reiterated promises of the government are carried out. As far as is known, their management is reserved for insurance companies when a determined level of investment yield or predetermined capital has been assured, with freedom to create "management companies" for non-insured public funds. In my opinion, this future law will only have a significant repercussion if the tax regulation of Pension Funds is satisfactory and if it is coordinated with an extraordinarily complex and difficult Social Security reform, which I do not see as very probable.

"Choice of Law in Tort and Delict" - A Law Commission Working Paper

Where a claim is made in a UK Court for a tort that has some connection with another country, which country's laws should govern the action? This is the question posed by Working Paper Number 62 of the Law Commission. The paper, of nearly three hundred pages, is based on the work of a joint working party set up under the chairmanship of Professor A.L. Diamond by the Law Commission and the Scottish Law Commission.

The subjects bristles with difficulties.

The present law in England is based on the rule in Phillips v Eyre (1870) L.R. 6 Q.B. 1, 28 when it was said. "To found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. 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." Thus, there must be double actionability. If there is, the Court proceeds to apply English law. This has the effect that the wrongdoer may plead any defence that would be available to him whether in English Law or in the place where the act complained of was done. For example in Boys v Chaplin [1971] A.C. 356, where two Englishmen resident in England had a road accident in Malta and one sustained injury involving loss of wages and general damages, the defendant maintained that because the laws of Malta did not provide for the award of general damages, the plaintiff was not entitled to them in an English suit. The House of Lords found against the defendant, holding that the rule in Phillips v Eyre was subject to an exception, but it is impossible to extract from the judgments of their Lordships just what the exception is. Hence English Law is at present in a state of uncertainty. This uncertainty extends to Scottish Law which closely resembles, though it does not coincide with, English Law.

Some practical points need to be borne in mind. First, collisions on or over the high seas are decided by English Law and no change is proposed in this respect. Second, the EEC in 1972 issued a Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations. This met with objections and the Commission subsequently decided to limit its activities to the contractual obligations. A convention was signed by the UK in 1981, but this has not yet been ratified. Many suits embody claims both in tort and contract. It is a feature of the laws of some countries e.g. France that if a claimant sues under a contract he cannot also sue in tort.

Third, there are in existence two conventions relating to choice of law governing traffic accidents and products liability respectively. These are the Hague Conventions of 1971 and 1973, but they have not been ratified by the UK. Fourth, the Civil Jurisdiction and Judgments Act 1982 contains

some provisions relevant to actions in tort. When they come into force it may be that UK Courts will see more actions arising out of foreign torts.

The paper says (3.17): "In our view the present law cannot be justified on grounds of principle and is anomalous, uncertain and can result in injustice". However, it admits that there is some judicial acceptance of the present law on the practical ground that no better rule can be found.

It is one thing to decide that the law needs reform but quite another to find a reform which will command general acceptance and minimise anomalies. A formula is needed that will cover miscellaneous torts such as defamation and conspiracy, as well and negligence.

The paper offers as alternatives two possible models, one based on application of the law of the country where the tort occurred (lex loci deliciti) and one on the "proper law".

Model 1 states the general rule (lex loci deliciti) to be accompanied by a definition, for cases concerning a number of states (multi-state cases), of the country where the tort occurred. For personal injury or damage this would be the country where the person or property was when injured or damaged; for defamation, the country of publication; and in other cases the country in which the most significant train of events occurred. The general rule would be displaced in favour of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection, but only if the occurrence and the parties had an insignificant connection with the country where the tort occurred and a substantial connection with the other country.

Model 2 states the general rule that the applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection. The country will be presumed to be, in the case of

defamation, the country of publication and, in cases of personal injury or damage to property, the country where the person or property was at the time of the injury or damage. The presumption could be departed from only if the occurrence and the parties had an insignificant connection with the country indicated by the presumption and a substantial connection with another country.

It is contemplated that the parties to a suit should be permitted, either before or after a tort has been committed, to choose the law to be applied, which would not necessarily be UK law.

A question raised by the working party is whether actions based on economic torts should be wholly or partly excluded from the proposed choice of law rule and whether the damages obtainable should be restricted. (One thinks of USA statutes which prescribe triple damages for some actions).

Special provision might be necessary for events confined to a single ship or aircraft in flight. It is suggested that the state to which a ship or aircraft belongs should be the state where it is registered. Where a state comprises more than one country (for example the UK or the USA) the country to which a ship belongs can be identified by its port of registry, but the working party asks for suggestions as to how the country should be identified in the case of an aircraft.

One difficulty with either of the rules proposed for choice of law arises where there are three or more parties to a single action. It is suggested that the choice of the applicable law should be made separately for each pair of opponents.

Another difficulty concerns the possibility of direct action against an insurer by a claimant. Should this possibility be governed by the applicable law in tort, as apparently in France, or by the proper law of the contract of insurance, which is the law that regulates the liability of the insurer to

the insured? The working party concedes that there might be circumstances in which a claimant could succeed in an action against an insurer but not against the wrongdoer himself.

Other problems will arise where vicarious liability differs from country to country; where systems of law provide for immunity from liability in actions between spouses or between parents and children; or where a system or law puts a ceiling on damages. It is conceded that where, as in New Zealand, actions in tort for accidental bodily injury have been abolished, an injured claimant in the UK in respect of an accident happening in New Zealand will get no damages if his case is held to be governed by New Zealand law.

Continental law leans towards the application of lex loci delicti in tort, though various qualifications are made.

The working party say that their objective is not to seek some general or idealised means of doing justice but rather to ensure our Courts will have a choice or law rule acceptable to the parties in most cases as being just. Such a rule should not consist mainly of a statement of a desired result but be formulated in such a way as to give guidance to the Courts and to advisers.

Comment

Probably the majority of cases where a choice of law has to be made concern traffic accidents and products liability. International conventions have been drawn up for both of these categories. An analysis of these conventions and an indication of whether they might be adopted by the UK would have been helpful. As in the earlier case of the Law Commission's proposals for modification of the duty of disclosure in insurance contracts, one approaches the working paper with a reluctance to see UK law modified unilaterally without full regard to international repercussions. Meanwhile one is bound to ask oneself whether the case for changes to the existing law

has been made out. Whatever the theoretical objections to our present choice of law rules they have the practical advantage that more often than not a UK Court finds itself applying UK law. This is easier for the Courts, and less expensive for litigants, than applying the law of the other states which has to be proved and interpreted where it differs from UK law. If one has to choose among the many possibilities that are admirably set out and discussed in the paper one's personal choice, in diminishing order of preference, would be:

(a) no major modification of existing UK law;
(b) if a change has to be made, a preference for Model 1 rather than Model 2 on the ground that it promises to result in fewer uncertainties than Model 2.

Conclusion

The Law Commissions say that they would particularly welcome advice from persons with practical experience in any of the wide range of situations to which the paper refers. They instance insurance and claims settling. The final date for the receipt of comments is 16 July 1985.

Hugh Cockerell

On Wednesday, 13 February, Mr. Anthony P. O'Dowd, who is perhaps best known for his work as an editor of "MacGillivray and Parkington on Insurance Law" was guest speaker at our third lunch-time meeting. His theme was:

"WHAT FUTURE FOR THE
NON-ADMITTED INSURER IN
THE LONDON MARKET?"