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CHOICE OF LAW IN TORTS: A COMPARATIVE APPROACH

-MADHUSUDAN YADAV[1]

ABSTRACT

The rise of Globalization has led to the development of various International Law concepts, including legal principles relating to transactions and events that occur across jurisdictions. Choice of law has been a deciding factor in the adjudication process for many different laws, in particular, Torts. Foreign Torts has developed on two prevalent legal principles of lex fori and lex loci delicti. The question that further arises after analyzing these principles is which is the most favourable to their larger goal of providing justice. This legal essay attempts to delve into these principles, and their application across jurisdictions and then tries to answer a further question of whether the shift that can be observed across jurisdictions from lex fori to lex loci delicti serves the purpose of the shift to providing flexibility to the courts to provide justice in the larger context.

INTRODUCTION

"The law concerning tort choice of law is in a state of flux." The period in which Peter Kincaid[2] makes this statement is truly the time in which the ever-prevailing questions relating to the choice of law in tort came to the front as globalization led to an increase in cases relating to foreign tort. Roman law, where the concept of "lex loci delicti" (the law of the location where the wrong happened) first took shape, is where choice of law concepts have their origins. The Romans laid the groundwork for contemporary conflict of laws ideas when they understood the significance of applying the law of the location where the tort or harm occurred. In the modern era, there has been significant development relating to choice of law in many European countries including France, Germany and the U.K., but In the United States, choice of law

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[2] Peter Kincaid, Justice in Tort Choice of Law, 18 ADEL. L. REV. 191 (1996).

principles evolved differently in different states, leading to a lack of uniformity. The "most significant relationship" test, proposed by the American Law Institute's Restatement (First) of Conflicts of Laws in 1934, sought to provide a more structured approach to resolving conflicts in tort cases. In recent years, there has been an initiative towards using the law of the location where the injury happened (lex loci delicti) or a more adaptive "interest analysis" strategy. The latter considers the interests of the pertinent jurisdictions and aims to strike a compromise between conflicting policy objectives. This disagreement is more than just a semantic issue; it illustrates a larger resistance among the legal profession to creating a clear-cut, guiding theory of tort choice of law. The critical question at the heart of this debate calls for thoughtful consideration: What should these rules governing tort choice of law ultimately seek to achieve? "Since Solon's times, it has been known that comparative law has one incontestable virtue: it shows up a greater range of possible solutions to a specific problem than any particular legal system can boast of.", F.K. Juengar[3] proposed in his paper. This paper intends to analyze various approaches that could be employed to address the tort law choice issues that have been revealed by existing or anticipated laws.

The analysis is done country by country, but towards the end, some comparisons are made along with notes on specific trends or tendencies that emerge in these systems. Any one of the chosen systems' legal summaries does not claim to be exhaustive. The study does not give an exact explanation of every twist, complexity, and wrinkle in the law of the systems under consideration since only a minimal amount of attention has been devoted to case law and academic commentary, at least concerning codified systems. However, a comparative analysis may be useful in determining whether the relevant legislation is appropriate as remedies for tort-related issues. The initial and primary phase of the research revolved around reviewing a wide range of primary and secondary sources related to the topic. The developments in the English tort law regarding the Choice of law are discussed briefly by Peter Kincaid[4] and he argues that if a deviation from the lex loci standard is required to achieve the desired outcome of treating the parties equally by meeting their expectations, then it should only be done so. The researcher while concurring with this opinion also tries to portray the various obstructions that lead to deviation from lex loci.

[3] Friederich K. Juenger, Lessons Comparison Might Teach, 23 AM. J. COMP. L. 742 (1975).
[4] Peter Kincaid, Justice in Tort Choice of Law, 18 ADEL. L. REV. 191 (1996).

Further, to reinstate the notion Janet Walker in his article[5], very substantially puts forth that, although there is also a fair amount of agreement that it is appropriate to apply a rule favouring the lex loci and some sort of exception (typically one involving the personal law of the parties), there is still some debate and uncertainty regarding the specifics of the exception's nature and its applicability. The researcher also analyses relevant sections of the Hague Convention on product liability as it becomes a very important factor in analyzing the comparative nature from a French perspective as the Hague Convention came into force into French tort law in the very early stage of the conflict of law developments.

STATEMENT OF PROBLEM

While analyzing and understanding the recent developments in the Choice of Law from a comparative perspective, we realize that there is a clear substantial movement towards flexibility. The choice of lex causae has always been a very grey area and whether this different application of various principles like lex loci delicti and lex fori is leading to the delivery of Justice, which seems to be the main goal while providing this amount of flexibility to the Judicial systems of this country.

Development of the Principles of lex fori and lex loci delicti in France, the USA and the UK

France:

The French Legal system seems to favour the conception that the lex loci delicti prevails. However, after the Hague Convention[6] came into force. Lex loci is a legal concept that developed in France as a result of how Article 3(1) of the French Civil Code was interpreted to mean that "laws of police and safety bind all those who inhabit the territory." By this clause, French courts came to the conclusion that the legal implications of a tortious act should be based on the laws of the foreign nation where it occurred. However, it wasn't until 1948's

[5] Janet Walker, Are We There Yet--Towards a New Rule for Choice of Law in Tort, 38 OSGOODE HALL L. J. 331 (2000).
[6] *Hague Convention: Service of Process Abroad* (Butterworths 1993)

famous Lautour v. Guiraud[7] case that the matter was finally resolved in French case law. In this particular case, during the Spanish Civil War, a convoy of French trucks was transporting supplies from France to the Republican government of Spain. The plaintiff's spouse, who was a truck driver in the same convoy but employed by a different company, was murdered in an explosion and fire in Spain caused by one of the trucks, that was being driven by a defendant (a French company) employee. Both the defendant's employee and the plaintiff's husband were citizens of France. When a defendant's activities and the injury take place in other nations, French law is ambiguous regarding how to determine the locus delicti. Especially when civil responsibility stems from a criminal law infringement, prior cases using French law in such circumstances may not be trustworthy precedents. When a French woman was seduced in Portugal, for example, French law was used, highlighting the fact that the harm was principally caused and persisted in France. However, it is challenging to foresee French court outcomes in such cases because there are no precedents for injuries sustained outside of France. The harm or the defendant's conduct seems to be subject to French law when they take place in France. Beyond that, French law is unclear, while contemporary doctrine favours the location of the damage.

In tort cases, French law strictly adheres to the lex loci delicti rule and opposes any departure from it. It's possible that many contentious legal issues would have been settled had the Hague Conventions been ratified, particularly the one on traffic accidents. [8]Beyond what these Conventions address, there are no current efforts to modify tort liability in any other areas. This strategy was reiterated in a 1969 French Draft Statute on Private International Law, which said that non-contractual duties would be controlled by the law of the location where the pertinent occurrence took place.

USA:

The lex loci delicti principle predominated the tort cases in the United States of America up until the 1950s. Dr J.H.C. Morris pioneered the idea of a "proper law" of delict in the 1950s, stating that a court should choose the law that, based on policy considerations, has the strongest relationship with the sequence of events and consequences in a particular scenario. This

[7] *Lautour v Guiraud* (Cour de Cassation), (1948).
[8] C. G. J. Morse, Choice of Law in Tort: A Comparative Survey, 32 Am J Comp L 51 (1984).

strategy gained traction in 1963 when the court rejected the first Restatement ruling in favour of a "grouping of contracts" strategy in the Babcock case. As demonstrated in a case where the applicable legislation was decided by the state with the most care for the particular subject in litigation, Currie's consideration of governmental interests also attracted attention. The ' most significant relationship' test, which emphasizes the significance of the connection between the legal issue and the pertinent jurisdiction, was accepted by the Restatement Second as its general principle in delict law in 1969. This idea is described in Section 145(2) of the Restatement Second as follows,

“2. Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

a) the law of the place where the injury occurred,

b) the law of the place where the conduct causing the injury occurred,

c) the domicile, residence, nationality, place of incorporation and place of business of the parties,

d) the place where the relationship, if any, between the parties is centred.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.”

The reference to section 6 in section 145 emphasizes the fact that the idea of the "most significant relationship" includes more than a simple count of contacts. Instead, it places a strong emphasis on taking into account both the fundamental legal concepts unique to each state's policies and objectives. The basis of this regulation is a study of governmental interests.

However, not all courts in America follow the same principle. For instance, the "comparative impairment" hypothesis was first introduced in Louisiana's Civil Code, which is a civil law state. The court must decide which state's interests would be least impacted if its law were not applied, by this idea. For example, the lex loci delicti principle governs conduct and safety-related issues. certain regulations are established for certain situations.

UK:

In past, English law has adjudicated actions under both the lex loci delicti commission and the lex fori principle. Dicey and Morris, Rule 203 reads as follows:

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

    a) 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

    b) Actionable according to the law of the foreign country where it was done.

2) But a particular issue between the parties may be governed by the law of the country which, concerning that issue, has the most significant relationship with the occurrence and the parties."

The usual rule in the aforementioned scenario is clause (1), which states that the wrong must be actionable under both the law of the forum (lex fori) and the law of the location where the wrong happened (lex loci delicti). According to this rule, which was established in the Phillips v. Eyre decision, two requirements must be satisfied to bring a lawsuit in England for an overseas wrong: the wrong must be of a kind that is actionable there and unjustifiable under the law of the country where it occurred. The exception to the norm is clause (2), which is based on the Roys v. Chaplin case. The emphasis is shifted from the actionability of the defendant's behaviour to justifiability under lex loci delicti. Clause (1), which defines that the wrong must be actionable under both the law of the forum (lex fori) and the law of the location where the wrong happened (lex loci delicti), is the standard norm in the aforementioned circumstance.

The Phillips v. Eyre case established the rule that two conditions must be met to file a lawsuit in England for an overseas wrong: the harm must be of a form that is actionable there and unjust under the law of the country where it occurred. Clause (2), which is based on the Boys v. Chaplin[9] case, is an exception to the rule. The focus is now on whether the defendant's actions are justifiable under lex loci rather than whether they are liable. The Private International Law (Miscellaneous Provisions) Act 1995 (UK), which abolishes the

[9] B*oys v Chaplin* [1971] AC 356.

conventional double actionability rule and its flexible exemption, sets forth the present position in English law. Instead, new statutory regulations are introduced. According to Section 11(1), the law that applies is the law of the nation where the events giving rise to the tort occurred. Exceptions are permitted whenever the parties, circumstances, or outcomes render it significantly more appropriate for the laws of another country to apply. This does away with the common law and substitutes it with a lex loci delicti norm with a movable exception, much like Lord Wilberforce did in the Boys v. Chaplin case.

German:

Legislation and court decisions serve as the foundation for West German tort liability choice of law regulations[10]. The German private international law system is presently the subject of multiple reform proposals. Nonetheless, the following summarises the status of the law as of right now:

As to the German Civil Code, BGB, § 823 subs. 1," one who causes harm to another person's life, body, health, freedom, property, or any other right without authorization must reimburse the victim for any resulting damages. The violation of one of the rights listed in § 823 subs". 1 BGB (objective element of the legislative definition of tortious conduct; objektiver Tatbestand), wrongfulness (Rechtswidrigkeit), and fault (subjective element; Verschulden) are the three requirements that must be met. This statutory definition relates to actions that are only slightly related to the infringement they have caused, such as when they fail to take action. It is outlined by the duties of care to maintain safety and protect third parties from harm (also known as the "Verkehr Sicherungspflicht," or simply "Verkehrpflicht"), which German courts began to establish not long after the BGB went into effect.

The reasonable expectations of the public, among other considerations, are a major consideration for the courts when determining the precise requirements. German courts have tackled the difficult problem of establishing the location of a tort. In light of their decisions, the legislation that benefits the plaintiff the most will be applied if the defendant's acts take place in one state while the plaintiff is harmed in another. The plaintiff bears the obligation of

[10] 53. Luer, "The Lex Loci Delicti in Single Contact Cases, A Comparative Study of Continental and American Law," 12 *Ned. Tijd. v.LR.* 124 (1965).

selecting the relevant law. Nonetheless, the plaintiff will have the court decide on their behalf if they are unable to decide or if their choice is not clear. The plaintiff has the right to decide which law applies in circumstances where the defendant's conduct are spread across many countries. However, in the event that the plaintiff sustains injuries in more than one place, the laws of each of those jurisdictions will apply to the particular injuries sustained there. The laws of the foreign countries where the defendant's acts occurred are either applied completely or in conjunction with these laws. It is significant to remember that these laws are distinct from those of other jurisdictions where harm has occurred. When the location of the illegal act—locus delicti—does not rule, determining the proper law in tort cases becomes complex. In these kinds of situations, the accident site's rules—especially those pertaining to traffic—are very important in determining who is liable under German law. When parties, such as spouses or employers and employees, have created statutory or contractual relationships, complications can occur. An additional degree of complication results from disagreements within the legal community about which set of laws—including its tort rules—should govern these connections. Additionally, distinctive choice-of-law principles pertaining to the particular subject govern the outcome of tort suits including "incidental" questions, like the legitimacy of marriages[11]. Establishing culpability, causation, proof of blame, accessible remedies, and other crucial elements are all dependent on the tort law. A notable defence against improper foreign legal influences is provided by Art. 30 of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (E.G.B.G.B.), which gives German courts the authority to refuse the adoption of foreign law if it conflicts with German statutory aims or public morals. In spite of these complications, the legal system makes sure that the relevant law is decided justly, taking into account the interests of all parties.

The Indian Context

The development of foreign tort and the principle of Lex loci delicti has been very similar to the UK developments as the very nature of Tort law in India originates from the English common law. There have been some cases such as Gurung v. Malhotra[12] and Patrick’s Rest., LLC.vs.Singh.

[11] C. G. J. Morse, Choice of Law in Tort: A Comparative Survey, 32 Am J Comp L 51 (1984).
[12] Gurung v. Malhotra, 279 F.R.D. 215 (S.D.N.Y. 2011).

The lex loci delicti principle, which establishes the relevant law depending on the location of the tort, is used in tort cases in India.
For instance, Mumbai's laws would apply if a person from Delhi was involved in an automob ile accident there.

The laws of the country of origin may also apply in cases like internet defamation if the detri mental act originated in another nation (such as the United States) but affects a person in Indi a. In India, lex loci delicti is applied in a complex manner that ensures a just resolution in complicated cross-border tort cases by taking into account a number of variables, including the place of the injury, the residencies of the parties, and international agreements. Additionally, the laws of the producing or transaction countries may be taken into account in product responsibility proceedings involving imported items. These cases have majorly held up the Lex loci doctrine and have very subtly rejected the principle of lex fori. This may seem a very pragmatic move in the historical context too but the developments of the past and around the world have led to the development and application of such doctrines.

While talking about the Gurung vs. Malhotra case, absolutely defying its very judgement Theodore says[13], “It is evident that Gurung and the cases that followed it are incorrectly decided because the Hague Service Convention is exclusive and only postal channels are authorised or permitted by the Convention (with Article 19 set aside) to potentially permit service by email. Thus far, the cases have involved postal service in nations that have opposed it. These choices shouldn't be implemented. Thus far, the cases have involved postal service in nations that have opposed it. These choices shouldn't be implemented.

A more challenging query is this: what happens if the state of destination has not objected to postal service? Although the answer is not entirely apparent, there are valid arguments against reading "postal channels" to include email. If this is accurate, then email service is never

[13]Theodore Folkman, Gurung v. Malhotra Is Wrongly Decided (Dec. 19, 2013), <https://ssrn.com/abstract=2370078>.

allowed as long as the convention is in effect, again excluding situations in which Article 19 applies."

To understand the stance of Indian courts on this issue we could refer to the paragraph from the judgement of Patrick's Rest LLC case:

"The Court concludes that service by email is appropriate and likely to be the best method of effectuating service of process against Mr. Singh. It has been seven months since Patrick's Restaurant attempted to serve Mr. Singh via the procedures outlined in the Hague Convention, but Mr. Singh remains unserved. Despite this, he is clearly aware of the action against him, as evidenced by his ability to hire a local attorney to defend him against this motion. The Court will authorize Patrick's Restaurant to serve Mr. Singh via email so that this litigation may begin to proceed."

This explains to us that the conception of justice from the judicial point of view is not a slave of doctrinal approach it is rather affluent to the nature of justice portrayed.

COMPARATIVE ANALYSIS OF THE JURISDICTIONAL DIFFERENCES

Initially, it was widely agreed that it was improper to apply lex fori in tort matters that were closely related to other legal systems. This departure from lex fori not only heralded the start of this revolution but also marked a crucial turning point in the development of choice of law rules. This shift was caused by the evolution of tort law, which moved from a kind of quasi-public law that supported local conduct standards to a more real form of private law that freed courts to concentrate on a just resolution between the parties. Even though there is general agreement that lex loci should be applied in tort cases, there is still significant disagreement about the nature, extent, and circumstances under which these exceptions should be used.

This attempt, however, fell short of offering a convincing justification for why courts would opt for lex loci and when exceptions ought to be allowed. Even though the 1995 United Kingdom Act was unambiguous, analysis of it didn't reveal when circumstances other than the

tort's place would call for replacing lex loci with a more suitable applicable law. The mystery of why certain courts appeared to know the law even in the face of contradicting authority, while legal professionals and academics couldn't identify a uniform norm or standard continued. The dilemma was answered when it became clear that the private law principles unique to the relevant area of law, rather than the traditional principles of public international law, were the context directing courts in the choice of law question. Courts tend to follow the fundamental principles of tort law, a field with which they are quite familiar while selecting the choice of law in tort cases. As required by standard tort principles, they were therefore inclined to apply the "law most substantially connected" to the case. Courts would manipulate choice of law rules to ensure a result consistent with tort principles if a preexisting conflict of laws doctrines conflicted with these well-known tort principles, confident that this strategy would result in a just outcome from their point of view.

Lex loci delicti has historically been applied as the choice of law in tort matters throughout Continental Europe, especially in the context of French law. Lex loci's effect continues to be felt, but the latest developments indicate that it has somewhat lessened its hold. Recognizing that it is no longer practicable or desirable to use lex loci delicti exclusively is a recurrent subject throughout each of the studied legal systems[14]. As a result, limitations on its unilateral jurisdiction have appeared. These exceptions can take different forms, but they typically involve applying "common personal law"—a body of law from a country where the parties and the tort are more closely connected than the locus delicti. The "personal law" exception's definition varies. Using a "common personal law," regardless of the definition, is based on the idea that it frequently has a stronger connection to the parties than lex loci delicti or that it applies in a way that more closely matches what the parties would expect. These exceptions, though, work automatically. It is not required for common personal law to reflect the expectations of the parties more accurately or to be fundamentally more tied to the parties and the tort. It is typically irrelevant to consider the degree of the parties' connections, the locus delicti, their laws, or the parties' reasonable expectations in light of these elements. It is unclear if and to what degree similar developments in the United States have impacted the shift in European legal systems away from depending primarily on lex loci delicti in tort cases. Even if they don't always agree with them, European scholars are aware of the important publications

[14] Pier Terblanche, Lex Fori or Lex Loci Delicti? The Problem of Choice of Law in International Delicts, 30 COMP. & INT'L L.J. S. AFR. 243 (1997).

that contributed to the American Conflicts movement. It's fair to argue that the conventional choice of law standards in European tort proceedings has been reassessed in light of American ideas. The ensuing laws in Europe are an original adaption influenced by these theories; nonetheless, they do not entirely conform to any particular American theories or procedures. None of the legal systems analyzed in this study adopts the Currie-proposed governmental interest analysis in its original or refined versions, nor do they fully accept the Leflar-proposed "better law" theory or Cavers' "principles of preference." The jurisdiction where the law controlling a claim is to be applied is determined by classic conflict rules, which are commonly followed by these systems. These systems rely on existing conflict rules rather than the American method, which involves a thorough review of substantive law policies before choosing a rule. The development of the laws in the legal systems under discussion reveals a noticeable trend toward flexibility. This change is impacted by practical factors as well as legal theories. The usage of locus delicti as a universally applicable element has become unworkable due to the rising mobility of individuals, improvements in transportation, and the emergence of new communication techniques.

Although reaching certainty in practice or theory is frequently problematic, the requirement for certainty balances the shift away from lex loci in Europe. Flexibility and clarity must be balanced, which is the main problem for nations dealing with international tort cases. The different weights that each of these goals is assigned across various countries is a major cause of the variations in the laws.

CONCLUSION

The fundamental components of the rule of law are coherence and reason. In essence, this means that state coercion should not be open to unconstrained discretion by officials, including judges, but instead be governed by clear and understandable standards. When implemented, these rules must be accurate enough to forecast the results, but not to the point of absolute predictability, which is only feasible with completely mechanical rules. The judges' discretion must be guided when the regulations are not mechanical. This instruction makes sure that judges are aware of the goal of the rule. Words like "substantially more appropriate" are

ambiguous and give judges free rein. Ideological lenses can be used to analyze the balance between public and private interests in "private" laws, such as torts and contracts, and to make the distinction between corrective justice and distributive justice.

In the field of tort law, the social context in which a tortuous act takes place and the connection between the parties play a crucial role in determining the appropriate criteria for recovery. According to conventional wisdom, expectations about the need to prevent harm and the amount of compensation due in the event of harm are shaped by the nature of the connection. Default rules, similar to those that apply to strangers on the street, take into account the parties' location where there is no clear relationship between the parties. The lex loci, or local law of the area where the tort happened, is not the main standard, though, in situations containing foreign elements. Rather, it functions as a backup plan when there isn't a significant relationship between the parties. Importantly, when there is a relationship between the parties that can be identified, even if it is just a shared foreign heritage, showing that it is fair to anticipate tort recovery to be regulated by foreign law, courts should apply that law. This method emphasises the significance of social context above geographic location, which is in line with the basic tenets of choice of law analysis in tort. A new viewpoint is revealed by inverting the traditional roles of the exception (social context) and the rule (geographical context). This viewpoint provides a new reading of accepted norms while highlighting the philosophy underlying the choice of law analysis in tort.

This recently developed rule upends the conventional framework and offers a fresh perspective on jurisdictional distinctions in tort cases. It acknowledges that the main determinant of appropriate standards for recovery should be the nature of the connection between the parties. Although there is room for improvement and criticism, these concepts represent a major step towards a more complex and situation-specific approach to tort law choice of law. The way tort law is developing as a result of new compensation models like no-fault systems highlights the necessity of ongoing modification and adaptation. This novel viewpoint provides a basis upon which courts can securely manage jurisdictional inequalities, creating conclusions that are consistent with their underlying logic and withstand legal scrutiny, even in the face of contradictory norms and conceptions. How is a court justified in applying foreign law to a case?

The rule[15] could be stated like this:

"The law applicable to a tort is the law of the place where the tort is alleged to have occurred unless it can be shown that in the circumstances the parties would not have expected that law to apply.

1) Circumstances which might show such a contrary expectation include the social environment in which the tort occurred and any relationship between the parties existing before the tort.

2) If the contrary intention points clearly to another law, then that law will apply. If the contrary intention points away from the law of the place of the tort, but does not point unequivocally to any other law, the law of the forum will apply.

3) The place where a tort occurred is the place where the injury was suffered, or the effect was felt unless the defendant can demonstrate that in the circumstances it could not foresee its behaviour having an effect outside the country where it took place, in which case the tort is treated as having occurred there."

[15] Peter Kincaid, Justice in Tort Choice of Law, 18 ADEL. L. REV. 191 (1996).