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Conflict of Laws - Extraterritorial Effect of Statute Making Insurance Company Directly Liable for Insured's Tort

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CONFLICT OF LAWS—EXTRATERRITORIAL EFFECT OF STATUTE MAKING INSURANCE COMPANY DIRECTLY LIABLE FOR INSURED'S TORT

The case of Lieberthal v. Glens Falls Indemnity Co.*, recently decided by the Supreme Court of Michigan, raises some questions as to certain phases of the Conflict of Laws. In that case ,the plaintiff, a resident of the state of Michigan, brought suit against the defendant insurance company as sole defendant in the Michigan courts. Plaintiff contended that he was injured in an automobile accident in the city of Waukesha, Wisconsin, that occurred through the negligence of a cab company in whose cab he was riding. The cab company carried motor liability insurance in the Glens Falls Indemnity Company of Glen Falls, New York, which company also carries on its business in the state of Michigan and Wisconsin. An indemnity policy had been issued to the alleged tort feasor in Wisconsin which by virtue of section 85.93 of Wisconsin Statutes creates a direct liability on the part of the insurance company to the party injured through the negligence of the insured named in the policy.[1] The plaintiff sought to recover his damages by virtue of this policy and the Wisconsin statute which created a direct liability to him on the part of the defendant insurance company. The supreme court of Michigan, in upholding the trial court's order to dismiss, held that in as much as Michigan statute specifically prohibits the joining of an insurance company as a party defendant in such a suit,[2] the Wisconsin statute upon which rests the plaintiff's right to sue the insurance company as sole defendant is contrary to the public policy of the state of Michigan and will not be recognized or enforced in the courts of Michigan. Not deciding the controversy between the plaintiff and the defendant as to whether the Wisconsin law is procedural or substantive in character, the court declared the right existed in the state of Michigan to refuse to enforce such law of a foreign state regardless of it being substantive or procedural in nature.

The ground upon which the Michigan court based its decision is no doubt sound when considered in the light of the principles of the Conflict of Laws. A tort committed in another state creates a

*24 N. W. 2d 547 (1946).

[1] Wis. Stat. (1945), 85.93 ACCIDENT INSURANCE, LIABILITY OF INSURER. "Any bond or policy of insurance covering liability to others by reason of the operation of a motor vehicle shall be deemed and construed to contain the following conditions: That the insurer shall be liable to the persons entitled to recover for the death of any person, or for injury to person or property, irrespective of whether such liability be in praesenti or contingent and to become fixed or certain by final judgment against the insured, when caused by the negligent operation, maintenance, use or defective construction of the vehicle described therein, such liability not to exceed the amount named in said bond or policy."

right of action that may be sued upon in a different state unless public policy of the state of the forum forbids. This is no doubt the rule which is most generally accepted in the United States. However, in those jurisdictions wherein the common law prevails the above rule is not generally accepted, as for example in England wherein the tort committed in the foreign jurisdiction must likewise be a tort under the English law.[3] However, as is pointed out in Loucks v. Standard Oil Co., some states have attempted a compromise between the rule generally accepted by the American states and the rule as limited by the laws of England.[4] The courts of such jurisdictions have gone even further than the Michigan court and the courts of the majority of American jurisdictions in placing public policy as a bar to the enforcement of such a right and yet fall short of the English extremity. These states require that there be between the law of the foreign jurisdiction wherein the tort was committed and the law of the forum state a substantial similarity. Thus this rule would tend to limit recovery in the forum where, even though not contrary to public policy, the right sued upon is not supported by a statute in the forum similar to the statute which constitutes the basis of the right in the foreign jurisdiction. Justice Cardozo maintains that this rule of 'substantial similarity' "has no more stable foundation than misapprehended dictum in McDonald v. Mallory" which case involved death on the high seas on a ship registered within a port of the forum state, New York.[5] Justice Cardozo's dissatisfaction with the rule of 'substantial similarity' is shared by many cases.[6]

The grounds upon which a court may properly decline to entertain jurisdiction in a suit based upon a right created by another sovereign state are enumerated by Justice Veeder in Lauria v. E. I. Du Pont De Nemours & Co. Inc. as: that the action is penal; that it contravenes some established and important policy of the state; that the local judicial procedure is inadequate to do substantial justice in the premises.[7] The determination as to the existence or non-existence

[2] 3 Comp. Laws 1929, sec. 12460, Stat. Ann. sec. 24.296 "In such original action such insurance company or other insurer, shall not be made, or joined as a party defendant, nor shall any reference whatever be made to such an insurance company, or other insurer, or to the question of carrying of such insurance during the course of trial."

[3] 6Halsbury, Laws of England, P. 248.

[4] Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918).

[5] Supra, Loucks v. Standard Oil Co.; McDonald v. Mallory, 77 N. Y. 546 (1879).

[6] Flash v. Conn., 109 U.S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966 (1883). Texas & Pac. R. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829 (1892); Barrows v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964 (1898); Missouri Pac. Ry. Co. v. Larussi, 161 Fed. 66 (1908); Burns v. Grand Rapids & I. R. R., 113 Ind. 169 (1888); Powell v. Great Northern Co., 102 Minn. 448, 113 N.W. 1017 (1907).

[7] Lauria v. E. I. Du Pont De Nemours & Co., 241 Fed. Rep. 687 (1917).

of one of these qualifications as a reason for denying relief in the state of the forum is in effect then the controlling decision as to whether an extraterritorially created right will be enforced. While recognizing the existence of such a right, the court need not enforce it if it determines that one or the other, or all, of the qualifications argue against its enforcement.

> "There is grave danger, however, that the constant repitition of such phrases (that a substantive right is transitory and follows the person wherever he may be) may induce the belief that the application of the foreign law is imposed upon the courts of the forum from without, when in truth the forum acts in perfect independence according to its own notions of what is right and proper."[8]

So also to the same effect, that the enforcing of a substantive right created by a foreign jurisdiction rests, within proper limits, within the discretion of the state wherein such right is attempted to be enforced:

> "A right having been created by the appropriate law, the recognition of its existence should follow everywhere . . . Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force . . . The general principle is, that when a right has once been created by the proper law it will be enforced everywhere, even where it could not originally have been created upon the same facts. And this is true, even if the right is against a citizen of the state in which it is enforced.
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> But since the enforcement comes through the domestic law, that law may refuse to give any effect to the right; and though enforcement will not be denied merely because the creation of the right is opposed to the domestic law, it will always be denied where there would be anything illegal in the enforcement itself. The law will not cause its own harm. Thus the enforcement will be denied where the right was created abroad in evasion or fraud of the domestic law, or where it is injurious or of bad example or against the public policy or against morality . . ."[9]

When a law of a foreign jurisdiction is enforced in the state of the forum it must be remembered that it is not enforced because of the existence of the foreign statute which does not extend ex proprio vigore beyond the state which enacted it, but because that right which was vested elsewhere legitimately belongs to the plaintiff and belongs to him wherever he might be.

> "In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, i.e., the

[8] "The Theory of Qualifications and the Conflict of Laws," 20 Columbia Law Review 247 at P. 279.
[9] Beale, Summary, Sec. 43, 48, 49.

> law of the place where the parties act in making their agreement. If by the law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it . . ."[10]

While the subject matter under consideration in the article of which the above quotation is a part was the question as to what law governs the validity of a contract, (the intent of the parties; the law of the place of the performance of the contract; or the law of the place of the making of the contract) it does not appear to be an unwarranted application to apply the reasoning which supports the latter rule mentioned in support of the theory that a liability to a third party beneficiary created by the law of the place of the making of the contract should be enforced outside the jurisdiction wherein the contract was entered into. That a plaintiff's right to sue an insurance company as sole defendant under a liability policy is a right vested against a third party within the terms of the contract itself by virtue of sec. 85.93 of the Wisconsin statute is supported by our own Wisconsin court. "It must be noted that the terms and conditions of Sec. 85.93 Stats. are a part of the insurance policy with like effect as though printed in the policy . . ."[11] Whether this right is a substantive one or one of procedure is a problem which we shall not discuss here but which has been considered in both the states of Michigan and Wisconsin.[12]

In the Lieberthal case[13] the dissent recognizes the right of discretion in the forum state to refuse to enforce a contract made in and legal in another sate if the performance thereof in the jurisdiction of the forum would be contrary to the law of the latter. However, the dissenting justice maintains that where a substantive right is vested elsewhere the state of the forum is bound to enforce it where such action is not so violently repugnant to its public policy as to effect its interests as a sovereign state. The dissenting chief justice then, while in agreement with the majority opinion upon the principle that the state of the forum controls the applcaition of the law of the foreign jurisdiction, parts with the majority on the issue as to whether the prohibition of the Michigan statutes, relating to the joining of an insurance company as a defendant, constitutes a legislative policy so strong as to prevent the enforcement of a substantive

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[10] 23 Harvard Law Review 267.
[11] Kujawa v. American Indemnity Co., 245 Wis. 361, 14 N.W. 2d 31, 151 A.L.R. 1113 (1944).
[12] Oertel v. Fidelity & C. Co., 214 Wis. 681, 251 N.W. 465 (1934); Clayton v. Boesch, 315 Mich. 1, 23 N.W. 2d 134 (1946).
[13] Lieberthal v. Glens Falls Indemnity Co., supra.

right arising elsewhere on the basis of its contravening the public policy of the state of Michigan. In view of the statutory provision[14] and the numerous state decisions[15] which have deplored the inserting of an insurance company's interest in the trial of a negligence case, the majority opinion appears to have decided the question of public policy on reasonable grounds and in accordance with the general principles enunciated in Re Estate Jacob Rahn:

> ". . . which expression (public policy) must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation . . ."[16]

The question as to whether uniformity in judicial administration between the various American states based on comity should be of greater consideration in suits involving rights arising out of laws of one state but sued upon in another than should adherence to the rules of Conflict of Laws is a question which is open for wide discussion. A pertinent point is made by Beale when he says:[17]

> "These considerations would seem to indicate that the application of the rule (that public policy can be a bar to a suit based upon a right arising in another jurisdiction) of this section should be extremely limited. This is especially true as between the states of the United States, for not only is there little or no variation in the fundamental policies of their respective laws, but here, even more than elsewhere, a uniform enforcement of right is greatly desirable."

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[14] 3 Comp. Laws 1929, sec. 12460, Stat. Ann. sec. 24.96, supra.
[15] Janse v. Haywood, 270 Mich. 632, 259 N.W. 347 (1935); Holman v. Cole, 242 Mich. 402, 218 N.W. 795 (1928); Dewey v. Perkins, 295 Mich. 611, 295 N.W. 333 (1940); Nicewander v. Diamond, 302 Mich. 239, 4 N.W. 2d 533 (1942).
[16] Re Estate Jacob Rahn, 51 A.L.R. 877 as referred to in Phil. Law Journal, vol. 21 no. 4. "What Is Public Policy," P 158 at P. 161.
[17] Beale, Summary, Sec. 612.1 at P. 1651.