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CONFLICT OF LAWS: THE "SIGNIFICANT INTEREST" TEST IN TORTS

The traditional choice of law rule in torts cases has been that the substantive rights of the parties are governed by the law of the wrong, *i.e., lex loci delicti.*[1] The advantages of such a rule are readily discernible: certainty and uniformity of result and ease of application. The rule seems to have worked satisfactorily for many years, for in reviewing the area in 1943, William H. Page commented: "The law of the ox-cart and sailing-vessel days has thus persisted through the horse-and-buggy days, into the railroad and street-car days, and thence on into the automobile days. The result seems to have been fairly satisfactory to the bench, to the bar, and to the laity; defeated litigants and their attorneys always excepted."[2]

Recently, however, the rule has been called into serious question both in the law reviews and textbooks.[3] The criticism stems, on the one hand, from certain allegedly unjust decisions which are a product of the application of the rule[4] and, on the other hand, from the allegedly artificial reasoning on the part of the courts when they create exceptions to reach more desirable results.[5]

Still more recently, the highest courts of at least three states have overruled cases decided under the traditional rule and have attempted to formulate a new "common law" of conflicts. These are the New York Court of Appeals in *Babcock v. Jackson,*[6] the Penn-

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[1] RESTATEMENT, CONFLICT OF LAWS §378 (1934).

[2] Page, *Conflict of Law Problems in Automobile Accidents,* 1943 WIS. L. REV. 179.

[3] See EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS §§219-23 (1962); GOODRICH, CONFLICT OF LAWS §§92-95 (4th ed. 1964); STUMBERG, CONFLICT OF LAWS 199-212 (3rd ed. 1963); Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L. J. 171; Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L. J. 1; Currie, *Survival of Actions: Adjudications versus Automation in the Conflict of Laws,* 10 STAN. L. REV. 205 (1958); Currie, *Justice Traynor and the Conflict of Laws,* 13 STAN. L. REV. 719 (1961); Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts,* 28 LAW & CONTEMP. PROB. 700 (1963); Ehrenzweig, *Guest Statutes in the Conflict of Laws,* 69 YALE L. J. 595 (1960); Ehrenzweig, *Products Liability in the Conflict of Laws,* 69 YALE L. J. 794 (1960); Morris, *The Proper Law of a Tort,* 64 HARV. L. REV. 881 (1951); Weintraub, *A Method for Solving Conflict Problems—Torts,* 48 CORNELL L. Q. 215 (1963); *Comments on* Babcock v. Jackson, *A Recent Development in the Conflict of Laws,* 63 COLUM. L. REV. 1212 (1963); Comment, 51 CALIF. L. REV. 762 (1963); Comment, 78 HARV. L. REV. 1452 (1965).

[4] See, *e.g.,* Walton v. Arabian American Oil Co., 233 F. 2d 541 (2nd Cir. 1956); Alabama Great So. R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); Workman v. Hargadon, 345 S.W. 2d 644 (Ky. 1961); Carter v. Tillery, 257 S.W. 2d 465 (Tex. Civ. App. 1953); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

[5] See *e.g.,* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P. 2d 944, 42 A.L.R. 2d 1162 (1953); Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928); Kilberg v. Northeast Airlines, Inc., 9 N.Y. 2d 34, 172 N.E. 2d 526, 211 N.Y.S. 2d 133 (1961); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W. 2d 814 (1959).

[6] 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y.S. 2d 743, 95 A.L.R. 2d 1 (1963).

sylvania Supreme Court in *Griffith v. United Air Lines,*[7] and the Wisconsin Supreme Court in *Wilcox v. Wilcox.*[8] These three cases set forth a common approach to choice of law in tort cases: the substantive rights of the parties are governed by the law of the jurisdiction having the more significant interest in the outcome of the litigation.

In order to clarify the operative differences between *lex loci* and the new rule, it may be well to examine a classic tort conflict situation. An automobile host and his guest begin a trip in State X, their common domicile, which permits recovery by a guest from his his host on a showing of ordinary negligence. While they are traveling in State Y, an accident occurs involving their car alone. State Y has a statute prohibiting suit by a guest against his host.[9] Under *lex loci,* of course, the statute would operate to defeat recovery,[10] since the accident occurred in the state having the guest statute. Under the "significant interest"[11] test, however, the purpose behind the two conflicting rules would be examined. It might be found, for example, that the purpose of the guest statute is to preserve the assets of the host for an innocent third party, or that it is to prevent a collusive suit in which the host aids the guest against the former's insurer. The purpose of State X's rule in allowing recovery by the guest for the host's ordinary negligence may be the general one to protect persons against harm caused by the negligent acts of others, and to provide a pool of assets for those treating the injuries within the state. Assuming the plaintiff brought suit in State X, as he is likely to do, it can be seen that State Y's policy of preventing collusive suits is inapplicable since State X is willing to take the risk. And since the accident involved no other car, there is no one for whom the defendant's assets ought to be preserved. State X, on the other hand, has a definite interest in seeing that its citizens recover for injuries negligently caused by another. Therefore, under the "significant interest" test, the law of State X determines the recovery.

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[7] 416 Pa. 1, 203 A. 2d 796 (1964).
[8] 26 Wis. 2d 617, 133 N.W. 2d 408 (1965).
[9] This is substantially what occurred in *Babcock v. Jackson.* In *Wilcox v. Wilcox* the guest statute differed in that it allowed recovery if gross negligence could be shown. *Griffith v. United Air Lines* involved an airplane accident in a state which permitted a relatively small recovery in a survival action when death was instantaneous; the forum state permitted a more liberal recovery.
[10] *But see* Ehrenzweig,*Guest Statutes in the Conflict of Laws,* 69 YALE L. J. 595 (1960).
[11] The phrase "significant interest," rather than the more familiar "significant contacts" or "grouping of contacts" is used to describe the common approach of *Babcock, Griffith,* and *Wilcox* to the resolution of tort conflicts problems in the hope that it is more suggestive of what is properly of concern in such situations.

The heart of the "significant interest" test thus appears to be an analysis of the policies pursued by the on-their-face conflicting laws of the different states to determine whether or not the policy of any of them will be advanced or retarded by the application of either law. *Babcock, Griffith,* and *Wilcox* were relatively easy cases, because in each of them the analysis showed that the policy of the law of the place of the injury would not be furthered by the law's application, and that the policy of the law of the forum-domicile would be so furthered. The application of the law of the forum-domicile is then the obviously correct choice of law. The problem, however, is that all cases will not be so easy. Suppose that an automobile host and his guest, residents of State A, embark on a weekend automobile trip to State B, where their car collides with another driven by a resident of State B. Assume that State B has a statute forbidding suit by an automobile guest against his host, one of the policy reasons for which is that an innocent third party should have a prior claim against the host's assets. State A has no such statute and permits a guest to recover for his injuries suffered through the ordinary negligence of the host. The guest joins the host and the third party in a suit in State A, and the third party sues the host. State A has an interest in seeing that the guest recovers for the usual reasons underlying recovery on a negligence theory, and has an additional interest in creating a pool of assets for him if his injuries were treated in State A and if his failure to recover would affect his and his family's financial well-being in State A. State B has an interest in preventing the guest's recovery, because it has seen fit to give priority to the rights of a third party in this situation, and will wish to create a pool of assets for him, for precisely the same reasons State A wishes to do so for the guest. Thus, no one state has an exclusive interest in the outcome of the case; and, in contrast with the three cases above referred to, the "significant interest" test gives no clear criterion of decision.

Under the "significant interest" analysis, there are two steps in the resolution of a "conflicts" problem: determining whether each of two rules conflicting with each other on their face involves a true and present policy conflict; and, if so, determining which rule should apply. This note will examine the problem, seeking to determine any tendency of the rule to operate strongly in favor of the law allowing recovery, and against the conflicting law which prohibits or limits recovery.

Concerning the question of "plaintiff orientation" at the first level of analysis, involving no true conflict of policies, it is obvious that a greater number of plaintiff's verdicts will be made possible under the new rule than under *lex loci*; for some of the impetus for

the elimination of the traditional rule was the prevention of what were considered unjust denials of recovery, which occurred occasionally under that rule. If this is the criterion to be used, any rule which discards a liability-insulating rule can be said to be plaintiff-oriented, whether or not it was, by the conscious intent of the rule-maker to adjust the rule to favor the plaintiff. If the question is to be meaningful at this level, however, it must be determined whether in judicial practice the policy interests of the jurisdiction with the liability-producing rule will be consistently emphasized, while those of the jurisdiction with the liability-insulating rule are minimized. On the basis of the three decisions mentioned above, there is no room for such a contention. The analysis common to the cases speaks for itself; and it would have been possible for a *lex loci* court, making use of one of the exceptions to the rule, to reach the same result.

A true possibility of a systematic orientation toward recovery exists in the genuine conflicts situation, where the laws of two or more jurisdictions are in conflict and the policies behind each are found to be logically applicable to the case. As has been stated, the "significant interest" test, looking as it does only to the existence of relevant competing policy interests, cannot resolve the problem of what law to apply here.

But some prinicple of decision must be found if the policy-oriented approach to conflict of laws is to succeed in this area. Suggestions as to what that principle of decision should be have been made by several writers in the field. The remaining part of this note will discuss the proposals of two of the best-known writers in terms of whether or not their proposals systematically favor recovery in those situations where there are genuinely conflicting interests, and will suggest a possible resolution of the problem.

Professor Russell J. Weintraub has urged that in the resolution of a genuine conflicts case the choice of law rule should further the substantive policies in the area in which the rules operate,[12] meaning that the law which is in agreement with current trends should be applied. It is his belief that since most tort conflicts cases involve either automobile or airplane accidents, where recovery is sought on the basis of negligence, current trends in the negligence area should be followed. Cases in that area have striven to make negligence law serve some of the functions of a social insurance plan, through the instrumentality of liability insurance. "The issue is not whether the defendant should pay but whether the loss should be distributed or remain concentrated, and the inexorable trend has

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[12] Weintraub, *supra* note 3.

been in favor of its distribution."[13] Thus the rule which favors liability would be applied, since the defendant is the one most capable of distributing the loss by liability insurance. The only exception to the imposition of liability would occur when the risk was of a kind against which insurance was unavailable, impractical, or uncommon.

Whether or not the Weintraub solution is ultimately desirable is beyond the scope of this note. But it is important to observe that it is, at least arguably, recovery-oriented in a way that the *Babcock* rule is not. Under *Babcock,* if it were found that the only rule logically applicable to the case were insulative of liability, that rule would have to be applied despite the fact that the plaintiff could have recovered had the negligence occurred in a different jurisdiction. The Weintraub solution tends, at least in its present-day context, to largely ignore those legitimate interests which current judicial policy elects to limit or deemphasize. Those opposed to the expansion of liability into new areas of conduct may well contend that no policy of universal liability is contemplated by those decisions which rationalize their liberality in terms of social and economic practicality. Defendants are not, in other words, liable in any sense simply because they are defendants, or because they are insured.

It is true, of course, that a rule favoring defendants could be as justly attacked on the same grounds; and it is also true that, whenever two states are found to have opposing policy interests in the outcome of a suit, the losing party can argue with some reason that his loss is as vital a subject of judicial concern as the winning party's gain. Nor are his feelings likely to be soothed by the realization that he lost, ultimately, because one state's policy was somewhat arbitrarily preferred over another's. This state of affairs may indicate that a decision of a true conflicts case on the merits of the competing policies is inadvisable.

Another approach has been suggested by the late Professor Brainerd Currie.[14] It builds upon the policy analysis of the "significant interest" test; but once a genuine conflict is discovered, the law of the forum is immediately applied. The rationale behind the application of forum law must be that any other choice would amount to an impossible admission, on the part of the court, that the rule of the forum is inferior to the rule applied. Since, by hypothesis, both policies are relevant to the matter in controversy, any other rule would require the court to choose a policy directly in opposition to its own. The advantage of this approach is that it relieves the court

[13] *Id.* at 238-39.
[14] Currie, *Conflict, Crisis, and Confusion in New York,* 1963 DUKE L. J. 1.

of the embarrassing choice between competing interests of states. But it would, as Professor Currie has admitted, result in different dispositions of the problem depending upon where the action is brought.

An approach similar to this was taken by the Wisconsin Supreme Court in *Wilcox*. There the court declared that, if the forum state is concerned, a rule of law repugnant to its own policies would be strongly disfavored, and held that forum law should presumptively apply unless it becomes clear that non-forum contacts are of greater significance.[15] While the application of forum law may be the only entirely honest solution in cases of conflicting policy, the result would depend upon a factor arguably no less "fortuitous" than the place of the injury, namely the plaintiff's choice of forum. In a strong number of cases, the outcome might turn largely upon which of several potential claimants initiated the first suit, thereby substituting an arbitrary time criterion for an equally arbitrary space criterion.

The only appellate decision to date that tends to touch upon the genuine conflicts situation is *Dym v. Gordon*.[16] At issue was whether or not a Colorado guest statute[17] would apply in a suit brought in New York by a New York guest against a New York host for injuries sustained in a Colorado automobile collision involving a second car driven by a Kansas resident. Both host and guest were sojourning in Colorado for the summer, and the trip began and was to end in Colorado. The court recognized that New York had an interest in assuring recovery by its citizens for injuries negligently caused by others, but also determined that Colorado was interested in the outcome of the case. The purpose of the Colorado guest statute was held to be threefold: the protection of Colorado drivers and their insurance carriers against fraudulent claims, the prevention of suits by "ungrateful guests," and the preservation of assets of the host for innocent injured parties in other cars. Reacting to the suggestion that New York law be applied *because* of its compensation policy, which would provide a pool of assets for creditors who treated the plaintiff's injuries, the court stated as follows:

> Were we to give our attention to such considerations we might just as well speculate about the possibility that the New York defendant could become a public charge if the plaintiff were given recovery . . . . A reflection on the import of this argument gives one the feeling that a preference for whatever law will compensate the New York tort plaintiff lurks in the background. The suggestion that our courts should apply this State's policy of compensation for innocent

[15] 26 Wis. 2d 617, 634, 133 N.W. 2d 408, 416 (1965).
[16] 16 N.Y. 2d 120, 209 N.E. 2d 792, 262 N.Y.S. 2d 463 (1965).
[17] COLO. REV. STAT. §13-9-1 (1954).

> tort victims to all cases of returning domiciliaries is tantamount to saying that different rules or interests of other jurisdictions should be denied application in a New York forum on the ground of their not suiting our public policy. The principles justifying our refusal to apply foreign law on the ground of public policy are well defined, and a mere difference between the foreign rule and our own will not warrant such refusal.
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> Public policy, per se, plays no part in a *choice* of law problem.[18]

Thus, the New York Court of Appeals appeared unwilling to decide what it considered to be a genuine conflicts case on the merits of the two conflicting policies.

The difficulty with the case, however, is that Colorado's asserted interest in the outcome of the suit is difficult to specify. Colorado would certainly have no interest in protecting the host's New York insurer from what it considers fraudulent claims, particularly since New York policy gives its insurers no such protection. And Colorado would likewise have no interest in preserving the host's assets for the protection of an injured third party from Kansas, absent a showing that he had incurred expenses in Colorado because of his injuries.

It is quite possible that Colorado's interest was founded on the fact that the relationship between the parties was centered there, particularly bcause of the length of time they remained there.

> Of compelling importance in this case is the fact that here the parties had come to rest in the State of Colorado and had thus chosen to live their daily lives under the protective arm of Colorado law. Having accepted the benefits of that law for such a prolonged period, it is spurious to maintain that Colorado has no interest in a relationship which was formed there.[19]

If the declaration that public policy plays no part in a choice of law problem means that public policy must be disregarded in determining whether any state has a significant interest in the outcome of the suit, the result would be a rule heavily suggestive of *lex loci*. The dissenting opinion of Judge Fuld directed attention to the statement of *Babcock* that a state is said to be concerned with a specific issue only when its policies enter into the making of a particular decision.[20] But

[18] 16 N.Y. 2d 120, 127-28, 209 N.E. 2d 792, 796, 262 N.Y.S. 2d 463, 469 (1965).
[19] *Id.* at 125, 209 N.E. 2d at 795, 262 N.Y.S. 2d at 467.
[20] *Id.* at 131, 209 N.E. 2d at 798, 262 N.Y.S. 2d at 472. The Wisconsin Supreme Court in the *Wilcox* case stated: "We conclude that the mere counting of contacts should not be determinative of the law to be applied. It is rather the relevancy of the contact in terms of policy considerations important to the forum, vis-a-vis, other contact states." 26 Wis. 2d 617, 633, 133 N.W. 2d 408, 416.

A subsequent New York Supreme Court case indicates the conceptual

Dym's exclusionary statement on public policy may have been meant to apply only to the genuine conflicts situation, indicating that in such situations a decision on the merits of the two conflicting policies would, in the majority's view, be unwise. Although there is a suspicion that the majority in the *Dym* case were not entirely convinced of the substantive merit of the rule enunciated in *Babcock*, which may account for the extended treatment given to the locale of the relationship between the parties, it is plain that *Babcock* itself involved no true conflict of policies. Nevertheless, *Dym v. Gordon* is aptly illustrative of the dangers encountered when policy analysis and preference are permitted to govern a genuine conflicts case. The lesson of *Dym* may be that, when the "significant interest" test shows that all the states involved have a legitimate policy concern with the outcome, public policy then must give way to other considerations.[21]

CONCLUSION

The policy-interest analysis of the "significant interest" test should continue to be the sole determinant of the result when only one jurisdiction is found to have a policy concern with the outcome of a suit, but it is submitted that although valiant attempts have been made to solve the genuine conflicts problem, courts should refrain from rendering decisions on the merits of the respective rules as a method of solving the problem. To insure against the possibility that choice of forum would be determinative in such cases, the Currie-*Wilcox* approach should yield to a rule which favors the place of the wrong. The cause of certainty would be advanced by such a rule, and the law of an interested state would almost always apply. In the rare instances when the place of the wrong would have

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difficulties reintroduced into the tort conflicts area by the *Dym* case. In Kell v. Henderson, 263 NY..S. 2d 647 (1965), a one-car accident involving only Ontario residents occurred in New York. Ontario has a guest statute forbidding suit by a guest against his host. New York does not. In denying the defendant's motion for an order granting permission to serve an amended answer setting up a complete defense based on the guest statute, the court held that public policy has no part in a choice of law problem and cited N.Y. VEHICLE AND TRAFFIC LAW §388, which prescribes that owners of vehicles are liable for death or injuries to person of property resulting from negligence in the use or operation of such vehicle in the business of the owner or with his consent—an agency statute—as controlling. Controlling effect was given to the law of the place of wrong without any policy analysis to determine what the policy interests of each jurisdiction were.

[21] Section 379 of Tentative Draft No. 9 of the RESTATEMENT (SECOND), CONFLICT OF LAWS (1964), does not recognize this two-step process in resolving conflicts questions, and therefore has not been considered specifically in this note. It also may be well to suggest the possibility that the Restatement rule rigidly applied may determine the "significant relationship" by a process of counting the "contacts" that a jurisdiction may have with the occurrence. In *Wilcox* the Wisconsin court was careful to state that the order of importance the *Restatement* has assigned to the various contacts is not necessarily controlling and made explicit that their weight depends on their relevancy to the policies of the various jurisdictions.

no interest in the outcome of the suit, another jurisdiction-selecting rule, such as one based on the physical situs of the relationship of the parties, could presumably be worked out without too much difficulty.

As a practical illustration of the different results that follow upon each of the several approaches to the genuine conflict situation discussed, the following case, which, for the moment, is hypothetical, might be examined: A, a resident of Wisconsin, is involved in an accident in Illinois with B, an Illinois resident. Procedurally, either party may initiate state or federal court action either in his own state or in the state of the other party. Illinois, however, conventionally treats contributory negligence as a complete bar to recovery, whereas Wisconsin follows the liberalizing principle of comparative negligence. Assume, in order to put the matter into focus, that each party is causally negligent.

Under Professor Weintraub's approach, it should make no difference where suit is brought because theoretically both states, mindful of the current negligence trends, would apply Wisconsin's comparative negligence law. If suit were initiated in Illinois, the jury might conceivably require extensive indoctrination in the unfamiliar doctrine of comparative negligence; and might also be less prone to find contributory negligence because of the popular understanding that it is a complete bar. Further, it may be unrealistic to assume that an Illinois court would submit to what must seem to it an arbitrary means of selection of the applicable law.

Under the Currie-*Wilcox* approach, the applicable law would depend upon where the the suit was brought; for each state would be justified in applying its own law. The effect of this is to allow the party who is successful in filing his suit first to determine the governing law; and to encourage forum-shopping without insuring predictability of result.

Under the writer's suggested approach, the issue of liability would be governed by Illinois law because, since each state has an interest in the outcome of the suit, the law of the place of injury applies, when that state is an interested jurisdiction. Since forum selection involves an estimate as to the legal background and behavior of juries, the plaintiff might be expected invariably to bring his suit in Illinois, because an Illinois jury, familiar with the practical consequences of contributory negligence under that law, would tend to take those consequences into consideration in its findings.

Without ignoring "significant interests" of either state, and yet without entirely substituting one arbitrary criterion for another, a fairly uniform and predictable result may be achieved.

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