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Conflict of Laws—Michigan Guest Statute Held Inapplicable as Defense in New York Wrongful Death Action

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CONFLICT OF LAWS—MICHIGAN GUEST STATUTE HELD INAPPLICABLE AS DEFENSE IN NEW YORK WRONGFUL DEATH ACTION

Decedent, a New York domiciliary, was killed in an automobile accident in Michigan while riding as a passenger in an automobile driven by a New York domiciliary. The car, owned by the driver's father, a New York domiciliary, was registered and insured in the state of New York. As a defense to the wrongful death action brought in New York, the defendant, the owner of the car, relied on the Michigan "guest statute." The "guest statute" allows guests to recover only by showing willful misconduct or gross negligence on the part of the driver.[1] The trial court, holding that the Michigan "guest statute" did not apply, allowed the guest to recover pursuant to proof of ordinary negligence. The Appellate Division[2] reversed and permitted the Michigan statute to be asserted as a defense. The Court of Appeals reversed. *Held:* the Michigan "guest statute" is not available as a defense to an action brought in New York by a New York domiciliary against a New York domiciliary where the car is registered and insured in New York, although the accident occurred in Michigan. *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

The traditional choice of law rule in New York was that the law of the place of the wrong, *lex loci delictus*, determined the substantive rights of the parties.[3] This rule had its conceptual foundation in the doctrine of vested rights, *i.e.*, a cause of action is created under the law of the jurisdiction where it occurred and is dependent upon the law of that jurisdiction for its existence and scope.[4] Thus the rights and duties vested in the parties at the time of the tort and followed the parties unchanged into whatever jurisdiction the action was brought. Notwithstanding its ease of application and consistency, the *lex loci delictus* rule found many critics who thought its rigid application produced results that were impractical or unjust.[5] After a partial rejection in *Kilberg v. Northeast Airlines*,[6] the New York Court of Appeals, in *Babcock v. Jackson*,[7]

1. MICH. STAT. ANN. § 9.2101 (1968).
2. Tooker v. Lopez, 30 A.D.2d 115, 290 N.Y.S.2d 762 (3d Dep't 1968).
3. For an example of the application of *lex loci delictus*, *see* Kaufman v. American Youth Hotels, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509, 39 N.Y.S.2d 438 (1943). A concise statement of the rule is found in the since changed RESTATEMENT OF CONFLICT OF LAWS 1967-69 (1935).
4. 3 J. BEALE, CONFLICT OF LAWS 1967-69 (1935); *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1213 (1963).
5. *See e.g.*, Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945); Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).
6. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). Massachusetts law was applied as to right of recovery but a $25,000 Massachusetts limitation on actions for wrongful death was disregarded.
7. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

ruled that the *lex loci delictus* rule was not applicable to tort actions. In *Babcock* both parties were New York domiciliaries; the car was registered and insured in New York; the trip originated and was to end in New York. Ontario's only connection with the litigation was the entirely fortuitous fact that it was the place where the accident occurred. Pointing out that the *lex loci delictus* theory "ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues," the court refused to allow the Ontario "guest statute" to be asserted as a defense.[8] Recovery was allowed pursuant to New York law on the ground that it was "the jurisdiction which, because of its relationship or contact with the parties, has the greatest concern" with the matter in issue and "the strongest interest" in its resolution.[9] This result was obtained by an application of the "grouping of contacts" or "center of gravity" approach. The approach involved a three step method for determining which of the conflicting jurisdictions had the greatest interest: isolation of the issues, identification of the policies underlying the laws in conflict, and, finally, examination of the jurisdictions' contact with the parties. The purpose of the "grouping of contacts" or "center of gravity" approach was to achieve "justice, fairness and 'the best practical result.' "[10] The court found that the policy underlying the Ontario statute was the prevention of collusion and assertion of fraudulent claims. It found further that the Ontario legislature in passing its "guest statute" was not concerned with these New York litigants and their New York insurer. In the light of this policy situation Ontario's only contact with the litigation, the fact that the accident occurred there, was considered insignificant, while New York's many contacts with the litigation and the litigants gave New York a dominant interest in the application of its law. The rule formulated in *Babcock* involved interest determination based upon the policy behind the laws in conflict as related to the contacts which the parties had with the conflicting jurisdictions. It was not at all clear, however, how the policy behind the laws was to be determined or which policies were significant or whether the contacts gained significance through their relationship to policy or simply by their sheer number.[11]

The court attempted to apply the *Babcock* rule in *Dym v. Gordon*.[12] Plaintiff and defendant were New York domiciliaries involved in a guest-host

8. *Id.* at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746.

9. *Id.* at 481, 484, 191 N.E.2d at 283, 285, 240 N.Y.S.2d at 749, 751.

10. *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749. For a more detailed study of *Babcock v. Jackson, see* Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Grouping for Contacts*, 16 BUFFALO L. REV. 537 (1967). *See also, Comments On Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

11. The initial confusion that followed was exemplified by the ambiguous approach of Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965). Early in the opinion the court used a qualitative approach, that is, contacts are considered in terms of their significance, while later in the opinion a listing of contacts seemed to stress quantity over quality.

12. 16 N.Y.2d 120, 209 N.E.2d 792, 262, N.Y.S.2d 463 (1965).

relationship that arose and was to terminate in Colorado, the site of the automobile accident which involved another car. Both parties were living in Colorado for the summer. The issue in *Dym* was essentially the same as the issue in *Babcock, i.e.*, whether another jurisdiction's "guest statute" would be allowed to bar recovery. In analyzing underlying policy, the court found that in addition to prevention of collusion and fraudulent claims, the Colorado statute was meant "to assure priority to injured parties in other cars in the assets of the negligent defendant."[13] The court, following the *Babcock* rationale, concluded that Colorado would have an interest in the outcome of this litigation in New York. For purposes of "grouping contacts," the presence of a third party was a significant contact with Colorado in the light of that state's statutory policy of protecting such third parties. *Babcock* was distinguished because it did not involve third parties and the possible policy considerations which might result therefrom. In addition to this factual distinction, the *Dym* decision was bolstered by factors not considered in *Babcock*: the guest-host relationship arose in Colorado, the parties temporarily resided in Colorado, and the intent of the parties as evidenced by their actions indicated their expectation that Colorado law would apply.[14]

The New York Court of Appeals was again faced with the "guest statute" problem in *Macey v. Rozbicki*.[15] In *Macey* the guest-host relationship between New York domiciliaries arose in Ontario, where the accident occurred. Even though third parties were involved in the accident, the priority of third parties was not an issue because the defendant settled with the third party prior to this action. The court did not allow the Ontario "guest statute" to bar recovery in *Macey*. It held that, in the absence of consideration of the third party, the facts were so similar to *Babcock* that the result ought to be the same.[16] Apart from the fact that the third party problem raised in *Dym* is not considered in *Macey*, the court still failed to effectively distinguish *Dym*. The only distinction brought out by the court in *Macey* was that the duration of the parties' stay outside of New York was longer in *Dym*. It remained uncertain whether only policy-related contacts were significant or whether grouping of contacts meant grouping of all contacts without regard to their relationship to policy behind the laws in conflict.

Judge Keating in his concurring opinion in *Macey* analyzed the problems of the *Dym* decision which were avoided by the majority. Keating pointed out that the factual distinctions brought out by the court in *Dym* to distinguish that case from *Babcock* were of little significance, since they were not related

13. *Id.* at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

14. Chief Judge Fuld in his dissent claimed that the majority gives controlling authority mechanically to the jurisdiction where the guest-host relationship arose without regard to the policy to be implemented. Fuld found no policy basis for the *Dym-Babcock* distinction.

15. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

16. *Id.* at 291, 221 N.E.2d at 381, 274 N.Y.S.2d at 592.

to the policies behind the laws in conflict.[17] He maintained that the *Babcock* approach indicated that only those contacts that are made qualitatively significant by their relationship to policy are to be considered in determining which laws should apply. Thus Keating found that the *Dym* case was wrong to the extent that it relied on quantitatively significant, rather than qualitatively significant, contacts. Keating further pointed out that in placing emphasis on the intent of the parties, the *Dym* court was engaging in a fiction, because the parties in *Babcock*, *Dym* and *Macey* probably had no intent with regard to whose law would govern in case of an accident. With respect to *Macey*, Keating found that the court came to the right conclusion for the wrong reasons since *Dym* was distinguished on the basis of duration of stay, a fact unrelated to the policies behind the laws in conflict and thus qualitatively insignificant. He stated that, in a correct application of the *Babcock* rule, controlling significance should be given to contacts relating "to policies sought to be vindicated by the *ostensibly* conflicting laws."[18]

Keating's analysis and application of the *Babcock* approach to choice of law problems was approved in a series of cases that followed *Macey*.[19] The choice of law rule in New York has recently been applied and clearly stated in its current form:

> [T]he rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and the facts or contacts which obtain significance in defining state interest are those which relate to the purpose of the particular law in conflict.[20]

None of these cases, however, dealt with a choice of law problem where a "guest statute" was in issue.

Tooker v. Lopez once again raised a choice of law question where a "guest statute" was in issue. The Court of Appeals concluded that the New York interest in the outcome of the case was "manifest," and that "Michigan has no interest in whether a New York plaintiff is denied recovery against a New York defendant where the car is insured here."[21] The only facts or contacts considered in *Tooker* in determining which jurisdiction had the greatest interest in the outcome were those which related to the purpose of the particular law in conflict. That the parties were New York domiciliaries and that they were insured in New York were the only significant contacts.[22] The court indicated

17. *Id.* at 295-97, 221 N.E.2d at 384, 274 N.Y.S.2d at 596-97 (concurring opinion).

18. *Id.* at 295, 221 N.E.2d at 383, 274 N.Y.S.2d at 595 (concurring opinion). It should be noted that Judge Keating's concurring opinion and its arguments in this case are repeated in large part as the majority opinion in *Tooker v. Lopez*.

19. Gore v. Northeast Airlines Inc., 373 F.2d 717 (2d Cir. 1967); In re Estate of Crichton, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967); In re Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 991 (1968).

20. Miller v. Miller, 22 N.Y.2d 12, 15-16, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734, 736 (1968).

21. Instant case at 577, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525.

22. *Id.* at 576-77, 249 N.E.2d at 398-99, 301 N.Y.S.2d at 525-26.

that the length of stay, the place of the origin of the guest-host relationship and the intent of the parties should not have been considered significant in *Dym*, and were given little significance in *Tooker*. They are facts that bear no relationship to the policy sought to be implemented by the "guest statutes."

The court admitted that there has been confusion because decision subsequent to the rejection of the *lex loci delictus* rule "have lacked precise consistency"[23] and assailed *Dym v. Gordon* as the chief source of inconsistency. Although the court recognized that the decision in *Dym* was distinguishable from *Tooker*, because *Dym* involved a third party non-guest while *Tooker* did not, the court did not choose to make this distinction. The court explicitly overruled *Dym v. Gordon*[24] finding that decision mistaken in two respects: first, priority of third party non-guests in the assets of the negligent defendant is not a policy reason for a "guest statute;" and second, controlling significance should not have been given to facts or contacts unrelated to the policy underlying the "guest statute," *i.e.*, the place where the guest-host relationship arose, the length of the stay, and the intent of the parties.

Of central significance in the instant case is the rejection of what the court calls the "teleological argument,"[25] that "guest statutes" are intended to insure the priority of injured non-guests in the assets of a negligent host. Keating, speaking for the majority in *Tooker*, pointed out that third party priority cannot logically be a policy reason for a "guest statute:" if that is a valid reason, the guest should not be allowed to recover even though gross negligence is proved. Third party priority is not insured by a "guest statute" if priority remains contingent on proof of a higher degree of negligence. The opinion pointed out that the only policy reason logically or constitutionally possible for "guest statutes" is prevention of collusion and fraudulent claims, a policy that cannot be vindicated when the action is brought in New York and a New York insurer is involved.

There are three significant contacts upon which the *Tooker* decision is based: the plaintiff is a New York domiciliary, the defendant is a New York domiciliary and the car is insured in New York. A question of the possible effect on the result arises if one or more of the significant contacts were altered or absent. One likely variation would be to have the Michigan guest sue in New York. The majority in *Tooker* implied that the result might depend on what the Michigan courts would do if the suit had been brought in Michigan.[26] The clear implication remains, however, that the third party guest could not recover in New York or Michigan. Michigan courts would most likely apply their own state law and New York courts would also apply Michigan law because a suit by the Michigan guest would give Michigan a significant interest in the outcome

23. *Id.* at 572, 249 N.E.2d at 395, 301 N.Y.S.2d at 521 (quoting *Miller v. Miller*).
24. *Id.* at 574, 249 N.E.2d at 397, 301 N.Y.S.2d at 523.
25. *Id.*
26. *Id.* at 580, 249 N.E.2d at 400, 301 N.Y.S.2d at 528.

of the New York action.[27] Certainly this result would seem inequitable, but the injustice results from the operation of Michigan law as applied to a Michigan domiciliary and should not be a matter of concern for a New York court, whose policy favors recovery for its residents.

Another variation is possible. Ordinarily if the defendant is domiciled in New York he will also be insured there. This is not always the case. An out of state defendant might have an insurance policy in New York which can be used as the res for purposes of obtaining in rem jurisdiction. *Tjepkema v. Kenney*[28] involved just such a situation. A New York plaintiff brought an action for wrongful death against a Missouri defendant in New York by attaching the defendant's New York insurance policy. A $25,000 Missouri limit on recovery for wrongful death was not applied.[29] This would seem to indicate that a New York plaintiff and a New York insurance policy or perhaps some other res in New York, by virtue of which jurisdiction may be obtained, might be sufficient significant contacts and may justify application of New York law.

The decision in *Tooker v. Lopez* with its analysis and explanation of past inconsistencies should have the effect of closing the book on the question of how the New York courts will approach a conflict of laws problem. The interest analysis approach is the method by which such conflicts will be resolved. The important question of predicting the results in a given conflict of law situation, however, remains difficult to answer. It is certain that such a decision will be based on the law of the jurisdiction which has the most significant interest in the outcome. It is also certain that significant interest will be determined by an accumulation of contacts that are made significant by the policy underlying the laws in conflict. The result remains uncertain only because of the difficulty of establishing the policy behind New York law and the difficulty becomes even greater when New York courts try to determine the policy behind the law of another state. On the other hand, a rule that provides certainty would require a mechanical application and would produce precisely those injustices the court was originally trying to avoid by its rejection of the *lex loci delictus* rule. As implied by Chief Judge Fuld's concurring opinion in *Tooker*, uncertainty about the result will lessen as the case law is built up surrounding a particular problem in the conflict of certain kinds of laws. For example, the decisions in *Babcock*, *Dym*, *Macey* and *Tooker* viewed together are a reasonable guide to the relevant considerations and the probable results of most conflict situations involving "guest statutes." As the interest analysis approach is applied to other situations, similar bodies of case law will grow and provide reasonable certainty and predictability without the sacrifice of flexibility or just result.

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27. Judge Fuld in concurring adopts a series of rules that follow from the majority opinion and would require this result.

28. 31 A.D.2d 908, 298 N.Y.S.2d 175 (1st Dep't 1969).

29. The court lists place of plaintiff intestate's residence, place where estate is being administered, and place of distributee's residence as New York contacts which make the Missouri statutory limitation inapplicable.