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PROBLEMS IN CONFLICT OF LAWS RELATING TO AUTOMOBILES

Improvements in roads and motoring facilities bring to insurers an ever-increasing number of problems arising out of accidents to tourists. The differences between the laws of the various Provinces of Canada and those of the various States of the United States relating to highways and the rights arising out of collisions thereon give rise to a set of principles regulating the conduct of an action in one jurisdiction where the acts upon which the action is based occurred in another jurisdiction. This article deals with the problems most familiar to the Canadian lawyer, i.e., those arising out of Canadian tourists travelling in the various States of the United States, but, for comparison, brief references must be made in a general way to the converse case. Insurance companies have a particular interest in these questions because in many cases they arise in actions brought by passengers or guests against their drivers after the return of the party to Canada.

As one of the purposes of this article is to point out the substantial differences between the rules adopted in Canada and those adopted in the United States in the converse case of an accident happening outside of one of the States and an action brought in respect of it in that State, it may be noted briefly that the American principle seems clear. Huddy's Cyclopedia of Automobile Law, 9th Edition, Volume 3-4, page 43, section 19, says :

> "Where an action for injuries arising out of an automobile accident which happened in one State is brought in the courts of another State, the case is governed by the law of the jurisdiction where the accident happened, but the law of the place where the action is brought regulates the remedy and its incidents, such as pleading, evidence and practice."

See also 12 Corpus Juris, page 452.

Thus, in the United States, the substantive law of the State in which the accident occurred is proved and applied in the Court where the action is brought. In Canada, where the English principles of international law are applied, a different method is adopted. In an action brought in Canada for a wrong committed outside of Canada our courts will inquire, first, whether the act is of such a character that it would have been actionable if committed in Canada and, secondly, whether the act was "not justifiable" by the law of the country or state where it was done. Having ascertained in reply to the first question that the act would have been actionable in Canada and in reply to the second question that it was "not justifiable" where it was done our courts proceed to apply Canadian law not only to matters of procedure but also to the substantive questions of law in the action. As a result of the decision of the Privy Council in *Walpole* v. *C.N.R.*[1] it is probably sufficiently accurate to say that the expression "not justifiable" is satisfied if the acts were punishable or if an action could have been brought in respect of them in the jurisdiction where they were done.

The difference between the American and Canadian Rules and the practical application of the Canadian Rules can best be shown by illustrating with reference to common problems.

Consider the application of these principles to the guest laws. In Canada guests have in general the same rights as other persons against motorists, (exceptions noted are Alberta (1934) Cap. 62, section 9, and New Brunswick (1934) Cap. 20, section 52 (1), barring guest claims, and Nova Scotia (1932) Cap. 6, section 183, requiring guests to prove gross or wilful or wanton negligence) but usually the statutory onus of proof of negligence does not operate against an owner or driver in favour of guests. In the United States, on the other hand, a majority of the States have adopted guest laws which require a guest, in order to succeed in an action against his host, to show something more than ordinary negligence on the part of the driver. The State of Illinois has a guest law requiring a gratuitous passenger to show wilful or wanton misconduct on the part of his host in order to succeed in an action for damages. A party of tourists, while driving in the State of Illinois and while returning to their home in Manitoba, met with an accident while entering one of the main highways near Chicago. The driver and owner of the automobile failed to see the warning

[1] [1923] A.C. 113.

sign of the approach to the highway and did not see the stop sign at the highway until he was upon it. He applied his brakes but a drizzling rain was falling and he skidded on the wet pavement into the path of an automobile travelling along the main highway. The driver's mother, who was a passenger in his automobile, was seriously injured, and when the party returned to Manitoba she commenced an action against her son for damages. There was no very strong evidence of wilful or wanton misconduct and the question arose whether advantage could be taken in Manitoba of the Illinois guest law. Had the action been brought in one of the other States of the United States it seems clear that the Illinois guest law would have been applied.[2] This exact question was decided in Massachusetts in *Hall* v. *Hamel*,[3] where the headnote reads :

> "Right of guest in automobile to recover for injury resulting from negligence of her host was governed by law of jurisdiction where the injury occurred."

On the other hand, it is equally clear that in England and Canada this principle would not likely apply. Following the English principle, our Courts must first inquire whether the acts, had they occurred in Manitoba, would have sustained an action in Manitoba. The answer was reasonably clearly "yes". The Courts must next inquire whether the acts were actionable or punishable in Illinois. While many of the American decisions have been very favourable to the guest, it is quite probable that an action in Illinois, based upon these facts, might have been dismissed, because wilful or wanton misconduct must be shown. On the other hand, it is reasonably likely that the negligence which caused the injury at the same time constituted a breach of some traffic statute or regulation and most probably made the driver subject to "punishment". The action by the mother was therefore maintainable in Manitoba against her son and of course against an insurance company. (This action was compromised before trial).

A party of Manitoba residents were driving in North Dakota. The automobile left the road, entered a ditch, upset and injured the passengers. On the return of the parties to Manitoba an action was commenced by a passenger against the driver. North Dakota has a guest law requiring a guest to prove gross negligence in an action against the host. The circumstan-

[2] See Huddy, Automobile Law, Volume 15-16, page 141, Section 76, and the footnotes.

[3] 138 Northeastern 925.

ces of this action would suggest that the driver's acts would not be punishable in North Dakota. It was necessary, therefore, in order to support an action in Manitoba, to show that the acts were actionable in North Dakota. An unsuccessful attempt was made to show that at the time of the accident the car was travelling at a fairly high rate of speed on very rough gravel. The trial judge held that gross negligence on the part of the driver was not proved and as the acts of the driver were neither actionable nor punishable in North Dakota no action could successfully be brought in Manitoba, notwithstanding that if the accident had occurred in Manitoba an action could probably successfully have been brought there. (No reasons for judgment).

In the recent case of *Williams* v. *Tang and Mitchell*[4], an action was brought in British Columbia in respect of a motor car accident which occurred in the State of Washington. The State of Washington has a guest law, which holds the host liable only if he has been guilty of gross negligence. As the road was covered with wet, slippery snow and the driver was travelling at 60 miles per hour, the trial judge held that the acts were actionable in the State of Washington and that accordingly an action could be brought in British Columbia.

The English and American authorities are substantially in agreement that in matters of limitation of actions the law of the jurisdiction where the action is brought governs.[5]

In the application of the rules as to assessing damages a substantial difference appears. In the United States the measure of damages depends upon the law of the place where the accident or tort occurred. In England and Canada, on the other hand, the measure of damages is determined by the laws of the place where the action is brought. Dicey's Conflict of Laws, 5th Edition, page 770, after pointing out that the question whether an act done in a foreign country is or is not a tort for which an action can be brought in England depends upon the combined effect of the law of the country where the act is done and of the law of England, then comments :

> "It is not wholly easy of defence on theoretic grounds, and is not on the whole in accord with American law, which tends to the simpler view that an action may be brought in respect of a tort committed in another country on the basis that 'The right to sue for the tort, the liability of the perpetrator, and the defences that he may plead, are,

[4] (1933) 2 W.W.R. 113.

[5] See Dicey's Conflict of Laws, page 849 and page 856, and Volume 12 Corpus Juris, page 447.

> with few exceptions, governed by the law of the place' (lex loci delicti). The evolution of this jurisprudence is that damages are based on that law, contrary to the English doctrine."

See also page 772 :

> "The penalty in the shape of damages will depend on English law as the lex fori, but will, of course, be based on the nature of the act done abroad."

One is surprised to find disagreement between so eminent an authority as Dicey and the Hailsham edition of Halsbury, in volume 6 of which at page 280, the statement is made :

> "The measure of damages in an action in respect of a tort committed abroad is (it would seem) to be governed by the lex loci actus."

That the statement in Dicey is correct would appear from an examination of the English cases and of the American cases which have taken the contrary view while recognizing that in England the rule is that the measure of damages is to be ascertained by the law of the *lex fori*, i.e., the place where the action is brought[6]. In Canada the Ontario Court of Appeal in *Story* v. *Stratford Mill Building Company*[7], appears to have followed the rule stated by Dicey in applying the Ontario rules as to damages and declining a limitation by statute in the Province of Quebec although the accident occurred in Quebec. Mr. Justice Riddell said at page 287 :

> "It follows then that the action being properly maintainable in our Court 'we must act according to our own rules in the damages which we may choose to give."

Four judges sat on the appeal, one of whom agreed with Riddell, J.A., and the other two agreed in the result. Had the action been brought in Quebec, where the accident occurred, there would have been a limit by statute to the amount of damages which could have been recovered. The Ontario Court of Appeal rejected this limitation.

The following illustration will show the application of this principle as between Canada and the United States. Two friends living in Manitoba take a drive through Minnesota. While in Minnesota the car leaves the road and the guest is killed under circumstances warranting a finding of negligence on the part of the driver. Minnesota has no guest law. The claim is therefore actionable in Minnesota on proof merely of

[6] See the American case of *Slater* v. *Mexican National Railroad Company* (1904) 194 U.S. 120.

[7] (1913) 30 O.L.R. 271.

ordinary negligence. An action can accordingly be brought in Manitoba and an action is brought in Manitoba, where the driver and host resides. The State of Minnesota has a statute which limits the damages to be obtained in such a case to $7,500.00. The question arises whether this Minnesota statute can be raised in defence in Manitoba. If the American principle were applied the most which could be recovered anywhere in respect of this accident is $7,500.00. Under the English, and of course the Canadian principle, this limitation as to damages does not apply. The family of the deceased are entitled in their action in Manitoba to an application of the principle of English law as to the measure of damages and the Minnesota limitation does not apply.

So far as foreign law may be of assistance in defending claims it should be noted that in general foreign law is a question of fact and must be pleaded and proved. There is now, fortunately, a tendency to relieve against this unnecessary rule and careful inquiry should in every case be made to ascertain whether this substantial expense is necessary. For instance, the Manitoba Evidence Act, which appears to have gone into force at March 31st, 1933, contains in section 25 a provision that every court shall take judicial notice of the laws of any part of the British Empire or of the United States of America, or any State, territory, possession or protectorate thereof, but that the foreign law shall nevertheless be pleaded where any rule so requires. Even where proof of foreign law is required the courts have on occasion admitted affidavit evidence[8]. If proof of foreign law is required it is not sufficient to cite a prior decision making a finding as to the law of that particular state or country[9].

It remains to consider the effect in Canada of a judgment obtained in a state of the United States on an accident which occurred there. A concrete illustration will assist. A resident of Saskatchewan while driving in the State of Michigan meets with an accident, as a result of which an action is brought against him in Michigan and is carried to judgment undefended. Service is made on the defendant in Saskatchewan by registered mail. The Canadian has no assets in Michigan and while this action in Michigan is proceeding the right to sue him where he resides expires under the short limitation provided in the statute limiting actions in respect to motor vehicles. Having lost the right to sue in Saskatchewan on the original cause of action, the

[8] See *Key* v. *Key*, 65 O.L.R. 232.

[9] See *Lazard* v. *Midland* [1933] A. C. 289.

Michigan claimant contends that he is entitled to bring an action in Saskatchewan on his Michigan judgment. An action on a judgment is ordinarily an action in contract and the shorter limitation does not apply.[10]

Sometimes special limitations are made for actions on foreign judgments. This illustration raises the question whether the Michigan judgment can be made the basis of an action in Saskatchewan. Dicey's Conflict of Laws, 5th Edition, (1932) at page 398, sets out the circumstances under which a foreign court is recognized in English law to have had jurisdiction so that an action can be brought upon its judgment.

> "RULE 95.—In an action in personam in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases:—
>
> First Case—Where at the time of the commencement of the action the defendant was resident or present (b) in such country, so as to have the benefit, and be under the protection, of the laws thereof (c).
>
> Second Case—Where the defendant is, at the time of the judgment in the action, a subject or citizen of such country (d).
>
> Third Case—Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, i.e., has precluded himself from objecting thereto (e)—
>
> (a) by appearing as plaintiff (f) in the actions; or
>
> (b) by voluntarily appearing as defendant (g) in such action; or
>
> (c) by having expressly or impliedly contracted (h) to submit to the jurisdiction of such Courts."

As the Canadian driver was neither resident nor present in Michigan when the action was commenced and was not a subject or citizen of that State, it was necessary for the claimant to show that there had been a submission to the jurisdiction of the State of Michigan within the Third Case quoted from Dicey in order to obtain the assistance of a Canadian Court in enforcing his Michigan judgment. There had been no appearance in the action but the Michigan claimant submitted that the Canadian driver had impliedly submitted to the jurisdiction of the State of Michigan within the meaning of rule (c) of the Third Case by his mere presence in the State of Michigan as the operator of a motor vehicle by reason of a Michigan Statute, apparently No. 80 of 1929, which provided that a non-resident, by the operation of a motor vehicle upon a highway of the State should be deemed to have appointed the Secretary of State to receive service of any summons arising out of any accident or collision on such

[10] See Western C.E.D., Volume 2, page 6, Section 3.

highway. Such operation was deemed a signification of his agreement that any such summons should have the same force as if served on him personally. There was a requirement that a copy of the summons be registered to the non-resident defendant. This was complied with. In the United States it has been ruled that operation of a motor car by a non-resident may be made conditional on an implied agreement to accept the jurisdiction of the Courts of the State in which the car is operated. See Dicey, page 410. It is apparent that Dicey does not consider that effect would be given to the Michigan statute in English law for the purpose of finding that the Michigan Court had jurisdiction and that its judgment should be enforced in England or Canada. See page 417 :

> "It is uncertain how far English Courts would recognize an obligation to submit imposed by legislation as an incident of personal presence or doing business through an agent, despite its own exercise of jurisdiction in the latter case."

A relevant statement is made by Middleton, J.A., of the Ontario Court of Appeal, in *Jones Incorporated* v. *Toronto General Insurance Company*[11].

> "I do not recapitulate the facts so fully stated by my Lord. It appears to me however that the judgment should be rested upon a comparatively simple ground. I am ready to assume that the Florida judgment was in accordance with the law of that State, although it does not appear to me that there was any evidence to show that the man there served as agent for the defendant company was in fact its agent, and although it now appears that he was in no sense an agent for the company. Assuming the validity of the judgment the fact remains that quoad that State the Toronto Company was an absent foreigner. The principle enunciated by no means for the first time, in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, (1894) A.C. 670, at p. 684, is this:— 'No territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners, who owe no allegiance or obediance to the Power which so legislates.' This principle is applicable equally in cases where there has been and cases where there has not been service."

See also Middleton, J.A., whose judgment is the majority judgment of the Court in *Lung* v. *Lee*[12].

> "While every Court is, for the purpose of pronouncing judgment, governed by the local legislation to which it is subject, and is bound to pronounce judgment accordingly, no territorial legislation can give jurisdiction which any foreign Court ought to recognize as against those who owe no allegiance or obedience to the power which so legislates. In a personal action against such a one, a decree pronounced

[11] [1933] O.R. 428 at 433; (1933) 2 D.L.R. 660, at 664.
[12] (1928) 63 O.L.R. 194 at 198; (1929) 1 D.L.R. 130 at 134.

in absentem by the foreign Court, to which the defendant has not in any way submitted himself, is by international law an absolute nullity."

The logical conclusion from these decisions is that the State of Michigan has no power to define jurisdiction for purposes other than the declaration of judgment in its own Courts. In this view the judgment obtained in Michigan was probably without jurisdiction so far as our Courts are concerned.

There are, of course, practical considerations which may become extremely important if the accident occurred in a State which is close to the place of residence of the Canadian defendant. If there is insurance and the claimant and the insured are in collusion the insured may return to the jurisdiction to permit personal service of the summons in the jurisdiction or seizure of his automobile under any judgment there. Even without collusion, the insured or his automobile may be found in the State where the accident occurred and the claimant may make personal service of the writ or seize the insured automobile.

These illustrations do not nearly exhaust the problems which arise out of the differences between the application in Canada and the United States of the rules as to conflict of laws in automobile accidents but they will serve to show the main differences in principle between the application of these rules in Canada and their application in the United States. Each illustration could be the subject of an article in itself. The purpose in this article has been to illustrate the problems. It is not pretended that the answers are complete or beyond criticism.

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