International Products Liability Litigation: Choosing the Applicable Law

Growth in transnational commerce and travel has substantially increased the cases in which injury-causing products have significant contacts with more than one state. A defective automobile is manufactured in Italy, by an Italian company, and exported to France; it is purchased by a French student who drives it to Oxford, where a defect in the steering causes an accident and injury. Or, an Englishman on a business trip to Italy buys a box of Swiss chocolate, eats the candy during a stopover in Paris, and falls ill on arrival back in London; as a result of the illness, he is unable to go to New York to conclude a profitable business deal. The special problems of multivictim accidents have also assumed larger importance. Airplane accidents, such as the 1974 crash in Paris of the Douglas DC-10 owned by the Turkish Air Line, have been a particularly prolific source of product liability litigation.[1]

When the injured driver, the sick candy eater or the heirs of the deceased air travellers sue the producers of the defective product, the court hearing the action will be faced with several competing laws which claim to "govern" the parties' rights and duties. The transnational character of such controverted events will force the forum to choose an applicable law as to any issue on which the susbstantive standards of the relevant states are not the same. Issues on which national norms diverge include burden of proof, statute of limitations, whether damages may be awarded for pain and suffering, and whether there will be recovery at all, based on strict liability for the defect or on a showing of negligence on the part of the manufacturer.

The first observation which should be made is that there is little law on point. Preliminary to the drafting of the 1972 Hague treaty on choice of law and products liability, the Hague Conference on Private International Law sent out to member countries a questionnaire on their national choice of law

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*Hughes Hubbard & Reed, Paris

[1]*See In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 2d 732 (D.C. Cal. 1975).

principles. Of the eighteen countries which responded, only two, Canada and the United States, noted any statute or case law which dealt with conflicts problems in the realm of product liability.[2]

Secondly, development of choice of law rules in the field of products liability has been complicated by the classic view that the same choice of law rules apply to all tortious acts regardless of subject matter: automobile accidents, defamation, defective machines and the seduction of another man's woman, have, until recently, all been seen as subject to a single rule. The classic doctrine in most American and Continental jurisdictions has been that of *lex loci delicti:* the tort is to be governed by the law of the place where the wrong is committed. Justice Holmes tried to explain this in 1904 in *Slater v. Mexican National Railroad Co.*[3] by a theory of vested rights: the tort gave rise to what Holmes called an *obligatio,* which the injured party carried around with him wherever he went. This finds an echo in the formulation of the French rule, which refers to the place where the obligation is generated: "*loi locale du fait générateur de l'obligation.*"[4]

For some torts the *lex loci delicti* is easily ascertainable. For assault or seduction the place of wrong is quickly found. But it is quite often question-begging to speak of "place of wrong" in the field of products liability. The elements of the cause of action, in a case where it is necessary to choose between different laws, will usually be spread over more than one place. The poisonous candy or defective car is negligently manufactured in state *X* but causes injury in state *Y.*

The First Restatement on Conflict of Laws took the position that the tort is committed at the place of the last event necessary to make the actor liable.[5] This is also the French doctrine.[6] The rule has the merit of ascertainability but the obvious defect that the place of the last event might be completely fortuitous, as in the case of an airplane crash or an automobile accident.

The Federal Tort Claims Act takes the contrary view and subjects the United States to tort liability under the law of "the place where the act or omission occurred."[7]

The Second Restatement has avoided the issue by rejecting automatic application of the *lex loci delicti.* The "proper law of the tort", according to the Second Restatement, will be the law of the state with "the most significant

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[2]CONFERENCE DE LA HAGUE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION, Tome III, pp 64-91 (1974).

[3]194 U.S. 120 (1904).

[4]*See* BATIFFOL & LAGARDE, DROIT INT'L PRIVÉ, No. 551-561. (Tome II, 6th ed.).

[5]§ 377.

[6]BATIFFOL & LAGARDE, *supra* note 3, No. 561.

[7]28 U.S.C. 1346(b). *But see* Richards v. United States, 369 U.S. 1 (1962) for a case of *renvoi* to the *lex loci delicti.*

relationship to the occurrence and the parties."[8] In cases of personal injury, the Second Restatement continues, the most significant relationship will usually be with the state where the injury occurs.[9]

The English rule is rather curious, and merits special treatment. While no English case or statute law deals directly with choice of law problems in the realm of products liability, general principles have been developed in cases dealing with maritime collision,[10] assault,[11] defamation[12] and motor vehicle accidents.[13] As generally formulated,[14] the rule is that an act done in a foreign country is actionable as a tort in England only if (i) it is a tort under English law and (ii) it is actionable according to the law of the foreign country where committed.

Applied to international product liability conflicts, the English rule has some questionable consequences. Let us assume that the foreign branch of an English candy-maker manufactures and sells, in Azania to an Azania resident, a bad box of chocolates. The Azanian consumer dies. His heirs sue the manufacturer in London. And let us assume liability under Azanian but not English law. In this case, despite Azania's obviously more significant connection with the occurrence and the parties, and despite the fact that all elements of the alleged tort were committed in Azania, an English forum would still deny recovery.[15]

In the reverse situation, where England, but not Azania, would grant recovery, the result is less certain. Until recently, an English court could grant recovery for a tort committed abroad if the conduct was actionable under English law and "not justifiable" in the country where committed. *Not justifiable* was interpreted as meaning "wrongful" or "not innocent." And since conduct might be "wrongful" without giving rise to civil liability, English courts gave recovery in cases where the *lex loci delicti* would not. In *Machado v. Fontes,*[16] libel in a Portugese language pamphlet published in Brazil was held civilly actionable in England even though it was assumed that under Brazilian law no damages would have been awarded to the defamed plaintiff. Libel was a violation of the Brazilian penal code, and so the court reasoned that the libellous statement was "not justifiable" in Brazil; thus

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[8]§ 145. The "proper law" concept was initially advanced by the British scholar J.H.C. Morris in *The Proper Law of the Tort,* 64 HARV. L. REV. 884 (1951).
[9]§ 146.
[10]The Halley (1868) L.R. 2 P.C. 193.
[11]Phillips v. Eyre (1870) K.R. 6 Q.B.I.
[12]Machado v. Fontes (1897) 2 Q.B. 231 (C.A.).
[13]Chaplin v. Boys (1971) A.C. 356 (H.L.).
[14]DICEY & MORRIS, CONFLICT OF LAWS (9th ed.) Rule 178, at 938.
[15]*See* The Halley, *supra,* note 9.
[16]*Supra,* note 11.

recovery was allowed in England without establishing actionability under the *lex loci delicti.*

Let us assume that Azania provided a fine for unsanitary conditions in a chocolate factory but did not require the factory to compensate (civilly) the victims of the dirty kitchens. Following the rule in *Machado v. Fontes,* the English court might have said that the filthy factory was "not justifiable" under the local law; thus the tort would have been actionable under English law, although not so under the law of the place where it was committed, which had the most significant relationship to the occurrence and the parties.

In 1971, however, the House of Lords criticized *Machado v. Fontes.* The case of *Chaplin v. Boys*[17] concerned a motor vehicle accident, in Malta, in which a British soldier (Chaplin) in a car ran over a British airman (Boys) on a motorcycle. Under the law of both Malta and England a tort had been committed. But under the Maltese civil code, the unfortunate Mr. Boys could recover only £53, his out-of-pocket expenses. In England he would have gotten an extra £2,250 for pain and suffering. The House of Lords allowed damages to be granted according to English law. The holding of *Chaplin v. Boys* is not inconsistent with the holding of *Machado v. Fontes.* In both cases damages were awarded according to the law of the forum, England, which would not have been given according to the *lex loci delicti.* But in its decision, the Law Lords said clearly that the rule of *Machado v. Fontes* was wrong. It is therefore now open to an English court to depart from *Machado v. Fontes,* and to make actionability under the *lex loci delicti* a *sine qua non* of recovery in England.

The English rule, both before and after *Chaplin v. Boys,* still requires a determination of the place of wrong. This is no mean task when different elements of the cause of action occur in different countries. The issue is addressed by a decision of the Court of Appeal, dealing not with choice of law, but with jurisdiction. Under Order 11 of the Rules of the Supreme Court, notice of a writ may be served outside England in an action based on a tort committed within England. In *George Monro Ltd. v. American Cyanamid and Chemical Corporation,*[18] a New York company sold rat poison to an English chain drug store, which sold it to a county government. The county in turn used it on the land of a local farmer. It is not known whether the chemical had the desired effect on the rats, but it did have an undesired effect on the farmer's livestock. It was alleged that the American manufacturer had been negligent in not properly labelling the product with a warning of the dangers of using the substance without certain precautions. The Court of Appeal held

[17] *Supra,* note 12.
[18] (1944) K.B. 432 C.A.

that there had been no tort committed within England, and thus it was not permissible to serve notice of a writ in New York. A similar result was reached in the Canadian case of *Abbot-Smith v. Governors of the University of Toronto,*[19] where a resident of Nova Scotia suffered injury from taking an oral polio vaccine manufactured in Ontario by the University of Toronto.

In general, application of the *lex loci delicti* will give satisfactory results when the situs of the wrong is ascertainable. There are situations, however, such as the malfunction of an automobile or airplane, where the law selected may have no connection with the interested states.

Each of the other choice of law rules is unsuitable for the field of products liability. The large measure of discretion given to a judge under the "proper law of the tort" or "most significant relationship" theory produces uncertainty and insecurity, which can be expected to increase litigation and impede settlement between insurers.[20] The application of the law of the forum (which, with a modification, is essentially the English rule) gives ascertainable results, but at the price of determining liability according to rules which may have no relation to the controverted event.

In response to this uncertain and undesirable state of affairs, the Hague Conference on Private International Law drafted a treaty setting forth rules designed to result in both (i) predictability of choice and (ii) a reasonable nexus between the applicable law and the controverted event. The Hague Convention on the law applicable to product liability was approved by the Conference in October 1972 and has been signed by eight European countries,[21] three of which, Norway, Yugoslavia and, most recently, France, have ratified it to date.

The convention must be treated by each contracting state as a uniform law. It applies regardless of reciprocity and even if neither the parties nor the applicable law are of another contracting state. Thus a French tribunal, hearing a case brought by an Englishman against a French company whose product he purchased in London would be obliged to apply English law even though the United Kingdom is not a party to the treaty.

The Conference considered the laws whose application might be appropriate to the ends which a conflicts rule should serve. The relevant contacts which were considered included—

1. the place of injury, which might be the place of consumption or use, the

[19](1964) 45 D.L.R. (2d) 672.

[20]*See, e.g.,* how during the last decade the New York Court of Appeals wavered back and forth concerning car accidents and guest statutes. Babcock v. Jackson 12 N.Y.(2d) 473 (1963); Dym v. Gordon 16 N.Y.2d 120 (1965); Tooker v. Lopez 24 N.Y.2d 569 (1969).

[21]Belgium, France, Italy, Luxembourg, Norway, Portugal, Yugoslavia, the Netherlands. *See* REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ, January/March 1977, at 30.

place where damage occurred, or the place where the consequences of the tortious act were felt;

2. the place of manufacture;
3. the place at which the product was last offered to the public;
4. the place of the victim's residence;
5. the place of foreseeable distribution of the product; and,
6. the place whose law was most favorable to the victim.

The basic scheme of the treaty, contained in Articles 4-7, rests on two postulates: first, that no single contact should be determinative, but that choice of law should be the result of a combination of contacts; and second, that the applicable law should always be reasonably foreseeable by the manufacturer.

The treaty designated two principal "connecting factors": 1) location of injury, and 2) residence of the victim, one of which would be the place of applicable law when coincidental with other designated factors.

The law of the place of injury is applicable when it is also that of either (i) the place of the habitual residence of the person directly suffering damage, (ii) the principal place of business of the person claimed to be liable or (iii) the place where the product was acquired by the person directly suffering damage.[22] On the other hand, the law of the habitual residence of the victim will be applicable if it coincides with that of either (i) the place where the product was acquired by the person directly suffering the damage, or (ii) the principal place of business of the manufacturer or supplier (the person alleged to be liable).[23] In case of conflict, the habitual residence of the victim takes precedence over the place of injury.

So if a man from Cape Cod goes to Paris on holiday, and there slits his throat with a defective Boston-made razor, purchased and used in his Paris hotel, a tribunal applying the treaty's provisions to an action against the Boston-based company would be bound to apply Massachusetts law.

There are, of course, instances where none of the contemplated combinations of contact points will occur; for example, if an American buys an English-made car in Monte-Carlo, and is injured while taking a jaunt into Italy. In an action against the manufacturer, neither of the combinations of contacts exists. The place of injury, Italy, is not that of victim's residence, manufacturer's principal place of business or the place of purchase. And the place of victim's residence does not coincide with the place of purchase or the manufacturer's principal place of business. In this case the victim would be given an option, under Article 6 of the treaty, to choose either English law (as

[22]Article 4.
[23]Article 5.

the law of the principal place of business of the manufacturer), or the law of Italy (as the place of injury).

The victim's choice is limited, however, in that neither the place of injury nor the residence of the victim may be selected unless reasonably foreseeable, by the person claimed to be liable, as a state where the product in question, or his own products of the same type, would be made available through normal commercial channels.[24] As will be discussed later, this rule is of particular importance in the application of the treaty to a territorially large federal system such as that of the United States.

While the convention applies to all persons suffering damage, only the person *directly* suffering damage is given significance in the choice of the applicable law. So if a resident of England lends his car to his father, resident in France, and a defect in the car causes injury to the father in Paris, French law is applicable regardless of whether the action is brought by the father or the son.

The treaty does not define the term "place of injury." The explanatory report of the Conference Rapporteur, Willis Reese, takes the position that the first impact of the defendant's wrongful act will normally be the critical element in determining the place of injury. In an action against the negligent manufacturer of an automobile, therefore, the critical element would be the place of the accident.

What happens, however, when the damage does not manifest itself immediately? An Englishman on a Continental holiday may consume bad food in Italy, but fall ill only on arrival in Paris on the next leg of his trip. In this case, the treaty is probably flexible enough to allow a judge to select either location as the place of injury.

But suppose the gravity or the extent of the injury becomes clear only after the victim has travelled to yet another jurisdiction? For example, the condition of the vacationing Englishman might become worse after return home to London. In such a situation, England would probably not be considered as a place of injury, at least not by the Conference Rapporteur.

While focusing on the place of injury, it might be worth considering whether its law should ever be chosen as the applicable law. It might be simpler and better to have only two alternatives: (i) the law of the consumer's habitual residence or (ii) the law of the manufacturer's principal place of business. The manufacturer would still be protected, under such a scheme, against an "unforeseeable law," by virtue of the requirement that it be reasonably foreseeable that the manufacturer's products of the same type would be made available in the state where the victim lives.

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[24]Article 7.

The treaty covers only extra-contractual liability. Article 1 of the treaty says it is inapplicable to actions against the direct transferor of the product. Liability between contracting parties *inter se* is covered by existing (non-treaty) rules. The Conference felt that contract obligations were adequately covered by existing law, and that to disturb the present pattern would lessen chances for adoption of the treaty.

Damage to property and out-of-pocket losses are covered by the treaty, but may be recovered only if accompanied by other damage.[25] For example, assume that a defect in a car causes a breakdown while a man is driving to an important business meeting. As a result of the breakdown he loses a lucrative contract. Neither the right to the cost of repairs of the car nor the right to lost business would be covered by the treaty unless the driver has also suffered personal injury. If he is injured, then all three types of loss are considered as "damage" under the treaty.

Damage covered by the treaty may be the result of a defect in the product, a misdescription, or failure to give adequate information concerning the product's characteristics. Therefore the treaty would apply to the claim of the Shropshire farmer, in *George Monro Ltd,*[26] for loss from the American rat poison which was not accompanied by a cautionary label.

The scope of the convention is wide as to both persons and products. "Product" means agricultural as well as industrial goods.[27] Potential defendants include not only manufacturers and producers, but also suppliers, even gratuitous, and repairmen in the commercial chain of distribution.[28]

The legal issues to which the treaty is applicable are also given broad scope. The questions submitted to the treaty-selected law include—

(i) the basis of liability,

(ii) the exemptions from liability (e.g., Act of God or *force majeure* defenses);

(iii) the amount and kinds of damages (e.g., whether there is recovery for pain and suffering or emotional distress);

(iv) whether damages may be assigned or inherited;

(v) the vicarious liability of principals for the torts of their agents or employees;

(vi) rules of prescription and limitation relating to the commencement of the action, and, very important,

(vii) the burden of proof.[29]

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[25]Article 2.
[26]*Supra,* note 17.
[27]Article 2.
[28]Article 3.
[29]Article 8.

In applying a single law to all issues the treaty may fall short of at least one of the policies which are supposed to govern choice of law rules. A court should attempt to apply the law of the state with the dominant interest as to the issue to be adjudicated. As legal issues differ, so may the state which has the paramount interest in the application of its law. For example, assume that a resident of state *X* purchases an automobile from a manufacturer in neighbouring state *Y*, where he is killed in an accident while driving home. It may be reasonable that the law of the state of injury should govern the basis and extent of the manufacturer's liability. But why should the law of state *Y* also determine whether the wife or child of the victim may sue for their loss by reason of the death of the husband or father? While simplicity is obviously to be desired, *quaere* whether its virtues are not outweighed by the benefits of a *dépécage* by which different issues are referred to the laws of different states.

The convention is silent as to whether the victim has a direct right of action against the insurer. And it is concerned only with choice of substantive law, not with judicial jurisdiction or with recognition and enforcement of foreign judgments.

By declaring a rule contrary to the forum's public policy, courts have on occasion avoided application of the foreign law selected by their conflicts principles.[30] The Convention permits the use of this escape hatch only when the foreign law is manifestly repugnant to a fundamental principle of the forum's law or morals. In the view of the Conference Rapporteur, recourse to this exception would not be legitimate merely because of a difference in the size of damages which would be awarded under the foreign law.[31]

One area which should be of special interest to American lawyers is the application of the treaty to a country composed of territorial units each having its own products liability rules. The treaty considers each political subdivision of a federal system to be a separate state for choice of law purposes.[32] Although clearly right, this approach may result in a federal system being under greater obligation to apply foreign law than would a country with a uniform legal system.

As an illustration, assume that a custom-made Italian sports car is exported to New York, where it is bought by a Connecticut resident who takes the car on a cross-country vacation. A defect in the steering causes an accident in North Dakota. If the United States had a uniform legal system, United States law would apply; the place of injury, the place of purchase and the residence of the victim would all have been the same. But because each state has its own

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[30]*See* Pancotto v. Sociedade de Safaris de Mocambique, 422 F. Supp. 405 (N.D. Ill. 1976).

[31]*See* Explanatory Report by W.L.M. Reese, ACTES ET DOCUMENTS DE LA DOUZIÉME SESSION DE LA CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, Tome III, at 269 (1974).

[32]Article 12.

law, the treaty provisions, in this case, will select foreign law. The law of the victim's residence, Connecticut, will not be applied because there are no other connecting points with that state. For the same reason neither would the law of North Dakota, place of injury. The plaintiff's special option to choose the place of injury regardless of lack of other contacts would not be exercisable if the foreign manufacturer could show that it was not reasonably foreseeable that sports cars of this type would be sold in North Dakota through normal commercial channels. So, the only law left to the plaintiff is Italian, as that of the manufacturer's principal place of business.

To avoid this type of situation, the treaty provides that a federal state is not bound to apply the treaty rules unless a unified legal system, in the same circumstances, would have applied a law other than its own. If the nations in the above hypothetical had been reversed, Italy would have applied its own law. Therefore the American state in which the case is brought would be free to select the applicable law by its own choice of law principles, without regard to the treaty.

What ought to be the attitude of American lawyers toward the treaty? As transnational commerce grows, so do the chances that consumers will be injured by products manufactured in foreign countries by foreign manufacturers. The present confusion in choice of law rules constitutes an impediment to settlement of claims arising out of these injuries. A uniform set of choice of law rules has thus become imperative.

Considering exclusively American interests, the design and scheme of the Hague convention will be generally beneficial to both American consumers and American manufacturers. The victim's habitual residence is at the top of the treaty's hierarchy of criteria for selecting the applicable law. Because American product liability law is on the whole stricter and more developed than that of our principal trading partners, the preference for the victim's residence means that an American plaintiff will usually get the benefit of our protective laws. Therefore, one effect of adoption of the treaty by the United States might be to raise the standards of care of foreign manufacturers. But an American manufacturer, sued by a foreign consumer, will usually be subject to the less stringent rules of the country where the foreign plaintiff resides and where the product was marketed.

The treaty rules are precise, and thus give a predictability of result which is essential to settlement between insurers. And because selection of an applicable law requires the coincidence of a combination of contact points, the designated law usually will in fact have a significant relationship to the occurrence and the parties.

Admittedly the treaty rules are too mechanical. There will be cases where they do not produce substantive justice. Moreover, the treaty begs important

questions about the nature of tort law: in particular, whether it should be a vehicle for changing behaviour by imposing civil sanctions against those making defective products, as well as compensating persons injured through the use of such products.

But all benefits have a cost. The hindrance to efficient settlement of disputes that results from the uncertainties of the present choice of law rules may exact an even higher price than do the treaty's defects.