Choice of law - Traditional Approach

Metaphysical theory of exclusive spheres of lawmaking power

Story & Beale

if an event happens in a sovereign’s territory it has exclusive legislative power to regulate it with its laws

* if it does not regulate it, then the event falls into a legal void — it is completely unregulated
* The same point applies to adjudicative authority, that is, the power to issue binding judgments concerning a person or a party
* If a person or property occurs within the sovereign’s territory, its courts have exclusive power to issue a judgment binding that person or property (think Pennoyer v. Neff)

Exclusive legislative power and exclusive adjudicative power seem to be in conflict. If an event happens in Alabama, Alabama has exclusive legislative power. But if the event is litigated in Mississippi, which has exclusive adjudicative power because the defendant or his property is within the borders of the state of Mississippi, then Mississippi has exclusive power to determine what judgment should be issued. (Notice we set aside here the limits imposed by the United States Constitution)

* It follows, for both Story and Beale, that a sovereign with adjudicative power is not legally required to respect the legislative power of the sovereign over the event being adjudicated
* Story thought that it was only comity that gave the sovereign with adjudicative power a reason to respect another sovereign’s legislative power
* Beale however thought it was more than comity that was at issue. If the other sovereign had legislative power, then the occurrence of the event within that sovereign’s sphere of power created a vested legal right (either for the plaintiff or for the defendant)
* The sovereign with adjudicative power should recognize the vested right, but is not legally obligated to do so
* This difference between Story and Beale has practical consequences. Story might say that Mississippi has no reason to respect Alabama’s legislative power unless Alabama respects Mississippi’s legislative power. But Beale would say that Mississippi should respect Alabama vested rights even if Alabama does not respect Mississippi vested rights.

The same point is true of vested rights created through judgments issued by courts with adjudicative power. Those judgments too create vested rights, which other sovereigns whose courts have adjudicative power should, but are not legally bound to, respect.

The idea here is that if there is a vested legal right, that right exists for all sovereigns, although they are not legally bound to recognize it.

The American legal realists, who were instrumental in the transformation of choice-of-law approaches in the mid 20th century, rejected the idea of vested rights entirely. They thought it was absurd metaphysics that there should be legal rights that transcend any particular sovereign. For them, to say that a legal right exists simply means that a court of a particular jurisdiction will behave in a certain way.

Reading legal rights this way emboldened conflicts scholars to come up with other methods of deciding choice-of-law cases.

Does the realist critique makes sense? Do we really think that legal rights are simply the behavior of courts?

Imagine that D, a Virginian, punches P, a Virginian, in Virginia. P sues D and Virginia state court. Wouldn’t we characterize P as suing upon a preexisting right?

Another way of thinking of the movement toward interest analysis in the mid 20th century is that it was predicated upon a view that the lawmaking power of sovereigns is concurrent rather than exclusive. Two or more sovereigns can have power to extend their law to a particular event. If that is true, one ought to look to the purposes of the laws at issue in order to determine whether a sovereign with power has actually chosen to exercise its power.

The move to theories of concurrent rather than exclusive lawmaking power also occurred in connection with personal jurisdiction. Under International Shoe, more than one jurisdiction will have power to issue a binding judgment in personam. It is no longer just the jurisdiction in which the defendant happens to be present at the initiation of the lawsuit.

A move to concurrent rather than exclusive lawmaking power also occurred with respect to the distribution of power between the federal gov’t and the states.

Back to the details of the first restatement approach for torts

* What is place of wrong? What if P had fallen in Miss, walked to La and his arm fell off?
  + Rule 1 sect 377 – Place of the wrong is where the harmful force takes effect on body - Miss
  + Why? – some damages in Miss, even if very small
  + Once there is a possible tort consummated by damages, that jurisdiction’s law applies concerning all damages, even those that occur later in other jurisdictions
  + Why do this? Probably because it’s too complicated to have the damages determined by the law of a number of jurisdictions, even though that would seem to follow from the first restatement theory

§ 377. The Place Of Wrong

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

Rule 1. *Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.*

* What if poisoned in Ala, gets sick in state Miss, dies in state La
  + - Place of wrong is Mississippi

Rule 2. *When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.  
...*

* Green just noticed the emphasis on *voluntarily* taking something that has been poisoned. He hasn’t been able to find anything on choice of law under the first restatement when someone is more directly poisoned. His guess is that the reason why there’s an emphasis in the rule on voluntarily taking something that is poisoned is because under the common law there was no consummated tort in such cases until the person got sick. That is why the place of the harm in such cases is considered the place where the poison takes effect.
* His guess is that in more direct cases of poisoning the place of the wrong is the place where the poisoning occurs.
* What about negl in Ala, causes death of husband in Miss, wife does w/o consortium in La – she sues for loss of consortium
  + Would think place of the harm would be the place where the wife suffers the loss of consortium, that is Louisiana
  + But again, all damages including those for loss of consortium are determined by the law of the place of the original wrong
  + Wrongful death?
    - Losses to relatives of decedents – still place of the original wrong
* D, in Mississippi, makes material misrepresentations by phone to P in Alabama. In reliance upon these representations, B sends goods from Alabama to D, in Mississippi. D keeps the goods. P sues D for fraud (a tort). Which law applies?
  + Which state?
  + Where the loss is sustained, not where the fraudulent representation is made
  + Sustained when P parted with goods in Alabama
  + Green notes that you could get creative here and argue that the plaintiff retained ownership of the property during shipment. That would be a way to make the place of the harm Mississippi, if that is where ownership actually was transferred.
  + This is an example of how technical legal questions become very important under the first restatement approach
* D, broadcasting in Alabama, slanders P. The broadcast is heard in Mississippi and Louisiana. P has a good reputation in both states, which is affected. Which state's or states' law applies?

377 Rule 5. *Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated.*

- “is communicated” refers to where the communication is heard

- MS and LA law?

- BOTH – although there is a tendency to use law of P’s domicile (greatest reputational loss)

* Example of D’s dog straying from Mass to NH
  + - Mass follows the dangerous propensity (one free bite) approach (negl approach)
    - NH, has strict liab
    - which law applies
    - strict liab – New Hampshire
    - LeForest v. Tolman
    - Notice how this frustrates the expectations of the defendant
* Sum up – determined by place of the wrong
  + whether damages are recognized (eg psychological harm, loss of consortium, wrongful death) – here place of original wrong
  + limitations on damages, exemplary (eg punitive) damages
  + standard of care (negl, strict liab)
  + whether contrib. negl or comp fault

- even when act of contrib. negl occurs in another state

* + - 1st Rest is often consistent: it looks to the place of where the harm occurs despite party expectations/interests
    - But sometimes the 1st Rest fudges out of concern for the expectations of the parties:
    - e.g. *application* of standard of care
      * relevant standard of care is (i.e. negligence, strict liability) is determined by state of the harm BUT
      * application of that standard is determined by law of the state of the conduct (and thereby upholds the actor’s expectations)
      * Immunities and privileges: again, out of concern for the expectations of the parties, uses the law of the place of the alleged wrongdoing (the act) not the harm (§382)

Similar concern for the expectations of the parties in connection with derivative liability

* + Scheer v. Rockne Motors Corp.
    - D in NY gave X car but did not authorize him to go to Ontario,
    - X goes to Ontario
    - law of Ontario created liability on D for X’s torts
    - law of NY did not
    - Does NY or Ontario law apply?
    - If you went strictly by the place of the harm Ontario law would apply- but the first restatement approach is it differently
    - For the place of the harm to determine derivative liability the principal must of authorized the agent to act in the place where the agent acted – that wasn’t true in Scheer
      * § 387 When a person authorizes another to act for him in any state and the other does so act, whether he is liable for the tort of the other is determined by the law of the place of wrong.
      * Employer must authorize employee to act where the wrongdoing occurs (not necessarily where harm occurred), protect the employer’s expectations, not submit him to liability where he didn’t expect it
      * Because the employer did not authorize his employee to act in the state, law of Ontario does not apply
  + Note: It is important to distinguish between substantive tort law and some procedural rule of the forum
  + A limitation on damages might be understood as a procedural rule. If so the limitation on damages of the place of the wrong will not apply.

Contracts

* Miliken v. Pratt
  + FACTS: K (guaranty) between seller (Maine) and wife (Mass) of buyer (on behalf of husband). Signed by defendant and sent by husband in Mass. to the seller in Maine. Forum is Mass., but at the time of contracting Mass. did not allow married women to make such a K whereas Maine did.
    - Purpose of law: protect wives who are dominated by husband? Notice that the 1st restatement doesn’t care about policy purpose
  + What law applies: Law of the place of contracting = Maine
    - Signed in Mass., mailed in Mass., but K in Maine?
      * Under the Mailbox Rule acceptance is consummated when mailed
      * In this case, the acceptance of the unilateral contract is by performance, thus, wife is offeror and the seller accepts the offer by mailing goods
  + Complicated: law on validity of contract is determined by where K entered into, if there is a contract, which there may not be…
    - Problems
      * People don’t always know *where* they are entering into the contract, thus the rule may undermine the parties’ expectations
      * Where acceptance occurred is itself a legal question
        + Possible that Maine would determine that acceptance was in Mass. and wife was acceptor; Mass. may view as unilateral K with acceptance in Maine
        + Triggering event (place of K) is itself legal, and therefore must know what law applies (at least concerning the place of acceptance) before you can determine what law applies?!

Situation is worse in contracts than in torts because there is much disagreement about the nature of contracts, what constitutes acceptance, etc.

Interest analysis

* *Carroll*: what were the interests of the different jurisdictions?
  + Ala. law allowed liability contrary to the fellow servant rule, why?
    - Purposes: provide employee with greater access to compensation, employer in better position to spread loss; deterrence, incentivize employer to monitor employees, train employees
    - Given these purposes, would legislature have wanted the law to apply to the inter-jurisdictional scenario in Carroll?
      * YES!
        + Both PLA and DEF Ala. domiciliaries, policy of loss spreading probably applicable to all who are domiciled in state (no matter where loss occurs)
        + Wrongdoing occurred in Ala – legislature probably wants to incentivize employers to monitor Ala acts – lack of monitoring occurred within Ala.
  + What about Miss. and the fellow servant rule?
    - Purpose? Tort beyond scope of employees job/authority, not directed or authorized by employer; Miss. wary of holding innocent employer liable
    - Directed as Miss. companies for persons acting within Miss. (inapplicable to this case, not interested in this case)
  + *Carroll*  is an example of a “false conflict”
    - Only one state (Ala.) is actually interested in its law applying to these facts
      * Yet the 1st Restatement chooses the opposite, chooses the state that doesn’t give a damn about its law being applied
* *Milliken*
  + Mass.: protective of married women in Mass.; interested in law applying?
    - YES: Mass. married woman possibly being influenced by husband
  + Mass rule is an exception to contract law - Why K law in general?
    - Uphold expectations; respecting peoples’ autonomy
  + Maine: interested in K law applying?
    - Yes
    - Encourage economic activity uphold expectations of Mainer?
  + Miliken is an example of a “true conflict”
    - Both states have interests to apply law: what should the forum court do when its sovereign is itself interested in its law applying?
    - Should the forum prefer the interests of another sovereign over the interests of its own?
      * So 1st Restatement gets it wrong again from an interest analysis perspective: compels a Mass ct to favor Maine interests over Mass interests