Supreme Court No. 101913-1
Court of Appeals No. 83078-3-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

CORONUS XES LTD. AND MATTHEW AARSVOLD,

Petitioners,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NO. ESG00317241 with Unique Market References B087517C9N5007 and B1161LS12017, an unincorporated foreign insurance syndicate,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Petitioners are Coronus XES, Ltd. and Matthew Aarsvold (collectively "Petitioners" or "Coronus"), plaintiffs and appellants below.

B. DECISION OF THE COURT OF APPEALS

Petitioners seek review of the decision of Division One of the Court of Appeals, filed December 27, 2022, affirming the trial court's order of dismissal for forum non conveniens. The decision is in the Appendix at A-0001-15. Petitioners moved for reconsideration, to which a response was requested and filed. The Court of Appeals denied reconsideration on March 20, 2023. A copy of the order denying reconsideration is in the Appendix at A-0016.

C. ISSUES PRESENTED FOR REVIEW

The order granting Underwriters' motion to dismiss based on forum non conveniens was predicated on the trial court's determination on choice of law that California law applies to Petitioner's extra-contractual claims, for which

Restatement (Second) Conflict of Laws, § 145 provides the analytical framework. The Court of Appeals affirmed. Accordingly, Petitioners seek review of the following legal issues:

1. Whether non-Washington residents suffer injury in Washington under Restatement (Second) Conflict of Laws, § 145(2)(a) by incurring the cost to defend themselves in a Washington court and pay a settlement of a Washington lawsuit to a Washington resident when their insurer wrongfully fails to defend or indemnify.

2. Whether the conduct causing injury to non-Washington residents sued in a Washington court occurs in Washington under Restatement (Second) Conflict of Laws, § 145(2)(b) when the insurer wrongfully fails to provide its insureds a defense in Washington, which is the last act, or failure to act, necessary to make the insurer liable for breach of the duty to defend.

3. Whether the domicile, residence, nationality, place of incorporation and place of business of the parties under Restatement (Second) Conflict of Laws, § 145(2)(c) is entitled to little weight when both the place of injury and conduct causing injury are in Washington, and the parties reside in multiple states and countries.

4. Whether, in determining the place where the relationship, if any, between the parties is centered under Restatement (Second) Conflict of Laws, § 145(2)(d), it is legal error to construe and extend a contractual choice of law provision in an insurance policy, which by its terms applies only to contract claims, to also apply to extra-contractual claims, and thereby negate application of the Washington insurance code and CPA.

D. STATEMENT OF THE CASE

1. Non-Resident Petitioners are Sued in Washington.

This case arises from a lawsuit filed in King County Superior Court, Bright Morning Consulting LLC v. Daniel C.

Webb, et al. CP 372-411. That suit did not involve Petitioners until defendant Webb filed a second amended answer and third-party complaint pleading claims against Petitioners, among others. CP 412-445.

2. The Insured Petitioners Tender Defense and Indemnity to Underwriters.

On July 12, 2018, Coronus' Seattle counsel tendered defense and indemnity to Underwriters in the U.K. CP 488-95. The policy identifies Underwriters' "claims manager" as CFC Underwriting ("CFC"). CP 464. An adjuster with CFC in the U.K. initially acknowledged the tender. CP 496. CFC then went silent, and repeated inquiries from Coronus' counsel went unanswered. CP 498-500.

Only after Coronus' counsel emailed CFC on August 28, 2018, noting CFC already had violated multiple Washington insurance claims handling regulations, was the tender referred to a California law firm, P.K. Schrieffer, LLP ("Schrieffer") for handling. CP 498, 502. After initial contact from Schrieffer, it

also became unresponsive. CP 502-76. Finally, on October 23, 2018, Schrieffer transmitted a denial of Coronus' tender. CP 577-98.

Coronus incurred several hundred thousand dollars in fees and costs defending itself in the Washington case. CP 689-92. The underlying litigation was settled on November 14, 2019, with Coronus paying $17,500. CP 303-04.

3. The Present Insurance Bad Faith Lawsuit.

Coronus filed this case in King County Superior Court – the same court where Webb sued Coronus – on October 19, 2020, pleading claims for declaratory judgment, breach of contract, insurance bad faith, negligent claims handling, violation of the Washington Consumer Protection Act ("CPA"), and a reserved claim for violation of the Washington Insurance Fair Conduct Act ("IFCA"). CP 1-24. As alleged in the complaint, all these claims arise from Underwriters' failure to conduct a reasonable and timely investigation and its wrongful failure to defend or indemnify its insureds in the Washington

lawsuit. Id.

On May 7, 2021, Underwriters filed a motion to dismiss for forum non conveniens. CP 66. This was after Coronus conducted discovery and obtained an expert opinion of bad faith. CP 637-60, 680-81.

On June 7, 2021, the trial court granted Underwriters' motion and dismissed the case with prejudice. CP 774-76. Coronus moved for reconsideration. CP 779-96. The trial court granted the motion in part, adding findings and ruling on choice of law, but still granted Underwriters' motion to dismiss, albeit without prejudice. CP 843-52.

Fundamental to the trial court's decision was its determination that California law applies, not only to the contract claims, as Coronus pleaded in its complaint, but also to the extra-contractual claims pleaded under Washington law. Id.

Ostensibly applying Restatement (Second) of Conflict of Laws, §145, the trial court concluded that, despite incurring hundreds of thousands of dollars in legal fees in defending the

Washington lawsuit, and despite paying a small settlement in Washington to resolve the litigation, there was no injury to Coronus in Washington (§ 145(2)(a)) and the conduct causing injury did not occur in Washington (§ 145(2)(b)). CP 847; compare with CP 689-92, and CP 304. The trial court also concluded that, in conducting the most significant relationship analysis, it was proper to effectively extend the policy's contractual choice of law provision to apply to the extra-contractual claims. CP 847.

Coronus appealed to Division One, which affirmed in an unpublished decision dated December 27, 2022. Appendix at A-0001-15. Coronus filed for reconsideration, which was denied on March 20, 2023. Appendix at A-0016. Coronus petitions for review pursuant to RAP 13.4.

E. ARGUMENT FOR ACCEPTANCE OF REVIEW

1. Division I's Decision Conflicts with Existing Law for Determining Choice of Law for Statutory and Common Law Torts.

This Court should accept review because the decision of

the Court of Appeals conflicts with Supreme Court decisions and published decisions of the Court of Appeals regarding choice of law for statutory and common law tort claims. RAP 13.4(1) & (2). Specifically, the Court of Appeals decision failed to consider cited Supreme Court decisions holding that the conduct causing injury occurs where the last act necessary to make the defendant liable occurs. Nixon v. Cohen, 62 Wn.2d 987, 995-96, 385 P.2d 305 (1963) ("The place of the wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place."); see Downing v. Losvar, 21 Wn. App. 2d 635, 654, 507 P.3d 894 (2022) (same); Harbison v. Garden Valley Outfitters, 69 Wn. App. 590, 598, 849 P.2d 669 (1993) (same). Generally, when the conduct causing injury occurs in Washington, the injury also occurs in Washington.

That is the situation in the present case. Underwriters failed to defend Coronus in a lawsuit pending in Washington (the conduct causing injury), forcing Coronus to incur the cost

of defending and settling the case itself in Washington (the place where the injury occurred). This is consistent with multiple provisions of the Restatement. See RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 146 cmt. d., 156(2) cmt. b., 157(2), 159(2), and 160(2); RESTATEMENT (FIRST) CONFLICT OF LAWS, § 377. Therefore, this Court should accept review of the decision of the Court of Appeals under RAP 13.4(b)(1) & (2).

This case also involves an issue of substantial public interest that should be determined by the Supreme Court. This case concerns insurance; specifically, performance of the insurer's duty to defend and indemnify a Washington lawsuit against non-resident insureds, who are then obliged to defend themselves in the Washington lawsuit and pay a settlement in Washington to resolve it. The availability of insurance to pay for the defense of non-resident defendants, as well as to pay any settlements or judgments eventually owed to Washington resident plaintiffs, is of substantial public interest under RAP 13.4(b)(4).

Petitioners seek review only of choice of law because reversal of that issue requires reversal of the decision of the Court of Appeals affirming the trial court's dismissal based on forum non conveniens.

2. Choice of Law for Extra-Contractual Claims.

The term "extra-contractual claims" means just that: claims not brought on the contract, but common law or statutory torts. Carideo v. Dell, Inc., 706 F.Supp.2d 1122, 1128 (W.D.Wash. 2010) ("Washington courts follow Restatement section 145 to determine what law applies to tort and CPA claims."), citing Rice v. Dow Chem. Co., 124 Wn.2d 205, 875 P.2d 1213 (1994).

In determining the law to be applied to statutory or common law tort claims, Washington applies the "most significant relationship" analysis of the Restatement (Second) Conflict of laws § 145:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most

significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred;
(b) the place where the conduct causing the injury occurred;
(c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and
(d) the place where the relationship, if any, between the parties is centered.

RESTATEMENT (SECOND) CONFLICT OF LAWS, § 145; Johnson v. Spider Staging Corp., 87 Wn.2d 577, 581, 555 P.2d 997 (1976).

Choice of law is reviewed de novo. Erwin v. Cotter Health Ctrs., Inc., 161 Wn.2d 676, 691, 167 P.3d 1112 (2007).

a. Washington is the place of injury for failure to defend a lawsuit in Washington.

The trial court ruled, and the Court of Appeals agreed, there was no injury to Coronus in Washington from Underwriters' failure to defend the lawsuit here. CP 847; Decision at14.

The parties did not identify Washington state case

authority on the first factor, the place of injury, in the context of the failure to defend and indemnify under an insurance policy, though it exists in the non-insurance context. Harbison v. Garden Valley Outfitters, 69 Wn. App. 590, 598, 849 P.2d 669 (1993) ('An injury "occurs" in Washington if the last event necessary to make the defendant liable for the alleged tort occurred in Washington.').

Instead, the parties relied upon persuasive authority from the federal Western District of Washington, applying Washington law, with the weight of authority in the Western District supporting Coronus' position. See Alaska Airlines, Inc. v. Endurance Am. Ins., No. C20-1444 TSZ, 2021 U.S. Dist. LEXIS 168046 *13, 2021 WL 4033297 (W.D. Wash. Sept. 3, 2021) (ruling injury occurred "where Alaska Airlines incurred the costs of defending itself") (citing Newmont USA Ltd. v. Am. Home Assurance Co., 676 F.Supp.2d 1146, 1163 (E.D. Wash. 2009)); Hawthorne v. Mid-Continent Cas. Co., 2017 U.S. Dist. LEXIS 119891, *11-12, 2017 WL 3237160 (W.D.

Wash. July 31, 2017) (Ruling, plaintiff's "injury occurred in Washington, where it was forced to defend against a suit as a result of Oklahoma Surety's alleged bad faith refusal to defend and indemnify."); Travelers Prop. Cas. Co. of Am. v. AF Evans Co., No. C10-1110JCC, 2012 U.S. Dist. LEXIS 134189 *22-23 (W.D. Wash. Sept. 19, 2012); Aecon Bldgs., Inc. v. Zurich N. Am., No. C07-832-MJP, 2008 U.S. Dist. LEXIS 112747 (W.D. Wash. March 20, 2008) (ruling Washington law applied to bad faith claim because "the injury to Aecon is the denial of coverage and the settlement with the Quinault Tribe, both of which occurred Washington."); but see MKB Constructors v. Am. Zurich Ins. Co., 49 F.Supp.3d 814, 833 (W.D. Wash. 2014) (place of injury both where underlying claim litigated and in insured's home state); Milgard Mfg., Inc. v. Ill. Union Ins. Co., No. C10–5943 RJB, 2011 WL 3298912 (W.D. Wash. Aug. 1, 2011).

Here, the trial court erred as matter of law when it ruled that "no injury occurred in Washington." CP 847. Yet, the

Court of Appeals affirmed, concluding that, while the place of injury "may be a close call, the trial court did not abuse its discretion in determining that the injury did not occur in Washington." Decision at 13. Respectfully, the Court of Appeals erred both on the place of injury and the standard of review because determining the place of injury is not a discretionary ruling. As discussed in the next section regarding "conduct causing injury," the Supreme Court and published decisions of the Court of Appeals hold that when the conduct causing injury occurs in Washington, the injury almost always occurs in Washington, as well. This is consistent with the presumption in multiple sections of the Restatement. See RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 146 cmt. d., 156(2) cmt. b., 157(2), 159(2), and 160(2).

Accordingly, this Court should accept review to rule definitively in the context of an insurer's wrongful failure to defend a non-resident insured sued in Washington whether the injury to the insured occurs in Washington for purposes of

Restatement (Second) Conflict of Laws, § 145(2)(a).

b. The Conduct Causing Injury was the Failure to Defend in Washington.

Regarding the second §145(2) contact, the Court of Appeals erred in affirming the trial court's ruling that the conduct causing injury was Underwriters' claims handling activity outside Washington, rather than the failure to defend the underlying litigation in Washington. CP 847; Decision at 14.

"The word 'tortious' is used throughout the Restatement of this Subject to denote the fact that conduct whether of act or omission is of such a character as to subject the actor to liability under the principles of the law of Torts." Nixon v. Cohen, 62 Wn.2d 987, 995-96, 385 P.2d 305 (1963) (citing RESTATEMENT, TORTS, § 6). In addition, "[t]he place of the wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place." Id. (citing RESTATEMENT (FIRST) CONFLICT OF LAWS, § 377); see In re Estate of Breese, 51

Wn.2d 302, 305, 317 P.2d 1055 (1957) ("If the insurer is obliged to defend suits brought against the insured, and an action is brought against him in this state, a refusal to defend such action would constitute a breach within this jurisdiction."); Downing v. Losvar, 21 Wn. App. 2d 635, 654, 507 P.3d 894 (2022) ("When determining whether a tortious act occurred in Washington, the court identifies the last event necessary to render the defendant liable") (citing CTVC of Hawaii Co. v. Shinawatra, 82 Wn. App. 699, 717-18 (1996); see Harbison v. Garden Valley Outfitters, 69 Wn. App. 590, 598, 849 P.2d 669 (1993) ('An injury "occurs" in Washington if the last event necessary to make the defendant liable for the alleged tort occurred in Washington.').

Here, the last act or omission subjecting the insurer to liability for breach of the duty to defend is the actual failure to defend. This is illustrated by the circumstance that, when an insurer ostensibly accepts a tender, but fails to actually provide a defense, it does not avoid liability for breaching the duty to

defend. See Ledcor (USA), Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 9, 206 P.3d 1255 (2009) (holding insurer's acceptance of tender without taking further action in defense of insured was bad faith). Thus, in that circumstance, it is the providing of a defense that is the last act necessary to avoid liability. Id. In short, it is the performance or non-performance of the duty to defend in Washington that is the last act or omission that respectively avoids or incurs liability for breach of the duty to defend. Id. This is entirely consistent with the federal authorities cited supra at 12-14.

For example, the Travelers court ruled "the conduct causing injury" was the insurer's failure to defend, and that was in Washington, the state where the case to be defended was pending. Travelers, 2012 U.S. Dist. LEXIS 134189 *23-24. This is consistent with other cases in the Western District. See Hawthorne, 2017 U.S. Dist. LEXIS 119891, *10 ("in the context of a failure to defend or indemnify, the state where the insured is sued has the 'most significant relationship' to the bad

faith and CPA claims that result."); TekVisions, Inc. v. Hartford Cas. Ins. Co., No. 16-1946-RAJ, 2017 U.S. Dist. LEXIS 91583 *10; 2017 WL 2574022 (W.D. Wash. June 13, 2017) ("the wrongful conduct that TekVisions alleges in its complaint relates to Washington because it is where Microsoft filed the lawsuit that Hartford refused to defend."); Tilden-Coil Constructors, Inc. v. Landmark Am. Ins. Co., 721 F. Supp. 2d 1007, 1015-16 (W.D. Wash. 2010) (ruling that Washington had the most significant relationship to bad faith and CPA claims arising from a breach of the duty to defend against a suit in Washington); Aecon Bldgs., Inc. v. Zurich N. Am., No. C07-832-MJP, 2008 U.S. Dist. LEXIS 112747 (W.D. Wash. March 20, 2008) ("Defendants' alleged violation of Washington's insurance regulations and its obligation of good faith and fair dealing also occurred in Washington.").

Even if it were correct that claims handling activities outside Washington were the injury causing conduct for purposes of the Restatement, which Coronus disputes, it would

be entitled to little weight.

It was to Underwriters and CFC in the U.K. that Coronus tendered, provided a copy of the underlying complaint, and corresponded to no avail prior to the assignment of further claims handling to Schrieffer in California. CP 488-501. The only communication from CFC was an acknowledgement email dated July 16, 2018. CP 496. Coronus counsel reached out to CFC on August 28, 2018, approximately six weeks later, noting prior attempts to reach it and CFC's violations of Washington insurance regulations. CP 498. Thus, Coronus had an accrued CPA claim against Underwriters as of August 28, 2018, based solely on claims handling activities between Washington and the U.K., not California. See St. Paul Fire Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129, 196 P.3d 664 (2008) ("This court long ago recognized that a single violation of a claims-handling regulation may violate the CPA."), citing Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 921, 792 P.2d 520 (1990).

Underwriters assigned a California firm to assert California law applied to the tort claims only after Coronus already asserted violations of Washington law by claims handlers in the U.K. Compare CP 498 with CP 502. Thus, even were the location of the claims handling personnel the pertinent inquiry for the conduct causing injury, the location of the claims handlers in California is entitled to little or no weight.

In sum, the Court of Appeals decision that no conduct causing injury occurred in Washington is contrary to decisions of the Supreme Court. RAP 13.4(1).

c. The Domicile, Residence, Nationality, Place of Incorporation, and Place of Business of the Parties is Entitled to Little Weight.

The third factor under Restatement § 145(2)(c), the domicile, residence, nationality, place of incorporation, and place of business of the parties is entitled to little weight where, as here, the place of injury and conduct causing injury are both in Washington.

Coronus is incorporated in Wyoming. CP 556-63.

Coronus is headquartered in California. CP 365. Matthew Aarsvold is a resident of Minnesota. CP 364-65; CP 370; CP 454-56. Although Underwriters is organized in the U.K., there is nothing in the record regarding the domicile of any of the "Certain Underwriters" on the policy. CP 463.

As stated in the Restatement (Second) of Conflict of laws, § 145, comment e:

> In the case of other torts, the importance of these contacts depends largely upon the extent to which they are grouped with other contacts. The fact, for example, that one of the parties is domiciled or does business in a given state will usually carry little weight of itself. On the other hand, the fact that the domicile and place of business of all parties are grouped in a single state is an important factor to be considered in determining the state of the applicable law.

(emphasis added). Thus, in these circumstances, the third factor carries "little weight of itself," as provided by the Restatement and as cases cited by Coronus have similarly ruled.

d. It is improper to extend a contractual choice of law provision to extra-contractual claims to determine the place where the relationship, if any, between the parties is centered.

The fourth factor under Restatement (Second) of Conflict of Laws § 145(2)(d), the place where the relationship, if any, between the parties is centered, is indeterminate for reasons similar to the third factor. Nevertheless, in analyzing this factor, the trial court concluded that because the insurance policy has a choice of law provision for contract claims, "it may be considered as an element in the most significant relationship test" for extra-contractual claims. CP 847. The Court of Appeals agreed. Decision at 10.

The choice of law provision in the Underwriters' policy provides in pertinent part:

> In the event of a dispute between **you** and **us** regarding this Policy, the same shall be governed by the laws of the state of the United States of America shown in the Choice of Law section of the Declarations.

CP 487 (underlining added). The state identified in the declarations is California. CP 464. Accordingly, Coronus' complaint acknowledged and pleaded that California law applied to its contract claims, but it pleaded extra-contractual claims under Washington law. CP 4, 18-23.

(1) It is improper to extend an insurance policy choice of law provision for contract claims to extra-contractual claims.

The trial court relied on this quote from Haberman: "While a choice of law provision in a contract does not govern tort claims arising out of the contract, it may be considered as an element in the most significant relationship test used in tort cases." CP 847, quoting Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 159, 744 P.2d 1032 (1987). The Court of Appeals agreed. A-0010. But Haberman was not an insurance case, and the contracts in that case were presumably the result of arms-length negotiations between and among the various states' attorneys. Id. Not so here.

Similarly, the Court of Appeals also relied upon JMP Sec. LLP, v. Altair Nanotechnologies, Inc., 880 F.Supp.2d 1029 (N.D.Cal. 2012), citing Nedlloyd Lines v. Superior Court, 3 Cal. 4th 459, 834 P.2d 1148 (1992). However, as a later California supreme court case explained:

> In Nedlloyd we found, as a matter of California law, that a clause negotiated by sophisticated business entities was phrased broadly enough to encompass the plaintiff's fiduciary duty claim, in addition to its claims for breach of contract and breach of the implied covenant of good faith and fair dealing. As we explained, "when a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship."

Washington Mutual Bank v. Superior Court, 24 Cal. 4th 906, 914, 15 P.3d 1071, 1077 (2001). Thus, both the Washington and California authorities relied upon by the Court of Appeals to apply the contractual choice of law provision to the extra-contractual claims at issue are inapposite.

The Underwriters' policy is on standard forms. CP 460-

87. There is no record that the policy is in any respect a "manuscript" policy, i.e., negotiated. Thus, it is indisputably a contract of adhesion, and ambiguities are resolved against the drafter. This is true in both Washington and California. See Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 737-38 (1969) ("Any ambiguity or uncertainty in the contract is to be resolved against the insurer."); American Nat'l Fire v. B&L Trucking, 134 Wn.2d 413, 430, 951 P.2d 250 (1998) ("Northern drafted the policy language; it cannot now argue that its own drafting is unfair."). Thus, it was contrary to a decision of the Supreme Court to construe a policy provision applying California law only to contract claims to also apply California law to extra-contractual claims.

(2) Washington's insurance code precludes applying the contractual choice of law to extra-contractual claims.

The Washington insurance code provides that "all insurance and insurance transactions in this state…or to be performed within this state, and all persons having to do

therewith are governed by this code." RCW 48.01.020 (underlining added). That provision, by itself, required the trial court to apply the Washington insurance code to Underwriters' performance or non-performance of its duty to defend its insureds in Washington, as well as violations of the CPA.

Moreover, any investigation of the duty to defend would necessarily have to be performed, at least in part, in Washington, where copies of pertinent pleadings in the underlying lawsuit necessary to determine Underwriters' duty to defend are located.

The Washington legislature has declared as the public policy of this state that all insurance obligations "to be performed within this state" are governed by the insurance code. RCW 48.01.020. That includes the obligation to investigate the tender of defense and provide a defense in Washington. Id. Thus, either the choice of law provision in the Underwriters' policy is properly interpreted to apply only to contract claims, or the entire provision is of no force or effect,

at least as to the extra-contractual claims at issue, as violative of the stated public policy of the State of Washington. Id.; see Pope Resources, LP v. Certain Underwriters at Lloyd's of London, 19 Wn. App. 2d 113 (2021); Brown v. MHN Gov't Servs., Inc., 178 Wn.2d 258, 275, 306 P.3d 948 (2013).

Similarly, "Washington has a strong interest in protecting insureds who must resort to litigation to establish coverage." Axess Int'l v. Intercargo Ins., 107 Wn. App 713, 30 P.3d 1 (2001) (declining to hold federal maritime law preempted Washington law); Weyerhaeuser Co. v. Hiscox Dedicated Corp. Members Ltd., 2019 U.S. Dist. LEXIS 147536, *5, 2019 WL 4082976 (W.D. Wash. Aug. 29, 2019) ("Washington has a strong policy of protecting insureds, a policy which permeates its insurance laws and regulations.").

This is consistent with the Restatement:

> The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the

> out-of-state facts involved, the court should so apply it unless constitutional considerations forbid.

RESTATEMENT (SECOND) CONFLICT OF LAWS, § 6, comment b. Consistent with the Restatement, this Court should accept review and hold that, per RCW 48.01.020, the Washington insurance code applies to an insurer's performance or non-performance of the duty to defend in Washington, precluding extension of the policy's choice of law provision from only contract claims to include extra-contractual claims.

(3) Tort claims do not arise from the insurance policy.

The Supreme Court has long held that bad faith and CPA claims do not arise under the contract of insurance. See St. Paul Fire Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129, 196 P.3d 664 (2008) ("This court long ago recognized that a single violation of a claims-handling regulation may violate the CPA.") (citing Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 921, 792 P.2d 520 (1990)); see O'Neill v. Farmers Ins. Co., 124 Wn. App. 516, 529-32, 125

P.3d 134 (2004); see also, Simms v. Allstate Ins. Co., 27 Wn. App. 872, 878, 621 P.2d 155 (1980) (citing Murphy v. Allstate Ins. Co., 83 Cal. App. 3d 38, 147 Cal. Rptr. 565 (1978)). Simms cited and adopted California authority, meaning this is the law in California, as well. See id.

Yet, despite this, the trial court concluded that, "the tort claims arise out of the insurance policy issued in California." CP 846. The Court of Appeals agreed. Decision at 11.

Respectfully, the decision of the Court of Appeals is contrary to decisions of the Supreme Court and published Court of Appeals decisions. Accordingly, this Court should accept review and reverse.

F. CONCLUSION

In this insurance bad faith case, Underwriters in the U.K. ignored Petitioner's tender of defense and indemnity for weeks, and already had violated Washington insurance regulations and the CPA before assigning a California firm, which continued to ignore the tender for additional weeks before sending a letter

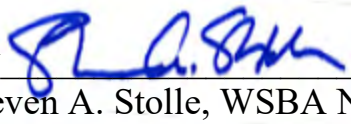
denying Petitioners' tender. In this context, it makes no logical or legal sense to identify the location of mailing the denial as the location of the conduct causing injury, when the last act or omission causing Underwriters to be liable for breaching the duty to defend is the failure to defend its insureds in the lawsuit pending in a Washington court. That failure to defend in Washington caused Petitioners' injury in Washington. That is how this Court and published decisions of the Court of Appeals apply the Restatement in other contexts. That is how this Court should apply it here.

The Court of Appeals decision in this insurance case is clearly contrary to Supreme Court decisions and published decisions of the Court of Appeals on each of the issues presented for review. Therefore, this Court should accept review and reverse the decision of the Court of Appeals, providing necessary correction and guidance not only in this case, but for future insurance cases.

The undersigned certifies that the present brief is 4,913 words of text in compliance with RAP 18.17(c)(10).

April 18, 2023.

Respectfully submitted,



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APPENDIX

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CORONUS XES LTD., a Wyoming corporation; and MATTHEW AARSVOLD, a married individual,

Appellants,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, SUBSCRIBING TO POLICY NO. ESG00317241 with Unique Market References B087517C9N5007 and B1161LS12017, an unincorporated foreign insurance syndicate,

Respondents.

No. 83078-3-I

DIVISION ONE

UNPUBLISHED OPINION

MANN, J. — This appeal arises from an insurance coverage and bad faith lawsuit filed by Coronus XES, Ltd., and its president, Matthew Aarsvold (collectively Coronus), against Certain Underwriters at Lloyd's London (Underwriters).[1] Coronus appeals the trial court's dismissal of its case based on forum non conveniens. We affirm.

[1] The full name of the respondents is Certain Underwriters at Lloyd's London, Subscribing to Policy No. ESG00317241 with Unique Market References B087517C9N5007 and B1161LS12017.

I.

A.

Coronus XES Ltd. is a corporation organized under the laws of Wyoming with its principal place of business in California. Coronus is a wholly owned subsidiary of QX Acquisition Corp. which also has its principal place of business in California. Aarsvold is president of Coronus and QX Acquisition. Aarsvold is a legal resident of Minnesota and has never resided in Washington or done business in Washington. Underwriters are residents of the United Kingdom. In 2017, CFC Underwriting, Ltd. (CFC), acting as coverholder for Underwriters, issued a policy to QX Acquisition. The policy was negotiated and purchased through a surplus lines broker in California. The policy was underwritten by syndicates in the United Kingdom, issued by CFC in London, England, and delivered to QX Acquisition at its California headquarters.

The policy covered the period from August 7, 2017 to August 7, 2018. While Coronus is not named in the policy, Coronus qualifies as an "insured" by being a subsidiary of QX Acquisition. The policy also covers Aarsvold as president of QX Acquisition and Coronus. Generally, the policy covers commercial liability arising from the business activities of QX Acquisition. The policy contains a choice of law clause in favor of California.

B.

From 2013 to December 2016, Aarsvold served as Executive Vice President of Strategy for Higher Upstream, LLC. Aarsvold was appointed to the position by Daniel Webb, sole member and CEO of Higher Upstream. At Higher Upstream, Aarsvold provided project management and business analyst services to clients in Texas, Florida,

California, Utah, and Wisconsin. In December 2016, Aarsvold left Higher Upstream and became president and sole owner of QX Acquisition. Aarsvold formed Coronus in April 2017.

While employed at Higher Upstream, Aarsvold personally guaranteed a loan from Bright Morning Consulting, LLC (BMC), a Colorado company, to Higher Upstream. Higher Upstream defaulted on the loan. In January 2017, BMC sued Higher Upstream in Colorado and received a default judgment. Later, Higher Upstream changed its name to Red River Solutions, LLC. In June 2017, BMC sued Higher Upstream and its CEO, Webb, to attempt to collect the default judgment. BMC sued Higher Upstream and Webb in King County, Washington, because Webb was a resident of King County.

In October 2017, Webb filed a third-party complaint against Coronus and Aarsvold.[2] The third-party complaint alleged claims of breach of guaranty, misappropriation, conversion, embezzlement, and civil conspiracy to damage or misappropriate Webb's LLC membership interest in Red River. The third-party defendants filed multiple unsuccessful motions to dismiss based on lack of personal jurisdiction.

In July 2018, Coronus's counsel tendered the third-party claim to Underwriters for defense and indemnification under the policy issued to QX Acquisition. Underwriters acknowledged receipt, reserved their rights under the policy, and began an investigation. Underwriters hired a California law firm as coverage counsel. Throughout the investigation, Underwriters maintained that California law applied.

[2] The third-party complaint also pleaded claims against other defendants not at issue in this appeal.

Underwriters declined coverage on various grounds including that the allegations in the third-party complaint did not arise out of the insured's "business activities." Coronus's counsel then provided additional documents and requested that Underwriters reconsider the denial of coverage. Following more investigation, Underwriters reaffirmed the denial of coverage.

The suit resulted in a comprehensive settlement including dismissal of the third-party claims against Coronus and Aarsvold.

C.

After the underlying litigation settled, Coronus sued Underwriters in King County Superior Court, pleading claims for declaratory judgment, breach of contract, insurance bad faith, negligent claims handling, and violation of the Washington Consumer Protection Act (CPA), ch. 19.86 RCW. The complaint reserved a claim for violating the Washington Insurance Fair Conduct Act (IFCA), RCW 48.30.015.

Underwriters moved to dismiss for forum non conveniens arguing that none of the parties were Washington residents, the parties entered into their insurance contract in California, and all of the evidence related to the policy interpretation is in California or London, but not in Washington. The parties agreed at argument that the contract was covered by California law, but disputed what law applied to the tort extra-contractual claims.

The trial court granted defendant's motion to dismiss. The trial court later granted in part and denied in part Coronus's motion for reconsideration. In its revised order, the trial court included additional findings, but maintained its dismissal of Coronus's claims based on forum non conveniens.

Coronus appeals.

II.

A.

A motion to dismiss for forum non conveniens requires a fact specific analysis with numerous factors to be considered and weighed in the discretion of the trial court. J.H. Baxter & Co. v. Cent. Nat'l Ins. Co. of Omaha, 105 Wn. App. 657, 662, 20 P.3d 967 (2001). Thus, we review decisions based on forum non conveniens for an abuse of discretion. J.H. Baxter, 105 Wn. App. at 661. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2016). "Rulings that are manifestly unreasonable or based on untenable grounds include those that are unsupported by the record or result from applying the wrong legal standard." Gilmore v. Jefferson County Pub. Transp. Benefit Area, 190 Wn.2d 483, 494, 415 P.3d 212 (2018). The reviewing court "may not find abuse of discretion simply because it would have decided the case differently—it must be convinced that no reasonable person would take the view adopted by the trial court." Gilmore, 190 Wn.2d at 494 (internal quotations omitted).

B.

Generally, a "plaintiff has the original choice to file his or her complaint in any court of competent jurisdiction." Sales v. Weyerhaeuser Co., 163 Wn.2d 14, 19, 177 P.3d 1122 (2008). Under the doctrine of forum non conveniens, trial courts have "the discretionary power to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought in another forum." J.H.

Baxter & Co., 105 Wn. App. at 661. "Essentially, the doctrine limits the plaintiff's choice of forum to prevent him or her from 'inflicting upon [the defendant] expense or trouble not necessary to [the plaintiff's] own right to pursue his remedy." Sales, 163 Wn.2d at 20 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)).

In deciding on forum non conveniens, the trial court "must balance certain private and public factors that determine the convenience of litigation in the alternative forum as opposed to the host forum." Sales, 163 Wn.2d at 20. This balancing requires first that the trial court determine that an adequate alternative forum exists. Sales, 163 Wn.2d at 20; Klotz v. Dehkhoda, 134 Wn. App. 261, 265, 141 P.3d 67 (2006). "[A]n alternative forum is adequate so long as some relief, regardless how small, is available should the plaintiff prevail." Klotz, 134 Wn. App. at 265. An alternate forum is inadequate only if the remedy provided is so clearly inadequate or unsatisfactory that it is no remedy. Hill v. Jawanda Transp. Ltd., 96 Wn. App. 537, 541, 983 P.2d 666 (1999). Moreover, a plaintiff cannot "defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum." Vivendi S.A. v. T-Mobile, USA, Inc., 2008 WL 2345283, at *11 (W.D. Wash. June 5, 2008) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)).

The trial court found that California is an adequate alternate forum. The court found that California recognizes causes of action for breach of contract under an insurance policy, bad faith, consumer protection, and tortious breach of the implied

covenant of good faith and fair dealing for violating claim handling regulations. Coronus does not challenge the trial court's findings on adequate alternative forum on appeal.

C.

Coronus argues that the trial court's findings and conclusions on the private interest factors are not supported by substantial evidence. We disagree.

"[W]here the court has considered all relevant and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." Creative Tech., Ltd. v. Aztec Sys. Pte., Ltd., 61 F.3d 696, 699 (9th Cir. 1995) (citing Piper Aircraft Co., 454 U.S. at 257).

The private interest factors require trial courts to consider the convenience of litigation in the alternate forum. The private factors include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Sales, 163 Wn.2d at 20 (quoting Gulf Oil, 330 U.S. at 508).

The trial court found that the private interest factors weighed against proceeding in Washington. The court found:

> [T]he essential issues in this case are insurance coverage and extra-contractual claims. The material witnesses that will testify in this action are in California or in states other than Washington. No witnesses to the insurance coverage question reside in Washington. Defendant's claim filing witnesses are in California. Plaintiff conceded that they had three witnesses in California. Moreover, the insurance dispute does not involve evidence in Washington State. Plaintiffs presumably maintain relevant business document[s] such as records of negotiation regarding the insurance policy in their business offices in Laguna Beach, California. All claim handling documents were exchanged between claim handlers in

> California or United Kingdom. Again, none of the insurance coverage or claim handling documents would be in Washington.

The trial court's findings are supported by substantial evidence. All 10 of the witnesses cited by Underwriters in their disclosure of possible primary witnesses reside outside of Washington. Coronus's disclosure of primary witnesses included at least 13 witnesses outside of Washington and 16 within Washington. Coronus concedes that it included attorneys on that list who were merely consulted by Coronus but never appeared in the underlying case. Thus, it was not error for the trial court to find it unlikely that some of those witnesses would be called to testify.

While Coronus emphasizes the underlying King County case as reason enough for this case to be brought in King County, Underwriters assert that the main issues to be litigated are whether Underwriters had a duty to defend Coronus and whether there was negligent claim handling. Determining the duty to defend depends first on a comparison between the allegations of the complaint and terms of the policy, then on extrinsic facts known to the insurer either at the inception of the third-party lawsuit or at the time of tender. Hartford Cas. Ins. Co. v. Swift Distrib., Inc., 59 Cal. 4th 277, 287, 326 P.3d 253, 172 Cal. Rptr. 3d 653 (2014).

Underwriters argued, and the trial court agreed, that the bulk of the witnesses and evidence related to those issues are not within Washington. Both Coronus and QX Acquisition have their principal place of business in California, the insurance policy was obtained in California via a California broker, the policy contains a choice of law

provision in favor of California, and the tender was investigated for Underwriters by a California law firm.

Here, the trial court "evaluate[d] the materiality and importance of the anticipated evidence and witnesses' testimony" and determined their accessibility and convenience to the forum. See Vivendi S.A., 2008 WL 2345283 at *12. Because the trial court appropriately weighed the private interest factors, we conclude the trial court did not abuse its discretion.

D.

Coronus argues that the trial court erred in finding that all the public interest factors favor California. We disagree.

The public interest factors to be considered are as follows:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gulf Oil, 330 U.S. at 508-09.

The trial court considered the public interest factors, finding that they balanced in favor of litigation in California instead of Washington:

> The origins of the present case arise from the claim coverage dispute which was decided by claim handlers in California governing a California insured who had an insurance policy issued by [a] UK insurer with a California choice-of-law provision. California has a strong public interest to protect its insureds and preside over policy insurance coverage

> disputes that involve California policy holders. A jury of California residents would have an interest given the plaintiff is a corporate resident of California. In contrast, Washington has no interest in deciding an insurance dispute between a California company, a California resident, and a UK insurer. Given the court's finding that California law applies to the extra-contractual claims, California courts are a more proper forum to apply the laws that govern the case. California has a compelling interest in regulating insurance policies written pursuant to its insurance laws and issued to a California company and to determine the extra-contractual obligation created by those policies.

Coronus focuses most of its argument on the final Gulf Oil public interest factor—the appropriateness of having trial "in a forum that is at home with the state law that must govern the case." Sales, 163 Wn.2d at 20 (quoting Gulf Oil, 330 U.S. at 508-09). Because the insurance policy contained a choice of law provision in favor of California, the parties did not dispute that California law would apply to the contractual claims in this case. Instead, the parties argued over which law would apply to the extra-contractual tort and CPA claims.

At the outset, Coronus argues that the trial court erred by concluding that "the tort claims arise out of the insurance policy issued in California." In Washington, while a choice of law provision in a contract does not govern tort claims, it may be considered when applying the most significant relationship test. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 159, 744 P.2d 1032 (1987). By its plain language, the "choice of law" clause in the policy appears broad and covers "a dispute between [Coronus] and [Underwriters] regarding this policy." Coronus's tort and CPA claims concern a dispute over Underwriter's failure to cover under the policy.[3]

[3] California law appears in accord. See Velasquez v. Truck Ins. Exch., 1 Cal. App. 4th 712, 720-22, 5 Cal. Rptr. 2d 1 (1981) (bad faith claim under fire insurance policy was on the policy because it sought to recover on the policy; other damage claims, such as those for cancellation of the policy, were inextricably bound up with the contract damage issue); JMP Sec. LLP v. Altair Nanotechnologies, Inc.,

Coronus cites O'Neill v. Farmers Ins. Co. of Wash., 124 Wn. App 516, 125 P.3d 134 (2004), to support its claim that the extra-contractual tort and CPA claims do not arise out of the underlying insurance policy. Coronus's reliance on O'Neill is misplaced. But O'Neill did not address whether tort and CPA claims arose out of a policy. Instead, the case concerned whether the contractual limitations period to bring claims under a homeowner's insurance policy should also apply to bar bad faith and CPA claims related to the handing of a claim under the policy. O'Neill, 124 Wn. App. at 529-31. The court followed precedence and concluded that the CPA's goal of protecting consumers by preserving statutory limitations periods for bad faith and CPA claims "'should not be frustrated'" by a shorter limitations period for bringing claims under the policy. O'Neill, 124 Wn. App. at 529-31 (citing Simms v. Allstate Ins. Co., 27 Wn. App. 872, 878, 621 P.2d 155 (1980)). The trial court did not err in finding that the extra-contractual claims arose out of the insurance policy.

Washington follows the "most significant relationship test" set out in Restatement (Second) Conflict of Laws § 145, to determine which state's law governs tort and CPA claims, Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 143, 210 P.3d 337 (2009). "Where a conflict exists, Washington court's decide which law applies by determining which jurisdiction has the most significant relationship to the given issue." Singh, 151 Wn. App. at 143. The factors to be evaluated for their relative importance are: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation, and

880 F. Supp. 2d 1029 (N.D. Cal. 2012) (holding that a choice of law clause "encompasse[s] all claims 'arising from or related to' the agreement, regardless of whether they were characterized as contract or tort claims and including 'tortious breaches of duties emanating from the agreement.'").

place of business for the parties; and (d) the place where the relationship, if any, between the parties is centered. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 582, 555 P.2d 997 (1976); RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (AM. L. INST. 1971). These factors are evaluated according to their relative importance to the issues at hand. In a tort case, the most important factors are "the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and particularly of the state with the dominant interest in the determination of the particular issue, and ease in the determination and application of the law to be applied." Tilden-Coil Constructors, Inc. v. Landmark Am. Ins. Co., 721 F. Supp. 2d 1007, 1016 (W.D. Wash. 2010).

The trial court considered the factors and determined that California had the most significant relationship:

> Here the tort claims arise out of the insurance policy issued in California and all decision-making was handled either in California or the United Kingdom. None of the parties to this insurance coverage suit is a Washington resident or Washington citizen. Plaintiff Coronus XES, Ltd. Is a Wyoming corporation with its principal place of business in Laguna Beach, CA. Plaintiff Matthew Aarsvold, the president of Coronus, is a resident of California and rents property in Minnesota. He never owned property or conducted business in Washington. Defendant [Underwriters] are residents of the United Kingdom. The relationship of these parties is centered either in California, or the UK, not Washington State.
>
> . . . .
>
> [T]he underlying action does not involve any physical injury/damage or insured operations in Washington. There is no injury in Washington, no conduct causing injury in Washington, no party who resides in Washington, and the place where the relationship between the parties is centered is in California or the UK, not Washington.

Coronus argues the trial court erred in concluding that the there was no injury in Washington because of Underwriters failure to defend the King County case against them. Coronus cites several federal cases in support of the proposition that the place of the alleged injury for lack of performance of the duty to defend is where the underlying lawsuit was filed.

However, in the cases Coronus cites, the insurer failed to defend and a judgment was entered against the insured. Alaska Airlines, Inc. v. Endurance Am. Ins. Co., 2021 WL 4033297, at *5 (W.D. Wash. Sept. 3, 2021) (noting that the injury occurred in Washington where the insured incurred the costs of defending itself and where a court entered judgment against it); Travelers Prop. Cas. Co. of Am. v. AF Evans Co., 2012 WL 4113279, at *8 (W.D. Wash. Sept. 19, 2012) (observing that the injury occurred in Washington where the insurer failed to defend and the court entered a stipulated judgment against the insured). Here, the insurer did not defend Coronus in the suit filed in King County Superior Court, but the settlement resulted in the dismissal of third-party claims against Coronus. No judgment was entered against Coronus in Washington. Also, the Alaska Airlines court noted that "Logically, when an insurance company acts in bad faith or violates IFCA or CPA, its insured will experience that injury where the insured is located." Alaska Airlines, Inc., 2021 WL 4033297, at *5. (quoting MKB Constructors v. Am. Zurich Ins. Co., 49 F. Supp. 3d 814, 833 (W.D. Wash. 2014)). While Coronus did have to defend itself in Washington, Coronus is not located in Washington and none of the companies involved in the litigation have ever done business in Washington. While the first contact may be a close call, the trial court did not abuse its discretion in determining that the injury did not occur in Washington.

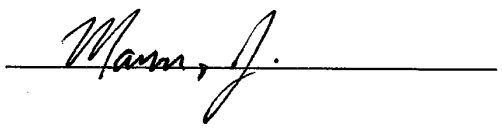
In determining the place where the conduct causing the injury occurred, courts generally consider where the insurance company makes its coverage decisions. See Alaska Airlines, 2021 WL 4033297, at *5 (holding, the conduct causing the injury did not occur in Washington or Oregon, thus the court gave no weight to this contact). This contact favors California as that is where Underwriters counsel investigated and denied coverage to Coronus.

Coronus next argues that the third and fourth factors were not supported by substantial evidence. We disagree. The location of the parties and place of their relationship favors California over Washington. Here, the trial court found that none of the parties were Washington residents. Coronus is a Wyoming corporation with its principal place of business in Laguna Beach, California. QX Acquisition has its principal place of business in California. Aarsvold is now a resident of Minnesota but is operating at least two businesses out of California. Underwriters are residents of the United Kingdom. The policy was purchased through a broker in California. And the policy contains a California choice of law provision.

Thus, even if the first factor were a close call, or even favors Washington, the remaining factors favor California as having the most significant relationship to this complaint. In making this determination, the trial court did not abuse its discretion in finding that California law would apply to the extra-contractual claims.

Finally, while Coronus disagrees with the trial court's consideration of the remaining Gulf Oil public interest factors, it fails to offer convincing argument. The trial court did not abuse its discretion in weighing the remaining public interest factors in favor of California.

Affirmed.



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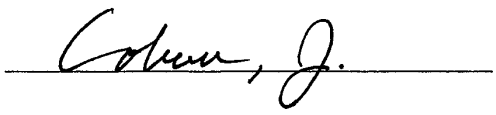

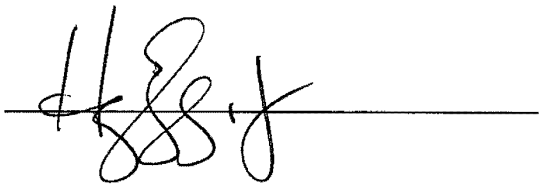

FILED
3/20/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CORONUS XES LTD., a Wyoming corporation; and MATTHEW AARSVOLD, a married individual,

Appellants,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NO. ESG00317241 with Unique Market References B087517C9N5007 and B1161LS12017, an unincorporated foreign insurance syndicate,

Respondents.

No. 83078-3-I

DIVISION ONE

ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Coronus XES Ltd. and Matthew Aarsvold moved to reconsider the court's opinion filed on December 27, 2022. Respondents Certain Underwriters at Lloyd's, London filed a response. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CORONUS XES LTD., a Wyoming corporation; MATTHEW AARSVOLD, a married individual, Plaintiffs, v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NO. ESG00317241 with Unique Market References B087517C9N5007 and B1161LS12017, an unincorporated foreign insurance syndicate, Defendants.	No. 20-2-15422-9 SEA **ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR RECONSIDERATION**

THIS MATTER having come before the Court on Defendants Certain Underwriters at Lloyd's, London's ("Underwriters") Motion to Dismiss Under the Doctrine of *Forum Non Conveniens* and Plaintiffs' Motion for Reconsideration of the Court's prior order dismissing this action, and the Court, having considered:

1. Defendants Underwriters' Motion to Dismiss Under the Doctrine of *Forum Non Conveniens*;

2. Declaration of J.C. Ditzler in Support of Motion to Dismiss Under the Doctrine of *Forum Non Conveniens*;

Judge Regina Cahan
King County Superior Court
516 Third Avenue
Seattle, WA 98104

3. **Plaintiffs' Response and Opposition to Defendants' motion to Dismiss Based on** *Forum Non Conveniens*;

4. **Declaration of Steven A. Stolle in Support of Plaintiffs' Response and Opposition to Defendants' Motion to Dismiss Based on** *Forum Non Conveniens*;

5. **Defendants' Reply** in Support of Motion to Dismiss Under the Doctrine of *Forum Non Conveneins*;

6. Supplemental Declaration of J.C. Ditzler in Support of Motion to Dismiss under the Doctrine of *Forum Non Conveniens*; and

7. **Supplemental Declaration of Steven A. Stolle in Support of Plaintiffs' Response and Opposition to Defendants' Motion to Dismiss Based on** *Forum Non Conveniens*;

8. **Plaintiffs' Motion for Reconsideration of Order on** *Forum Non Conveniens*;

9. **Declaration of Steven A. Stolle in Support of Plaintiffs'** Motion for Reconsideration of Order on *Forum Non Conveniens*;

10. **Defendants' Opposition to Plaintiffs' Motion for Reconsideration of Order on** *Forum Non Conveniens*;

11. **Declaration of Jonathan Toren in Support of Defendants' Opposition to Motion** for Reconsideration;

12. **Plaintiffs' Reply in Support of their** Motion for Reconsideration of Order on *Forum Non Conveniens*;

and having heard all arguments, and the Court makes the following findings:

I. Background

Plaintiffs filed this suit on October 19, 2020, pleading claims for declaratory judgment, breach of contract, insurance bad faith, negligent claim handlings, violation of the Washington consumer Protection Act (CPA) and a reserved claim for violation of the Washington Insurance Fair Conduct Act (IFCA). The underlying lawsuit was filed on June 1, 2017 in King County

Superior Court titled Bright Morning Consulting LLC v. Daniel Webb and Red River Solutions LLC f/k/a/ Higher Upstream LLC, Cause No 17-2-14091-5 SEA. Webb then pled a third-party complaint against the plaintiffs in this action, Coronus XES LTD and Mathew Aarsvold, among others. The third-party Complaint alleged: (1) guarantee, (2) misappropriation, conversion, embezzlement, and (3) civil conspiracy. Plaintiffs sought coverage under their insurance policy for defense of the Webb's third-party claims. On July 12, 2018, plaintiffs' counsel tendered defense and indemnity to Underwriters under the policy. On October 23, 2018, plaintiffs' counsel received a letter denying plaintiffs' tender. There was a renewed request and the re-tender was denied on the same base as the first: the third party claims did not implicate the "business activities" of the named insured, QX Acquisition, a non-party to the underlying suit. The underlying suit was settled for $17,500. This lawsuit followed.

None of the parties to this insurance coverage suit is a Washington State resident or citizen. Plaintiff Coronus XES Ltd is Wyoming corporation with its principal place of business in Laguana Beach, CA. Plaintiff Matthew Aarsvold, the President of Coronus, is resident of California and rents property in Minnesota. He never owned property or did business in Washington State. Defendant Certain Underwriters at Lloyd's London are residents of the United Kingdom. The Underwriters' policy at issue was negotiated through a surplus line broker in California and delivered to the first name insured, QX Acquisition Corp. in California. All claim handling communication was between claim handlers in California and the UK-based representatives. There was no claim handling activity in Washington.

II. Choice of Law

Defendants filed a motion to dismiss under the doctrine of forum non conveniens. Because choice of law issues bears on the Defendant's motion to Dismiss under the doctrine of forum non conveniens, the Court address the choice of law first.

1. California law applies to the extra-contractual claims

Both parties request that the court determine which law applies to this action. Both parties agree California law applies to the contract claims given the California choice-of-law clause in the contract itself. The choice of law section indicates: "In the event of a dispute between you and us regarding this Policy…California law shall govern." The issue for this court is whether California or Washington law applies to the extra-contractual claims.

Both parties acknowledge there are material differences between Washington and California law regarding the extra-contractual claims. Under Washington choice-of-law rules, where an actual conflict exists, Section 145 of the Restatement applies. *Rice for Dow Chem. Co*. 124 Wn 2d 205, 213 (1994). In determining the law to be applied to a tort claim, the court must consider which state has the "most significant relationship" to the occurrence and the parties. Under Section 145 of the Restatement, the Court considers (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.

These factors must be evaluated according to their relative importance with respect to the issues at hand. In a tort case, the most important factors are "the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and particularly of the state with the dominant interest in the determination of the particular issue, and ease in the determination and application of the law to be applied. *Tilden-Coil Constructors, In v. Landmark Am. Ins. Co*, 721 F. Supp 2d 1007, 1011 (W.D. Wash 2010); *Migard Mfg Inc V. Ilinois Ins. Co*, 2011 WL 3298912 1, 8.

Here, the tort claims arise out of the insurance policy issued in California and all decision-making was handled either in California or the United Kingdom. None of the parties to this insurance coverage suit is a Washington resident or Washington citizen. Plaintiff Coronus XES Ltd is a Wyoming corporation with its principal place of business in Laguana Beach, CA.

Plaintiff Matthew Aarsvold, the President of Coronus, is resident of California and rents property in Minnesota. He never owned property or conducted business in Washington. Defendant Certain underwriters at Lloyd's London are residents of the United Kingdom. The relationship of these parties is centered either in California or the UK, not Washington State.

Plaintiffs argues Washington is the where the injury occurred, conduct causing injury occurred and the place where the relationship between the parties is centered based on the theory that the plaintiffs suffered the costs of defending itself in Washington when the insurance company determined there was no duty to defend. Plaintiffs rely on the following cases to support its position: *Hawthorne v. Mid-Continent Cas. Co*. 2017 WL 3237160, July 31, 2017; *Traveler Prop. Cas Co. v. AF Evans Co*, 2012 WL 4113279 (W.D. Wash. 9/19/2012.) Defense distinguishes these cases because they all have underlying actions with some combination of physical injury, property damage and/or insured operations in Washington State. In contrast, the underlying action does not involve any physical injury/damage or insured operations in Washington. There is no injury in Washington, no conduct causing injury in Washington, no party who resides in Washington and the place where the relationship between the parties is centered is in California or the UK, not Washington.

Moreover, California has more substantial interest in this case than Washington. Coronus XES Ltd's principal place of business is California and the underlying insurance contract was negotiated and delivered in California. Significantly, the parties agreed to a choice of law provision that California law would apply. Although a choice of law provision in a contract does not govern tort claims, it may be considered as an element in the most significant relationship test. *Haberman v. Washington Pub. Power Supply Sys*. 109 Wn 2d 107, 159 (1987). See also *Auto Auction Inc, v, Indian Harbor Ins. Co*, C09-1522RAJ,2010 WL 11688494 W.D. Wash 9/16/10 (choice of law in favor of New York was enforceable and court dismissed the insured's extra-contractual claims); *Gierke v. Allstate Prop. Cas. Ins. Co.*, No C19-0071JLR, 2019 WL

4849494 (W.D. Wash. Oct 1. 2019. All these factors weigh in favor of finding that California law applies to the extra-contractual claims.

III. Forum Non Conveniens Motion

In considering whether to dismiss an action *on forum non conveniens* grounds, the court must examine 1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favor dismissal. A threshold issue on a motion to dismiss for forum non conveniens is for the defendant to prove that an alternative forum exists. If shown, then the court balances the private and public interests involved. *Myers v. Boeing*, 115 Wn 2d 123 (2013).

1. California is an adequate alternate forum.

In rare cases, an alternate forum proves inadequate because "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Id.* (quoting *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)). So long as the plaintiff can litigate the essential subject matter of the case in the alternate forum, the fact that recovery would be smaller—even considerably smaller—does not render the forum inadequate. *Klotz v. Dehkhoda*, 134 Wn App 21, 268, 141 P. 3d 67 (2006). Moreover, a plaintiff cannot defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. *Vivendi S.A. v. T-Mobile USA, Inc*, 2008 WL 2345283 at 11 (WD Wash. June 5, 2008). California recognizes causes of action for breach of contract under an insurance policy, bad faith, Consumer protection, and tortious breach of implied covenant of good faith and fair dealing for violating insurance claim handling regulations.

Although the relief may be less in California, Washington cannot be the haven for extra-contractual claims when there is little to no connection to this state. Plaintiff argues they could not compel many of their damage witnesses to appear in California. The court finds this

argument unconvincing. Plaintiffs have identified 17 Washington-based legal professionals to provide testimony regarding "reasonableness and necessity" of legal fees. The court finds it unlikely most of these witnesses would be called to testify. Moreover, there is no reason to believe the damage witnesses would not voluntarily testify in California.[1] The court finds California is an adequate forum.[2]

2. The State of California presents a more convenient forum for this action

Private and public interest need to be balanced when an alternative forum exists. The private interest factors that the court must consider in deciding whether to dismiss for forum non conveniens include the relative ease of access to sources of evidence, the availability of compulsory process for the attendance of unwilling witnesses, and all other practical problems that make trial of a case easy, expeditious and inexpensive. *Myers,* 115 Wash.2d at 128, 794 P.2d 1272 (quoting *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)).

Here, the essential issues in this case are insurance coverage and extra-contractual claims. The material witnesses that will testify in this action are in California or in states other than Washington. No witnesses to the insurance coverage question reside in Washington. Defendant's claim filing witnesses are in California. Plaintiff conceded they had three witness in California. Moreover, the insurance dispute does not involve evidence in Washington State. Plaintiffs presumably maintain relevant business document such as records of negotiation regarding the insurance policy in their business offices in Laguna Beach, California. All claim handling documents were exchanged between claim handlers in California or United Kingdom. Again, none of the insurance coverage or claim handing documents would be in Washington.

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[1] Finally, the court inquired regarding video technology at oral argument because the practice of law has changed this past year. Of course, legal tests do not change in real time. Video testimony may be an option in the future to allow witnesses from out of state to testify more easily. The court did not base its decision on this but merely discussed this reality.

[2] Plaintiffs' choice of forum is not entitled to deference because the record and arguments reflect an attempt at forum shopping for favorable local laws which do not, in any event, apply to this action.

The court also considers the following public interest factors: (1) Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin; (2) Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation; (3) In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only; (4) There is a local interest in having localized controversies decided at home; and (5). There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 129, 794 P.2d 1272 (quoting *Gulf Oil,* 330 U.S. at 508–09, 67 S.Ct. 839).

The origins of the present case arise from the claim coverage dispute which was decided by claim handlers in California governing a California insured who had an insurance policy issued by an UK insurer with a California choice-of-law provision. California has a strong public interest to protect its insureds and preside over policy insurance coverage disputes that involve California policy holders. A jury of California residents would have an interest given the plaintiff is a corporate resident of California. In contrast, Washington has no interest in deciding an insurance dispute between a California company, a California resident, and a UK insurer. Given the court's finding that California law applies to the extra-contractual claims, California courts are a more proper forum to apply the laws that govern the case. California has a compelling interest in regulating insurance policies written pursuant to its insurance laws and issued to a California company and to determine the extra-contractual obligation created by those policies. The balance of private and public interest factors weigh in favor of California.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Reconsideration is GRANTED in part. The court had previously failed to provide sufficient findings. Additionally, the case is Dismissed without Prejudice to allow refiling in California.

Defendants Underwriters' Motion to Dismiss Under the Doctrine of *Forum Non Conveniens* is GRANTED. The court finds California law applies to both the contract and extra-contractual claims.

DATED this 5th day of August, 2021.

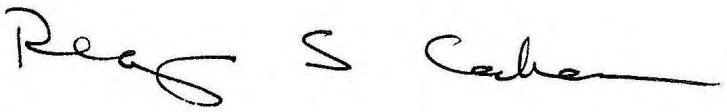
Electronic Signature Attached

THE HONORABLE REGINA CAHAN

King County Superior Court
Judicial Electronic Signature Page

Case Number:	20-2-15422-9
Case Title:	CORONUS XES ET ANO vs CERTAIN UNDERWRITERS AT LLOYDS LONDON
Document Title:	ORDER RE GRANTING IN PART P'S MOTION TO RECO

Signed By:	Regina Cahan
Date:	August 05, 2021



Judge: Regina Cahan

This document is signed in accordance with the provisions in GR 30.

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RCW 48.01.020 Scope of code. All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code. [1947 c 79 § .01.02; Rem. Supp. 1947 § 45.01.02.]

RCW 48.01.030 Public interest. The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance. [1995 c 285 § 16; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

Effective date—1995 c 285: See RCW 48.30A.900.

RCW 48.01.060 "Insurance transaction" defined. "Insurance transaction" includes any:

(1) Solicitation.

(2) Negotiations preliminary to execution.

(3) Execution of an insurance contract.

(4) Transaction of matters subsequent to execution of the contract and arising out of it.

(5) Insuring. [1947 c 79 § .01.06; Rem. Supp. 1947 § 45.01.06.]

Restatement First, Conflict of Law § 377

§ 377 The place of wrong

Scope Note

Whether a tort has been committed is a question of the law of Torts of some particular state. If a tort has been committed by the law of a state, the question whether other states will recognize it and enforce a duty of compensation for the injury caused thereby is a question of the Conflict of Laws. To constitute a tort there must be an injury to the plaintiff (see Restatement of Torts, § 7) legally caused by an actor whose conduct is tortious in character (see Restatement of Torts, § 6). If an actor's conduct is tortious, the actor becomes liable if his conduct is a legal cause of an injury to another who has not, by his own misconduct, so contributed to his injury as to bar recovery (see Restatement of Torts, § 5). If the law of any state imposes a tort liability upon an actor, the recognition and enforcement of such liability by other states depends upon the rules stated in Topic 1 of this Chapter. A court in which the question is raised, whether a tort has been committed, will make reference to the law of the place where the duty to pay for an injury is alleged to have been imposed.

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

COMMENTS & ILLUSTRATIONS

Comment:

a. Each state has legislative jurisdiction to determine the legal effect of acts done or events caused within its territory (see § 64). If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof (see § 65). Thus, both the state in which the actor acts and the state in which legal consequences of his act occur have legislative jurisdiction to impose an obligation to pay for harm caused thereby. If any state having legislative jurisdiction so to do imposes a right-duty relation delictual in character, other states will recognize the existence of such relation under the rules stated in § 377 to § 390. What acts and events are necessary to constitute a tort is a question of the law of Torts and that law varies in different states. Although by statute, the state in which any event in the train of consequences, starting with the act of the wrongdoer and continuing until the final legal consequences thereof, may make the event a wrong, the situation is, in most cases, governed by the common law. The common law selects some particular point in the train of events as the place of wrong. In the following Note are stated rules which represent the general common law as to what constitutes the place of wrong in different types of torts. These rules can be, but ordinarily are not, changed by statute.

NOTE.

Summary of Rules in Important Situations Determining Where a Tort is Committed.

1. *Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body*.

Such a force is first set in motion by some human being. It is quite immaterial in what state he set the force in motion. It must alone or in cooperation with other forces harm the body of another. The person harmed may thereafter go into another state and die from the injury or suffer other loss therefrom. The place where this last event happens is also immaterial. The question is only where did the force impinge upon his body.

Illustration:

1. A, standing in state X, fires a gun and lodges a bullet in the body of B who is standing in state Y. The place of wrong is in Y.

2. *When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered. Illustration*:

2. A, in state X, mails to B in state Y a package containing poisoned candy. B eats the candy in state Y and gets on a train to go to state W. After the train has passed into state Z, he becomes ill as a result of the poison and eventually dies from the poison in state W. The place of wrong is state Z.

3. *When harm is caused to land or chattels, the place of wrong is the place where the force takes effect on the thing*.

Illustrations:

3. A, standing in state X, throws a stone with which he breaks a mirror in state Y. The place of the wrong is state Y.

4. A, in state X, throws out noxious fumes from a chimney which destroy the grass of B in state Y. The place of the wrong is in Y.

4. *When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made*.

Illustrations:

5. A, in state X, makes false misrepresentations by letter to B in Y as a result of which B sends certain chattels from Y to A, in X. A keeps the chattels. The place of the wrong is in state Y where B parted with the chattels.

6. A, in state X, owns shares in the M company. B, in state Y, fraudulently persuades A not to sell the shares. The value of the shares falls. The place of wrong is X.

5. *Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated*.

7. A, broadcasting in state X, slanders B. B is well and favorably known in state Y and the broadcast is heard there by many people conversant with B's good repute. The place of wrong is Y.

The rule here stated is confined to situations in which the cause of action in tort is the harm to reputation. There may be a criminal libel where there is no harm to the reputation. Such a situation is outside the scope of this rule.

End of Document

Restat 2d of Conflict of Laws, § 6

Restatement of the Law, Conflict of Laws 2d - Official Text > Chapter 1- Introduction

§ 6 Choice-Of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

COMMENTS & ILLUSTRATIONS

Comment on Subsection (1):

a. Statutes directed to choice of law. A court, subject to constitutional limitations, must follow the directions of its legislature. The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so. An example of a statute directed to choice of law is the Uniform Commercial Code which provides in certain instances for the application of the law chosen by the parties (§ 1-105(1)) and in other instances for the application of the law of a particular state (§§ 2-402, 4-102, 6-102, 8-106, 9-103). Another example is the Model Execution of Wills Act which provides that a written will subscribed by the testator shall be valid as to matters of form if it complies with the local requirements of any one of a number of enumerated states. Statutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number.

b. Intended range of application of statute. A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the intended range of application of a particular statute. The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid. On the other hand, if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application.

Sometimes a statute's intended range of application will be apparent on its face, as when it expressly applies to all citizens of a state including those who are living abroad. When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.

Comment on Subsection (2):

c. Rationale. Legislatures usually legislate, and courts usually adjudicate, only with the local situation in mind. They rarely give thought to the extent to which the laws they enact, and the common law rules they enunciate, should apply to out-of-state facts. When there are no adequate directives in the statute or in the case law, the court will take account of the factors listed in this Subsection in determining the state whose local law will be applied to determine the issue at hand. It is not suggested that this list of factors is exclusive. Undoubtedly, a court will on occasion give consideration to other factors in deciding a question of choice of law. Also it is not suggested that the factors mentioned are listed in the order of their relative importance. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law. So, for example, the policy in favor of effectuating the relevant policies of the state of dominant interest is given predominant weight in the rule that transfers of interests in land are governed by the law that would be applied by the courts of the situs (see §§ 223-243). On the other hand, the policies in favor of protecting the justified expectations of the parties and of effectuating the basic policy underlying the particular field of law come to the fore in the rule that, subject to certain limitations, the parties can choose the law to govern their contract (see § 187) and in the rules which provide, subject to certain limitations, for the application of a law which will uphold the validity of a trust of movables (see §§ 269-270) or the validity of a contract against the charge of commercial usury (see § 203). Similarly, the policy favoring uniformity of result comes to the fore in the rule that succession to interests in movables is governed by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death (see §§ 260 and 263).

At least some of the factors mentioned in this Subsection will point in different directions in all but the simplest case. Hence any rule of choice of law, like any other common law rule, represents an accommodation of conflicting values. Those chapters in the Restatement of this Subject which are concerned with choice of law state the rules which the courts have evolved in accommodation of the factors listed in this Subsection. In certain areas, as in parts of Property (Chapter 9), such rules are sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors which underlie them. In other areas, such as in Wrongs (Chapter 7) and Contracts (Chapter 8), the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can presently be done in these areas is to state a general principle, such as application of the local law "of the state of most significant relationship", which provides some clue to the correct approach but does not furnish precise answers. In these areas, the courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them.

Statement of precise rules in many areas of choice of law is made even more difficult by the great variety of situations and of issues, by the fact that many of these situations and issues have not been thoroughly explored by the courts, by the generality of statement frequently used by the courts in their opinions, and by the new grounds of decision stated in many of the more recent opinions.

The Comments which follow provide brief discussion of the factors underlying choice of law which are mentioned in this Subsection.

d. Needs of the interstate and international systems. Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.

e. Relevant policies of the state of the forum. Two situations should be distinguished. One is where the state of the forum has no interest in the case apart from the fact that it is the place of the trial of the action. Here the only relevant policies of the state of the forum will be embodied in its rules relating to trial administration (see Chapter 6). The second situation is where the state of the forum has an interest in the case apart from the fact that it is the place of trial. In this latter situation, relevant policies of the state of the forum may be embodied in rules that do not relate to trial administration.

The problem dealt with in this Comment arises in the common situation where a statute or common law rule of the forum was formulated solely with the intrastate situation in mind or, at least, where there is no evidence to suggest that the statute or rule was intended to have extraterritorial application. If the legislature or court (in the case of a common law rule) did have intentions with respect to the range of application of a statute or common law rule and these intentions can be ascertained, the rule of Subsection (1) is applicable. If not, the court will interpret the statute or rule in the light of the factors stated in Subsection (2).

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made. On the other hand, the court is under no compulsion to apply the statute or rule to such out-of-state facts since the originating legislature or court had no ascertainable intentions on the subject. The court must decide for itself whether the purposes sought to be achieved by a local statute or rule should be furthered at the expense of the other choice-of-law factors mentioned in this Subsection.

f. Relevant policies of other interested states. In determining a question of choice of law, the forum should give consideration not only to its own relevant policies (see Comment *e*) but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved. So if a husband injures his wife in a state other than that of their domicil, it may be that the state of conduct and injury has the dominant interest in determining whether the husband's conduct was tortious or whether the wife was guilty of contributory negligence (see § 146). On the other hand, the state of the spouses' domicil is the state of dominant interest when it comes to the question whether the husband should be held immune from tort liability to his wife (see § 169).

The content of the relevant local law rule of a state may be significant in determining whether this state is the state with the dominant interest. So, for example, application of a state's statute or common law rule which would absolve the defendant from liability could hardly be justified on the basis of this state's interest in the welfare of the injured plaintiff.

g. Protection of justified expectations. This is an important value in all fields of the law, including choice of law. Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state. Also, it is in part because of this factor that the parties are free within broad limits to choose the law to govern the validity of their contract (see § 187) and that the courts seek to apply a law that will sustain the validity of a trust of movables (see §§ 269-270).

There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question.

h. Basic policies underlying particular field of law. This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved. This factor explains in large part why the courts seek to apply a law that will sustain the validity of a contract against the charge of commercial usury (§ 203) or the validity of a trust of movables against the charge that it violates the Rule Against Perpetuities (§§ 269-270).

i. Predictability and uniformity of result. These are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules. Predictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions. It is partly on account of these factors that the parties are permitted within broad limits to choose the law that will determine the validity and effect of their contract (see § 187) and that the law that would be applied by the courts of the state of the situs is applied to determine the validity of transfers of interests in land (see § 223). Uniformity of result is also important when the transfer of an aggregate of movables, situated in two or more states, is involved. Partly for this reason, the law that would be applied by the courts of the state of a decedent's domicil at death is applied to determine the validity of his will in so far as it concerns movables (see § 263) and the distribution of his movables in the event of intestacy (see § 260).

j. Ease in the determination and application of the law to be applied. Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results. The policy does, however, provide a goal for which to strive.

k. Reciprocity. In formulating common law rules of choice of law, the courts are rarely guided by considerations of reciprocity. Private parties, it is felt, should not be made to suffer for the fact that the courts of the state from which they come give insufficient consideration to the interests of the state of the forum. It is also felt that satisfactory development of choice-of-law rules can best be attained if each court gives fair consideration to the interests of other states without regard to the question whether the courts of one or more of these other states would do the same. As to whether reciprocity is a condition to the recognition and enforcement of a judgment of a foreign nation, see § 98, Comment *e*.

States sometimes incorporate a principle of reciprocity into statutes and treaties. They may do so in order to induce other states to take certain action favorable to their interests or to the interests of their citizens. So, as stated in § 89, Comment *b*, many States of the United States have enacted statutes which provide that a suit by a sister State for the recovery of taxes will be entertained in the local courts if the courts of the sister State would entertain a similar suit by the State of the forum. Similarly, by way of further example, some States of the United States provide by statute that an alien cannot inherit local assets unless their citizens in turn would be permitted to inherit in the state of the alien's nationality. A principle of reciprocity is also sometimes employed in statutes to permit reciprocating states to obtain by cooperative efforts what a single state could not obtain through the force of its own law. See, e. g., Uniform Reciprocal Enforcement of Support Act; Uniform (Reciprocal) Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings; Interpleader Compact Law.

REPORTER'S NOTES

The rule of this Section was cited and applied in Mitchell v. Craft, 211 So.2d 509 (Miss.1968). Subsection (1) of the rule was cited and applied in Oxford Consumer Discount Company v. Stefanelli, 102 N.J.Super. 549, 246 A.2d 460 (1968).

See generally Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L.Rev. 267 (1966); Leflar, Conflicts Law: More on Choice-Influencing Considerations, 54 Calif.L.Rev. 1584 (1966); Traynor, Is This Conflict Really Necessary? 37 Texas L.Rev. 657 (1954); Cheatham and Reese, Choice of the Applicable Law, 52 Colum.L.Rev. 959 (1952); Reese, Conflict of Laws and the Restatement Second, 28 Law & Contemp. Prob. 679 (1963).

Cases where the court explicitly looked to similar factors in deciding a question of choice of law are Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Heath v. Zellmer, 35 Wis.2d 578, 151 N.W.2d 664 (1967).

Comment k: On the subject of reciprocity, see Lenhoff, Reciprocity and the Law of Foreign Judgments, 16 La.L.Rev. 465 (1956); Lenhoff, Reciprocity in Function, 15 U. Pitt.L.Rev. 44 (1954); Lenhoff, Reciprocity: The Legal Aspect of a Perennial Idea, 44 Nw.U.L.Rev. 619, 662 (1952).

On rare occasions, the courts have incorporated the reciprocity principle into a common law rule of choice of law. See e. g., Forgan v. Bainbridge, 34 Ariz. 408, 274 Pac. 155 (1928); Union Securities Co. v. Adams, 33 Wyo. 45 236 Pac. 513 (1925).

Cross Reference

ALR Annotations:

Duty of courts to follow decisions of other states, on questions of common law or unwritten law, in which the cause of action had its situs. 73 A.L.R. 897.

Digest System Key Numbers:

Action 17

End of Document

Restat 2d of Conflict of Laws, § 145

Restatement of the Law, Conflict of Laws 2d - Official Text > Chapter 7- Wrongs > Topic 1- Torts > Title A- The General Principle

§ 145 The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

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

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

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

COMMENTS & ILLUSTRATIONS

Comment:

a. Scope of section. The rule of this Section states a principle applicable to all torts and to all issues in tort and, as a result, is cast in terms of great generality. This is made necessary by the great variety of torts and of issues in tort and by the present fluidity of the decisions and scholarly writings on choice of law in torts. Title B (§§ 146-155) deals with particular torts as to which it is possible to state rules of greater precision. Undoubtedly, this list will lengthen with increased experience. Title C (§§ 156-174) deals with particular issues in tort. It seems clear that the best way to bring precision into the field is by attempting to state special rules for particular torts and for particular issues in tort.

Comment on Subsection (1):

b. Rationale. The principles stated in § 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, to the potentially interested states, the occurrence and the parties. The factors listed in Subsection (2) of the rule of § 6 can be divided into five groups. One group is concerned with the fact that in multistate cases it is essential that the rules of decision promote mutually harmonious and beneficial relationships in the interdependent community, federal or international. The second group focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors in this second group are at times referred to as "state interests" or as appertaining to an "interested state." The third group involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result. The fourth group is directed to implementation of the basic policies underlying the particular field of law, such as torts or contracts, and the fifth

group is concerned with the needs of judicial administration, namely with ease in the determination and application of the law to be applied.

The factors listed in Subsection (2) of the rule of § 6 vary somewhat in importance from field to field. Thus, the protection of the justified expectations of the parties, which is of extreme importance in such fields as contracts, property, wills and trusts, is of lesser importance in the field of torts. This is because persons who cause injury on nonprivileged occasions, particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct. Such persons have few, if any, justified expectations in the area of choice of law to protect, and as to them the protection of justified expectations can play little or no part in the decision of a choice of law question. Likewise, the values of certainty, predictability and uniformity of result are of lesser importance in torts than in areas where the parties and their lawyers are likely to give thought to the problem of the applicable law in planning their transactions. Finally, a number of policies, such as the deterrence of tortious conduct and the provision of compensation for the injured victim, underlie the tort field. These policies are likely to point in different directions in situations where the important elements of an occurrence are divided among two or more states.

Because of the relative insignificance of the above-mentioned factors in the tort area of choice of law, the remaining factors listed in § 6 assume greater importance. These remaining factors are the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and particularly of the state with the dominant interest in the determination of the particular issue, and ease in the determination and application of the law to be applied.

c. Purpose of tort rule. The purpose sought to be achieved by the relevant tort rules of the interested states, and the relation of these states to the occurrence and the parties, are important factors to be considered in determining the state of most significant relationship. This is because the interest of a state in having its tort rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and by the relation of the state to the occurrence and the parties. If the primary purpose of the tort rule involved is to deter or punish misconduct, as may be true of rules permitting the recovery of damages for alienation of affections and criminal conversation, the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship (see § 154, Comment *c*). On the other hand, when the tort rule is designed primarily to compensate the victim for his injuries, the state where the injury occurred, which is often the state where the plaintiff resides, may have the greater interest in the matter. This factor must not be overemphasized, however. To some extent, at least, every tort rule is designed both to deter other wrongdoers and to compensate the injured person. Undoubtedly, the relative weight of these two objectives varies somewhat from rule to rule, and in the case of a given rule it will frequently be difficult to tell which of these objectives is the more important.

A rule which exempts the actor from liability for harmful conduct is entitled to the same consideration in the choice-of-law process as is a rule which imposes liability. Frequently, however, it will be more difficult to discern the purpose of a rule denying liability than of a rule which imposes it. Take, for example, a statute which abolishes the right of action for alienation of affections. Such a statute may have been designed only to spare the local courts from the burden of having to hear such actions. If so, the statute should only be applied to bar actions brought in the state of its enactment. On the other hand, the statute may have had as its sole, or alternative, purpose the protection of defendants against being harassed by such actions. If so, there would be a basis for applying the statute to bar an action brought outside the state of its enactment if the complained-of conduct had taken place in that state and particularly if, in addition, the defendant had been domiciled there.

Frequently, it will be possible to decide a question of choice of law in tort without paying deliberate attention to the purpose sought to be achieved by the relevant tort rules of the interested states. This will be so whenever by reason of the particular circumstances one state is obviously that of the applicable law.

d. The issue involved. The courts have long recognized that they are not bound to decide all issues under the local law of a single state. Thus, in a simple motor accident case that occurred outside the state of the forum, a court under traditional and prevailing practice applies its own state's rules to issues involving process, pleadings, joinder of parties, and the administration of the trial (see Chapter 6), while deciding other issues -- such as whether the defendant's operation of the vehicle was negligent -- by reference to the law selected by application of the rules stated in this Chapter. The rule of this Section makes explicit that selective approach to choice of the law governing particular issues.

Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states.

Experience and analysis have shown that certain issues that recur in tort cases are most significantly related to states with which they have particular connections or contacts. So, for example, a state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there. Thus, subject only to rare exceptions, the local law of the state where conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor's conduct was entitled to legal protection (see §§ 146-147).

On the other hand, the local law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury, may be applied to determine whether one party is immune from tort liability to the other or may be held liable to the other only for injuries resulting from intentional conduct or from some aggravated form of negligence, or conversely, whether one party owes the other a higher standard of care than would be required in the circumstances of the case by the local law of the state where conduct and injury occurred. An example is the issue of intra-family immunity, which, as stated in § 169, is usually determined by the local law of the state of the spouses' common domicil. Likewise, the circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence may be determined by the local law of their common domicil, if at least this is the state from which they departed on their trip and that to which they intended to return, rather than by the local law of the state where the injury occurred.

Again the state where the conduct and injury occurred will not necessarily be the state that is primarily concerned with the issue whether tort claims arising from the injury survive the death of the tortfeasor. So when conduct and injury occur in state X but both the plaintiff and the defendant are domiciled in state Y, it would seem that, ordinarily at least, Y would have the greater interest in the issue of survival and that its law should control (see § 167, Comment *c*). Similarly, whether a charitable corporation can successfully assert the defense of charitable immunity may be determined by the local law of the state where the plaintiff is domiciled and the defendant incorporated rather than by the local law of the state where conduct and injury occurred (see § 168, Comment *b*). By way of further example, it would seem that the state where all interested persons are domiciled will, usually at least, have the greatest interest in determining the extent to which each shall share in a tort recovery. So it may be that questions relating to the distribution between spouses of a recovery for an injury to one of the spouses should be determined by the local law of their domicil (cf. § 166, Comment *b*).

Undoubtedly, future cases will provide the basis for constructing special rules for still other issues of choice of law.

Comment on Subsection (2):

e. Important contacts in determining state of most significant relationship. In applying the principles of § 6 to determine the state of most significant relationship, the forum should give consideration to the relevant policies of all potentially interested states and the relevant interests of those states in the decision of the particular issue. Those states which are most likely to be interested are those which have one or more of the following contacts with the occurrence and the parties. Some of these contacts also figure prominently in the formulation of the applicable rules of choice of law.

The place where injury occurred. In the case of personal injuries or of injuries to tangible things, the place where the injury occurred is a contact that, as to most issues, plays an important role in the selection of the state of the applicable law (see §§ 146-147). This contact likewise plays an important role in the selection of the state of the applicable law in the case of other kinds of torts, provided that the injury occurred in a single, clearly ascertainable, state. This is so for the reason among others that persons who cause injury in a state should not ordinarily escape liabilities imposed by the local law of that state on account of the injury. So in the case of false imprisonment, the local law of the state where the plaintiff was imprisoned will usually be applied. Likewise, when a person in state X writes a letter about the plaintiff which is received by a person in state Y, the local law of Y, the state where the publication occurred, will govern most issues involving the tort, unless the contacts which some other state has with the occurrence and the parties are sufficient to make that other state the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties (see § 149).

Situations do arise, however, where the place of injury will not play an important role in the selection of the state of the applicable law. This will be so, for example, when the place of injury can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue (see § 146, Comments *d*-*e*). This will also be so when, such as in the case of fraud and misrepresentation (see § 148), there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury, or when, such as in the case of multistate defamation (see § 150), injury has occurred in two or more states. Situations may also arise where the defendant had little, or no, reason to foresee that his act would result in injury in the particular state. Such lack of foreseeability on the part of the defendant is a factor that will militate against selection of the state of injury as the state of the applicable law. Indeed, application of the local law of the state of injury in such circumstances might on occasion raise jurisdictional questions (see § 9, Comment *f*).

The place where conduct occurred. When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort. This is particularly likely to be so with respect to issues involving standards of conduct, since the state of conduct and injury will have a natural concern in the determination of such issues.

Choice of the applicable law becomes more difficult in situations where the defendant's conduct and the resulting injury occurred in different states. When the injury occurred in two or more states, or when the place of injury cannot be ascertained or is fortuitous and, with respect to the particular issue, bears little relation to the occurrence and the parties, the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law. For example, the place where the conduct occurred is given particular weight in the case of torts involving interference with a marriage relationship (see § 154) or unfair competition (see Comment *f*), since in the case of such torts there is often no one clearly demonstrable place of injury. Likewise, when the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance (see Comment *c*). And the same is true when the conduct was required or privileged by the local law of the state where it took place (see § 163, Comment *a*).

The place where the defendant's conduct occurred is of less significance in situations where, such as in the case of multistate defamation (see § 150), a potential defendant might choose to conduct his activities in a state whose tort rules are favorable to him.

The domicil, residence, nationality, place of incorporation and place of business of the parties. These are all places of enduring relationship to the parties. Their relative importance varies with the nature of the interest affected. When the interest affected is a personal one such as a person's interest in his reputation, or in his right of privacy or in the affections of his wife, domicil, residence and nationality are of greater importance than if the interest is a business or financial one, such as in the case of unfair competition, interference with contractual relations or trade disparagement. In these latter instances, the place of business is the more important contact. At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter place.

These contacts are of importance in situations where injury occurs in two or more states. So the place of the plaintiff's domicil, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law as to most issues in situations involving the multistate publication of matter that injures plaintiff's reputation (see § 150) or causes him financial injury (see § 151) or invades his right of privacy (see § 153).

In the case of other torts, the importance of these contacts depends largely upon the extent to which they are grouped with other contacts. The fact, for example, that one of the parties is domiciled or does business in a given state will usually carry little weight of itself. On the other hand, the fact that the domicil and place of business of all parties are grouped in a single state is an important factor to be considered in determining the state of the applicable law. The state where these contacts are grouped is particularly likely to be the state of the applicable law if either the defendant's conduct or the plaintiff's injury occurred there. This state may also be the state of the applicable law when conduct and injury occurred in a place that is fortuitous and bears little relation to the occurrence and the parties (see § 146, Comments *d*-*e*).

The importance of those contacts will frequently depend upon the particular issue involved (see Comment *d*).

The place where the relationship, if any, between the parties is centered. When there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship, the place where the relationship is centered is another contact to be considered. So when the plaintiff is injured while traveling on a train or while riding as a guest passenger in an automobile, the state where his relationship to the railroad or to the driver of the automobile is centered may be the state of the applicable law. This is particularly likely to be the case if other important contacts, such as the place of injury or the place of conduct or the domicil or place of business of the parties, are also located in the state (see, for example, § 146, Comment *e* and § 147, Comment *e*). On rare occasions, the place where the relationship is centered may be the most important contact of all with respect to most issues. A possible example is where the plaintiff in state X purchases a train ticket from the defendant to travel from one city in X to another city in X, but is injured while the train is passing for a short distance through state Y. Here X local law, rather than the local law of Y, may be held to govern the rights and liabilities of the parties.

Illustrations:

1. A and B are both domiciled in state X. A accepts B's invitation to accompany him as his guest on an automobile trip which is to start in X, go through several neighboring states and then end in X. B is insured against liability by an X insurance company. While in state Y, a neighboring state, B negligently drives the automobile off the road and A is injured. A brings suit to recover for his injuries in a court of state Z. B would not be liable to A under Y local law, since a Y statute provides that a guest passenger shall have no right of action against his host for negligently-caused injuries. B would be liable to A, however, under X local law. The first question for the Z court to determine is whether the interests of both X and Y would be furthered by application of their respective local law rules. This is a question that can only be determined in the light of the respective purposes of these rules (see Comment *c*). The interests of X would be furthered by application of the X rule if, as is probably the case, one purpose of this rule is to protect X passengers against negligent injury by X hosts. Whether the interests of Y would be furthered by application of the Y rule is more uncertain. If the only purpose of the Y rule is to protect Y insurance companies against collusion between host and guest, Y interests would not be furthered by application of the Y rule since an X insurance company is involved. In such a case, the Z court should permit A to recover against B by application of X local law. On the other hand, Y interests would presumably be furthered by application of the Y rule if at least one purpose of this rule is to protect hosts, while in Y, against the ingratitude of their guests. Among the questions for the Z court to determine in such a case would be whether X's interest in the application of its rule outweighs the countervailing interest of Y. Factors which would support an affirmative answer to this question are that A and B are both domiciled in X and that the relationship between them was centered in X. Other factors which would support application of the X rule are that the trip began and was to end in X and that it could be deemed fortuitous that the accident occurred in Y rather than in some other state. If it were to be found that a Y court would not have applied its rule to the facts of the present case, the arguments for applying the X rule would be even stronger, for it would then appear that, even in the eyes of the Y court, Y interests were not sufficiently involved to require application of the Y rule (see § 8, Comment *k*).

2. Same facts as in Illustration 1 except that the accident would not have occurred if the automobile had been equipped with a safety device required by Y local law, but not by the local law of X, and the question is whether B should be held liable to A as a result. In this case, Y's interests would be furthered by application of its rule since Y is clearly concerned with what are standards of acceptable conduct in Y. Among the other factors which would support application by the Z court of the Y rule in order to hold B liable are that conduct and injury occurred in Y and that Y has an obvious interest in the application of its rule. If it were to be found that an X court would have applied the Y rule to the facts of the present case, the arguments for applying the Y rule would be even stronger. For it would then appear that, even in the eyes of the X court, X interests were not sufficiently involved to require application of the relevant X rule (see § 8, Comment *k*).

Comment:

f. The tort involved. The relative importance of the contacts mentioned above varies somewhat with the nature of the tort involved. Thus, the place of injury is of particular importance in the case of personal injuries and of injuries to tangible things (see §§ 146-147). The same is true in the case of false imprisonment and of malicious prosecution and abuse of process (see § 155). On the other hand, the place of injury is less significant in the case of fraudulent misrepresentations (see § 148) and of such unfair competition as consists

of false advertising and the misappropriation of trade values. The injury suffered through false advertising is the loss of customers or of trade. Such customers or trade will frequently be lost in two or more states. The effect of the loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business. But this place may have only a slight relationship to the defendant's activities and to the plaintiff's loss of customers or trade. The situation is essentially the same when misappropriation of the plaintiff's trade values is involved, except that the plaintiff may have suffered no pecuniary loss but the defendant rather may have obtained an unfair profit. For all these reasons, the place of injury does not play so important a role for choice-of-law purposes in the case of false advertising and the misappropriation of trade values as in the case of other kinds of torts. Instead, the principal location of the defendant's conduct is the contact that will usually be given the greatest weight in determining the state whose local law determines the rights and liabilities that arise from false advertising and the misappropriation of trade values.

The principal location of the defendant's conduct is also the single most important contact in the case of interference with a marriage relationship (see § 154). In situations involving the multistate publication of matter that injures the plaintiff's reputation (see § 150) or causes him financial injury (see § 151) or invades his right of privacy (see § 153), the place of the plaintiff's domicil, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law.

g. Recovery on some theory other than tort. A plaintiff who cannot obtain recovery in tort under the law selected by application of the rule of this Section may sometimes obtain application of a more favorable law by relying upon some other basis of liability. Thus, the plaintiff may have the basis for a claim that the defendant is liable to him for his injuries on the ground of breach of contract. If so, the applicable law would be that selected by application of the rules of §§ 187-188. Conversely, a defendant who would be liable under the law selected by application of the rule of this Section may on occasion be able to escape liability because of some provision in a contract. A relationship of master and servant, carrier and passenger or vendor and vendee may provide a basis for a contention that the case should be characterized as one of contract rather than tort. In some situations, the same result will be reached irrespective of whether the problem is characterized as one of tort or of contract. As to characterization, see § 7.

h. Reference is to "local law" of selected state. The refernce is to the "local law" of the state of the applicable law and not to that state's "law," which means the totality of its law including its choice-of-law rules (see § 4). Values of certainty of result and of ease of application dictate that the forum should apply the local law of the selected state and not concern itself with the complications that might arise if that state's choice-of-law rules were applied. There is also no basis for supposing that fairness requires the forum to apply the choice-of-law rules of the selected state. To the extent that they may give thought to the possible consequences before engaging in conduct which may be tortious, persons would probably expect that the local law of the state selected by application of the present rule would be applied.

On the other hand, in judging a state's interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case. The fact that these courts would have applied this rule may indicate that an important interest of that state would be served if the rule were applied by the forum. Conversely, the fact that these courts would not have applied this rule may indicate that no important interest of that state would be infringed if the rule were not applied by the forum (see § 8, Comment *k*). It should be reiterated that in the torts area the forum will not apply the choice-of-law rules of another state. The forum will consult these rules, however, for whatever light these rules may shed upon the extent of the other state's interest in the application of its relevant local law rule.

Illustration:

3. In state X, A shoots at a bird and hits B, who is standing in state Y. B, who is domiciled in Y, brings suit against A in state Z. If the Z court determines that Y is the state of most significant relationship, the Z court will apply Y local law. In determining whether Y is the state of most significant relationship, the Z court may consider whether the Y courts would have applied their own local law or the local law of another state in deciding the particular issue.

Comment:

i. When rule of two or more states is the same. When certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state.

Illustration:

4. By conduct in state X, A injures B in state Y. X and Y have the same local law rules with respect to liability in tort for causing personal injuries. The case will be treated for the purposes of this Section as if conduct and injury had taken place in one state.

REPORTER'S NOTES

The rule of this Section was cited and applied in Schwartz v. Schwartz, 447 P.2d 254 (Ariz. 1968) (as contained in Tent. Draft, No. 9, 1964); Mitchell v. Craft, 211 So.2d 509 (Miss.1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo.1969); Brown v. Church of the Holy Name of Jesus, R.I. , 252 A.2d 176 (1969).

Comments b-d: The importance of the precise issue in the choice of the applicable law is made clear by Brandle v. General Tire and Rubber Company, 408 F.2d 116 (4th Cir. 1969); Gaither v. Myers, 404 F.2d 216 (D.C.Cir.1968); Manos v. Trans World Air Lines, Inc., 295 F.Supp. 1170 (N.D.Ill.1969); Satchwill v. Vollrath Company, 293 F.Supp. 533 (E.D.Wis.1968); Reich v. Purcell, 67 Cal.2d 551, 63 Cal.Rptr. 31, 432 P.2d 727 (1967); Abendschein v. Farrell, 162 N.W.2d 165 (Mich.App.1968); Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36 (1967); James v. Powell, 19 N.Y.2d 249, 225 N.E.2d 741 (1967) (two different issues in tort determined by the local law of two different states); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); Long v. Pan American World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796 (1965); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965); Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C.Cir. 1965), cert. den. 383 U.S. 943 (1966) (quoting rule as stated in Tentative Draft No. 9); Seguros Tepeyac, S.A. Compania Mexicana v. Bostrom, 347 F.2d 168 (5th Cir. 1965); Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Gianni v. Fort Wayne Air Service, 342 F.2d 621 (7th Cir. 1965); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); Woodward v. Stewart, R.I. , 243 A.2d 917 (1968); Marmon v. Mustang Aviation, Inc., Tex. , 430 S.W.2d 182 (1968) (dissenting opinion); Wilcox v. Wilcox, 26 Wis.2d 617, 133 N.W.2d 408 (1965). See also the authorities cited in the Reporter's Note to § 146.

The needs of the international and interstate systems were explicitly considered in Romero v. International Terminal Operating Co., 358 U.S. 354, 382-383 (1959) ("we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community"); Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) ("in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided"); Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, supra; Dym v. Gordon, supra; Kilberg v. Northeast Airlines, Inc., supra.

Cases emphasizing the importance of applying the local law of the state which has the dominant interest in the decision of the particular issue include those cited above and Armiger v. Real S.A. Transportes Aereos, 377 F.2d 943 (D.C.Cir.1967); McClure v. United States Lines Company, 368 F.2d 197 (4th Cir. 1966); Bowles v. Zimmer Manufacturing Company, 277 F.2d 868 (7th Cir. 1960); Erazo v. M/V Ciudad De Neiva, 270 F.Supp. 211 (D.Md. 1967); Gordon v. Parker, 83 F.Supp. 40 (D.Mass.1949), aff'd 178 F.2d 888 (1st Cir. 1949); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953); Graham v. General U.S. Grant Post No. 2665, 239 N.E.2d 856 (Ill.App.1968) (quoting and applying rule as stated in § 379 of Tent.Draft No. 9; 1964); rev. on other grounds, 43 Ill.2d 1, 248 N.E.2d 657 (1969); Fuerste v. Bemis, Iowa , 156 N.W.2d 831 (1968); Johnson v. St. Paul Mercury Insurance Co., 218 So.2d 375 (La.App.1969) quoting and applying rule as stated in § 379 of Tent.Draft No. 9, 1964); Wessling v. Paris, 417 S.W.2d 259 (Ky.1967); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Casey v. Manson Construction and Engineering Co., 428 P.2d 898 (Ore.1967) (quoting and applying rule as stated in Tentative Draft No. 9, 1964).

See also Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Thigpen v. Greyhound Lines, Inc., 110 Ohio App.2d 179, 229 N.E.2d 107 (1967); Heath v. Zellmer, 35 Wis.2d 578, 151 N.W.2d 664 (1967).

Compare Arnett v. Thompson, 433 S.W.2d 109 (Ky.1968) (Kentucky local law will be applied whenever permissible); Layne v. Layne, 433 S.W.2d 116 (Ky.1968) (same).

Comment c: Cases emphasizing the importance in the choice-of-law process of the purposes of the tort rules involved include those cited above. See also Cavers, The Choice-of-Law Process c. 2, 3, 5-7 (1965); Currie, Selected Essays on the Conflict of Laws (1963) (passim); Ehrenzweig, The Place of Acting in Intentional Multistate Torts, 36 Minn.L.Rev. 1 (1951); Morris, The Proper Law of a Tort, 64 Harv.L.Rev. 881 (1951); Rheinstein, The Place of Wrong, 19 Tulane L.Rev. 4 (1944); Weintraub, A Method for Solving Conflicts Problems -- Torts, 48 Cornell L.Q. 215 (1963).

Decisions involving injuries to intangible interests support the rule of this Section:

Defamation: Insull v. New York World-Telegram Corporation, 172 F.Supp. 615, 633 (N.D.Ill.1959), aff'd, 273 F.2d 166 (7th Cir. 1959) (stating that the law governing defamation is the local law of the "state which bears the most substantial relationship to all communications to third parties in all states in which communication occurs"); Palmisano v. News Syndicate Co., Inc., 130 F.Supp. 17, 20 (S.D.N.Y.1955) (where the court, in denying summary judgment under the local law of plaintiff's domicil, stated: "If the state of plaintiff's principal reputation is different from the state of his technical domicile, . . . and to make the case progressively stronger, the situs of the other contacts considered by legal writers are partially, primarily or wholly in the state of principal reputation, then the assumption implicit in the concept of domicile should give way to the facts."); Dale System v. General Teleradio, 105 F.Supp. 745, 749 (S.D.N.Y.1952) (explaining the choice of the applicable law on the ground that "a grouping of the dominant contacts in this case points to the internal law of New York").

Injurious Falsehood: Kemart Corporation v. Printing Arts Research Lab., Inc., 269 F.2d 375, 392-393 (9th Cir. 1959), cert. den. 361 U.S. 893 (1959) (explaining the choice of the applicable law as follows: "It is clear from the above that the State of California is the state having the closest relationship to the parties involved in the present litigation and has contacts with the subject matter of the litigation concerning the publications of the charge of patent infringement . . . equal or superior to any other state. Thus it is only fitting and proper that the law of California should be the substantive law governing this litigation."); Nagoya Associates, Inc. v. Esquire, Inc., 191 F.Supp. 379 (S.D.N.Y.1961) refusing summary judgment under the local law of any state chosen in accordance with rigid choice-of-law rules on the ground that the applicable law may appear from facts shown at the trial).

Alienation of Affections and Loss of Consortium: Gordon v. Parker, 83 F.Supp. 40 (D.Mass.1949), aff'd, 178 F.2d 888 (1st Cir. 1949) (applying the local law of the state where defendant acted rather than the local law of the state where plaintiff and his wife were domiciled, after weighing the relative interests of the two states); Conway v. Ogier, 1150 Ohio App. 251, 184 N.E.2d 681 (1961); cf. Albert v. McGrath, 278 F.2d 16 (D.C.Cir.1960) applying the local law of the state of conduct); Orr v. Sasseman, 239 F.2d 182 (5th Cir. 1956) (same).

Negligent delay in issuing insurance policy: "[W]e find it most reasonable, in these circumstances, to avoid a rigid rule and to pursue instead a more flexible approach which would allow the court in each case to inquire which state has the most significant relationships with the events constituting the alleged tort and with the parties." Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co., 319 F.2d 469, 473 (4th Cir. 1963).

As to unfair competition, see Note, 39 Temp.L.Q. 449 (1966).

Illustration No. 1 is based on Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

In recent maritime death cases, the courts have refused to distinguish between admiralty and other kinds of cases for choice-of-law purposes, and have followed the approach of Babcock v. Jackson, supra. Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1968); Thomas v. United Air Lines, 24 N.Y.2d 973 (1969). In earlier maritime cases the majority of courts applied the local law of the state where injury occurred to determine the rights and liabilities of the parties. Levinson v. Deupree, 345 U.S. 648 (1953); Skovgaard v. The Tungus, 358 U.S. 588 (1959); Hess v. United States, 361 U.S. 314 (1960); Harris v. United Air Lines, Inc., 275 F.Supp. 431 (S.D.Iowa 1967).

See generally Currie, The Choice Among State Laws in Maritime Death Cases, 21 Vand.L.Rev. 297 (1968).

Comment h: The courts, subject to a few rare exceptions, have not applied the renvoi doctrine in tort cases. The doctrine was expressly rejected in Haumschild v. Continental Casualty Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959). Some support for the application of the renvoi doctrine in tort cases is furnished by Truath v. Northeast Airlines, Inc., Civil No. 149-256 S.D.N.Y.; Fouts v. Fawcett Publications, Inc., 116 F.Supp. 535 (D.Conn.1953); Hazlitt v. Fawcett Publications, Inc., 116 F.Supp. 538 (D.Conn.1953); cf. Richards v. United States, 369 U.S. 1 (1962) (application of Federal Tort Claims Act).

In support of what is said in the second paragraph of this comment, see Maffatone v. Woodson, 99 N.J.Super. 559, 240 A.2d 693 (1968).

Comment i: See Geehan v. Monahan, 257 F.Supp. 278 (E.D.Wis.1966); Carpenter, Recent Cases of Interest, 41 Chi.B.Rec. 95 (1963); Leflar, True "False Conflicts", et Alia, 48 B.U.L.Rev. 164, 171-174 (1968).

The rule of this Section is approved in Moreland, Conflicts of Law -- Choice of Law in Torts -- A Critique, 56 Ky.L.J. 5 (1967). For criticisms of the rule, see Currie, Comments on Babcock v. Jackson, 63 Colum.L.Rev. 1233 (1963); Ehrenzwig, The 'Most Significant Relationship' in the Conflicts Law of Torts, 28 Law & Contemp.Prob. 700 (1963); Comment, The Second Conflicts Restatement of Torts: A Caveat, 51 Calif.L.Rev. 762 (1963). See Note, 54 Ky.L.J. 728 (1966) (suggesting that the local law of the place of injury should be applied except where that place is fortuitous).

Cross Reference

ALR Annotations:

Modern status of rule that substantive rights of parties to a tort action are governed by the law of the place of the wrong. 29 A.L.R.3d 603.

What law governs the right of a tortiously injured married woman to sue in her own name and the ownership of the cause of action. 97 A.L.R.2d 725.

Choice of law in application of automobile guest statutes. 95 A.L.R.2d 12.

What is place of tort causing personal injury or resultant damage or death, for purpose of principle of conflict of laws that law of place of tort governs. 77 A.L.R.2d 1266.

What law governs liability of manufacturer or seller for injury caused by product sold. 76 A.L.R.2d 130.

Conflict of laws with respect to the "single publication" rule as to defamation, invasion of privacy, or similar tort. 58 A.L.R.2d 650.

Conflict of laws as to survival or revival of wrongful death actions against estate or personal representative of wrongdoer. 17 A.L.R.2d 690.

Law of state where ticket was purchased, rather than law of state where accident occurred, as governing in action against carrier for death of passenger. 13 A.L.R.2d 650.

State or country deemed to be the place of tort causing personal injury or death, as regards principle that law of place of tort governs. 133 A.L.R. 260.

Right of personal representative appointed at the forum or in a jurisdiction where decedent was domiciled or where the tort occurred, to maintain action for death under foreign statute which provides that the action shall be brought by executor or administrator. 85 A.L.R. 1231, s. 162 A.L.R. 323.

Nature of differences between lex loci and lex fori which will sustain or defeat jurisdiction of a cause of action for death arising under the the law of another state or country. 77 A.L.R. 1311.

Power of court, in exercise of discretion, to refuse to entertain action for nonstatutory tort occurring in another state or country. 32 A.L.R. 6, s. 48 A.L.R.2d 800.

Extraterritorial operation of Workmen's Compensation Acts; conflict of laws. 28 A.L.R. 1345, s. 35 A.L.R. 1414, 45 A.L.R. 1234, 59 A.L.R. 735, 82 A.L.R. 709, 90 A.L.R. 119.

Applicability of state statutes and rules of law to actions under Federal Employers' Liability Act. 12 A.L.R. 693, s. 36 A.L.R. 917, 89 A.L.R. 693.

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§ 146 Personal Injuries

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

COMMENTS & ILLUSTRATIONS

Comment:

a. Scope of section. The rule of this Section applies to personal injuries that are caused either intentionally or negligently and to injuries for which the actor is responsible on the basis of strict liability.

b. Personal injury. As here used, a "personal injury" may involve either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another. On the other hand, injuries to a person's reputation (see §§ 149-150) or the violation of a person's right of privacy (see §§ 152-153) are not "personal injuries" in the sense here used.

c. Rationale. The rule of this Section calls for application of the local law of the state where the injury occurred unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. Whether there is such another state should be determined in the light of the choice-of-law principles stated in § 6. In large part, the answer to this question will depend upon whether some other state has a greater interest in the determination of the particular issue than the state where the injury occurred. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and of the particular issue (see § 145, Comments *c-d*). Particular issues are discussed in Title C (§§ 156-174). The likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties.

The rule furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law (see § 6).

d. When conduct and injury occur in same state. In the majority of instances, the actor's conduct, which may consist either of action or non-action, and the personal injury will occur in the same state. In such instances, the local law of this state will usually be applied to determine most issues involving the tort (see § 145, Comments *d-e* and §§ 156-166 and 172). This state will usually be the state of dominant interest, since the two principal elements of the tort, namely, conduct and injury, occurred within its territory. The state where the defendant's conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character. Similarly, the state where the injury occurs will, usually at least, have the dominant interest in determining whether the interest affected is entitled to legal protection. As to issues that are less likely to be governed by the local law of the state of conduct and injury, see §§ 167-171 and 173-174.

Situations will, however, arise where, although conduct and injury occur in the same state, some other state is that of most significant relationship and therefore the state of the applicable law even with respect to such issues, as those discussed in §§ 156-166 and 172, which would usually be determined by the local law of the

state of conduct and injury. A possible example is where the plaintiff, who is domiciled in state X, purchases a ticket in X from the defendant airline, which is incorporated and has its principal place of business in X, for transportation from one point in state X to another point in state X. A straight line between these two points runs for a short distance over the territory of state Y. While over state Y, the pilot commits an act of negligence which causes the plane to lose an engine and the plaintiff suffers severe fright and shock as a result. The plane does not crash and continues safely to its destination. Here the relationship between the parties is centered in X and both are far more closely related to X than to Y. Even though Y is the state of both conduct and injury, its relationship to the occurrence and the parties is insubstantial. X may therefore be the state of most significant relationship and, if so, it will be the state of the applicable law with respect to issues that would usually be determined by the local law of the state of conduct and injury.

[See Illustrations 1 and 2 to § 145.]

e. When conduct and injury occur in different states. On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort (see § 145, Comments *d*-*e*, and §§ 156-166 and 172). One reason for the rule is that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of the injury. Moreover, the place of injury is readily ascertainable. Hence, the rule is easy to apply and leads to certainty of result.

The local law of the state where the personal injury occurred is most likely to be applied when the injured person has a settled relationship to that state, either because he is domiciled or resides there or because he does business there. When, however, the injured person is domiciled or resides or does business in the state where the conduct occurred, there is a greater likelihood that this state is to be the state of most significant relationship and therefore the state of the applicable law with respect to issues that would usually be determined by the local law of the state of injury. The same may be true when the injury occurred in the course of an activity or ofa relationship which is centered in the state where the conduct occurred and when the injured person has no settled relationship to the state where the injury occurred.

The state where the conduct occurred is even more likely to be the state of most significant relationship when these two elements are combined, that is to say, when, in addition to the injured person's being domiciled or residing or doing business in the state, the injury occurred in the course of an activity or of a relationship which was centered there. One example is where the injury occurred in the course of an employment which is centered in the state where the conduct took place and where the injured person is domiciled.

As stated in Comment *c*, an important factor in determining which is the state of most significant relationship is the purpose sought to be achieved by the rule of tort law involved. If this purpose is to punish the tortfeasor and thus to deter others from following his example, there is better reason to say that the state where the conduct occurred is the state of dominant interest and that its local law should control than if the tort rule is designed primarily to compensate the victim for his injuries (see § 145, Comment *c*). In the latter situation, the state where the injury occurred would seem to have a greater interest than the state of conduct. This factor must not be over-emphasized. To some extent, at least, every tort rule is designed both to deter other wrongdoers and to compensate the injured person. Undoubtedly, the relative weight of these two objectives varies somewhat from rule to rule, but in the case of a given rule it will frequently be difficult to determine which of these objectives is the more important.

By way of further example, if the relevant local law rule of the state where the injury occurred would impose absolute liability upon the defendant, it is probable that this state is seeking by means of this rule to insure compensation for the injured person. If so, the interests of this state would be furthered by having its rule applied. If, on the other hand, the defendant would enjoy a special immunity for his conduct under the local law of the state of injury, it is not clear that the interests of this state would be furthered by application of its rule. The purpose of such a rule is presumably to encourage persons to engage in the particular conduct within the state. But in the situation here considered the defendant's conduct took place in another state and hence might be thought not to come within the purpose of the rule of the state of injury. If, however, the relevant local law rule of the state of conduct gave the defendant a special immunity, the interest of this state in having its rule applied would be clear.

As to the situation where the complained-of conduct was either required or privileged in the state where it was done, see § 163, Comment *a*.

As to issues that are less likely to be governed by either the local law of the state of conduct or of injury, see §§ 167-171 and 173-174.

On rare occasions when conduct and injury occur in different states, a state which is neither the state of conduct nor of injury may nevertheless be that of most significant relationship and therefore the state of the applicable law even with respect to such issues, as those discussed in §§ 156-166 and 172, which would usually be determined by the local law of either the state of injury or of conduct. A possible example is where the plaintiff, who is domiciled in state X, purchases a ticket inX from the defendant airline, which is incorporated and has its principal place of business in X, for transportation from one point in state X to another point in state X. A straight line between these two points runs for a short distance over the territory of states Y and Z. While over state Y, the pilot commits an act of negligence which causes the plane to lose an engine while over state Z and the plaintiff suffers severe fright and shock as a result. The plane does not crash and continues to its destination. Here the relationship between the parties is centered in X and both are far more closely related to X than to Y or Z. The relationship of both Y and Z to the occurrence and the parties is insubstantial. X may therefore be the state of most significant relationship, and, if so, it will be the state of the applicable law, at least as to most issues.

f. As to recovery on some theory other than tort, see § 145, Comment *g*.

g. For reasons stated in § 145, Comment *h*, the reference is to the "local law" of the state of the applicable law and not to that state's "law," which means the totality of its law including its choice-of-law rules.

h. As to the situation where the local law rule of two or more states is the same, see § 145, Comment *i*.

REPORTER'S NOTES

See generally the authorities cited in the Reporter's Note to § 145.

Comment d: With respect to issues relating to standards of conduct, the local law of the state of conduct and injury has been invariably applied.

For cases in which the local law of the state of conduct and injury has been applied to issues other than standards of conduct, see Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C.Cir.1965) cert. den. 383 U.S. 943 (1966) (finding for defendant with respect to measure of damages, quoting § 379 of Tent. Draft No. 9, 1964); Thieman v. Johnson, 257 F.2d 129 (8th Cir.1958) (finding for defendant with respect to applicability of automobile guest statute, although plaintiff was ultimately allowed to recover); Gatenby v. Altoona Aviation Corp., 259 F.Supp. 573 (W.D.Pa.1966) (finding for plaintiff with respect to measure of damages, citing § 379 of Tent. Draft No. 9, 1964); Braughton v. United Airlines, Inc., 189 F.Supp. 137 (W.D.Mo.1960) (choice of wrongful death statute); Desch v. Reeves, 163 F.Supp. 213 (M.D.N.C.1958) (finding for defendant with respect to applicability of an automobile guest statute); Holtz v. Elgin, Joliet & Eastern Ry. Co., 121 Ind.App. 175, 98 N.E.2d 245 (1951) (finding for defendant with respect to proximate cause); Wilcox v. Swenson, 324 S.W.2d 664 (Mo.1959) (finding for plaintiff with respect to applicability of an automobile guest statute); Casey v. Manson Construction & Engineering Co., 247 Or. 274, 428 P.2d 898 (1967) (finding for defendant with respect to recovery for loss of consortium, quoting § 379 of Tent. Draft No. 9, 1964); Bednarowicz v. Vetrone, 400 Pa. 385, 162 A.2d 687 (1960) (finding for defendant with respect to applicability of an automobile guest statute); Conklin v. Horner, 38 Wis.2d 468, 157 N.W.2d 579 (1968) (finding for plaintiff with respect to applicability of an automobile guest statute, citing Tent. Draft No. 9, 1964).

For cases in which the local law of a state other than that of conduct and injury was applied to issues other than standards of conduct, see McClure v. United States Lines Co., 368 F.2d 197 (4th Cir.1966) (finding for defendant with respect to vicarious liability, citing §§ 379 and 390 of Tent. Draft No. 9, 1964); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C.Cir.1965) (finding for plaintiff with respect to vicarious liability); Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965) finding for defendant with respect to plaintiff's standing to sue under wrongful death statute, citing § 379 of Tent. Draft No. 9, 1964); Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968) (finding for plaintiff with respect to interspousal immunity; citing § 379 of Tent. Draft No. 9, 1964); Wartell v. Formusa, 34 Ill.2d 57, 213 N.E.2d 544 (1966) (interspousal immunity; citing § 390 of Tent. Draft No. 9, 1964); Fuerste v. Bemis, Iowa , 156 N.W.2d 831 (1968) (finding for defendant with respect to applicability of an automobile guest statute, citing § 379 of Tent. Draft No. 9, 1964); Fabricius v. Horgen, 257

Iowa 268, 132 N.W.2d 410 (1965) (applying measure of damages of parties' domicile contrary to plaintiff's contention, quoting § 379 of Tent. Draft No. 9, 1964); Wessling v. Paris, 417 S.W.2d 259 (Ky.1967) (finding for plaintiff with respect to applicability of an automobile guest statute, quoting § 379 of Tent. Draft No. 9, 1964); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968) (finding for plaintiff with respect to applicability of an automobile guest statute); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966) (finding for plaintiff with respect to applicability of an automobile guest statute); Kennedy v. Dixon, 439 S.W.2d 173 (Mo.1969) (finding for plaintiff with respect to applicability of an automobile guest statute, quoting § 145 of Proposed Official Draft); Clark v. Clark, 107 N.M. 351, 222 A.2d 205 (1966) (finding for plaintiff with respect to guest statute; quoting § 379 of Tent. Draft No. 9, 1964); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967) (finding for plaintiff with respect to applicability of an automobile guest statute, quoting § 379 of Tent. Draft No. 9, 1964 and comment [d]); Mullane v. Stavola, 101 N.J.Super. 184, 243 A.2d 842 (1968) (finding for plaintiff with respect to applicability of an automobile guest statute); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, (1969) finding for plaintiff with respect to applicability of an automobile guest statute; Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380 (1966) (finding for plaintiff with respect to applicability of an automobile guest statute); Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36 (1967) (finding for plaintiff with respect to vicarious liability and application of wrongful death statute); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963) (finding for plaintiff with respect to applicability of an automobile guest statute, citing § 379 of Tent. Draft No. 8 (1963); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1960) (finding for plaintiff with respect to measure of damages); Griffith v. United Airlines, 416 Pa. 1, 203 A.2d 796 (1964) (finding for plaintiff with respect to measure of damages; citing § 379 of Tent. Draft No. 9, 1964); Woodward v. Stewart, R.I. , 243 A.2d 917 (1968) cert. dismissed 393 U.S. 957 (1968); (finding for plaintiff on issue of choice of wrongful death statute, citing § 379 of Tent. Draft No. 9, 1964); Wilcox v. Wilcox, 26 Wis.2d 617, 133 N.W.2d 408 (1965) (finding for plaintiff with respect to applicability of an automobile guest statute, quoting § 379 of Tent. Draft No. 9, 1964).

Comment e: The local law of the state of injury has usually been applied to particular issues in a case, although the conduct occurred elsewhere. See e. g., Schultz v. Tecumseh Products, 310 F.2d 426 (6th Cir. 1962) (finding for defendant with respect to necessity of privity of contract in products liability actions); Boland v. Love, 222 F.2d 27 (D.C.Cir.1955) (finding for plaintiff with respect to causation); Diesbourg v. Hazel-Atlas Glass Co., 176 F.2d 410 (3d Cir. 1949) (applicable law in products liability action); Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940) (finding for plaintiff with respect to negligence per se); Smith v. Piper Aircraft Corp., 18 F.R.D. 169 (M.D.Pa.1955) (standard of care); Cameron v. Vandergriff, 53 Ark. 381, 13 S.W. 1092 (1890); Le Forest v. Tolman, 117 Mass. 109 (1875) (finding for defendant with respect to applicability of statute affixing liability); Hughes Provision Co. v. La Mear Poultry & Egg. Co., 242 S.W.2d 285 (Mo.App.1951) (finding for plaintiff with respect to negligence per se); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949); Fischl v. Chubb, 30 Pa.D. & C. 40 (1937) (finding for plaintiff with respect to absolute liability); see Carlson v. Chisholm-Moore Hoist Corp., 281 F.2d 766 (2d Cir. 1960), cert. den. 364 U.S. 883. In the following decisions applying the local law of the state of injury, the place of conduct was not specified, but on the facts it appears probable that the conduct occurred in another state: Wright v. Carter Products, 244 F.2d 53 (2d Cir. 1957); Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957), cert. den. 355 U.S. 815 (tort liability of a manufacturer to one not in privity); Anderson v. Linton, 178 F.2d 304 (7th Cir. 1949) (finding for plaintiff with respect to applicable law of manufacturer's liability); Haberly v. The Reardon Co., 319 S.W.2d 859 (Mo.1958); Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948) (finding for defendant with respect to duty of care owed parties not in direct privity).

In more recent cases in which conduct and injury took place in different states, the courts have not followed a mechanical approach to choice of law. In Bowles v. Zimmer Mfg. Co., 277 F.2d 868 (7th Cir. 1960), a breach of warranty action, the court applied the local law of the state with which the events were "most closely associated", which was also the state where the injury was sustained; see also Gaither v. Myers, 404 F.2d 216 (D.C.Cir.1969) (finding for plaintiff with respect to proximate cause by applying local law of the state of conduct, citing § 145 of the Proposed Official Draft); Wojciuk v. United States Rubber Co., 19 Wis.2d 224, 122 N.W.2d 737 (1963) (finding for defendant with respect to requirement of timely notice of breach of warranty by applying the local law of the state of conduct, citing § 379 of Tent. Draft No. 8, 1963).

In the above cases it appears that the parties had their domicil or place of business in different states. In a case in which the state of conduct was also the domicil of both parties, the local law of this state, rather than that of the state of injury, was applied. Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957). Similarly, federal law was applied to an action where conduct in the United States resulted in injury on the high seas aboard a Venezuelan airplane, and where both parties were United States citizens. Noel v. Airponents, Inc., 169 F.Supp. 348 (D.N.J.1958).

In an action against the United States, the court, in applying the local law of the state of the "most significant relationship," applied the local law of plaintiff's domicile, where conduct and injury took place in two other states. Merchants National Bank & Trust Co. v. United States, 272 F.Supp. 409 (D.N.D.1967) (finding for plaintiff with respect to measure of damages).

To the effect that the basic purpose of the rule of tort law involved is a significant factor in the selection of the applicable law, see the cases cited in the Reporter's Note to § 145. See also Zucker v. Vogt, 200 F.Supp. 340 (D.Conn.1961), aff'd 329 F.2d 426 (2d Cir. 1964) applying the Dram Shop Act of Connecticut, where defendant acted, to an injury in New York on the grounds that to deny recovery would defeat the public policy of both states. Cf. Osborn v. Borchetta, 20 Conn.Supp. 163, 129 A.2d 238 (Super.Ct.1956) holding a New York liquor dealer liable under the New York Dram Shop Act without discussion of choice of law.

For views favoring the application of the local law of the state where the conduct occurred, see Ehrenzweig, The Place of Acting in Intentional Multistate Torts, 36 Minn.L.Rev. 1 (1951); Rheinstein, The Place of Wrong, 19 Tulane L.Rev. 4 (1944). For a general discussion of the law governing personal injuries, see Annotation, 77 A.L.R.2d 1266 (1961). As to choice of law in the application of automobile guest statutes, see Annotation, 95 A.L.R.2d 12 (1964).

Cross Reference

ALR Annotations:

What law governs the right of a tortiously injured married woman to sue in her own name and the ownership of the cause of action. 97 A.L.R.2d 725.

What is place of tort causing personal injury or resultant damage or death, for purpose of principle of conflict of laws that law of place of tort governs. 77 A.L.R.2d 1266.

What law governs liability of manufacturer or seller for injury caused by product sold. 76 A.L.R.2d 130.

Conflict of laws as to right of injured person to maintain direct action against tort-feasor's automobile liability insurer. 16 A.L.R.2d 881.

State or country deemed to be the place of tort causing personal injury or death, as regards principle that law of place of tort governs. 133 A.L.R. 260.

Choice of law in application of automobile guest statutes. 95 A.L.R. 12.

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§ 156 Tortious Character of Conduct

(1) The law selected by application of the rule of § 145 determines whether the actor's conduct was tortious.

(2) The applicable law will usually be the local law of the state where the injury occurred.

COMMENTS & ILLUSTRATIONS

Comment:

a. The term "conduct," as used in the rule of this Section, includes both action and non-action.

b. Rationale. The law selected by application of the rule of this Section determines whether the actor's conduct satisfied required standards of behavior or, on the other hand, whether this conduct was tortious. If the conduct is determined to have been tortious, the further question whether the actor should be held liable will depend upon whether his conduct caused injury (see § 160) and upon still other factors, such as whether the plaintiff was contributorily negligent or assumed the risk (see §§ 164-165).

The determination of the state of the applicable law should be made in the light of the choice-of-law principles stated in § 6. As stated in § 145, Comment *d*, the local law of the state where the conduct and the injury occurred will usually be applied to determine whether the actor's conduct satisfied required standards of acceptable behavior. If conduct and injury occurred in different states, the local law of the state of injury will be applied unless some other state, which would usually be the place of conduct, has a more significant relationship to the occurrence and the parties with respect to the particular issue (see § 157). This is so for the reason, among others, that persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state on account of the injury.

c. Injuries intentionally caused. The law selected by application of the rule of § 145 determines the circumstances under which the actor will be held liable for an intentionally-caused injury. It is for this law to decide whether the actor will be held liable for injury caused by an intentional failure to act or whether he will be liable only for injury caused by affirmative action. This law also determines the time when the actor's intention is material, such as whether the actor must intend to cause injury at the time he does the act or at the time when the force set in motion by the act causes the injury. This law will usually provide that the time of the act, rather than the time when the result of the act takes place, is the time when the actor's intention is material.

If, under the applicable law, the actor is liable only for intentional injuries, he will not be held liable for injury caused either by his negligence or by his recklessness.

d. Injuries negligently or recklessly caused. The law selected by application of the rule of § 145 determines the circumstances under which the actor will be held liable for injury he has caused negligently. It is for this law to decide what standard of care shall be applied in determining whether the actor was negligent. This law therefore determines whether the applicable standard is how the reasonable man would have conducted himself under the circumstances of the particular case or whether the standard is more precise, such as that a motorist must stop, look and listen before he crosses a railroad track or that an employer must make use of a certain safeguard for the protection of his employees (see § 157).

The law selected by application of the rule of § 145 likewise determines the circumstances under which the actor will be held liable only for injury he has caused by some form of aggravated negligence or by

recklessness. It is for this law to decide what conduct falls within the scope of the required degree of aggravated negligence and what conduct constitutes recklessness.

e. Liability without fault. The law selected by application of the rule of § 145 determines the circumstances under which the actor will be held liable for injury he has caused without fault on his part, namely, without negligence and without any intention to cause the harm. Thus, it is for this law to decide whether one who keeps a wild animal, or who maintains an artificial reservoir filled with water or who conducts blasting operations is absolutely liable for any injury caused by these activities.

Illustration:

1. By blasting done in state X, A causes damage to B's house in state Y. A is domiciled in X and B is domiciled in Y. A was not negligent and for this reason would not be liable to B under X local law. A would, however, be liable under Y local law which imposes absolute liability for damage done by blasting. B brings suit against A in a court of state Z. The first question for the Z court to determine is whether the interests of X and Y would be furthered by application of their respective local law rules. Y's interests would be furthered by application of its rule of absolute liability which was surely intended to provide compensation for damage done in Y. X interests would also probably be furthered by application of its rule which presumably was intended to encourage, or at least not to discourage, blasting operations in X. Under the circumstances, the Z court should hold A liable to B by application of the Y rule for the reason, among others, that X has no greater interest in the application of its rule than has Y and that ordinarily, at least, one should not be allowed to escape liability imposed upon him by the local law of the state where his act caused injury. If it were to appear that an X court would have applied the Y rule of absolute liability to the facts of the present case, the arguments for applying the Y rule would be even stronger. For it would then appear that, even in the eyes of the X court, X interests were not sufficiently involved to require application of the X rule (see § 8, Comment *k*).

Comment:

f. Exceptions to normal liability. Whether the actor is relieved from ordinary tort liability may, on occasion, depend upon some law other than that which determines whether his conduct is tortious. This is particularly likely to be true in a situation where the actor claims to be relieved from liability because of his particular relationship to the plaintiff, and the parties are domiciled in a state other than that in which the tortious conduct and resulting injury occurred. Suppose, for example, that A and B are both domiciled in X, that B takes A as his guest on an automobile trip on which the parties plan to go from X through state Y and a number of other states and then finally return to X, and that A is injured in an automobile accident in Y. In this situation, Y local law would usually be applied to determine whether B's conduct was negligent or otherwise tortious (see § 146). On the other hand, the local law of X, the state where the parties are domiciled, may be applied to determine whether B is entirely immune from tort liability to A because of the guest-passenger relationship or is liable to A only for gross negligence or for some other form of aggravated conduct (see § 145, Comment *d*). Similarly, the question of intra-family immunity will usually be determined by the local law of the state of the parties' domicil (see § 169). Also whether a charitable corporation can successfully assert the defense of charitable immunity may be determined by the local law of the state where the plaintiff was domiciled and the defendant incorporated and where the relationship between them is centered rather than by the local law of the state where conduct and injury occurred (see § 168).

Questions such as these involve other considerations than the tortious character of the actor's conduct. Hence as to them the state of most significant relationship may be different.

REPORTER'S NOTES

See generally the authorities cited in the Reporter's Note to §§ 145-147.

The Illustration is based on Dallas v. Whitney, 118 W.Va. 106, 188 S.E. 766 (1936).

Cross Reference

ALR Annotations:

Choice of law in application of automobile guest statutes. 95 A.L.R.2d 12.

Digest System Key Numbers:

Negligence 103 1/2

Torts 2

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Restat 2d of Conflict of Laws, § 157

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§ 157 Standard of Care

(1) The law selected by application of the rule of § 145 determines the standard of care by which the actor's conduct shall be judged.

(2) The applicable law will usually be the local law of the state where the injury occurred.

COMMENTS & ILLUSTRATIONS

Comment:

a. Rationale. Under the rule of § 156, the law selected by application of the rule of § 145 determines the circumstances under which the actor's conduct is tortious or, stated in other words, is potentially liability-creating. This law therefore decides what standard of care shall be applied in determining whether the actor's conduct was tortious, such as the general standard of how a reasonable man would have conducted himself under the circumstances of the particular case, or a more precise standard set forth in a statute, ordinance or common law rule. The present rule and its Comments amplify what is said in § 156.

b. Application of general standard. The forum will apply any general standard of care that is prescribed by the applicable law in determining whether or not the actor was negligent. Such a general standard will usually be found in a common law rule. Typically, it will be how would the reasonable man have conducted himself in the circumstances of this particular case.

c. Application of precise standard. The forum will apply any precise standard of care that is prescribed by the applicable law in determining whether or not the actor was negligent. Such a precise standard of care may be established by a statute or ordinance. If, for example, the actor's conduct involved a violation of a criminal statute, the applicable law will determine (1) whether a tort standard of care can appropriately be derived from the particular enactment and, if so, (2) whether the necessary conditions for doing so have been met, such as that the plaintiff belongs to the class of persons the statute was designed to protect and that the harm which occurred was of the sort the statute was designed to prevent. The applicable law will also determine whether violation of such a statute or ordinance is conclusive evidence of negligence or prima facie evidence of negligence or merely some evidence of negligence which the jury is free to accept or reject as it sees fit. Such a precise standard of care may also be established by common law rule. So, if by common law rule in the state of the applicable law a motorist is negligent as a matter of law if he crosses a railroad track without stopping, looking and listening, the court will charge the jury to this effect, even though under the local law of the forum the question whether the motorist was negligent in failing to stop, look and listen would be for the jury to decide. In determining, on the other hand, whether the motorist did in fact stop, look and listen, the court will apply its own rules of evidence and its own judicial procedures.

d. Source of standard. The determination of the state of the applicable law should be made in the light of the choice-of-law principles stated in § 6. If the wrongful conduct and the resulting injury occur in the same state, the local law of this state will usually be applied to determine the appropriate standard of care (see § 145, Comment *e*). If conduct and injury occur in different states, the local law of the state where the injury occurred will be applied to determine the standard of care unless some other state, which would usually be the state of conduct, has a more significant relationship to the occurrence and the parties with respect to the particular issue.

Complexities may arise when conduct and injury occur in different states and when the applicability of a precise standard of care is in question. It may be claimed that such a standard should be derived from a statute, ordinance or a common law rule which requires certain conduct or prohibits certain conduct. The statute, ordinance or common law rule may belong to the state where the injury occurred or to the state where the conduct occurred. By way of example, suppose that an engine of the A railroad company emits sparks in state X that set fire to B's house in state Y, and that B brings suit against A to recover for his loss in state Z. Suppose further that the sparks would not have been emitted if the engine had been equipped with a certain safety device and that X has a statute which makes it a criminal offense for a railroad to operate its trains without such a device. If the X courts would have held on the facts of the case that the A railroad was negligent as a matter of law by reason of its violation of the X statute, there is good reason why the Z court should do the same. X has a natural interest in regulating conduct that takes place within its territory and if it chooses to brand certain conduct as negligent as a matter of law, there is good reason for the forum to do the same.

Illustrations:

1. The A company, a food distributor incorporated in state X, ships cans of meat from X into state Y. B buys one of these cans in Y from a retailer and becomes sick from eating the contents which are impure. A Y statute makes it a criminal offense to sell unwholesome food, and the Y courts have held that violation of this statute is conclusive evidence of negligence in a tort action for damages. X has no such statute. B brings suit against A to recover for his injuries in a court of state Z. The first question for the Z court to determine is whether the interests of X and Y would be furthered by application of their respective local law rules. If the Y courts would have found that the Y statute provided the source of a precise standard of care applicable to the present case and would have held A negligent as a matter of law, it is apparent that Y's interests would be furthered by application of its rule, which was presumably intended (a) to insure, insofar as possible, the award of compensation for injuries suffered in Y, or (b) to deter the sale of unwholesome food in Y, or (c) to accomplish both of these objectives. X's failure to enact a statute similar to that of Y, to the extent that any purpose can be attributed to this failure, may have been to encourage food distributors to do business in X. Under the circumstances, the Z court should hold A liable to B by application of the Y rule for the reason, among others, that X certainly has no greater interest in the application of its rule than has Y, and that ordinarily, at least, one should not be allowed to escape liability imposed upon him by the local law of the state where his act caused injury. If it were to appear that an X court would have applied the Y rule to the facts of the present case, the arguments for applying the Y rule would be even stronger. For it would then appear that, even in the eyes of the X court, X interests were not sufficiently involved to require application of the X rule (see § 8, Comment *k*).

2. A statute of state Y makes it a criminal offense for a locomotive to be operated without an efficient spark arrester. State X has no such statute. Sparks from a locomotive of the A railroad company, while being operated in X without a spark arrester, set fire to B's house in Y. B sues A in state Z. The Z court should follow the same approach as that outlined in Illustration 1. If the Y courts would have found that the Y statute provided the source of a precise standard of care applicable to the present case and would have held A negligent as a matter of law, the Z court should hold A liable by application of this statute for reasons stated in Illustration 1. *Cf.* § 163.

Comment c: See Bresnahan v. Proman, 312 Mass. 97, 43 N.E.2d 336 (1942); Weir v. New York, N. H. & H. R. R. Co., supra; Pilgrim v. MacGibbon, supra; see also cases cited below in support of Comment d.

Comment d: In several cases, a precise standard was found in a statute of the state of injury even though the conduct took place in another state. See, e. g., Hunter v. Derby Foods, 110 F.2d 970 (2d Cir. 1940); Hughes Provision Co. v. La Mear Poultry & Egg Co., 242 S.W.2d 285 (Mo.App.1951). On the other hand, a court of the state of injury has found a precise standard in a statute of the state of conduct. Waynick v. Chicago's Last Department Store, 269 F.2d 322 (7th Cir. 1959), cert. den. 362 U.S. 903 (1960).

Illustration 1 is based on Hunter v. Derby Foods, supra.

REPORTER'S NOTES

Comment b: See Weir v. New York, N. H. v. H. R. R. Co., 340 Mass. 66, 162 N.E.2d 793 (1959); Pilgrim v. MacGibbon, 313 Mass. 290, 47 N.E.2d 299 (1943); Peterson v. Boston & Maine Railroad, 310 Mass. 45, 36 N.E.2d 701 (1941).

Cross Reference

ALR Annotations:

What law governs liability of manufacturer or seller for injury caused by product sold. 76 A.L.R.2d 130.

Digest System Key Numbers:

Automobiles 229 1/2

Negligence 103 1/2

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Restat 2d of Conflict of Laws, § 159

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§ 159 Duty Owed Plaintiff

(1) The law selected by application of the rule of § 145 determines whether the actor owed a duty to the injured person and whether this duty was violated.

(2) The applicable law will usually be the local law of the state where the injury occurred.

COMMENTS & ILLUSTRATIONS

Comment:

a. Rationale. Before the actor can be held liable to another in tort, it is necessary to show that the actor owed the other a duty and that this duty was violated. Whether the actor owed the other a duty and whether this duty was violated are questions that are determined by the law selected by application of the rule of § 145.

By way of example, this law determines whether in order to recover for harm caused by the actor's negligence it is necessary that the person or thing harmed be within the zone of danger or, stated in other words, that the actor could reasonably have foreseen that his act might cause harm to the person or thing (see Restatement of Torts (Second), § 281). The same law determines the circumstances under which a manufacturer or contractor is liable for harm caused by his negligence to a third person, such as an ultimate consumer, with whom he has no contractual relationship. Likewise, this law determines the situations in which one person owes another person an affirmative duty of care and will be held liable for harm suffered by the latter person on account of his failure to act.

The determination of the state of the applicable law should be made in the light of the choice-of-law principles stated in § 6. If the wrongful conduct and resulting injury occur in the same state, the local law of this state will usually be applied to determine whether the defendant owed the plaintiff a duty and, if so, whether this duty was violated (see, e. g., §§ 146, 147, 149). If conduct and injury occur in different states, the local law of the state of injury will be applied unless some other state, which would usually be the place of conduct, has a more significant relationship to the occurrence and the parties with respect to the particular issue.

Illustration:

1. The A company manufactures automobiles in state X. In the normal course of business, A sells an automobile to a retailer in state Y who in turn sells it to B. While in state Y, B is injured when the automobile goes off the road by reason of a defective steering mechanism. A would be absolutely liable to B for the latter's injuries under Y local law. Under the local law of X, however, A would only be liable if it were negligent. B brings suit to recover for his injuries in a court of state Z. The first question for the Z court to determine is whether the interests of X and Y would be furthered by application of their respective local law rules. This is a question that can only be determined in the light of the respective purposes of these rules (see § 145, Comment *c*). Y's interests would almost surely be furthered by application of its rule, since this rule was undoubtedly intended to provide compensation for injuries suffered in Y. X's failure to enact a rule similar to that of Y, to the extent that any purpose can be attributed to this failure, may have been to encourage automobile manufacturers to do business in X. Under the circumstances, the Z court should hold A liable to B by application of the Y rule for the reason, among others, that X certainly has no greater interest in the application of its rule than has Y and that ordinarily, at least, one should not be allowed to escape liability imposed upon him by the local law of the state where his act caused injury. If it were to appear that an X court

would have applied the Y rule to the facts of the present case, the arguments for applying the Y rule would be even stronger. For it would then appear that, even in the eyes of the X court, X interests were not sufficiently involved to require application of the X rule (See, § 8, Comment *k*).

Comment:

b. Exceptions to normal liability. Sometimes the actor may claim that because of his relationship to another he is immune from all tort liability to the other or else will be liable to the other only for some aggravated form of conduct, such as recklessness or gross negligence. So a husband may claim that he is immune from tort liability to his wife and the driver of an automobile may claim that he can only be held liable to a guest passenger for intentional injuries or for some aggravated form of negligence. In such circumstances, the state where the parties are domiciled and where their relationship is centered may be the state of most significant relationship with respect to this issue. If so, its local law will be applied to determine whether the actor is excused from normal tort liability because of the relationship (see § 145, Comment *d*; § 156, Comment *f* and § 169).

REPORTER'S NOTES

See Wright v. Carter Products, 244 F.2d 53 (2d Cir. 1957); Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957); Anderson v. Linton, 178 F.2d 304 (7th Cir. 1949); Diesbourg v. Hazel-Atlas Glass Co., 176 F.2d 410 (3d Cir. 1949); Zarski v. Craemer, 317 Mass. 744, 59 N.E.2d 704 (1945); Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958); Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949); but see Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932), in which the local law of the state of conduct was applied to hold the defendant liable in a case in which defendant owed plaintiff no duty under the local law of the place of injury.

Cross Reference

ALR Annotations:

What law governs liability of manufacturer or seller for injury caused by product sold. 76 A.L.R.2d 130.

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Negligence 103 1/2

Torts 2

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Restat 2d of Conflict of Laws, § 160

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§ 160 Legal Cause

(1) The law selected by application of the rule of § 145 determines whether an act or omission is the legal cause of an injury.

(2) The applicable law will usually be the local law of the state where the injury occurred.

COMMENTS & ILLUSTRATIONS

Comment:

a. Meaning of legal cause. The words "legal cause" denote the fact that the manner in which the actor's tortious conduct has resulted in another's injury is such that the law holds the actor responsible therefor unless there is some defense to liability (see Restatement of Torts (Second), § 9).

b. Rationale. A person will not be held liable in tort unless there was an adequate causal relation between his act or omission and the resulting injury. The existence of such a causal relation presents questions both of fact and of law. The first inquiry is whether the act or omission was a cause in fact of the injury, or, stated in other words, whether the injury would not have occurred but for the actor's conduct. This is a question of fact which will be determined in accordance with the local procedures of the forum (see Chapter 6). Even though the act or omission was a "but for" cause of the injury, the actor will not be held liable unless his conduct was also a legal cause of the injury, which means that the connection between conduct and injury was sufficiently close for the law to hold the actor responsible for the injury (see Restatement of Torts (Second), §§ 9, 430-431). The existence of legal causation presents a question of law which will be determined by the law selected by application of the rule of § 145. This law decides, for example, in what circumstances an actor is liable for unforeseeable results which may stem directly from his conduct or else may be the combined product of the actor's conduct and of one or more intervening causes, which in turn may either be foreseeable or unforeseeable.

There are also situations where an actor will be held liable for an injury which would have occurred even if he had not conducted himself in the way that he did. Whether a given case involves such a situation likewise presents a question of law which will be determined by the law selected by application of the rule of § 145. This law decides, for example, whether one who sets a fire which combines with another fire of unknown origin to burn plaitniff's house is liable for the destruction of the house even though the other fire, if it had been the only fire, would have consumed the house of its own force.

The determination of the state of the applicable law should be made in the light of the choice-of-law principles stated in § 6. If the wrongful conduct and resulting injury occur in the same state, the local law of this state will usually be applied to determine whether the defendant's wrongful conduct was a legal cause of the plaintiff's injury (see, e. g., §§ 146, 147, 149). If conduct and injury occur in different states, the local law of the state of injury will be applied unless some other state, which would usually be the place of conduct, has a more significant relationship to the occurrence and the parties with respect to the particular issue.

Illustrations:

1. In state X, grass in A's field is set on fire by sparks negligently allowed to escape from a locomotive operated by the B railroad company. The fire spreads from A's field in X to C's field in state Y and burns C's barn. Under X local law, the burning of C's barn is regarded as too remote for recovery; the contrary is true under the local

law of Y. C sues B in state Z. The Z court should follow the same approach as that outlined in the Illustration to § 159. For reasons stated in this Illustration, the Z court should hold B liable by application of the Y rule.

2. In state X, A negligently sets fire to a house that is situated close to the border of state Y. Fearing that the fire will spread to a house in Y in which she is at the time, B trips over a chair while seeking to leave the house as quickly as possible. B suffers a miscarriage as a result. Under X local law, B could not recover from A because her injury would be deemed unforeseeable. Y local law, on the other hand, does not limit a tortfeasor's liability to foreseeable injuries, B brings suit to recover for her injuries in a court of state Z. The Z court should follow the same approach as that outlined in the Illustration to § 159. For reasons stated in this Illustration, the Z court should hold A liable by application of the Y rule.

REPORTER'S NOTES

What constitutes legal cause has been determined in accordance with the local law of the state where the conduct and the injury occurred. Boland v. Love, 222 F.2d 27 (D.C.Cir.1955); Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3rd Cir. 1948); Holtz v. Elgin, Joliet & Eastern Ry. Co., 121 Ind.App. 175, 98 N.E.2d 245 (1952); Kingery v. Donnell, 222 Iowa 241, 268 N.W. 617 (1936); Gregory v. Maine Central Railroad, 317 Mass. 636, 59 N.E.2d 471 (1945); Legere v. Tatro, 315 Mass. 141, 52 N.E.2d 11 (1943); Haberly v. Reardon Company, 319 S.W.2d 859 (Mo.1958); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949).

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