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CONFLICT OF LAWS-TORTS-CHOICE OF LAW IN MULTIPLE STATE DEFAMATION

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CONFLICT OF LAWS—TORTS—CHOICE OF LAW IN MULTIPLE STATE DEFAMATION—Plaintiff, a Connecticut corporation engaged in business throughout several Eastern states, brought an action for an injunction and damages arising from alleged defamatory statements broadcast over defendant's radio network. Defendant's broadcast originated in New York and was heard by listeners from Maine to North Carolina and as far west as Pennsylvania including the area in which plaintiff was carrying on its business. Defendant moved to dismiss the complaint for failure to state a claim on which relief could be granted. To rule on this motion, it was necessary to choose the appropriate governing law. *Held,* the law of New York, the state of the forum, should be applied. *Dale System v. General Teleradio,* (D.C. N.Y. 1952) 105 F. Supp. 745.

The question of choice of law in multiple state torts has received scant recognition in judicial opinion largely because of the theoretical and practical difficulties which must be overcome in reaching a rational solution.[1] In the principal case, the federal court was obligated to apply the conflict of laws doctrine of the state in which it was sitting.[2] New York courts have followed the *Restatement* choice of law rule for torts generally and accordingly have selected the law of the state where "the last event necessary to make the actor liable" took place.[3] It has been suggested that in cases of defamation this is the place

[1] In several cases the courts have either ignored the conflict of laws problem [Layne v. Kirby, 208 Cal. 694, 284 P. 441 (1930); Curley v. Curtis Publishing Co., (D.C. Mass. 1942) 48 F. Supp. 29] or recognized the problem without resolving it. Grant v. Reader's Digest Assn., (2d Cir. 1945) 151 F. (2d) 733, cert. den. 326 U.S. 797, 66 S.Ct. 492 (1946); Spanel v. Pegler, (7th Cir. 1947) 160 F. (2d) 619.

[2] Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020 (1941).

[3] CONFLICT OF LAWS RESTATEMENT §377 (1934). Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 169 N.E. 112 (1929).

of communication.[4] However, this test was not helpful in the principal case since New York decisions had not authoritatively indicated which state is the place of communication when multiple state defamation is involved.[5] It is submitted that there are two basic approaches which can be taken in selecting the governing law in an action of this nature. As one alternative, the court could have taken the realistic view that the libel was communicated in every state in which it was heard by a third person to the injury of the plaintiff. The consequence of this rule is to create at least one cause of action under the laws of each of these states.[6] By application of the traditional vested rights theory[7] in the conflict of laws field, the court would then be called upon to decide each separate cause of action under the law of the state in which it arose. While this method of attack might be desirable from a theoretical standpoint, it runs into insurmountable difficulties of practical administration.[8] Not only would the court have the burden of acquainting itself with the different libel laws of many jurisdictions, but the confusion resulting from the jury's attempt to apply these different laws to the same facts and plaintiff's difficulty in proportioning his injuries among several states would be certain to impede prompt justice.[9] The other alternative, and the one followed by this court, presents a workable solution to this problem. For conflict of laws purposes, the cause of action in multiple state defamation is considered to arise in only one jurisdiction. The objection to this assumption is that it is completely incompatible with the vested rights theory because, of necessity, it fails to recognize and enforce

[4] CONFLICT OF LAWS RESTATEMENT §377(5) (1934).

[5] The court cited Mattox v. News Syndicate Co., (2d Cir. 1949) 176 F. (2d) 897, as leaving this question explicitly undecided because the plaintiff had suffered damage in only a single state. However, the language used in that case suggests that libel is communicated wherever it is heard by a third person to the detriment of the plaintiff. Does this indicate that the court might not confine the place of communication to a single state?

[6] Under the traditional approach a separate cause of action was created every time libel was transmitted to another person. Because this rule became unmanageable when there was a wide circulation of the libel, such as in a newspaper or radio broadcast, most jurisdictions have now adopted a single publication rule under which all of the libel arising within the state is treated as one cause of action. See 10 LA. L. REV. 339 at 340 (1950). But regardless of the rule followed in the state where the cause of action arises, the single publication rule is generally thought to be procedural and thus the law of the forum would be applied. But compare Hartman v. Time, Inc., (3d Cir. 1948) 166 F. (2d) 127, in which the forum's single publication rule was only applied to causes of action arising in states which had a similar rule. This decision has been severely criticized by legal writers. 43 ILL. L. REV. 556 (1948); 61 HARV. L. REV. 1460 (1948); 48 COL. L. REV. 932 (1948).

[7] "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation . . . which . . . follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, but equally determines its extent." Holmes, J., in Slater v. Mexican National R.R. Co., 194 U.S. 120 at 126, 24 S.Ct. 581 (1904). GOODRICH, CONFLICT OF LAWS, 3d ed., §92 (1949).

[8] Hartman v. Time, Inc., supra note 6, exemplifies the difficulty that can arise from this approach even before the merits of the case are decided.

[9] This is discussed in 35 VA. L. REV. 627 at 637-640 (1949)

each cause of action arising under the law of each separate jurisdiction. It is noteworthy that this court entirely ignored any inconsistency with this generally accepted doctrine. Perhaps this can be explained by the fact that this court has followed the local law theory rather than the vested rights theory in deciding cases according to the laws of a foreign jurisdiction.[10] Under this local law doctrine, the court would not recognize any cause of action arising in a foreign state but would only give cognizance to an obligation arising under its own legal standards which in turn are determined by the extent to which the forum will adopt the law of another place. While this application of the local law theory appears to be a satisfactory means of avoiding the vested rights objection, there still remains the problem of selecting the proper governing law. This court suggested five contact points, namely, the state of the forum, the place of the last event necessary to make the actor liable, the point of origination, the state of principal circulation, and the domicile of the plaintiff, as possible factors having an influence on the choice of law.[11] A grouping of these dominant contacts indicated that three of them applied to New York exclusively and that the remaining two were as favorable to New York as to any other jurisdiction with the result that New York law was chosen. It is submitted that the first requisite should be that the plaintiff sustained substantial injury in the state whose law is to be applied.[12] This would give maximum effect to the *Restatement* rule applicable to torts generally. With this requirement satisfied, the court could then look to other dominant contacts which may be pertinent to the facts of the particular case. While the court made no attempt to lay down a mechanical test to be followed in every multiple state defamation action in the future, this decision, nevertheless, has several significant aspects. First, this decision shows a willingness by the court to recognize a problem that had previously been ignored or avoided due to its difficulty. This would seem to be true at least in jurisdictions following the local law approach under which both a theoretical and workable solution could be reached. Secondly, this is an indication that the court may choose a law other than that of the

[10] Judge Learned Hand, the author and leading exponent of the local law theory, was formerly a judge of this court. In Guinness v. Miller, (D.C. N.Y. 1923) 291 F. 768 at 770, Judge Hand said, ". . . However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."

[11] For an evaluation of these contacts see Ludwig, "'Peace of Mind' in 48 Pieces v. Uniform Right of Privacy," 32 MINN. L. REV. 734 at 760-762 (1948); 60 HARV. L. REV. 941 at 943-951 (1947).

[12] While the court, in the principal case, appears to have discarded the *Restatement* rule as being of no help in making the choice of law, it, nevertheless, resorted to this rule in determining one of the contacts and it eventually chose the law of a state in which the plaintiff actually did receive substantial injury. It is significant that the courts have very seldom deviated from the Restatement rule in selecting the appropriate law to govern a tort action. But see Gordon v. Parker, (D.C. Mass. 1949) 83 F. Supp. 40.

forum in this type of case.[13] This would be an incentive to lawyers who wish to advocate the application of a foreign law which is more favorable to their clients. Thirdly, this decision suggests several dominant contacts that the court may consider material in selecting the governing law for multiple state defamation and thereby notifies lawyers along what lines to direct their arguments.

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[13] Or did the court merely apply a test that would give the desired result of using the forum's own law? The writer suggests that this has been the practice in a surprisingly large number of conflict of laws cases.