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# Conflict of Laws -- Torts -- Time for a Change

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CONFLICT OF LAWS—TORTS—TIME FOR A CHANGE.—In *La Van v. Danyluk and Danyluk*,<sup>1</sup> Kirke Smith J. of the Supreme Court of British Columbia again examined the conflict of laws rules applicable to torts committed abroad. His decision is an important one as he believed himself to be bound by precedent to follow the opinion of the Supreme Court of Canada in *McLean v. Pettigrew*<sup>2</sup> which adopted the views expressed in *Machado v. Fontes*,<sup>3</sup> instead of the opinion of the majority of the Law Lords in *Boys v.*

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<sup>26</sup> *Supra*, footnote 5. Since this comment was originally written, this issue has again come before the Canadian courts. In *Re Chromex Nickel Mines Ltd.* (1970), 16 D.L.R. (3d) 273, the British Columbia Court of Appeal was called upon to decide the question in a context very similar to that in which it was raised in *Re Clark and Ontario Securities Commission*, *supra*, footnote 2. Once again it was decided that a subsequent fair hearing on appeal could cure earlier defects of natural justice at first instance. *Leary* was discussed at some length in the judgment of Bull J.A. (with whom McFarlane J.A. concurred) but was distinguished on the basis that the appeals council of the Trade Union was only purporting to exercise appellate jurisdiction while the Securities Commission in this case possessed powers of hearing and making orders itself. The appellate tribunals in *King v. University of Saskatchewan*, *supra*, footnote 1, and *Re Clark and Ontario Securities Commission* had similar dual capacities. There is, of course, a certain logic in the distinction drawn between the three Canadian cases and *Leary*. Nevertheless, it is unfortunate that a Canadian court has once again missed the opportunity of dealing with the real issues raised by this problem, issues that were at least considered by Megarry J. in *Leary*.

The issue was also dealt with by the Supreme Court of Nova Scotia in *O'Laughlin v. Halifax Longshoremen's Association* (1970), 15 D.L.R. (3d) 316, where Hart J. held, without discussion of the authorities or principles, that an appeal conducted by a meeting of the general membership of a Trade Union in accord with the rules of natural justice overcame earlier defects of natural justice in O'Laughlin's original suspension from the Union by the Executive Board.

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<sup>1</sup> (1970), 75 W.W.R. 500 (B.C.S.C.).

<sup>2</sup> [1945] S.C.R. 62, [1945] 2 D.L.R. 65. ". . . In order to succeed, the plaintiff must establish in the first place that the quasi-delict committed in Ontario would have given rise to an action for damages in Quebec, if it had been committed in this latter Province. In the second place he must also show that the act with which the driver is charged is, to use the expression of the authors, 'wrongful', i.e. 'non justifiable' according to the law of the place where the quasi-delict was committed". Per Taschereau J., at pp. 76-77 (D.L.R.).

<sup>3</sup> "The innocence of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be 'justifiable' by the law of the place where it was done." [1897] 2 Q.B. 231, per Rigby L.J., at p. 235.

Chaplin<sup>4</sup> who held that *Phillips v. Eyre*<sup>5</sup> had laid down a double actionability rule.<sup>6</sup>

Kirke Smith J. would have preferred to apply the proper law of the tort doctrine<sup>7</sup> which he had first adopted in *Gronlund v. Hansen*<sup>8</sup> only to find it rejected by the British Columbia Court of Appeal.<sup>9</sup>

The facts of *La Van v. Danyluk and Danyluk*<sup>10</sup> are quite simple. The action arose out of a collision which took place in the State of Washington between two automobiles both registered, licensed and insured in British Columbia. All the parties to the litigation had their residence and domicile in this province. The plaintiff, who was contributorily negligent, claimed damages for injuries he received as a result of the collision. The court had to determine the law applicable to the questions of liability and quantum of damages.

In the State of Washington, contributory negligence is a complete defense to an action in tort whereas this is not the case in British Columbia.

Since the plaintiff was contributorily negligent, the defendant driver's negligent conduct was not actionable in the State of Washington. To maintain his action in British Columbia, the plaintiff had to prove either that the proper law of the tort was the law of this province or that, under *McLean v. Pettigrew*, the defendant driver's conduct was unjustifiable in the State of Washington and actionable in British Columbia. His Lordship was faced with a

<sup>4</sup> [1969] 3 W.L.R. 322, [1969] 2 All E.R. 1085, [1971] A.C. 356.

<sup>5</sup> "First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done." (1870), L.R. 6 Q.B. 1, at pp. 28-29.

<sup>6</sup> A tort committed abroad may be sued upon in England if it is actionable, i.e. the subject of a civil remedy both by the *lex fori* and the *lex loci delicti*.

<sup>7</sup> Meaning the law with which the parties and the act done have the most significant connection. Per Lord Denning M.R., in *Boys v. Chaplin*, [1968] 2 Q.B. 1, [1968] 2 W.L.R. 328, [1968] 1 All E.R. 283, at p. 290 (C.A.) and in the House of Lords, per Lord Hodson, at pp. 330-331 (W.L.R.) and Lord Wilberforce, at pp. 391-392 (A.C.), *supra*, footnote 4. Also Lord Denning M.R., in *Sayers v. International Drilling Co. N.V.*, [1971] 3 All E.R. 163, [1971] 1 W.L.R. 1176, at p. 1180 (C.A.): "In considering that claim, we must apply the proper law of tort, that is, the law of the country with which the parties and the acts have the most significant connection."

<sup>8</sup> (1968), 65 W.W.R. 485, 69 D.L.R. (2d) 598. Also G.A. Biggar (1969), 27 U. of T. Fac. L. Rev. 138.

<sup>9</sup> The decision of the Supreme Court of British Columbia was affirmed using the conventional approach: (1969), 68 W.W.R. 329, 4 D.L.R. (3d) 435. The Court of Appeal relied on *Canadian National Steamships Co. Ltd. v. Watson*, [1939] S.C.R. 11, which in turn applied the formula of *Phillips v. Eyre* (the act must not have been justifiable by the law of the place where it was committed). Reference was also made to *McLean v. Pettigrew*, *supra*, footnote 2.

<sup>10</sup> *Supra*, footnote 1.

true conflicts situation.<sup>11</sup>

By finding that the defendant driver was, on the overwhelming preponderance of evidence, driving in excess of the permitted night speed limit on the highway where the collision occurred, a punishable offence by the law of the State of Washington, he was forced, on the authority of *McLean v. Pettigrew*, to give judgment in favour of the plaintiff since the defendant driver's negligence was actionable in British Columbia. Had he applied the test laid down by the House of Lords in *Boys v. Chaplin*, a different result would have been reached although it might not necessarily have been a just result in the circumstances of the particular case.

Kirke Smith J.'s decision would have been the same if he had used the proper law of the tort doctrine. In fact the court, by giving relief to the plaintiff, effected the policy expressed by the law of British Columbia. In the circumstances, this province had a much greater interest in applying its policy and thus its laws than the State of Washington.<sup>12</sup> His Lordship recognized that his task had not been an easy one:<sup>13</sup>

I confess to having been deeply concerned in arriving at this conclusion, for although it accords both with the authorities binding on me, as I understand them, and also with the "proper law of the tort" concept which attracts my respect, albeit insignificant support, it clashes with the view expressed by the majority of the House of Lords in the *Chaplin* case. Here, I am of the opinion that there was clear contributory negligence on the part of the plaintiff. By Washington law, as I have it in evidence before me, this is a complete bar to his action for damages. The defendant driver's contributory negligence is therefore, by Washington law, not actionable, and it follows that the plaintiff's action could not be maintained in the courts of that state or this province.

I hasten to add that my concern is for the state of the law, and not as to the practical consequences in this case, for the result at which I have thus far arrived, that the law of this province applies to the issues of liability and quantum, appears to me to accord with the realities of the situation.

Mr. Justice Kirke Smith cannot be criticized for applying the law of British Columbia since, as he said, it accords with the realities of the situation. However, those who share his concern for the state of the law will regret that he did not take this opportunity again to depart from precedent in the hope that, this time, the British Columbia Court of Appeal and eventually the Supreme Court of Canada might be prepared to reconsider *McLean v. Pettigrew*. Whatever opinion one may have on the question of which conflict of laws rules should be applicable to foreign torts, I believe that there is a consensus that the concept of "unjustifiability"

<sup>11</sup> See P.K. Westen, *False Conflicts* (1967), 55 Cal. L. Rev. 74.

<sup>12</sup> See Currie, *Notes on Methods and Objectives in the Conflict of Laws* (1959), 8 Duke L. J. 171, at pp. 177-178.

<sup>13</sup> *Supra*, footnote 1, at pp. 502-503.

as explained in *Machado v. Fontes* and *McLean v. Pettigrew* should be discarded.

I do not intend to review the arguments advanced in favour of or against the several possible conflicts rules in the field of torts. Others have already done this admirably and at great length in the pages of this *Review*<sup>14</sup> and elsewhere.<sup>15</sup> However, without suggesting that we should blindly follow decisions of the House of Lords in common law matters, I believe that *Boys v. Chaplin* represents a definite step forward that merits serious and prompt consideration by our courts in order to avoid forum shopping and its resulting uncertainties.<sup>16</sup> There are, of course, other possible solutions which also deserve the attention of the legal profession. The doctrine of the proper law of the tort is one of them.<sup>17</sup> Furthermore some recent developments should be noted. For instance, in Quebec, the Private International Law Committee of the Office of Revision of the Civil Code has proposed the following rule:<sup>18</sup>

Extra contractual civil liability is governed by the law of the habitual residence of the plaintiff at the time when the act which caused the damage occurred. However, the defendant may raise a defense based on the lawfulness of the act which caused the damage and the absence of an obligation to repair it according to the law of the place where this act occurred.

The *lex loci delicti commissi* is rejected as a general principle. The law of the habitual residence of the plaintiff-victim is applicable subject to a certain form of control exercised by the *lex loci delicti* and tempered by public policy. The victim must obtain the type of compensation to which he is entitled at the place where he resides habitually when he suffered his injury.

This new approach, if adopted by the Quebec Legislature, might

<sup>14</sup> See e.g. M.G. Baer, *Conflict of Laws—Torts—A Blind Search for a "Proper" Law* (1970), 48 *Can. Bar Rev.* 161.

<sup>15</sup> L. Lazar, *Phillips v. Eyre* Revisited (1969), 32 *Mod. L. Rev.* 638; Harvey McGregor, *The International Accident Problem* (1970), 33 *Mod. L. Rev.* 1 reprinted in (1971), 19 *Chitty L. J.* 187; P.M. North, P.P.H. Webb, I.G.F. Karsten, *Foreign Torts and English Courts* (1970), 19 *Int. & Comp. L.Q.* 24.

<sup>16</sup> For a criticism of the double actionability rule see M.G. Baer, *op cit.*, footnote 14, at pp. 164-168.

<sup>17</sup> In the United States see *Restatement of Law, Conflict of Laws*, 2nd, Proposed Official Draft, Part II (1968), s. 145. For a proposal that is very close to the American doctrine of the proper law of the tort, see Conference of Commissioners on Uniformity of Legislation in Canada, Tentative First Draft of a Foreign Torts Act: 1966 Proceedings 58 and M. Hancock, *Canadian-American Torts in the Conflict of Laws. The Revival of Policy-Determined Construction Analysis* (1968), 46 *Can. Bar Rev.* 226 and H.E. Read, *What Should Be the Law in Canada Governing Conflict of Laws in Torts* (1968), 1 *Can. Legal Studies* 277; J.A.C. Smith, *The Foreign Torts Act: Look Before you Leap* (1970), 20 *U. of T. L. J.* 81.

<sup>18</sup> J.-G. Castel, P.-A. Crépeau, *International Developments in Choice of Law Governing Torts* (1971), 19 *Am. J. of Comp. L.* 17, at p. 33.

eliminate the uncertainty that has crept into the law of this province. Although in *O'Connor v. Wray*<sup>19</sup> the Supreme Court of Canada held that the conflicts rule applicable in the Province of Quebec to foreign torts was the same as that in force in the common law provinces, Quebec courts have not always followed this view. In some instances, relying on article 6, paragraph 3, of the Civil Code, they have applied the *lex loci delicti*<sup>20</sup> although, more recently, they seem to have followed *McLean v. Pettigrew*.<sup>21</sup>

Attempts have also been made to reconcile the doctrine of the proper law of the tort with the application of the *lex loci delicti*. Thus, in 1969, the *Institut de Droit international* resolved that, on principle, tort liability should be governed by the law of the place where the tort is committed, it being understood that the tort is regarded as having been committed at the place with which, in the light of all the facts connecting a tort with a given place (from the beginning of the tortious conduct to the infliction of the loss), the situation is most closely connected.<sup>22</sup>

In a more general way, it has been suggested that the time has come for the adoption of an international Standard of Damages comparable to that used in claims for state responsibility in public international law.<sup>23</sup>

Actually, as a result of technical developments, the courts and the legislatures should realize that it is no longer possible to have only one general rule of conflict of laws in the field of foreign torts. Traffic accidents, products liability, defamation, invasion of privacy and other types of wrongful conduct require special conflicts rules as the issues they raise are not always of the same nature. These differences have been recognized by the Conference of Commissioners on Uniformity of Legislation in Canada which, in 1970, adopted and recommended for enactment a model Conflict of Laws (Traffic Accidents) Act<sup>24</sup> based on the 1968 Hague Convention on the Law Applicable to Traffic Accidents.<sup>25</sup> The purpose of the Convention is to determine the law applicable to civil non-contractual liability arising from traffic accidents involving one or more vehicles, whether motorized or not, on public highways, grounds

<sup>19</sup> [1930] S.C.R. 231, [1930] 2 D.L.R. 899.

<sup>20</sup> See P.-A. Crépeau, *De la responsabilité civile extracontractuelle en droit international privé Québécois* (1961), 39 Can. Bar Rev. 3 and cases cited therein.

<sup>21</sup> *Gagnon v. Benoit*, [1970] C.S. 395; also *Dame St-Pierre v. Dame McGraw*, [1960] B.R. 998; *Dame Friedland v. Feig* (1971), unreported, Montreal No. 760.692.

<sup>22</sup> See (1971), 18 Am. J. of Comp. L. 4. Also J.-G. Castel, P.-A. Crépeau, *op. cit.*, footnote 18, at p. 34.

<sup>23</sup> B.A. Wortley (1971), 20 Int. & Comp. L. Q. 586.

<sup>24</sup> 1970 Proceedings 263. See also the excellent report accompanying the Model Act, prepared by Mr. Hugo Fischer, at p. 215 *et seq.*

<sup>25</sup> For an analysis of the Convention, see J.-G. Castel, P.-A. Crépeau, *op. cit.*, footnote 18, at p. 19 *et seq.*; also N. Lepine (1969), 47 Can. Bar Rev. 509.

open to the public, or private grounds to which certain persons have access. The basic principle of the Convention is that the internal law of the state where the accident occurred is to be applied. However, there are many exceptions to this principle: thus, according to articles 4, 5 and 6, in certain cases, the internal law of the state where the vehicles are registered or, if they have no registration or are registered in several states, the internal law of the state in which they are habitually stationed, together with, in other cases, the habitual residence of a person involved, will be applied.

The Convention and the model Act attempt to provide a reasonable compromise between the *lex loci delicti* and the proper law of the tort doctrine. Since the double actionability rule favoured by the House of Lords does not appear to be very desirable in traffic accidents cases in Canada, the adoption of the model Conflict of Laws (Traffic Accidents) Act should be supported by the legal profession. This does not mean that *Machado v. Fontes* and *McLean v. Pettigrew* should not be overruled. These cases have been heavily criticized here and in England mostly on the ground that the rule they laid down encourages forum shopping and does not promote uniformity, certainty and predictability of results. Every opportunity should be taken by the lower courts to force the Supreme Court of Canada to develop new and revolutionary conflicts rules in the field of foreign torts.<sup>26</sup> There is no reason why in Canada there could not exist side by side a general common law rule, which might well be the double actionability rule, and several specially designed conflicts rules to cover traffic accidents, products liability, defamation and other types of wrongful acts.

Modern conditions and technology have given tort liability in the conflict of laws a prominence which can only increase with the years to come. It is thus of vital importance that old concepts be reexamined in the light of our new ways of life in order to reflect contemporary society in Canada. Blindly to adhere to precedent in the light of the ever increasing rate of change in our society is tantamount to legal suicide. If the law lags behind, unbearable social stresses will develop. In the field of foreign torts, as in other fields, the courts should strive to update outmoded common law conflicts rules.<sup>27</sup> Our legislatures should also seriously consider the

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<sup>26</sup> Perhaps, the Supreme Court may be prevailed upon to adopt the same attitude as the House of Lords with respect to its previous decisions. See Practice Statement (H.L.) (Judicial Precedent), [1966] 1 W.L.R. 1234.

<sup>27</sup> See Diplock L. J. in *Indyka v. Indyka*, [1966] 3 W.L.R. 603, at p. 615 (C.A.): "It is the function of the courts to mould the common law and to adapt it to the changing society for which it provides the rules of each man's duty to his neighbour. . . . And within the limits that we are at liberty to do so, let us adapt the common law in a way that makes common sense to the common man."

adoption of the Conflict of Laws (Traffic Accidents) Act. Finally, the legal profession should study with great interest the Draft Convention on Products Liability in the Conflicts of Laws, recently adopted by a Special Commission of the Hague Conference on Private International Law,<sup>28</sup> as this draft will be one of the topics to be discussed at the Twelfth Session of the Hague Conference on Private International Law to be held in the fall of 1972.

The law must not be focussed backward but forward. As André Gide once wrote: "Man cannot discover new oceans unless he has the courage to lose sight of the shore."

J.-G. CASTEL

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<sup>28</sup> Canada is a member of the Conference. In article 3, the Draft Convention adopts as a general principle the application of the internal law of the state of the habitual residence at the time of the accident of the person directly injured by the product provided the product or products of the same origin and the same type were available in that state through commercial channels with the consent, express or implied, of the person sought to be held liable. Exceptions are provided in articles 4 and 5. See Preliminary Document No. 5 of July 1971.