

Session of Edinburgh – 1969

Delictual Obligations in Private International Law

(Twenty-sixth Commission, Rapporteur : Mr Otto Kahn-Freund)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Being of the opinion that as a result of technical developments the principles governing delictual liability in private international law have greatly gained in practical importance and that they continue to do so,

Observing that largely as a result of these developments the traditional application of the law of the place of delict has been and is being questioned in many countries by courts and by academic writers,

Being convinced that the application of the law of the place of delict should be subject to exceptions where that place is merely fortuitous and where the social environment of the parties differs from the geographical environment of the delict but that nevertheless the rule by which the law of the place of the delict governs liability should be maintained.

Being further of the opinion that the extent to which and the way in which the law of the place of delict is to be replaced by some other legal system must be worked out separately for each type of delict (traffic accidents, accidents at work, defamation and infringement of privacy through mass media of communication, unfair competition and other economic delicts, delicts committed on the high seas, in the air, or in space, etc.) and transcends the limits of a general resolution on delictual liability,

And being also of the opinion that the time has not yet arrived for the Institute to express any view in favour or against the expediency of applying different laws to different issues arising from delictual liability.

Considering that the difference between liability for fault and liability for risk and between the purposes of deterrence and of risk distribution are differences of degree and not differences in kind, that it is impossible to establish different principles of private international law for the two types of liability or for the two types of purposes, and that the same rules of private international law should apply to fault liability and to risk liability as well as to rules serving the primary purpose of deterrence and serving the primary purpose of social risk distribution.

Considering further that it is inexpedient to establish abstract rules for the definition of the place of delict, the determination of which must in each case depend on the degree to which the issue involved is connected with one of the places at which the conduct alleged to be delictual occurred or the effect of that conduct was produced,

Being of the opinion that it is inexpedient in a Resolution devoted to delictual liability to establish any rules of law governing the characterisation (qualification) of a claim, a matter which can only be discussed within the framework of the general principles of private international law,

But considering that the scope of the following rules on delictual liability should not include either contractual liability or liability for unjust enrichment, or any questions of the immunity *inter se* of members of a family from delictual claims, or the transmission of delictual claims to the estate, the heir or other successor in title of the victim of a delict or the transmission of delictual liability to the estate, the heir or other successor in title of the person responsible.

And considering further that the rights of an insurer of a victim to be subrogated to the claim of the victim against the person responsible for the accident, and the right of the victim to raise a direct claim against the insurer of the person responsible, are so closely connected with the sphere of the contract of insurance as to render it inadvisable for the Institute in this Resolution on delictual liability to express any views as to the law applicable to these rights.

And considering that in view of the rapid and often conflicting development of the law in many countries the time has not arrived to formulate a precise draft of legislation, but that general principles are required which can give guidance to courts and to academic writers,

Has passed the following Resolution :

Article 1

On principle delictual liabilities are governed by the law of the place at which the delict is committed.

Article 2

For the purpose of Article 1 a delict is regarded as having been committed at the place with which, in the light of all the facts connecting a delict with a given place (from the beginning of the delictual conduct to the infliction of the loss), the situation is most closely connected.

Article 3

In the absence of any substantial connection between the issue to be determined and the place or places at which the delict has been committed, and by way of exception to the rules in Articles 1 and 2, that law is to be applied which is indicated by a special relation between the parties or between the parties and the occurrence :

- a) thus the law of the common habitual residence may be applied between members of the same family, the law of the seat of an enterprise to liabilities arising between employers and employees and between fellow employees of the same enterprise ;
- b) thus the law of the registration of a vehicle may be applied to liabilities arising between its driver or owner and its passengers, whether for hire and reward or gratuitous, and between those passengers, the law of the place at which an expedition has been organised to delicts committed in the course of the expedition.

With the same intent the law of the flag may be applied to delicts on board a ship in foreign territorial waters, and the law of the place of registration to delicts committed on board an aircraft.

Article 4

The principles expressed in Articles 1, 2 and 3 apply to all issues arising from delictual liability, and notably :

- a) to the standard of liability, including the question whether a person made responsible is liable for the creation of a risk or for fault, for gross negligence or simple negligence, and to all presumptions relating to this liability ;
- b) to the question how far contributory fault of the victim is relevant to the liability of the person responsible ;
- c) to the question of delictual capacity, including that of infants and mentally disordered persons, and of corporate bodies ;
- d) to immunities from delictual liability of charitable organisations and trade unions ;
- e) to questions of vicarious liability, including those of employers for their employees and of corporate persons for their organs, but not necessarily to that of husbands for their wives, parents for their children, or teachers and masters for their pupils and apprentices ;
- f) to the determination of the person or persons entitled to compensation, to the determination of the loss for which compensation can be claimed (including the question of *dommage moral*) and to the assessment of the damage (including financial limitations).

Article 5

The application of the law which is applicable in accordance with the preceding rules can be only excluded in so far as such application to the issue to be determined would be manifestly incompatible with the public policy of the forum.

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(11 September 1969)