Choice of Law for Tort Claims in Virginia: A Brief History and Current Status

by Timothy J. St. George, Kathleen M. Knudsen, Scott Kelly, and David N. Anthony

Graphic compiled from Adobe Stock assets by Kaylin Bowen

Choice of law issues are threshold matters that frame all the legal issues in the case, and can often be outcome determinative. The choice of law rubric applicable to tort claims in Virginia, *lex loci delicti*, however, has shifted over time, resulting in a lack of clarity that has hindered the resolution of a crucial question. This article explores that evolution and where Virginia's *lex loci delicti* doctrine stands today.

I. Virginia's Lex Loci Delicti Standard and History of the Doctrine

Virginia's *lex loci delicti* choice of law standard has long applied to determine the substantive law applicable to a plaintiff's tort claims when Virginia is the forum state. The law of the place where the wrong was committed—literally the situs (*loci*) of the tort—was the general rule for determining liability by the turn of the century.[1] The *lex loci delicti* concept was further clarified by the Restatement (First) of Conflict of Laws, published in 1934, which explained that "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."[2] Yet, the First Restatement included a note explaining that "[w]hen a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made."[3] Thus began the ambiguity in the *lex loci delicti* analysis: was the *lexi loci delicti* where defendant's last action occurred (situs of the tort) or where plaintiff felt the injury?[4]

Over the next several decades, the *lex loci delicti* doctrine was criticized and critiqued due to its inflexibility and sometimes seemingly inequitable results.[5] In 1971, the Restatement (Second) of Conflict of Laws § 145 (1971) synthesized the evolved view that choice of law should be determined based on the forum with "the most significant relationship to the occurrence and the parties."

Virginia, however, has explicitly refused to adopt this "most significant relationship" rule. Today, only 10 states still follow *lex loci delicti*.[6] Virginia remains one of those 10.[7] The Supreme Court of Virginia has also explicitly "decline[d] the invitation" to adopt the Second Restatement's "most significant relationship" rule and reaffirmed the *lex loci delicti* principle.[8]

II. Virginia Courts' Application of the Lex Loci Delicti Rule

Maintaining the *lex loci delicti* principle does not answer the complicated question of *where* exactly *is* the *lex loci delicti*. For instance, is it:

1. the place of defendant's wrongdoing?; or
2. the place where the injury is felt?

Initially, Virginia appeared to follow the first definition—the place where the wrongful act took place. That principle was based on the reasoning that, if a party would not be liable where the allegedly wrongful action was committed, then they should not be liable in Virginia. To that end, multiple Virginia cases have described *lex loci delicti* as the "place of wrong." For example:

- *Diaz Vincente v. Obenauer*, 736 F. Supp.

679, 690 (E.D. Va. 1990) ("Defendants' fraudulent acts occurred chiefly in Virginia. Accordingly, Virginia law controls plaintiffs' common law fraud claims.").
- *Jones v. R.S. Jones & Assocs., Inc.*, 246 Va. 3, 5 (1993) ("[I]n this case, we apply the substantive law of Florida, the place of the wrong, and the procedural law of Virginia.").
- *Milton v. IIT Research Inst.*, 138 F.3d 519, 521 (4th Cir. 1998) ("Virginia applies the *lex loci delicti*, the law of the place of the wrong, to tort actions like this one.").
- *Dreher v. Budget Rent-A-Car Sys., Inc.*, 272 Va. 390, 395 (2006) ("[I]if the Owners' alleged liability under N.Y. Law § 388(1) is a matter of tort, Virginia applies the doctrine of *lex loci delicti*, meaning the law of the place of the wrong governs all matters related to the basis of the right of action.").

However, and introducing uncertainty to the choice of law calculus, Virginia courts have also explored applying the law of the "place of injury" or the "place of the last act necessary for the tort to be completed." For example:
- *Career Care Inst., Inc. v. Accrediting Bureau of Health Educ. Sch., Inc.*, No. 1:08CV1186, 2009 WL 742532, at *2 (E.D. Va. Mar. 18, 2009) (Trenga, J.) (stating law of state where injury occurred "likely applied to" plaintiff's tort claims and noting defendant did not dispute such law's applicability because the laws did not differ materially).
- *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 671 (E.D. Va. 2019) (4th Cir. July 5, 2019) (applying foreign law because the tort was "complete" when the plaintiff experienced the injury).
- *Depp v. Heard*, 102 Va. Cir. 324 (2019) ("Application of *lex loci delicti*, the place of the wrong, requires the Court to determine 'where the last event necessary to make an act liable for an alleged tort takes place.'").

Which interpretation is correct?

III. The Fourth Circuit Weighs In

At first, two Fourth Circuit decisions appeared to hold that the law of the place of injury, not the place where the tortious act occurred, applied under Virginia's choice of law rules.

First, *Lachman v. Pennsylvania Greyhound Lines*, 160 F.2d 496 (4th Cir. 1947), involved a Greyhound bus that crashed into a telephone pole in Maryland while traveling from New York to Virginia. Plaintiff filed the suit in Virginia state court and Greyhound removed it to federal court. Applying Virginia's choice of law rules, the Fourth Circuit held that the plaintiff's substantive rights were governed by the law of Maryland because "it is well settled in Virginia that liability for tort depends upon the law of the place of injury."

Second, *Quillen v. Int'l Playtex, Inc.*, 789 F.2d 1041 (4th Cir. 1986), involved a suit against a tampon manufacturer after a plaintiff developed toxic shock syndrome. Plaintiff purchased the tampon in Tennessee, first experienced distress in Virginia, and was ultimately hospitalized in Tennessee. Although Plaintiff advocated for applying Tennessee law, which recognized strict liability, the Fourth Circuit applied Virginia law which did not. Applying Virginia's *lex loci delicti* rule, it determined the last event necessary for the cause of action to arise occurred at the place of injury—when Plaintiff first became ill in Virginia.

Nonetheless, based on a subsequent decision from the Fourth Circuit, it appears that *Quillen* and *Lachman* went too far in stretching the *lex loci delicti* doctrine to the place of injury. Without directly citing either *Quillen* and *Lachman*, the Fourth Circuit's later ruling in *Milton v. IIT Research Institute*, 138 F.3d 519, 522 (4th Cir. 1998), clarified that the *lex loci delicti* was *not* where the injury was felt but where the wrong *act* occurred. Milton brought a wrongful discharge action against his former employer, IIT Research Institute, in a Virginia court. Milton resided in Virginia, but his termination was communicated to him at his office in Maryland.[9] Milton argued that the *lex loci delicti* was Virginia because that is where he felt the effect of his wrongful discharge through lost income and emotional distress.[10] After canvassing Virginia law, the Fourth Circuit rejected Milton's argument. In particular, the Fourth Circuit's *Milton* holding was based on an intervening decision from the Supreme Court of Virginia—*Buchanan v. Doe*, 246 Va. 67 (1993)—in which the Supreme Court of Virginia defined a "tort" as "any civil wrong or injury; a wrongful act."[11]

Choice of Law *continued on page 49*

Timothy J. St. George is a partner at Troutman Pepper focusing his practice in complex litigation and business disputes, financial services litigation, and consumer litigation. He is based out of the firm's Richmond office.

Kathleen M. Knudsen is an associate in the Consumer Financial Services practice at Troutman Pepper. She is based out of the firm's Virginia Beach office.

Scott Kelly is a partner at Troutman Pepper focusing his practice on national class actions and complex business disputes. He is in the firm's Richmond office.

David N. Anthony is a partner at Troutman Pepper focusing his practice on class actions and complex individual lawsuits. He is in the firm's Richmond office.

Additional research provided by Gerald (Jam) Jamison, 2022 summer associate at Troutman Pepper and student at William & Mary Law School.

Choice of Law *continued from page 27*

Relying on *Buchanan,* the Fourth Circuit in *Milton* concluded that application of Virginia's *lex loci delicti* rule "clearly selects the law of the place where the *wrongful act occurred*, even when that place differs from the place where the effects of injury are felt."[12] The Court reasoned that the "place of the wrong" is where "the tortious conduct—the *legal injury*—occurred," not necessarily the "place where the effects of injury are felt."[13]

Thus, per *Milton*, Fourth Circuit precedent indicates that Virginia's *lex loci delicti* principle applies the law of the place where the wrong occurred. The Supreme Court of Virginia also has not provided any further guidance since *Buchanan v. Doe*, meaning that the place where the wrong occurred appears to be the current standard in Virginia state court as well.

Conclusion

For more than two centuries, Virginia has adhered to the *lex loci delicti* principle. In contrast to the balancing of interests approach adopted by other states, *lex loci delicti* is meant to provide clarity. But its application has varied. Virginia has followed a long and winding path to transition its understanding of the "place of the wrong" from the place where the injury is felt to the place where the events leading to the injury occurred. *Milton* has seemingly clarified that the "place of the wrong" is where "the tortious conduct—the *legal injury*—occurred," and not necessarily the "place where the effects of injury are felt." However, it remains to be seen whether this winding path has reached its end. ⚖

Endnotes

1 *See, e.g.*, *Denver & R. G. R. Co. v. Warring*, 37 Colo. 122, 131 (1906) (discussing application of the *lex loci delicti* rule).
2 Restatement (First) of Conflict of Laws § 377 (1934)
3 *Id.*
4 *Id.*
5 *See, e.g.*, *Mertz v. Mertz*, 158 Misc. 85, 85 (N.Y. Sup. Ct. 1935), *aff'd*, 247 A.D. 713 (N.Y. App. Div. 1936), *aff'd*, 271 N.Y. 466 (1936) (recognizing the general rule that "in a transitory action such as this, the *lex loci delicti commissi* governs the substantive rights and obligations between the parties," but refusing to apply foreign law because it was contrary to the public policy of New York).
6 *Depp v. Heard*, 102 Va. Cir. 324 (2019)
7 *Id.*
8 *See McMillan v. McMillan*, 219 Va. 1127, 1128 (1979).
9 *Id.*
10 *Id.* at 521.
11 *Id.* at 71.
12 *Milton*, 138 F.3d at 522 (emphasis added).
13 *Id.*