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Trans-National Torts

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A British plaintiff institutes an action against the publishers of a magazine in Rio De Janiero, Brazil for having published a libel against him there. Libel is a crime in Brazil whereas a civil suit was filed in Britain. How should the case be decided? Which law is to be applied? This was precisely the difficulty faced by international courts in the early era of private international law.

Then came the age when the law of the land, which least harmed the defendant to the plaintiff's advantage, was preferred. This continued for a while until finally the theory of *Lex Fori* (the law of the land where the action is instituted) gained acceptance.

In the early 19th century, two jurists namely Wachter and Savigny contributed a great deal to international law with their treatises on matters pertaining to tortious liability. Wachter was the first to deal with torts in a meaningful and comprehensive manner. His views were totally in favour of dispute resolution through *Lex Fori*:

"If, as was said, circumstances that the act accrued at a certain place does not create an unconditional right to have adjudication according to the laws of that place, if further more, one cannot speak here of a free autonomous submission to those laws, then the state in which the compensation of delicts are sought should, as in the case for punishment for crime as a rule, take as guidance for decision only its own laws and not subject itself to foreign views about justice."

Savigny's conception of *Lex Fori* was perhaps more subtle than Wachter's, and stressed less on the identification of criminal law with that of tort.

Soon *Lex Fori* became popular in continental Europe and a vast part of America. Originally, English courts were rather insular, taking up cases which arose in Britain only, but soon a very famous case popularly known "The Halley"[1] caused a change to infiltrate the system. The judge at the first instance decided in favour of the plain-

(1) (1868) LR 2PC 893

tiff on the grounds of the law of the land where the tort was committed and rejected *Lex Fori* on the grounds of public policy, but in an appeal to the Privy Council *Lex Fori* was considered the dominant law and till to-day an English court will not give a remedy in respect of a tort committed abroad, unless the allegedly wrongful act is actionable as a tort by English domestic law. The courts thus exhibited a hint of conventionalism.

Initially American courts as well as those of continental Europe followed this British philosophy, but soon they began to realise that contrary to the views of Wachter and Savigny, a plaintiff will only sue in a forum whose law gave him a right of action; once the question of jurisdiction was answered, the forum would apply its own law. It was never argued that the law of the place where the defendent acted was different. So then the question of *Lex Loci Delicti* (the law of the land where the tort was committed) was raised, for it not only availed the defendent as a defence, but also operated positively to give him a right of action which *Lex Fori* did not. So the Americans rejected the philosophy of "The Halley" Though *Lex Loci Delicti* now forms the major bulk of the law governing foreign torts, the Americans had to overcome great difficulties relating to technicalities of foreign law which were still very incipient in their system. The jurisdiction of courts in each state was different and this also posed a problem in totally ousting *Lex Fori.*

Continental Europe too, opposed the traditional approach of British courts and began to see the logic of *Lex Loci Delicti* as the Americans did. So Germany, France, U.S.S.R., and some other countries began to apply this law in their courts. However they were less enthusiastic about abolishing *Lex Fori* as compared to America and so, by way of public policy, traces of *Lex Fori* were retained in their system.

Lex Loci Delicti began to gain importance subsequently in other parts of the world. Courts explicily justified their reference to this law because they felt that it would be unjust to fix a defendent with liability for *Lex Fori* when the act itself probably attracted no legal sanction under *Lex Loci Delicti.* Where was justice if one party was to be victimised by tort law? Thus, an equitable approach is seen where measures were taken to implement this law in most courts.

Individual cases have also aided in shaping private International Law. In a very famous case, *Phillips Vs. Eyre* (1870)[2],

(2) (1869) LR 4 QB 225

the conflict between *Lex Fori* and *Lex Loci Delicti* arose. The judges dealt with the case in the same manner as they had "The Halley".

The court observed that:

> "It appears clear that where, by the law of another country, an act complained of is lawful, though it would have been wrongful by English law if committed in England; it cannot be made the grounds for an action in an English Court".

The case temporarily laid down a principle in England that an English court had jurisdiction over a case only if the tort committed abroad was actionable if committed there so as to fall under English law.

Lex Loci: the act should be a wrongful one in addition to the first rule by the law of the place where it was committed.

It is uncertain as to whether this rule applies now, as far as English law is concerned as the judges deciding the case *Chaplin Vs. Boys*[3] seemed to think otherwise and once again there was conflict between *Lex Fori* and *Lex Loci Delicti* regarding the assessment of damages. The House of Lords unanimously decided in favour of English law much to the benefit of the plaintiff. After a series of conflicting judgements, the court took up the case on the grounds that Maltese law did not apply to persons residing outside. No exact ratio can be derived from the case; a majority of judges to-day disagree with the decision and rely more on the rule laid down in *Phillips Vs. Lyre*.

The case *M'Elory Vs. M'Allister*[4] decided in 1940 also proved to be rather interesting. The Sessions Court in England dismissed the claim on the grounds that according to Scots law, the negligence of the driver was not actionable and the widow could not claim damages. Unless the plaintiff was eligible for compensation in both courts of law the suit was to be dismissed by an English court.

Thus it may be noted that English courts entertain suits on varied grounds each time. Though, in general the *Phillips Vs. Eyre* rule prevailed, it was made more flexible to accommodate other cases. Thus to some degree, though minute, it cannot be said that *Lex Loci Delicti* is totally disregarded by English courts.

(3) (1971)AC 356
(4) 1949 SC 110

American courts follow the principle of *Lex Loci Delicti* but as mentioned earlier, where technical details of that law are too different from *Lex Fori* then the case is rejected. This is demonstrated in the case *El'Paso and Guarez Traction Company Vs. Carruth* (1925)[5]. The plaintiff was injured in an accident in Mexico and the laws pertaining to that action were vastly different from those in Texas, U.S.A., where the action was instituted. The Texas court for "want of jurisdiction" dismissed the case. Hence a great difference can be seen between English and American attitudes towards tortious liability.

Most European countries too, abide by this principle. From times as early as 1888 as demonstrated in the case *Lautour Vs. Guirand*, a Swiss plaintiff was allowed to avail himself of the rules of French law in respect of negligent information received by him in a letter sent from France by the defendent.

Attempts to unify private international law as far as tort is concerned so far has not proved to be very successful though this is possible if it approaches to create a separate law itself, to resolve these disputes, is made by a combination of various practices. Specific choice of law rules may be established for each tort or situation.

(5) LIL Rep 323

A man may fall many times but he won't be a failure until he says that someone pushed him.

— ELMER G. LETTERMAN

Though I am not naturally honest, I am so sometimes by chance.

—SHAKESPEARE