose is to fix the standard of conduct of a person so he can know what he may do and what he may not do, and so that others can know what type of conduct to expect from him.' "[7]

In other words, the law should be such as to protect the actor's

2. Notes 133 A.L.R. 260, 15 C.J.S. 897; Stumberg, Conflict of Laws (1937) 163; Minor, Conflict of Laws (1901) 479; 2 Beale, The Conflict of Laws (1935) 1287-1288, § 377.2.

3. Ibid.

4. 2 Beale, op. cit. supra note 2, at 1287.

5. Id. at 1287, n. 4; Moore v. Pywell, 29 App. D. C. 312, 9 L.R.A. (N.S.) 1078 (1907); Keller v. Fred T. Ley and Co., 49 F.(2d) 872 (C.C.A. 1st, 1932), (same case) 65 F.(2d) 499 (C.C.A. 1st, 1933); Cameron v. Vandergriff, 53 Ark. 381, 13 S.W. 1092 (1890); Otey v. Midland Valley R.R., 108 Kan. 755, 197 Pac. 203 (1921); Connecticut Valley Lumber Co. v. Maine Cent. R.R., 78 N.H. 553, 103 Atl. 263 (1918).

6. Rheinstein, The Place of Wrong: A Study in the Method of Case Law (1944) 19 Tulane L. Rev. 4, 165.

7. 2 Rabel, The Conflict of Laws, A Comparative Study (1947) 309, quoting Cheatham, Cases (1934) 416.

"justified expectations," so that he will not be taken by surprise if the consequences of his actions should cross into another jurisdiction. By following the strict letter of the rule set forth by Professor Beale, a person would be susceptible to an action for damages if he acted pursuant to law in one state and the injurious consequences of his actions occurred in a second state which imposed liability for this type of conduct. Disturbed by the possibility of such unjust results, the draftsmen of the Restatement of Conflicts inserted an exception from liability under the law of the place of impact, if the actor's conduct was "privileged" by the law of the place where he acted.[8] However, the scope of this exception is as obscure as the reason why exemption from liability should be granted to conduct generally prohibited, but "privileged" for some special reasons, but not for conduct which is not prohibited at all at the place of acting.

Both prior and subsequent to the Restatement, writers[9] in the field of conflict of laws, as well as the courts, have occasionally expressed doubts as to the appropriateness of the place of harm theory. One writer expresses his view that:

> "Unfortunately for the proponents of the theory in question [place of harm], when it is sought to apply it to more complex situations, difficulties are encountered for which the theory has not made adequate provision."[10]

The courts have likewise shown a tendency to veer away from the place of harm rule in cases where injustice would be done by strict adherence to it. In *Scheer v. Rockne Motors Corporation*,[11] the defendant, an automobile sales company maintaining a branch business in Buffalo, New York, has authorized an employee of that branch to use one of its automobiles. Subsequently, the employee, with plaintiff as his invited guest, drove the car to Windsor, Ontario. An accident occurred in Ontario, and plaintiff was injured. Under an Ontario statute, defendant would have been liable even if the trip were not made for a business purpose. Under the usual rule that the law of the place of impact governs, the law of Ontario would have applied irrespective of whether or not the employee had authority to operate the car in Canada.

8. Restatement, Conflict of Laws (1934) § 382.
9. 2 Callman, Unfair Competition (1945) 1589; Cook, The Logical and Legal Basis of the Conflict of Laws (1942) 314; Hancock, Torts in the Conflict of Laws (1942) 172; Rheinstein, supra note 6; Stumberg, The Conflict of Laws (1937) 182.
10. Cook, loc. cit. supra note 9.
11. 68 F.(2d) 942 (C.C.A. 2d, 1934).

The court, speaking through Judge Learned Hand, held, however, that the defendant would be liable *only* if it could be shown that he had authorized the agent to take the car into Ontario.

This case definitely enunciates an exception to the place of injury rule. Here the defendant's own activity was in New York and the impact was in Ontario. In holding that the Ontario law would not be applied *unless* the agent had been given authorization to operate the car in Canada, the court implied that if no authorization were given, the New York law would be applicable. Obviously the court in this case realized the hardship that would be visited upon the defendant if a strict application of the place of impact rule had been adhered to.

In *Siegman v. Meyer*,[12] defendant's wife had committed an assault upon plaintiff while in Florida on vacation. Plaintiff brought suit in the federal district court for New York, joining both the defendant and his wife, alleging that since the harm had occurred in Florida, the law of that state, which imposes liability upon the husband for the torts of his wife, should apply. Under the law of the forum the husband would not be liable for the torts of his wife. The husband had not been in Florida at the time of the assault. The court held that even though the tort had occurred in Florida, it would not apply the common law rule of that state and hold the defendant liable.

The place of harm rule has been disregarded even in cases where its application would not have caused obvious injustice to the actor and even though the effect is the imposing of liability that would not have existed under the law of the place of harm. In the Louisiana case of *Caldwell v. Gore*,[13] there was a shallow drain traversing plaintiff's land in *Arkansas* and extending into defendant's adjoining land in *Louisiana*. Defendant erected a dam on his land across this drain, thereby impounding water on plaintiff's land in Arkansas. Under Arkansas law a landowner has the right to dam up the flow of water, while no such right exists under Louisiana law. Action was brought in Louisiana to have the dam removed. The court held that even though the injury occurred in Arkansas, the plaintiff was entitled to drainage rights over defendant's land in the same manner as if both pieces of land were in Louisiana. The Louisiana Supreme Court plainly considered the place of acting (building of the dam) as the place

12. 100 F.(2) 367 (C.C.A. 2d, 1938).
13. 175 La. 501, 143 So. 387 (1932), final disposition in 144 So. 151 (1932).

of wrong, rather than the place of injury. In justifying the application of its own law, the court said:

> "Although the several states of the American union are distinct sovereignties, they are nevertheless members of the same political family, which necessarily leads to a more intimate relationship than is usual among independent foreign nations. While foreign in some purposes, the states are united in others."[14]

The decision in this case is directly contrary to the illustration given under Section 377[15] of the Restatement of Conflicts, which designates the place of wrong as the place where the force takes effect upon the land.

In *Burkett v. Globe Indemnity Company*[16] plaintiff was riding in a car with the owner in *Alabama*. The car, due to a defect in the steering apparatus, ran into a ditch, injuring the plaintiff. It was discovered that a repairman had been negligent in adjusting the steering apparatus in New Orleans, Louisiana. Suit was brought in a *Mississippi* court against the Louisiana repairman's insurer for damages caused by the accident. Without mentioning the *Alabama* law in the decision, the court decided the case in accordance with the *Louisiana* law.

Here it will be noted that the court of a neutral state applied the law of the state where the tortfeasor acted and not the law of the place where the injury was sustained. The decision could be explained upon the theory that Louisiana law governed the contract for repairing and was therefore allowed to impose a contractual liability upon the repairman in favor of third parties suffering injury by reason of his negligence. Whatever may be the theoretical explanation of the case, it is evident that the court did not feel bound to apply the law of the place of injury. Instead, the law of the place of acting prevailed.

Another pertinent example of the apparent tendency on the part of the courts to depart from the usual rule is shown in the case of *Levy v. Daniels U-Drive It Auto Rental Company*.[17] The

14. 175 La. 501, 505, 143 So. 387, 388 (1932).

15. Restatement, Conflict of Laws (1934) § 377, Illustration 3. "When harm is caused to land or chattels, the place of wrong is the place where the force takes effect on the thing."

16. 182 Miss. 423, 181 So. 317 (1938).

17. 108 Conn. 333, 143 Atl. 163 (1928). In Chicago, R. I. and P. Ry. v. McCrary, 179 Ark. 403, 16 S.W.(2d) 466 (1929), defendant negligently maintained a defective footrest on one of its coaches. Plaintiff boarded the train in Arkansas and rode to Memphis, Tennessee, where he was injured when he attempted to withdraw his feet from under the footrest. The Arkansas

defendant owned an establishment in Connecticut, where he rented a car to one Sack, who drove into Massachusetts, where he negligently injured the plaintiff. Under the common law of Massachusetts defendant would not be responsible. Hence, if the rule that the law of the place of injury determines liability had been applied, defendant could not have been held. However, Connecticut had a statute which imposed liability for the negligence of a driver upon the person renting a car to such driver. Suit was brought in a Connecticut court, and it gave judgment for the plaintiff, although the injury occurred in Massachusetts. The court reached the result upon the theory of a third-party beneficiary contract. Apparently, the court employed this concept as a device to rationalize its holding. It was motivated by the idea that one of the policies underlying the Connecticut statute was to provide incentive to the person who rents cars to rent them to competent and careful drivers.

Similarly, in *Lindstrom v. International Navigation Company*,[18] the forum applied the law of the place of acting. The deceased was riding on defendant's vessel on the high seas when it shipped a large wave which swept him overboard. The jury found that the accident was the result of defendant's negligence. It was contended by the defendant that the part of the ocean where the deceased drowned was the place of impact and that therefore, since no law exists on the high seas giving an action for wrongful death, the plaintiff should be denied recovery. The court held that the defendant's activity on board the ship was the proximate cause of death. The ship was held to be subject to New York law and recovery was allowed.

From the *Lindstrom* case it is seen that peculiar difficulties may arise in attempting to localize the impact in actions of wrongful death. The interest protected by death statutes is not that of the person killed in his continued life, but that of the survivors in being deprived of their supporter and close relative. Strict adherence to the rule of the Restatement[19] would require the localization of this intangible interest, but, because of the obvious difficulties of the task, even the Restatement approves the court's inconsistency in localizing the tort at some other place, usually

court applied its own law without mentioning the conflict of laws problem involved. Again in Johnson v. Missouri Pac. R.R., 167 Ark. 660, 269 S.W. 67 (1925), the Arkansas court applied the law of the place of acting (Arkansas) when, as in the *McCrary* case, the negligence was in Arkansas and the injury in Oklahoma.

18. 117 Fed. 170 (E.D. N.Y. 1902).

19. Restatement, Conflict of Laws (1934) § 392.

the place where the impact upon the body of the deceased occurred.

It is well to note several cases dealing with unfair competition, patent and copyright infringements, which are in keeping with the trend of disregarding the place of impact rule.

In *Addressograph-Multigraph Corporation v. American Bolt and Manufacturing Company*,[20] suit was brought in a federal district court in Illinois as a result of alleged unfair competition in misappropriating plaintiff's system of marketing mechanical addressing machines. For use in its machines, plaintiff manufactured special address plates from which it derived a large measure of its profits. Defendant duplicated the plates manufactured by plaintiff and by introducing them into the market injured plaintiff's sales of its own address plates. Defendant maintained its principal place of business in Illinois, where it received and filled orders for the plates. Although the defendant's acts were not considered illegal under the law of Illinois, plaintiff claimed that the effect of the defendant's competitive acts had taken place in states other than Illinois, and that, therefore, the law of these states should apply. The court, however, applied the law of Illinois, rather than the law of each state where defendant's activity had its injurious effect. Here again we see the reluctance on the part of the court to follow the strict rule of "place of injury." It is obvious from the outset that a great burden would be imposed upon the tribunal of the forum if it attempted to apply the law of each state where some impact had been noted from the defendant's activity. By resorting to the law of the place of defendant's activity, the task of the court was greatly facilitated.

In *Triangle Publications v. New England Newspaper Publishing Company*[21] a multiple contact problem similar to the one raised in the *Addressograph* case was presented to the federal district court sitting in Massachusetts. Here the defendant, a newspaper publisher, had appropriated certain horse racing information gathered by the plaintiff and had published it in its newspaper without plaintiff's consent. Plaintiff sued to enjoin this activity on the ground that its copyright was being infringed by the defendant. The papers were published in Massachusetts and probably circulated in several other states. When the question arose as to the law applicable, the court held that the fact

20. 124 F. (2d) 706 (C.C.A. 7th, 1941).
21. 46 F. Supp. 198 (D.C. Mass. 1942).

that publication occurred in Massachusetts alone would justify application of Massachusetts law. Furthermore, the court stated:

> "Even if some part of defendant's papers were sold in other states (which is not clear from the evidence), the Massachusetts court in determining issues of damages would probably not apply to such sales the rules of unfair competition prevailing in these states. And certainly the Massachusetts courts, and fortiori this court, in considering whether to issue an injunction would be guided solely by Massachusetts rules of unfair competition, and would ignore the rules of unfair competition prevailing elsewhere."[22]

Thus, again, we see the court conveniently abandoning the place of impact rule in rendering its final decision in the case.

In an older leading case[23] concerning unfair competition alleged to have been committed by the use of a brand which was protected as a trade mark in the United States, but not in Germany, the American court took jurisdiction and applied American law because the fraudulent conspiracy to affix the brand in Germany on the barrels to be sent there was conceived in the United States and the barrels were manufactured and filled here and shipped from American ports. Though the effect of the activity would be registered in Germany, the federal court applied American law and enjoined the activity in this country.

From a survey of the cases involving multiple contact torts, it may be seen that the courts frequently look to the law of the place where the defendant acted. It is apparent that much inconvenience would be experienced by the court if it attempted to apply the law of each place where some amount of injury manifested itself. In view of these administrative difficulties the courts have shown a definite trend toward applying the place of acting rule.

Similarly, the courts have encountered some difficulty with regard to the place of impact rule when dealing with violations of a person's right of privacy. In *Banks v. King Features Syndicate, Incorporated*,[24] X-rays were made of plaintiff's pelvic region in order to discover the location of a hemostat left in her after a previous operation. These X-rays were given by her physician to a newspaper reporter, who transferred them to defendant, who

22. Id. at 203.
23. Vacuum Oil Co. v. Eagle Oil Co. of New York, 154 Fed. 867 (D.C. N.J. 1907).
24. 30 F. Supp. 352 (S.D. N.Y. 1939).

subsequently published the pictures in its newspapers throughout the United States. In considering the problem of choice of law, the court quoted from the Restatement of Conflicts, Section 378, then stated:

> "But if there is a series of acts, or a train of events, cutting across state lines, the question as to which law should be applied becomes a bit involved. In such case the law of the 'place of wrong' will control. Under Section 377, Restatement of Conflicts, the place of wrong is the state where the last event necessary to make the actor liable for the alleged tort takes place."[25]

This case clearly shows the court's intention to apply the "place of impact" theory, but it is difficult to find where that place is localized in the case of the invasion of an interest as intangible as that of privacy. Apparently the court considered the place of "first impact" as being most nearly connected with the privacy which was here invaded.

Aside from the multiple contact cases, a very recent case[26] presented a situation readily susceptible to the application of the place of injury rule. As in the case of invasion of privacy, the court was called upon to determine where the impact occurred when dealing with another intangible interest, that is, that of a husband in the undisturbed affections of his wife. The plaintiff and his wife were domiciled in Pennsylvania. While the husband was in the armed service abroad, his wife went to Massachusetts, where she met the defendant, a citizen of that state. An overly friendly relationship developed between the plaintiff's wife and the defendant, and as a result of this relationship plaintiff brought suit in the Federal District Court for Massachusetts for alienation of affections. This type action was abolished by statute in Pennsylvania, but not by the laws of Massachusetts. Defendant argued that the asserted harm had been inflicted on the marital relationship at the marital domicile in Pennsylvania and, that, consequently, the action should be decided according to the laws of that state. Under the impact theory, the Pennsylvania law should apply because, although the activity was admittedly carried on in Massachusetts, the relational interest alleged to have been violated thereby was located in Pennsylvania, the marital domicile. Apparently the court experienced difficulty in attempting to find at what place the defendant's action caused the injury to the

25. Id. at 354.
26. Gordon v. Parker, 83 F. Supp. 40 (D.C. Mass. 1949).

plaintiff. In reaching his final conclusion, Judge Wyzanski avoided the "place of wrong" inquiry, weighed the relative interests of the two states and decided to apply Massachusetts law. In this case the definition set forth in the Restatement as the place of wrong would have left many questions unanswered. Where did the "last event necessary to make the defendant liable" take place? Was the loss sustained in India where the plaintiff was at the time, or in Pennsylvania where the plaintiff ordinarily enjoyed the rights and privileges of consortium, or was it in Massachusetts, where the defendant acted? Manifestly the court was motivated by something more far reaching than the application of the stereotyped rule of "place of injury." Here the defendant acted in Massachusetts, where he was presumed to have known that he would be liable for his conduct. According to the basic theory of tort law, the standards governing his activity were set forth in the laws of Massachusetts. The defendant violated the accepted standard of conduct, and even though the repercussions of his conduct may have occurred in other states, the court very properly held that he would be liable under the law of the place where he acted.

From a detailed examination of the cases involving elements of a tort occurring in different jurisdictions, it thus appears that two categories readily evolve. First, there are those cases where action appears in one state causing harm in several states, such as publishing a newspaper;[27] and those where the action in several states causes harm in one, such as in the unfair competition, patent and copyright infringement cases,[28] where the harm may be said to occur at the defendant's principal place of business. In both these situations the courts look to the place where the activity occurred, obviously because of the facility with which its law may be applied.

The second category consists of those cases in which there is action in one state resulting in an impact in only one other jurisdiction.[29] In the past the courts have given these cases a summary treatment by applying the "place of injury" rule[30] and

27. Triangle Publications v. New England Newspaper Publishing Co., 46 F. Supp. 198 (D.C. Mass. 1942).

28. Addressograph-Multigraph Corp. v. American Bolt and Manufacturing Co., 124 F. (2d) 706 (C.C.A. 7th, 1941); Vacuum Oil Co. v. Eagle Co. of New York, 154 Fed. 867 (D.C. N.J. 1907).

29. Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932), final disposition in 144 So. 151 (1932); Lindstrom v. International Nav. Co., 117 Fed. 170 (E.D. N.Y. 1902); Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938); Gordon v. Parker, 83 F. Supp. 40 (D.C. Mass. 1949).

30. Supra note 2.

justifying it on the questionable theory of vested rights. As stated by Professor Stumberg, "Its greatest virtue is its simplicity, the facility of its application."[31]

It is eminently clear that the jealous adherence to this rule will lead to hardship in many cases. As has been pointed out above in the cases referred to, the courts have realized this fact and, upon considerations of sound social policy and basic tort theory, are leaning toward applying the law of the place where the tortfeasor acted. It is submitted that this solution to the problem produces a more just result and better serves the social function of the law.

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CHOICE OF LAW IN MULTISTATE LIBEL SUITS

It is generally considered axiomatic that the creation and extent of tort liability is governed by the law of the place of wrong.[1] The place of wrong is defined as the place where the impact occurs upon the interest alleged to have been violated.[2] As the interest protected against defamation is that of a person's interest in his unblemished reputation,[3] the place of impact is said to be where the defamatory statement has been communicated to third persons.[4] Obviously, such a rule results in difficulties where an allegedly defamatory statement has been published in a newspaper or magazine which has been circulated throughout the nation or even into foreign countries. With communication to third parties in every state and an impact resulting from each communication,[5] we are confronted with a dilemma as to which law to apply. Furthermore, in mass publication of defamatory matter, we are faced with the closely related task of deter-

31. Stumberg, op. cit. supra note 2, at 182.

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1. 62 C.J. 1109, § 27-28; 15 C.J.S. 896, § 12; Goodrich, Conflict of Laws (3 ed. 1949) 260; Stumberg, Conflict of Laws (1937) 163.

2. Restatement, Conflict of Laws (1934) § 377; "The place of wrong is in the state where the last event necessary to make an actor liable for a tort takes place." See, e.g., Alabama G.S.R. Co. v. Carroll, 97 Ala. 126, 11 So. 803 (1892) (train negligently repaired in State *X* moves into State *Y* where *P* is injured. Law of *Y* governs.); Le Forest v. Tolman, 117 Mass. 109 (1875) (Dog strayed from State *X* and bit *P* in State *Y*. Law of *Y* governs.).

3. Restatement, Torts (1938) § 559: "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him."

4. Restatement, Conflict of Laws (1934) § 377, comment (a), note (3): "Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated."

5. Ibid.