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IN SEARCH OF JUSTICE: TORTS CONFLICTS OF LAW

HARVEY COUCH*†

While complete agreement on proper outcomes in choice-of-law questions is not always possible, there is a lack of consensus regarding conflicts issues today that is disconcerting. Persuasive law review articles appear, but authors disagree over solutions.¹ Courts decide choice-of-law questions, but one suspects that such decisions are based on a judicial sixth sense rather than a consistent methodology.²

If certainty, predictability and uniformity of result are appropriate goals in conflicts, as they are in other areas of the law, then general areas of agreement need to be identified and expanded.

By no means is everything bleak; great progress has been made in the last two decades. A series of essays by Brainerd Currie introduced a more rational approach to choice-of-law problems.³ Currie called for the identification and analysis of the relevant governmental interests of each state. If no interest could be found, there would be no reason to apply that state's law.⁴ His methodology resulted in a refreshing honesty; public

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1. *E.g.*, compare articles cited note 15 *infra* with articles cited note 16 *infra*.

2. For the New York experience, see *Tooker v. Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969); *Macey v. Rozbicki*, 18 N.Y.2d 289, 274 N.Y.S.2d 591, 221 N.E.2d 380 (1966); *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

3. See generally B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter cited as CURRIE]. In some respects, Currie built on the theories of Cook and Cavers. See W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1947); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933-1934).

4. CURRIE, *supra* note 3, at 188-282.

policy, which previously had been used only as a last resort, became a controlling consideration under Currie's analysis.⁵ Virtually all conflicts writers accepted Currie's analysis, albeit with individual variations. The courts were slower with such acceptance, though many have now adopted some form of interest analysis.⁶

It soon became clear however that, at best, Currie's method offered merely a frame of reference. It was discovered that using Currie's formula, interests could be manipulated or fabricated to fit the party's needs.⁷ Currie's solution in so-called true conflict cases⁸ was to apply the law of the forum. This solution was not wholly satisfactory since it reflected an admittedly "give-it-up" attitude⁹ and encouraged the prospect of forum-shopping. Most conflicts writers, on the other hand, agree that normative principles operating independently of the chosen forum should be utilized in conflicts analysis.¹⁰ Another difficulty with Currie's analysis arose with the "unprovided for case."¹¹ For example, in a wrongful death action, if plaintiff and plaintiff's decedent are from a state with a \$50,000 limitation on recovery for wrongful death and defendant is from a state imposing no such limitation, neither state can be said to have an interest to advance, since the policy of plaintiff's state is to protect defendants from outlandish, emotion-ridden judgments and the policy of defendant's state is to afford plaintiffs full recovery for their loss. How, then, would interest analysis

5. "[W]hy not summon public policy from the reserves and place it in the front line where it belongs?" *Id.* at 88 (footnote omitted).

6. Louisiana, for example, had adhered to the traditional approach as late as 1970, but adopted a modern approach to choice of law in 1973. Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 *TUL. L. REV.* 1 (1974-1975).

7. Compare *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965) with *Tooker v. Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969).

8. A "true conflicts" case exists where more than one state has a legitimate interest in having its law applied to the issue, and the laws of these states conflict. *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

9. CURRIE, *supra* note 3, at 121.

10. "Predictability of results includes the ideal that the decision in litigation on a given set of facts should be the same regardless of where the litigation occurs, so that forum-shopping will benefit neither party." R. LEFLAR, *AMERICAN CONFLICTS LAW* 245 (1968) [hereinafter cited as LEFLAR]. Professor Trautman has urged the pursuit of "neutral principles that apply equally to like cases." Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 *Vt. L. REV.* 1 (1976) [hereinafter cited as Trautman].

11. An "unprovided for case" arises when neither state has an interest to advance. CURRIE, *supra* note 3, at 152-53.

cope with such a case?¹²

There were, at least implicitly, two other criticisms of the Currie analysis: (1) Except for the domicile of the parties, rather short shrift was given to territorial contacts or to where an event was centered and (2) Currie's vision was too narrowly focused on specific or local policies of a state without sufficient consideration of general or multistate policies.¹³

These two criticisms seem to have spawned, however inadvertently and indirectly, two of the principal factions in choice of law today. In delineating these two groups there is, of course, the risk of oversimplification. Perhaps, however, for the purpose of facilitating discussion, some generalization is permissible. One group has been referred to as "the new territorialists."¹⁴ Professors Cavers, Reese and Twerski are representative of this group.¹⁵ This is not to suggest that these writers would

12. For Currie's suggestions, see CURRIE, *supra* note 3, at 152-56; for a more recent attempt to cope, see Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125 (1973) [hereinafter cited as Sedler]. Professor Twerski may exaggerate when he says "that interest analysis met its Waterloo with the advent of the unprovided for case." Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 107 (1973) [hereinafter cited as Twerski].

13. Currie acknowledged this latter criticism:

I have been told that I give insufficient recognition to governmental policies other than those that are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on. If this is so, it is not, I hope, because of a provincial lack of appreciation of the worth of those ideals, but because of a felt necessity to emphasize the obstacles that the present system interposes to any intelligent approach to the problem. Let us first clear away the apparatus that creates false problems and obscures the nature of the real ones.

CURRIE, *supra* note 3, at 186-87.

14. R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 339 (2d ed. 1975).

15. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 139-80 (1965); Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 360 (1970-1971) [hereinafter cited as Cavers, *Conflicts Justice*]; Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211 (1970-1971) [hereinafter cited as Cavers, *Principled Preferences*]; Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548 (1971); Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1971-1972) [hereinafter cited as Reese, *Choice of Law*]; Reese, *The Kentucky Approach to Choice of Law: A Critique*, 61 KY. L.J. 368 (1972-1973) [hereinafter cited as Reese, *The Kentucky Approach*]; Twerski, *Enlightened Territorialism and Professor Cavers — The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1970-1971) [hereinafter cited as Twerski, *Enlightened Territorialism*]; Twerski, *supra* note 12.

This list, of course, is not exhaustive, and other writers and judges might be included. Those included have done a fair amount of influential writing. Among the judges that might be mentioned are Chief Judges Fuld and Breitel. See their opinions in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972).

always agree on a given result; indeed, their approaches differ in some measure. What they have in common is the view that territorial contacts must be given weight in conflicts analysis. In the search for some workable guidelines to be used in resolving choice-of-law problems, these writers refuse to ignore the territorial aspects of the case. The second group might be called "multistaters," and would include, among others, Professors von Mehren, Trautman and Hancock.¹⁶ Again, their analyses are not interchangeable, but they do share the tendency to discuss conflicts cases without any significant regard for the territorial setting beyond the identification of concerned jurisdictions. To resolve a conflict in competing local policies, these writers seek an accommodation by looking to national or multistate policies that overarch the concerned states. Such policies might include, for example, easing the judicial task; encouraging the free flow of interstate transactions; evenhandedness; the better, or emerging, rule of law and, in tort cases, compensation and deterrence.

Assuming that these roughly defined factions do represent two distinct approaches in choice of law today, there are nevertheless many outcomes upon which the two groups would agree and some cases, fewer in number, about which they may never agree. This premise can be illustrated through an analysis of some well-known cases. Conflicts scholars agree, for example, that *Grant v. McAuliffe*¹⁷ and *Haumschild v. Continental Casualty Co.*¹⁸ reached the right result, though using a now out-

16. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 215-327 (1965); Hancock, *Some Choice-of-Law Problems Posed by Antiquated Statutes: Realism in Wisconsin and Rule-Fetishism in New York*, 27 *STAN. L. REV.* 775 (1974-1975) [hereinafter cited as Hancock]; Trautman, *supra* note 10; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 *CORNELL L. REV.* 927 (1974-1975) [hereinafter cited as von Mehren, *Recent Trends*]; von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 *HARV. L. REV.* 347 (1974-1975).

Again, there are other writers who should be mentioned. Professor Leflar's well-known "choice-influencing considerations," for example, embrace multistate considerations and do not include any territorial elements. LEFLAR, *supra* note 10, at 233-65. The prolific Professor Sedler is an admitted "anti-territorialist." Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 *DUQ. L. REV.* 394 (1970-1971). Luther L. McDougal, who is developing a complex methodology essentially based on multistate policies, or "inclusive interests," as he describes them, should also be mentioned. McDougal, *Choice of Law: Prologue to a Viable Interest-Analysis Theory*, 51 *TUL. L. REV.* 207 (1977).

17. 41 Cal. 2d 859, 264 P.2d 944 (1953).

18. 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

dated methodology.¹⁹ In *Grant*, two California residents were involved in a collision in Arizona. The alleged tortfeasor subsequently died and suit was filed against his estate in California. Under Arizona law, a cause of action in tort did not survive the death of a tortfeasor, while California, on the other hand, had a survival statute. The policy behind the Arizona law was to protect the family and heirs of the tortfeasors; California took the view that an injured plaintiff should not be deprived of compensation by the death of the tortfeasor. In *Grant*, California had an interest in advancing its policy to protect the California plaintiff. Since the family and heirs of the tortfeasor were also California residents, Arizona had no interest in applying its law. In such a case, there would be agreement that California law should apply even though the accident occurred in Arizona.²⁰

In *Haumschild*, a Wisconsin couple was involved in an accident in California. After returning to Wisconsin, the wife filed suit against the husband and his insurer. California, but not Wisconsin, had the doctrine of interspousal immunity. California's policy was to preserve family harmony and prevent collusive suits; Wisconsin's policy was to provide financial protection to injured plaintiffs without making an exception in the husband-wife situation. Since this case involved a Wisconsin family and Wisconsin insurer, California had no interest in applying its law and clearly the only sensible reference was to the law of Wisconsin.²¹ Since only one state, in each of the two cases, had an interest in having its law applied, these cases are classic false conflicts.²² Certainly both multistaters and territo-

19. The methodology used was the characterization of an issue in such a way so as to avoid or escape the application of another state's laws that normally would apply. *Id.* at 140, 95 N.W.2d at 819.

20. The California Supreme Court, speaking through Justice Traynor, applied California law by characterizing survival statutes as remedial and therefore more procedural than substantive; the forum, of course, applies its own procedural law. 41 Cal. 2d at ____, 264 P.2d at 948-49. Subsequently, Traynor admitted the opinion was not "ideally articulated." Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1958-1959).

21. The Wisconsin Supreme Court applied Wisconsin law by characterizing the issue as one of family law, which should be governed by the law of the family domicile, rather than tort law. 7 Wis. 2d at 136-37, 95 N.W.2d at 817-18.

22. In Wisconsin, a false conflict occurs when two or more states have legitimate interests in having their laws applied, but the competing laws do not conflict. Therefore, it makes no real difference which state's law is applied. See *Hunker v. Royal Indem. Co.*, 57 Wis. 2d 588, 204 N.W.2d 897 (1973); *Conklin v. Horner*, 38 Wis. 2d 468,

rialists would approve the indicated results.²³ *Grant* and *Haumschild* are not only false conflicts, they are easy cases in which the result is obvious.

Unfortunately, however, the two groups may not always agree on cases labeled false conflicts. For example, in *Tooker v. Lopez*,²⁴ two New Yorkers were full-time students at Michigan State University. While there, they decided to take a weekend trip to Detroit in a car insured in New York and owned by the father of one of them. There was an accident resulting in the death of the two students. Subsequently, in New York, the representative of the guest-passenger filed suit against the father of the host-driver. Michigan had a guest statute, reflecting a policy of attempting to reduce the potential for collusive suits against the host's insurer. New York did not have a guest statute, indicating the view that the general policy of compensating persons injured through the ordinary negligence of another should not be subordinated in the guest-host situation. Here, New York had an interest in protecting the New York plaintiff and since there was a New York insurer, Michigan had no interest in applying the guest statute. Thus, under interest analysis, this was a false conflict and New York law should govern.²⁵ Multistaters would agree: New York represents the better, or emergent, rule of law and affords greater financial protection to the injured party. Territorialists, however, are troubled by this result:²⁶ the parties were, in effect, residents of Michigan, the guest-host relationship was formed there, the trip was to begin and end in Michigan and the tragic accident occurred there. These are numerous and weighty contacts with

157 N.W.2d 579 (1968). The Wisconsin terminology accords with the view of Professor Leflar. Leflar, *True "False Conflicts," Et Alia*, 48 B.U.L. REV. 164, 169-74 (1968).

23. Conflicts scholars in both camps accept interest analysis generally as a starting point. The exception is Professor Twerski, who wrote: "I am only advocating territorialism as a normal operating principle. We can and will provide for the throwout and will do so honestly, reflecting the teaching of the interest analysis. But, the base rule should be a territorial one." Twerski, *Enlightened Territorialism*, *supra* note 15, at 382-83. Twerski would surely characterize *Grant* and *Haumschild* as "throwout" cases.

24. 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969).

25. This was the view of Judge Keating writing for the majority in *Tooker*. See Sedler, *supra* note 12, at 126.

26. Twerski, *supra* note 12, at 123. Twerski, *Enlightened Territorialism*, *supra* note 15, at 379-85. Cavers has conceded, at least, that the result in *Tooker* is "a bit odd" and a "bit quixotic." Cavers, *Conflicts Justice*, *supra* note 15, at 369-70; Cavers, *Principled Preferences*, *supra* note 15, at 218. See *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965), and Professor Cavers' approval of that result. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 293-312 (1965).

Michigan. Here the territorial elements pull strongly away from the state that is presumably the only interested state.

While there will be exceptions like *Tooker*, multistaters and territorialists agree on the resolution of most false conflict cases. Some measure of agreement can also be reached on more difficult, or true conflict, cases. To continue with the familiar guest-host setting, the formula for a true conflict in such a situation is a plaintiff-guest from a state without a guest statute (state *A*) and a defendant-host from a state with a guest statute (state *B*). State *A* seeks to assure compensation to an injured plaintiff for the ordinary negligence of the defendant and state *B* protects the host's insurer from collusive suits. If the host enters state *A* and there forms the guest-host relationship with the guest for a trip to state *B* and an accident occurs in *A*, all would agree that *A* law should apply to the guest-host issue. All the territorial contacts are in *A* and the application of *A* law results in the application of the better, or emerging, rule of law; imposes the higher standard of care; allocates the risk of loss to the wrongdoer and advances the multistate policies of compensation and deterrence. Thus, utilization of *A* law will satisfy both choice-of-law analyses.²⁷ Assume, however, that the guest enters state *B* and there forms the guest-host relationship with the host for a trip to state *A* and an accident occurs in *B*.²⁸ Territorialists would elect to apply the guest statute of state *B*²⁹ because the event is centered in *B*, the parties would expect *B* law to govern and it would unfairly surprise the host to be subjected to *A* law when he has had no contact with state *A* other than in giving a ride to a resident of *A*. The multistaters would, however, apply *A* law³⁰ because the territorial contacts are essentially irrelevant, *A* law is the better rule, *A* law more properly allocates the risk of loss and *A* law advances the general policies of compensation

27. If multistaters would apply the law of *A* when the case is centered in *B*, see note 30 and accompanying text *infra*, they would obviously do so here. Since the case here is centered in *A*, territorialists would apply *A* law. See Cavers, *Conflicts Justice*, *supra* note 15, at 366-67; Twerski, *Enlightened Territorialism*, *supra* note 15, at 388-90.

28. This is the case of *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). The case is the subject of a symposium in 9 DUQ. L. REV. 347 (1970-1971).

29. Cavers, *Conflicts Justice*, *supra* note 15; Twerski, *Enlightened Territorialism*, *supra* note 15.

30. See *Cipolla v. Shaposka*, 439 Pa. 563, —, 267 A.2d 854, 857-62 (1970) (Roberts, J., dissenting); Hancock, *supra* note 16, at 783-84.

and deterrence common to both states. Here, a stalemate is reached; in fact, there may never be complete agreement.

The same results occur upon examination of an "unprovided for case." Under interest analysis, *Neumeier v. Kuehner*³¹ is such a case. Consideration might first be given to a variation on the actual facts: a resident of Ontario is temporarily in New York where he receives a ride with a New York resident for a trip within New York. There is an accident injuring the Ontario guest, and the guest then files suit against his New York host. Ontario has a guest statute protecting the host's insurer; New York does not, protecting instead the injured plaintiff. Thus, neither state has a real interest in advancing its policy. Territorialists would have no trouble in applying New York law because the negligent conduct and the injury occurred in New York, the guest-host relationship is centered there and the defendant is domiciled there. Multistaters would agree with this result since application of New York law advances New York's general interest in compensation and is the better rule of law.

In *Neumeier*, however, the facts were reversed. A New Yorker drove into Ontario, picked up an Ontario resident for a trip within Ontario and the accident occurred in Ontario. Since the accident, injury, relationship and trip all occurred within Ontario, territorialists (including, in this case, Chief Judge Fuld) called for the application of the Ontario guest statute, with the probable result of denying recovery to the plaintiff.³² Multistaters, however, would view the place of the accident and the seat of the relationship as essentially fortuitous or irrelevant and would urge application of New York law³³ since it is the better, or emergent, law, it advances the policies of both states in compensation and deterrence and it results in evenhanded justice.³⁴

If the results predicted in the foregoing cases are essentially

31. 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972). The case is the subject of a symposium in 1 *HOFSTRA L. REV.* 93 (1973).

32. *E.g.*, Twerski, *supra* note 12.

33. Hancock, *supra* note 16, at 785-87; Sedler, *supra* note 12; Trautman, *supra* note 10.

34. That is, if the New York host had injured a New York guest in Ontario, then New York law would apply; there is no rational basis for discriminating against an Ontario guest by not applying the more generous New York law. This argument for evenhandedness is well made in Trautman, *supra* note 10, at 16-20. *See also* Hancock, *supra* note 16, at 786.

accurate, certain propositions can be deduced. There is agreement as to the applicable law in the easy, indisputably false conflicts. With regard to closer cases, there is also agreement when the territorial center of a case is in the state providing the greater degree of financial protection to the injured plaintiff. Disagreement arises, however, when the case is territorially centered in the state providing a lesser degree of financial protection. These areas of disagreement will continue since territorialists speak of predictability, expectations and unfair surprise and refuse to countenance an approach that seems to be directed toward getting the insurer³⁵ while multistaters urge that the most rational means of solving the dilemma posed by tough cases is in looking to general, shared policies of the concerned jurisdictions.³⁶ There is, however, some area of agreement that should be solidified. For example, there is concurrence that the purpose of choice of law is to achieve conflicts justice.³⁷ This view recognizes that the goals of predictability, certainty and uniformity of result have merit and that a system which does not require every choice-of-law case to be appealed to the state supreme court is desirable.³⁸ Therefore, although there must be room for flexibility, it would seem that if choice of law is to have a minimal amount of predictability there must be at least a few widely accepted rules.

35. Professor Cavers has warned against application of whichever law imposes the greater liability on the defendant's insurer. Some may applaud this as frankly realistic, but to me this preference seems unprincipled. I cling to the notion that a liability insurer is liable only if and to the extent the insured is liable. A preference disregarding that contractual relationship does not seem to me to be choosing between competing laws: It is sticking the insurance company.

Cavers, *Principled Preferences*, *supra* note 15, at 219-20 (footnotes omitted).

36. See generally articles cited note 16 *supra*.

37. See Cavers, *Conflicts Justice*, *supra* note 15. For the term, conflicts justice, Cavers acknowledged his indebtedness to Professor Gerhard Kegel of the University of Cologne. *Id.* at 360 n.2. Conflicts justice may differ from perfect justice, but as Professor Reese has said, "Perfection is not for this world." Reese, *Choice of Law*, *supra* note 15, at 322. Another scholar has said:

While I would not want to be understood as saying that a bad rule is better than no rule at all, I do assert that a choice-of-law rule need not achieve perfect justice every time it is invoked in order to be preferable to the no-rule approach.

Rosenberg, *Comment on Reich v. Purcell*, 15 U.C.L.A. L. REV. 641, 644 (1967-1968) [hereinafter cited as Rosenberg].

38. Courts "should not be asked to concern themselves with multitudes of fine-spun issues and problems merely because we conflicts men insist on hand-tailored, case-by-case, take-it-all-the-way-to-the-Supreme-Court-every-time justice." Rosenberg, *Conflict of Laws Round Table*, 49 TEX. L. REV. 229, 230 (1970-1971).

The first *Restatement of Conflicts*³⁹ and its reporter, Professor Beale,⁴⁰ attempted to create rules for solving all the permutations involved in conflicts cases. As Beale and the Restatement have come under heavy and successful attack,⁴¹ rules have taken on a negative connotation in modern choice-of-law thinking because they conjure up visions of an uncompromising rigidity and narrow-mindedness. This, of course, is a greatly exaggerated view and many conflicts writers acknowledge the advantage of having some rules, though obviously there may be disagreement over the number and scope.⁴² If, however, the discussion of territorialists and multistaters has any validity, then the points of agreement between the two can lead to a few narrowly drawn principles.

It is clear that in order to pass examination by territorialists and multistaters, any rule must be narrowly and carefully drawn. The problems presented by broader principles can be illustrated by considering the rules suggested by Chief Judge Fuld for resolving guest statute cases.⁴³ Fuld's first rule provides: "When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest."⁴⁴ This rule reaches *Babcock v. Jackson*,⁴⁵ and to that extent would be approved by all schol-

39. RESTATEMENT OF CONFLICT OF LAWS (1934).

40. See generally J. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

41. Virtually every conflicts writer has taken shots at Beale and the first Restatement. See generally W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT LAWS (1947). Of Cook's writings, Brainerd Currie said, "Walter Wheeler Cook discredited . . . [Beale's] theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." CURRIE, *supra* note 3, at 6 (footnote omitted).

42. Some years ago, when an approach or method was the fashion, Professor Rosenberg valiantly argued for the need for rules. Rosenberg, *supra* note 37. Professor Cavers has long urged the use, if not of rules, at least of principles of preference. D. CAVERS, THE CHOICE-OF-LAW PROCESS 114-224 (1965). Professor Reese says we may now be ready to formulate a few rules. Reese, *Choice of Law*, *supra* note 15. The desire for rules is not limited to territorialists; while multistaters may feel that we are not yet ready for rules, Professor Trautman has observed that "neutral principles that apply equally to like cases" are "ultimately indispensable to law." Trautman, *supra* note 10. Professor von Mehren has noted that, "In the administration of justice, rules are psychologically attractive and of considerable practical advantage." von Mehren, *Recent Trends*, *supra* note 16, at 965.

43. Fuld's rules were incorporated in the majority opinion in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972), but were first set out in *Tooker v. Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969).

44. 24 N.Y.2d at 585, 301 N.Y.S.2d at 532, 249 N.E.2d at 404 (concurring opinion).

45. 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

ars and judges, at least those who have adopted a modern approach to choice of law. In *Babcock*, a New York guest and New York host left New York and an accident occurred while they were temporarily in Ontario. This is a classic false conflict and only a traditionalist adhering to a rigid "place of wrong"⁴⁶ rule would urge application of Ontario's guest statute. However, Fuld's rule is too broad to be acceptable to either territorialists or multistaters. The former might be disturbed by the result the rule would prescribe in a case like *Tooker v. Lopez*⁴⁷ where none of the immediate territorial contacts are centered in the state of common domicile. At the same time, multistaters might reject the result required by Fuld's rule in a case where the guest and host are domiciled in a state with a guest statute, but the accident occurs in a state without a guest statute.⁴⁸ Here it is the state of the accident and not the common domicile that has the better rule of law which provides financial protection to injured plaintiffs and to possible medical creditors in the accident state. Thus, to receive general approval, Fuld's first rule would have to be qualified to read something like this:

When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest, provided the guest-host relationship is formed in that state, or the accident occurs there, and provided further, that the domiciliary state imposes the higher standard of care or greater financial protection against injury.⁴⁹

The foregoing is a rule that would be acceptable to everyone.

Fuld's second rule presupposes, in effect, a true conflict: the

46. "Place of wrong" rule is now almost completely discredited but was the traditional rule of torts espoused in the first *Restatement of Conflicts*. It provided that the determination of the existence and extent of tort liability is made according to the law of the place of the "wrong." RESTATEMENT OF CONFLICT OF LAWS § 384 (1934).

47. 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969). See notes 24-26 and accompanying text *supra*.

48. See Hancock, *supra* note 16, at 779-83; Trautman, *Two Views on Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465 (1967). Cases applying the law of the accident state (no guest statute) though both the guest and host are domiciled in a state with a guest statute are *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Kell v. Henderson*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

49. The wording of the last phrase is from Cavers. Cavers, *Principled Preferences*, *supra* note 15, at 217. See also D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 139-66 (1965).

host-driver from a state with a guest statute, the guest-passenger from a state without a guest statute. Fuld, disclosing a territorialist bias, would here refer to the place of the accident as a means of resolving the conflict.⁵⁰ This solution is not acceptable to either of our delineated factions. When the host-driver has an accident in his home state (having a guest statute), the multistaters are not prepared to apply the host's law.⁵¹ In such a case, territorialists are more likely to acquiesce in the rule's application, but they might reject the result it requires in a case like *Foster v. Leggett*.⁵² There, though the host-driver had the accident in his home state (which had a guest statute), he worked in the guest's home state, spent several nights a week there, the pertinent guest-host relationship was formed there and the trip was to begin and end there. Thus, in *Foster* the case was territorially centered in a state other than the place of the accident.⁵³ In such a case, even territorialists would object to Fuld's second rule since it makes the choice turn on only one territorial contact: the place of the accident.

Fuld's third rule, in part, provides: "In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred"⁵⁴ The "other situation" envisioned here is the unprovided for case: the guest from a state affording protection to the host's insurer and the host from a state which protects the injured guest. Fuld suggests a presumptive reference to the law of the place of the accident. Again, this would encounter dual objection. Multistaters would object because use of the rule may result in application of a law (*e.g.*, a guest statute) which represents an outdated, exceptional rule, and which subordinates the general policy (common to all states)

50. *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 301 N.Y.S.2d 519, 533, 249 N.E.2d 394, 404 (1969) (concurring opinion).

51. See note 30 and accompanying text *supra*.

52. 484 S.W.2d 827 (Ky. 1972). The case is the subject of a symposium in 61 Ky. L.J. 367 (1972-1973).

53. Cavers, in his fourth principle, would refer to the state that is the seat of the guest-host relationship. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 166 (1965). However, Reese would, very hesitantly, go along with Fuld's rule and apply the guest statute of the accident state. Reese, *The Kentucky Approach*, *supra* note 15, at 373. See also Twerski, *To Where Does One Attach the Horses?*, 61 Ky. L.J. 393 (1972-1973).

54. *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 301 N.Y.S.2d 519, 533, 249 N.E.2d 394, 404 (1969) (concurring opinion).

of compensating persons injured through the negligence of another;⁵⁵ territorialists would object to the exclusive reference to the place of the accident.⁵⁶

This brief review of Fuld's rules underscores what was said earlier: generally speaking, agreement can be reached when territorial contacts and compensation coincide. However, there is likely to be disagreement when the case is centered territorially in a state where recovery would be limited or denied. Perhaps the issue can be put in the form of a question: will the basic, multistate policy of compensation eventually overrun virtually all territorial considerations. An affirmative answer may already be evolving.⁵⁷

It is not an easy question. The contention is persuasive that in tort cases, recovery for injuries caused by the negligence of another is the norm and inhibitions to recovery are the exception and therefore, a defendant should lose these protections when he is involved in a multistate transaction. It is also generally true that restrictions on recovery, such as guest statutes, immunities and dollar limitations, are out of favor and decreasing in number.⁵⁸ In addition, since a judge has a freedom in a

55. See notes 33, 34 and accompanying text *supra*. The articles cited therein are all critical of Fuld's rules.

56. See note 53 and accompanying text *supra*.

57. Professor Reese has observed:

In this day of widespread insurance, however, the policy of providing compensation for the victim enjoys increasing importance, and the time may come when it is recognized that this is the basic policy underlying at least the area of unintentional torts. Indeed, it may be noteworthy that the great majority of the recent choice of law decisions involving unintentional tortious injuries have applied a law favorable to plaintiff. It may be, in other words, that the policy favoring compensation is already *sub silentio* at work. In any event, the time may come when the policy will play an important role in the formulation of precise choice of law rules for torts.

Reese, *Choice of Law*, *supra* note 15, at 333. As an illustration, seventeen cases are cited in the present article; the law favoring the plaintiff was applied in thirteen of them. Of the four exceptions, one, *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965), has been effectively overruled by *Tooker v. Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969); in another, *Hunker v. Royal Indem. Co.*, 57 Wis. 2d 588, 204 N.W.2d 897 (1973), the plaintiff did at least recover workmen's compensation though denied additional tort recovery; the other two cases, *Neumeier v. Kuehner*, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972), and *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970), have been much discussed, in part, because the law favoring plaintiff was not applied.

58. See, e.g., "Since . . . [1961], a number of states have repealed their wrongful death limitations or increased the amounts so that at the present time there are only seven which have an outright limit. . . ." *Rosenthal v. Warren*, 475 F.2d 438, 445 (2d Cir. 1973). "No American state has newly adopted a guest statute for many years.

choice-of-law case not present in a wholly domestic case, is it not proper that his creativity be exercised to fashion choice-of-law decisions giving effect to general principles of compensation and recognized trends in the law? And yet, this judicial freedom reduces the likelihood of gaining predictability and certainty. Multistaters speak of general policies of compensation common to both states, but when one state has expressly decided in a given situation to subordinate that general policy to a specific policy of restriction, should that judgment be so lightly dismissed? Finally, can territorial contacts really be deemed irrelevant and thereby disregarded? When a defendant acts entirely within his home state and in the process causes injury to an out-of-state plaintiff, is it fit and proper to apply the law of the plaintiff's state?⁵⁹ To do so will likely afford full recovery to the plaintiff, but whether conflicts justice is achieved is doubtful.

In choice-of-law problems, seemingly insoluble areas of disagreement are present. However, there are some areas of agreement from which some principles may be drawn. This article has been an attempt to identify both some areas of discord and of harmony in the hope that such a discussion may lead to greater harmony and hence to greater certainty and predictability in conflicts cases.

Courts of states which did adopt them are today construing them much more narrowly, evidencing their dissatisfaction with them." *Clark v. Clark*, 107 N.H. 351, —, 222 A.2d 205, 210 (1966).

59. Two cases applying the plaintiff's law in such a situation and allowing full recovery are: *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973); *Foster v. Maldonado*, 315 F. Supp. 1179 (D.N.J. 1970). The latter case is described as "deplorable" in *Cavers, Conflicts Justice*, *supra* note 15, at 364.