REQUISITE REFORMATION ON DOUBLE ACTIONABILITY IN ENGLISH LAW: THE DEBATE OF LEX FORI AND LEX LOCI DELICITI

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ABSTRACT

In cross-border torts, the law of the forum where the claim is brought, or the law of the forum where the tort was committed, may be applied, and if the act is committed in one country but its effects are felt in another, the law of the forum where the tortious act was committed, or the law of the place where its effects were felt, may apply. The court makes its decision based on private international law principles.

As per traditional common law rules, plaintiff in an English court after satisfying the court to take jurisdiction must go through the double actionability test. Which has been established in the case of *Phillip vs. Eyre* and further furnished by Lord Wilberforce in the case of *Boys vs. Chaplin.* But this test is subjected to criticism as to pass that test, the plaintiff must show that liability in domestic torts would arise between the parties to the action, assuming the action had all taken place in England; and that the defendant is liable for a civil wrong resulting from his conduct under the law of the place where the wrong was committed under the law of the place where the wrong was committed (the lex loci delicti).

This paper has been developed to examine the major fallacy of the doctrine of double actionability in common law countries with a special reference to England and India. Further taking into consideration the current scenario, this paper has briefly introduced the reformation that the countries has adopted against the doctrine and what are the other reformation that can be brought into picture with respect to cross-border torts.

Keywords: Torts, cross-border, double actionability, Common law, reformation.

Chapter 1

1.1. Introduction

Common law defines the torts as civil wrongs committed against an individual, his property, or his reputation. Which further includes act like negligence, trespassing, and defamation, etc. In some cases, such as assault, an act may qualify as both a tort and a crime at the same time. A tortious act can also arise from a contractual context, in which case the injured party has the option of suing for contract breach or tort damages. Both English and Indian legal frameworks provide the option of claiming relief in either contract or tort.[1] In the case of cross-border torts, determining the appropriate applicable law is subjected to many challenges. The reason for this is that there are multiple connecting factors in the facts of a tort related claim, such as the location of the tort, the parties' nationality, and domicile, and so on. Further, cross-border torts are having the additional challenge of determining the jurisdiction in which the tort was committed. There are also a variety of tortious issues that may arise, such as limitation, damages, etc. The question then becomes whether all these issues should be governed by the same law? Various countries have used a diverse set of solutions to address this problem, and even among these solutions, there has been significant evolution over time.[2]

The most basic principle in the application of law in the case of a tort is lex loci delicti – the law of the place where the tortious activity was committed. However, this clarity is only available when the tort is of a domestic nature and no conflict of laws exists. Various jurisdictions have adopted newer, more contemporary approaches.[3] However, in the case of a tort or delict, the most basic and historically oldest approach has always been lex loci delicti. The real issue of choice of law arises in the case of cross-border torts, i.e., when a foreign element is introduced. There are two scenarios: (a) when the act is committed in one country, but the proceedings are brought forth in another; and (b) when the act is committed in one country, but its consequences are felt in another. Now there is the possibility of conflicting laws – in cases where (a) the law of the forum where the claim is brought, i.e., lex fori, or the law of the forum where the tort was committed, i.e., lex loci delicti; and (b) the law of the forum where the tortious act was committed or the law of the place where its effects were felt.[4]In general three theories has been taken in consideration in a common law countries to

[1]J. Chitty & H. G Beale, *Chitty on Contracts: General Principles* 142 (1 ed.2012).
[2]G.C. Cheshire, P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law* 605 (13 ed. 1999).
[3]District of Columbia v. Coleman, 667 A.2d 811.
[4]ATUL MOTILAL SETALVAD, SETALVAD'S CONFLICT OF LAWS (3 ed. 2014).

deal with cross-border torts. Lex Fori, Lex Loci Deliciti and the proper law theory. This Paper has will further discuss each theory with special attention to extract the better and desirable solution, a common law country should have.

As far as the position at common law in England is concerned, it was previously settled, the Law Reform (Miscellaneous Provisions) Act 1995, enacted by Parliament, drastically altered the English law on the subject, introducing a new set of choice of law rules. The position on defamation-related torts has not changed since it was settled in common law. Furthermore, because relief is regarded as a procedural matter in English law, the rules that apply to it are determined by lex Fori.[5] While according to position in common law The "double actionability rule," which was established in the case of *Phillips v. Eyre*[6] and is still applied to defamation-related claims, which became a general rule that requires two conditions to be met in cross-border torts. First, the wrong must be of such a nature that it would be actionable in England, and second, the act must be unjustifiable under the law of the place where it was committed.

Research Problem:

The doctrine of double actionability for the disputes related to tort has been criticized by eminent scholars and jurists, also those critiques has been backed by various judicial pronouncements. The choice of law on the other hand has been relied upon three major theories i.e., Lex Fori, Lex Loci Delicitie and Proper law theory. But each of them is subjected to criticism and none of them are completely appropriate to resolve cross-border tort disputes in common law countries. Despite of several reforms, that has been incorporated in England, the choice of law in tort cases, having a foreign element, is still in question as the reforms has been made taking in consideration the said theories. Divergent decisions by the judicial authority with regard to this issue is one of the relevant proofs of inconsistent and uncertain reforms that has been adopted in English law.

Review of related literatures:

- A journal article by Syed Hassan, tiled *"International litigation: Doctrine of Lex fori vs. Le Loci"*, talks about the ideology drawn by Carl Von Savigny, to establish international

[5]Yashaswini Prasad, CROSS BORDER TORT DISPUTESACADEMIKE (2015), https://www.lawctopus.com/academike/cross-border-tort-disputes/#_edn7 (last visited Apr 15, 2022).
[6]Phillips v. Eyre, (1870) LR 6 QB 1.

uniformity of results.[7] The jurisdictional debate in international litigation arises from the fact that different legal jurisdictions have different procedural rules, which can drastically alter the outcome of the case. The lex fori principle is also influenced by factors such as the classification of the matter, the nature of the property, and the location where the matter occurred. He further stated that the courts decide the lex fori and lex loci based on legal choice-influencing considerations rather than some international legal formula derived from conventions or legal agreements. Whereby it is very relevant that the author submits the jurisdictional debate and prioritize the principle over any agreements and conventions.

- Another article by J.H.C. Morris, " *The proper law of a tort*", where the author analyzed the proper law doctrine in cross-border torts and came to a conclusion that the suggestion that applying the proper law of the tort might be a desirable way of dealing with tort problems was immediately stigmatized as "absurd"[8] because determining what is the proper law of a tort is difficult; however, the critic did not explain why the difficulty of determining the proper law of a tort should be any greater than that of determining the proper law of a contract. In fact, the difficulty appears to be lessened because the factors to be considered are likely to be fewer and because, in many, if not all, cases, there would be no need to look beyond the law of the wrongdoing location.
- Rippa Rogerson, in her article, "*Choice of law in tort: A missed opportunity*", analyzed the proper law test in detail and came up with certain uncertainty and unpredictability but that is with respect to American law. Based on two landmark judgements i.e., *Red sea insurance case* and *Boys vs. Chaplin*, the author criticized the theory of lex loci deliciti and stated that in some cases, locating the locus delictus can be extremely difficult. These are amplified when the harm is economic rather than physical, or when the defendant's action is accomplished using telecommunications. These complexities are nothing new to the English courts.[9] For all torts, the test for determining the locus delictus is generally the same. The court must first determine the "substance" of the tort and then pinpoint the location of that "substance." Because the substance of each tort varies depending on the specific tort at hand, the test is adaptable to various types of liabilities.

[7]Sayed Hassan, *International Litigation: Doctrine of Lex Fori Vs. Lex Loci*, 2020 IRPJ: INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL 01–06 (2020).
[8]J.H.C. Morris, *The Proper Law of a Tort*, 64 HAVARD LAW REVIEW 881–895 (1951).
[9]Pippa Rogerson, *Choice of Law in Tort: A Missed Opportunity?* 44 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 650–658 (1995).

- V Niranjan in his article, "Double actionability, substance and procedure in Indian law", dealt with the various judgements to draw the rationale whether the doctrine is having relevance in Indian circumstances related to tort. As per his analogy, the fact that there is no statutory choice of law rule in India that corresponds to the 1995 Act is the starting point. As a result, the 'double actionability' rule applies to any foreign tort brought in an Indian court.[10] This was the English choice of law rule until the 1995 Act effectively abolished it. Since at least 1915, the choice of law rule in India has been double actionability. The Rajasthan High Court used it to interpret the Fatal Accidents Act in 1960, and the Punjab & Haryana High Court used it to interpret the Motor Vehicles Act in 2010.

Objectives:

1. To analyze the reforms adopted by common law countries to deal with loophole created by double actionability.
2. To evaluate the reforms and check the competency with respect to current scenario.
3. To figure out a better and stable solution for choice of law in cross-border tort disputes.
4. To understand the analogy done by judicial bodies with respect to cross-border tort and analyze the trend in the same.
5. To understand the position of India being a common law country, in this controversy.

Scope and Limitations:

This study is only based on common law countries' PIL rule relating to cross-border torts with a special concern to India and England and not otherwise. All the theories and principle in this paper has been extracted from relevance sources and views over the same has been drawn by eminent jurists and landmark judgements. The reach of this paper has been extended to a critical view over the reforms done in English law to check the competency in current scenario. This paper further tries to cover those circumstances where the foreign elements are present, hence domestic torts are mostly ignored due course of this paper.

Research Questions:

1. Whether the reformative approach implemented in English law is competent enough to deal with cross-border torts?

[10]V. Niranjan, DOUBLE ACTIONABILITY, SUBSTANCE AND PROCEDURE IN INDIAN LAWINDIACORPLAW (2017), https://indiacorplaw.in/2014/04/double-actionability-substance-and.html (last visited Apr 14, 2022).

2. Whether double actionability doctrine is still been followed indirectly to deal with tot disputes in common law countries?
3. Whether a stable and justified PIL rule is possible to apply universally in cases of cross-border torts?
4. Whether Indian judiciary is in a right way to establish justice in cases of tort containing foreign elements?

Hypothesis:

The researchers believed that the reforms made in English law to tackle with the grey area created by double actionability is not competent enough to dela with cross-border torts. The theories from which the PIL rule is derived from, are subjected to criticism and not absolute. Further it is belief of the researchers that there should be better and efficient rule to deal with cross-border torts in common law countries like India and U.K.

Methodology:

The researchers in this paper used doctrinal method of research throughout. This paper is divided into various chapters to deal with the statement of problem with different aspects. All the data and judicial decisions stated in this paper has been extracted from relevant sources only and a major weightage has been given to landmark judgements, views of eminent jurists to reach to the conclusion. The researchers have further referred to various national and international journals to explore the views of other research scholars and interpreted them to make their decision and justifying the hypothesis of the paper.

Chapter 2 Reforms and Development in Common law Countries

When a plaintiff wishes to recover damages in English Courts under traditional common law for wrong done by a foreign defendant, it becomes difficult and a real struggle for the plaintiff. To initiate, the plaintiff must persuade the court that it has jurisdiction over the case. Second, as a general rule, the double actionability test in Phillips vs Eyre[11], as referred to by Lord Wilberforce in Boys vs Chaplin[12], must be met. To succeed under the test, the plaintiff must demonstrate that liability exists between the parties under domestic tort law, assuming the cause of action arises in England and the defendant is liable for the tort resulting from his conduct, i.e., *lex loci deliciti commissi.* A plaintiff who is denied of recovery under the general rule might succeed if the law with most significant relationship with the occurrence makes the parties liable. Since Boys vs Chaplin[13] was decided there has been much academic criticism of the choice of law rule, but only a few reported cases. However, two major developments i.e., the case of Red Sea Insurance vs, Bouygues SA[14] and the Private International Law (Miscellaneous Provisions) Bill introduced before the House of Lords in 1994, which seeks to invalidate the common law on choice of law in tort.

In Red Sea Insurance vs Bouygues SA[15], the Privy Council was given the opportunity to reconsider the double-actionability rule. This case raised the issue of lex fori and presented an occasion to reconsider the rule given by the Halley.[16] On the appeal from the Hong Kong Court of Appeal Lord Slynn gave the advice to their Lordship, as the decision of the Privy Council not technically binding on an English court, the case was explicitly decided on the basis that Hong Kong law is similar to English law.

Dicey, Morris, Cheshire, and North have all criticized the *Halley rule*, which requires liability to arise under English Law *qua lex fori*. However, the English Court has clung tenaciously to the plaintiff in tort as a matter of domestic law. Furthermore, tort law has been compared to criminal law rather than contract law. Imposing liability for harm is a matter that is rooted in a specific society's culture and is based, to some extent, on public policy arguments. To remove the requirement for liability to arise under English law would mean that the court would have

[11] Phillips vs Eyre [1870] L.R. 6 Q.B. 1.
[12] Boys vs Chaplin [1971] A.C. 356.
[13] Id.
[14] Red Sea Insurance vs, Bouygues SA [1994] 3 W.L.R. 926.
[15] Id.
[16] (1868) L.R. 2 P.C. 193.

to decide on liability without the cultural infrastructure to support the public policy decision that might be Necessary.The rule does serve to keep out of English courts actions for wrongs that English law does not consider to be so concerned as to necessitate recovery. The rule also prevents a plaintiff from recovering damages in circumstances that would give rise to strict liability under another law but in which the plaintiff cannot prove negligence as required by English law. To the contrary, the justification for modern tort law differs from that of criminal law. The law of tort now resembles the law of contract in many ways. Indeed, there are many cases where the facts give rise to overlapping liability in tort and contract or quasi-contract.[17]

2.1. Rationale for the rule given in *The Halley*

The Halley rule is epithet "parochial" because it results in the application of English law even when there is no connection between the facts and English law. This can be seen in the case of Red Sea Insurance vs. Bouygues SA[18], where the only connection to Hong Kong appears to be that the insurance company was incorporated there. Its headquarters were in Saudi Arabia, and all of the other elements of the case appear to be linked to the country. The building was built there, the insurance policy was governed by Saudi Arabian law, and all contracts between the various defendants were governed by Saudi Arabian law. As a result, assigning such a dominant rule to the *lex fori* is inconsistent with modern conceptions of the function of a choice of law rule.

The *lex fori* is not incorporated into other rules of choice of law except when English notions of public policy require it or when the issue before the court is one of procedure. In other areas where foreign law is properly pleaded and proven, courts have appeared willingly to allow a case to be decided on its merits according to some unfamiliar rules and concepts. The rule is not only inconsistent with the principle of choice of law, but it is also unnecessary because the same results can be obtained in other ways. The choice of law rule is interpreted in such a way that it refers the issue to English law whenever there is a sufficient connection with England to justify it in the same way that other choice of law rules does. *Lex fori* could be used in appropriate circumstances to prevent liability arising under a foreign law from being recoverable in English courts by using public policy as an exception.

[17] Refer to Case the Evia Luck [1992] 2 A.C. 152; also see Sayers vs. International Drilling Co. Ltd. [1971] W.L.R. 1176.
[18] Red Sea Insurance vs, Bouygues SA [1994] 3 W.L.R. 926.

Only a few reported cases have used the Halley Rule to prevent a plaintiff from recovering because no liability arose under the lex fori. As a result, the rule is upheld as one that promotes certainty. The absence of reported cases, however, does not imply that justice is always served. Even if the defendant cannot be sued elsewhere, a plaintiff who clearly cannot recover under English law will not take the risk of bringing a costly case here. Furthermore, in Boys vs Chaplin, the Lordships reaffirmed the Halley rule, with Wilberforce, Donovan, and Pearson giving English law, the lex fori, the dominant role as substantive law. Despite a lengthy discussion on the subject, their lordships' statements were only obiter dicta. There was no doubt in that case, but liability arose as a result of English Law. The Privy Council was not bound by any recent decision in Red Sea Insurance, and this was an ideal case to go over the arguments again. Lord Slynn undoubtedly upheld the rule, never questioning its validity. He simply determined that this case could be answered if (a) there was a flexible exception to the double actionability rule, specifically the Halley rule, and (b) the facts of the case met the exceptions' requirements.

The English Court of Appeal in case of Church of Scientology vs Commissioners of the Metropolis[19] and Coupland vs Arabian Gulf Oil Ltd.[20] has accepted that Lord Wilberforce's flexible exception existed but, in neither case, it was adopted. The only English Case which used it as *ratio decidendi* is the first-instant decision of Johnson vs Coventry Churchill[21]. On the basis of that Lord Slynn held that the flexible exception was indeed part of English Conflict of laws. It does not seem to have been brought to the attention of the Privy Council that in Breavington vs. Goldeman[22] the majority, led by Mason CJ, adopted a new choice of rule based in the *lex loci deliciti* as the substantive law of the tort. If that choice of law rule were to be applied in this case, the plaintiff would have been able to recover. It may be perplexing that this argument was not presented to their Lordships, but this could be explained. In recent Australian cases McKain vs Miller[23] and Stevens vs Head[24] Mason CJ's view became minority one. The current position in Australia is one strict double actionability with *Lex fori* as the substantive law and it is likely that there is no flexible exception in Australia, at least for international torts.[25] However, none of these cases was strictly on point as in all of them the

[19] Church of Scientology vs Commissioners of the Metropolis (1976) 120 S.J. 690.
[20] Coupland vs Arabian Gulf Oil Ltd [1983] 3 W.L.R. 1136.
[21] Johnson vs Coventry Churchill [1992] 3 All E.R. 140.
[22] Breavington vs. Goldeman (1988) 80 A.L.R. 362.
[23] McKain vs Miller (1991) 104 A.L.R. 257.
[24] Stevens vs Head (1993) 67 A.L.J.R. 343.
[25] Breavington vs. Goldeman (1988) 80 A.L.R. 362.

plaintiff could recover under the *lex fori* and was seeking to avoid the application of the *lex loci deliciti*, the reverse of Red Sea Insurance. Therefore, the Australian cases add nothing to Lord Slynn's case.

After determining that there was evidence that flexibility needed to be incorporated into the general rule in the interest of justice, Lord Slynn advised that in exceptional cases, an issue could be decided by applying the law that has the most significant relationship with the occurrence and the parties. This is in line with Lord Wilberforce's position in Boys vs Chaplin[26]. However, Lord Lynn went on to say that the exception could be used to hold the defendant liable even if the defendant was not liable under the *lex fori*. The Privy Council expressly retained the rule requiring liability under the lex fori in most cases, except where it was necessary to disregard it in the interests of justice. However, Lord Slynn did not explain why it was "just" in this case to apply another law rather than the lex fori. There is obviously a difference between a court being able to apply its own law exclusively and being required to apply another system exclusively. This, however, is not necessarily fatal to the contention that only the lex loci delicti be applied since the foreign law can be proved and it is clear that in appropriate cases the lex loci delicti can be applied to give a just result when the *lex fori* might not do so.[27] The only explanation for it being "just" based on these facts was that the parties had no strong ties to Hong Kong but had strong ties to Saudi Arabia. This made it more appropriate for Saudi Arabian law to govern any liability arising between the parties. If the parties had considered the possibility beforehand, they might have expected Saudi Arabian law to govern the matter. Their reasonable expectation would justify the application of that law. Applying the same rationale to the application of lex fori, it is clear that it is "just" to apply lex fori only when there are strong ties between the parties and that law, and not otherwise. The use of the lex fori in every case is unwarranted and out of date. Fortunately, if the Law Commission passes the Private International Law (Miscellaneous Provision) Bill, which repeals the *Halley Rule*, this may not be a problem.

2.2. Arrival of The Proper Law Test:

The “significant relationship” test as used in the Red Sea Insurance vs Bouygues SA[28] is the same as “proper law” of the tort propounded by Dr Morris and so been criticized by the House

[26] Boys vs Chaplin [1971] A.C. 356.
[27] Red Sea Insurance vs, Bouygues SA [1994] 3 W.L.R. 926.
[28] id

of Lords in Boys vs Chaplin[29] that it was rejected by all of them as general rule. Lord Slynn in *Red Sea Insurance* refused to adopt the proper law rule due its complexities and uncertainty.[30] The English Court appears to be afraid of what has happened in American courts where a similar test has been used. Lord Slynn made no mention of the policy underlying Hong Kong's rule. He was only interested in finding the law that had the most significant relationship to the parties and the occurrence.

In practice, regardless of which law rule is used, the outcome is likely to be the same. The Law Commission recommended the use of lex loci deliciti, which has been partially adopted in the Bill. This test, it has been argued, is much more certain and has an almost intuitive appeal. It can be argued in favour of *lex loci deliciti* that the law of the place where the defendant acted and where the plaintiff suffered harm is the only law that could have been applied. As a result, the law is more likely to meet both of their legitimate expectations.

The *lex loci delicti* has several criticisms. Firstly, deciding the case under foreign law exposes the parties to unnecessary uncertainty and expense. That argument, however, could also be used to argue against choice of law rules in general. It can be countered by admitting that in England, the parties could always choose to have the matter decided solely by English law by not pleading or proving foreign law, which is aided by the presumption that foreign law is the same as English law. Second, it has been stated that a choice of law rule based on the location of the incident is "inappropriate to modern travel conditions."[31] There are, however, many circumstances in which the place where the harm was suffered was not a matter of chance which can be inferred from the case of Boys vs Chaplin.[32] Lastly, the lex loci deliciti is not as certain a rule as it might appear because of the difficulty in locating the *locus delicitus*.[33] There are real problems in discovering the *locus delicitus* in some cases. Any which way, the English Courts are no strangers to these complexities.

2.3. The Private International Law (Miscellaneous Provision) Bill

The Bill does not use the terminology of “proper law” or of the “substance” of the tort. Nonetheless, the concepts underlying the Bill and common law are very similar. The Bill states

[29] Id para 16
[30] Supra p 17
[31] Supra p 16
[32] id
[33] [1994] L.M.C.L.Q. 248

that for a tort consisting of "events" that occur in more than one country, the court must apply the law of the country where the "most significant element" of those events occurs. It would not be surprising if the courts drew on cases determining a tort's "substance" to determine its "most significant element." The Bill also allows an exception to that general rule where it is "substantially more appropriate" for another law to apply once the significance of all the "factors" connecting the tort to the various countries is compared. The factors to be taken into consideration are those which would be investigated as part of the determination of the proper law. As a result, the exception in the Bill is very similar to the proper law test, which would almost certainly have become the rule at common law after the Red Sea Insurance case. Legislative reform is, therefore, probably unnecessary.

Chapter 3 Contemporary approaches for solving the foreign torts:

A tort is a civil wrong and one of the main problems in the commission of torts in a foreign territory is the choice of law. It is every much quite obvious that there exist different modes for claiming reliefs and limitations is different in different states so the primary concern would be the choice of law issue ie which ultimately takes us through the concept of which law is more suited for the parties to apply.

There are theories which talks and deal this sort of disputes the one would be the Lex Loci Deliciti and the other would-be Lex forum. The former says that the law of the place where the act is being committed or the place where the affect is shown then that law will be applied. And the later talks about the when the act is committed in one country, but the proceedings are brought forth in another, the law of the forum where the claim is brought, or the law of the forum where the tort was committed then in such case the law of forum will be applied.[34]

However, all that phenomenon solely depends upon the Private International Law rules in particular and it various from country to country. The theories may always vary depending upon the circumstances, but the main aim is to apply the theory in such a way that it provides certainty and is still flexible enough to accommodate complex cases. The reason behind this is that at a very basic level of the facts of a tort related claim there are multiple connecting factors such as the place of the tort, the nationality and domicile of the parties, etc.

The reason behind making it very much complicated is that there exist multiple connecting factors such as place of commission, the domicile of the person and the nationality of the individual etc to consider. And there is also undermined issue in relation to this is that there are different kinds of torts so is there any different approach for the sake of commission of different torts.[35] These theories are of approach are of more basic in nature. And there also exists new approaches to this which were being adopted by various jurisdictions:

(i) Significant relationship approach rule

(ii) The government interest approach

[34]G.C. Cheshire, P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law* 605 (13 ed. 1999).
[35]A. M. Setalvad, *Conflict of Laws* 648 (1 ed.2007).

(iii) Comparative impairment analysis approach[36]

3.1. Significant Relationship Rule:

This rule basically talks about the situation where the rights and liabilities of parties are actually determined by the local laws of the state which is going to have most significant relationship to the parties and the occurrence of an event.The court is going to consider various factors to ascertain and distinguish the rights and liabilities of a party such of those are: Domicile of the parties, location of tort, forum clause in case of any agreement.[37]In the case of Bates vs Superior Court the court held that the significant relationship rule is always have a direct link with the place of commission of tort. It undermined the principle saying that it is the way and the opinion which says that only the local of the state will determine the rights and liabilities of the states. Unless there exists, any other law which can significantly derive the relationship better than that of a local law.[38]It further held that which state is going to have a significant approach will be determined on qualitative approach but not on quantitative factors.

In addition, there can also be one more principle under this domain which says that in case the injured person is residing or conducting business or is domiciled there then in such case the injury has occurred there then that place would become the significant law.The specific contacts to be taken into account when assessing which state has the most significant relationship to a tort claim include:

- The place where the injury occurred,
- The place where the conduct causing the injury occurred,
- The domicile, residence, nationality, place of incorporation and place of business of the parties, and
- The place where the relationship, if any, between the parties is cantered.

Another principle which is being followed in order to understand the Significant law which has to be applied can be assessed with which the court analysis various contacts and then come to a consideration on which would be the most significant contacts with the issue. So, the basis

[36]Supra Note 5.
[37]US Legal, FIND A LEGAL FORM IN MINUTESCONFLICT OF LAWS, https://conflictoflaws.uslegal.com/laws-applicable-to-torts/most-significant-relationship-rule/ (last visited Apr 20, 2022).
[38]*Bates v. Superior Court*, 156 Ariz. 46 (Ariz. 1988).

of such analysis is not only the mere counting of contacts but rather checking the relevance of such contacts with the issues and considerations of the party.[39]

In the caseof *Wilcox vs Wilcox*[40]the court observed that it is obvious that one state may have a legitimate concern with one facet or issue of the case, but not with another, and hence it is not necessary in each case to apply only the law of a single state to all phases of the lawsuit may well involve the application of the rules of the road of the tort state since it is that state that is primarily concerned with safety on its highways.

3.2. Government Interest Approach:

In determining the choice of law to apply in a tort case then the courts would like to approach which would protect the government interest. It requires the application of law of the state that would better fit the shoes with the greater interest in the solving the issue. This approach solely has its basis on evaluation of the particular laws of the parties and on such application which law would actually advance the remedy to the party according to the facts then that application of law is considered.[41]The factors which are to be considered in order to apply this approach would be:

- The place where the injury has occurred.
- The place where the conduct causing the injury occurred.
- The domicile, residence, nationality, place of incorporation and place of business of the parties; and
- The place where the relationship is cantered.[42]

The analysis taken by the courts would amount to a position where firstly the courts examine the substantive laws of different parties and then evaluate whether if there is any difference to it and the law which is examined is on par with the facts of the case is mandatory.Secondly if there is difference in the laws examined by the courts of that of parties then in such case it would go to a situation and look at the legitimate interest of the jurisdictions laws to entertain the case or if they are in need of their own law to be applied and if one party is having legitimate interest then that particular would be applied.And in case if both the parties' jurisdictions are

[39]*Martinez v. Smithway Motor Xpress, Inc., 2000 U.S. Dist. LEXIS 17145 (N.D. Ill. Nov. 22, 2000)*.
[40]*Wilcox v. Wilcox, 26 Wis. 2d 617 (Wis. 1965)*.
[41]US Legal, FIND A LEGAL FORM IN MINUTESCONFLICT OF LAWS, https://conflictoflaws.uslegal.com/laws-applicable-to-torts/government-interests-approach/ (last visited Apr 20, 2022).
[42]*District of Columbia v. Coleman*, 667 A.2d 811 (D.C. 1995).

interested in application of its rule of justice then the procedure would be hanged to the other step.[43]Thirdly the court at this stage would analyze and get into the shoes of the parties and evaluate which law on application would impair the interest of the parties less and then accordingly apply the other such law where the parties' interest is impaired more.

3.3. Comparative Impairment Analysis:

It is the actually the continuation of the Government interest approach where the legitimate interest of the parties is being taken into consideration and if both state laws are actually interested in the application of their own rule of law then in such case the law which would be more hampering the interest on comparison to the other if they were not applied would then be applied. [44]Comparative impairment analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied.In the case of Cable vs Sahara Tohoe Corporation the court have discussed the methodology to evaluate the laws of two states when we have a point of discussion in order to eliminate one when one such law would be impaired more. It does not involve the court in weighing the conflicting governmental interests in the sense of determining which conflicting law manifests the better or the worthier social policy on the specific issue. Rather, the resolution of true conflict cases may be described as essentially a process of allocating respective spheres of lawmaking influence.[45]

3.4. Other countries Codification:

1) The German codification with respect to torts gave the choice directly to the victim of tort other than the tortfeasor. Article 40(I) of the codification provides in part: "Claims arising from tort are governed by the law of the state in which the person liable to provide compensation acted. The injured person may demand, however, that the law of the state where the result took effect be applied instead."
2) The Portuguese codification with respect to torts gave the choice to the court to decide upon. Article 45 is subjected torts to the law of the place of conduct, but also provided that "if the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the former state shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission."

[43]*CRS Recovery, Inc. v. Laxton, 2010 U.S. App. LEXIS 7050 (9th Cir. Cal. Apr. 6, 2010).*
[44]*Bernhard v. Harrah's Club, 16 Cal. 3d 313 (Cal. 1976).*
[45]*Cable v. Sahara Tahoe Corp., 93 Cal. App. 3d 384 (Cal. App. 2d Dist. 1979).*

3) Article 62 of the Italian codification with respect to the Torts provides in reverse believes in the approach that torts will be governed by the law of the state of the injured person that is the victim, but "the person suffering damage may request the application of the law of the State in which the event causing the damage took place and have happened."[46]

3.5. Criticism:

The growth of these approaches might be even larger but what Mr Kanowzitz feel is that despite the growth and the application and consideration being given to the legitimate interest of the parties the ultimate interest vests in the forum to apply the law which it suits. Rather than solving the problem of conflict of laws it would still promote the concept of forum shopping. The conduct of courts in such cases extremely lightened many other theorists that even after being the sovereign country but still being dictated by any other law is something which is making the judges discomfort. After all these the author says that the concept and approach is actually more illusory than real and cannot bring into existence practically and it feels that it would bring more problems than solving.[47]And the most serious defect in the approach would be however, in the comparative-impairment method is that, notwithstanding the court's protestations that it differs qualitatively from a weighing process "in the sense of determining which conflicting law manifested the 'better' or the 'worthier' social policy on the specific issue,'" the comparative-impairment technique inevitably implicates the kind of value judgments which so effectively demonstrated to be beyond the competence of state or federal courts, a basic principle conceded by the court and scholars advocating the use of the method.

Conclusion:

The Modern approaches towards the solving of cross border tort disputes as we discussed in the Chapter 3 of this paper generally are being adopted and followed by the civil law countries. So, after going through the various approaches and analysing their mode of application the researcher would like to conclude that those approaches cannot actually solve the problem in total it actually even opens door for the sake of forum shopping where still the decision ultimately is being given to forum. And coming to the one such approach it is being there and followed by the common law countries it believes in the theory of “Lex Loci deliciti”. So, the

[46] Symeon C. Symeonides, Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should, 61 Hastings L.J. 337 (2009).
[47] Leo Kanowitz, Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws, 30 Hastings L. J. 255 (1978).

researcher would like to suggest that on application of these approaches the problem which exists regarding the choice of law in case of cross border tort disputes is only partially solved. The inference which can be drawn from the various criticisms on the stated approaches would be giving more problems that solving the existing problems with respect to the choice of law.

It is really difficult and a struggle for the Plaintiff to recover damages if the defendant is a foreigner further, the plaintiff must persuade the court that it has jurisdiction over the case. If that is established the double actionability test as given in the Philips vs Eyre case has to satisfy. To give some relief to the plaintiff the Red Sea Insurance vs Bouygues SA was given the opportunity to reconsider the doble actionability rule. The court proceeded to test the lex fori rule as given by the Halley. Further, there was a long discussion to check whether the Halley rule should be the substantive law or not, but the statement given by Wilberforce was considered as obiter dicta. With the case coming into picture reforms to the substantive law also started to change with this a new choice of law rule was adopted i.e., lex loci deliciti but soon this rule was also avoided as the English Court taking into reference the difficulties faced by the Australian Court, ruled that lex fori should compulsorily be followed. With the development and cases related to tort where foreign element was involved the court now started to look at "just" and equitable ground. There is obviously a difference between a court being able to apply its own law exclusively and being required to apply another system exclusively. This, however, is not necessarily fatal to the contention that only the lex loci delicti be applied since the foreign law can be proved and it is clear that, in appropriate cases the lex loci delicti can be applied to give a "just" result when the *lex fori* might not do so. The court then came up with the "significant relationship test" in which, what should be the proper law to govern the parties was tested based on which law is most suitable to give equity to the party.

To address all these issues the legislature came up with the Private International Law Bill which if passed will clarify the confusion arising in the different cases and will also be able to address the issues faced by the plaintiff when asking for compensation and will be a "just" law for each party. It can be concluded by stating that the hypothesis assumed by the researchers is proved to be partially true and to an extent it is false as constant attempt has been done by legislatures to tackle with the issue but changing economic, social and financial circumstances makes it difficult to apply the rules universally although there has been contribution from the judiciaries too who has upheld that basic essence of the justice and at the same time tries to establish it successfully in various cases as they deemed fit.

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