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A PROPOSED STEP TOWARD REASONED ADJUDICATION OF TORTS IN THE CONFLICT OF LAWS

Throughout the United States "the law of the place of wrong"¹ generally has been mechanically applied to determine the substantive law governing action in tort.² It has been suggested that this rule has settled upon the courts a formula for expeditious but not always just settlement of choice-of-law problems.³ In the interest of doing justice between parties certain exceptions have been carved out of the rule. Until recently these exceptions were centered in the areas of maritime⁴ and workmen's compensation law.⁵ No reason of significant

1. Restatement, Conflict of Laws § 378 (1934).

2. See Annot., 77 A.L.R.2d 1266, 1268 n.1 (1961). See also Goodrich, Conflict of Laws 7 (3d ed. 1949); Annot., 76 A.L.R.2d 130 (1961); Annot., 77 A.L.R.2d 1266 (1961); 11 Am. Jur. *Conflict of Laws* § 182 (1937).

The theory . . . is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligato, which, like other obligations, follows the person, and may be enforced wherever the person may be found But as the only source of this obligation is the law of the place of the act, it follows that the law determines, not merely the existence of the obligation, . . . but equally determines its extent.

Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904); *accord*, Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914); Spokane & Inland Empire R.R. v. Whitley, 237 U.S. 487 (1915).

There has been a considerable amount of criticism of the approach taken in the Slater case. See, e.g., Cook, *The Logical and Legal Basis of the Conflict of Laws*, 33 Yale L.J. 457 (1924).

3. See Cook, *supra* note 2; Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1; Ehrenzweig, *The Lex Fori—The Basic Rule in the Conflict of Laws*, 58 Mich. L. Rev. 637 (1960); Ehrenzweig, *Alienation of Affections in the Conflict of Laws*, 45 Cornell L.Q. 514 (1960); Ehrenzweig, *Lex Fori—Exception or Rule?*, 32 Rocky Mt. L. Rev. 13 (1959); Ehrenzweig, *Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws"* (pts. 1-3), 69 Yale L.J. 595, 794, 978 (1959); Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. Chi. L. Rev. 474 (1956); Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 Minn. L. Rev. 1 (1951); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. Pitt. L. Rev. 397 (1954); Stumberg, *"The Place of the Wrong" Torts and the Conflict of Laws*, 34 Wash. L. Rev. 388 (1959).

4. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (Jones Act not applied to Spanish citizen injured aboard Spanish ship while in American territorial waters); *Farmer v. Standard Dredging Corp.*, 167 F. Supp. 381 (D. Del. 1958) (Venezuelan law not applied to U.S. citizen injured aboard vessel of U.S. registry while in Venezuelan waters).

5. In these cases the ultimate answer was to break away from both tort and contract characterizations, and to hold that location of the employer-employee status is the crucial fact. *Arnold v. Industrial Comm'n*, 21 Ill. 2d 57, 171 N.E.2d 26 (1961) (Illinois law not applied though injury suffered there, because employer-employee status centered in Alabama).

Leflar, Conflict of Laws, 1961 Ann. Survey Am. L. 29, 42 n.76; see *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); *Nashko v. Standard Water Proofing Co.*, 4 N.Y.2d 199, 149 N.E.2d 859, 173 N.Y.S.2d 565 (1958); 2 *Larson, Workmen's Compensation Law* §§ 86-87 (1952); Stumberg, *Conflict of Laws* 212-23 (2d ed. 1951); Cowan, Jr., *Extraterritorial Application of Workmen's Compensation Laws—A Suggested Solution*, 33 Texas L. Rev. 917 (1955). See also *Watson v. Employers Liab. Corp.*, 348 U.S. 66 (1954) (commercial insurance). See generally *Laufer, Torts and Workmen's Compensation*, 1962 Survey of New York Law, 14 Syracuse L. Rev. 309 (1963).

importance appears to deter courts from taking a reasoned approach toward the prevailing *lex loci delicti* rule. But tradition has a way of hardening. Movement in this area has been slow and cautious on the part of the courts. Nevertheless, some decisions of the past decade point to an improved treatment for conflict of laws problems arising in actions for personal injury.⁶

In New York the now famous case of *Kilberg v. Northeast Airlines, Inc.*⁷ evidenced a unique deviation from what has been described as "a choice-of-law rule derived from . . . Ice Age of conflict of laws jurisprudence."⁸ The decedent, Kilberg, was a New York resident. He purchased a ticket in New York for passage on a plane which began its flight from New York. The plane crashed at a completely fortuitous site, located in Massachusetts. Kilberg was survived by dependents who will undoubtedly continue to find their support within New York where they were living at the time of his death. The action was predicated on two counts, one upon the Massachusetts wrongful death statute⁹ and the other upon breach of contract for safe carriage arising out of the carrier-passenger relation consummated in New York. The breach of contract count was dismissed.¹⁰ Although that left plaintiff's success to rest on the Massachusetts wrongful death statute the New York Court of Appeals avoided that statute's \$15,000 limitation of recovery provision on the ground of public policy as well as by characterizing the measure of damages as procedural.¹¹ Exactly seventeen months later the procedural characterization was withdrawn in *Davenport v. Webb*,¹² leaving *Kilberg* as authority indicative of the importance attributed to a state's public policy for the benefit of its citizens.

At the time of *Kilberg* there was little doubt that where a state had a genuine interest, application of its public policy was not constitutionally prohibited by the full faith and credit clause.¹³ But subsequently in a similar case,

6. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (Massachusetts limitation on wrongful death damages rejected); *Haumerschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (question of interspousal immunity considered family law rather than tort law); *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958) (question of interspousal immunity logically determined by reference to law of family domicile); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957) (express rejection of principles in Restatement, Conflict of Laws §§ 377-78 under circumstances of action premised on dramshop act); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (question of parental immunity logically determined by reference to law of family domicile); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953) (*locus delicti* rule rejected in determining whether personal injury claim survives tortfeasor). See also *Currie, Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958) (discussing *Grant v. McAuliffe, supra*).

7. *Supra* note 6. Student commentators have given the case varying degrees of both favorable and critical attention in at least twenty law reviews. The majority have been critical. A nearly exhaustive collection of the citations appears in *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 556 n.7 (2d Cir. 1962).

8. *Pearson v. Northeast Airlines, Inc.*, *supra* note 7, at 557.

9. Mass. Gen. Laws Ann. ch. 229, § 2 (1958), amended to raise limit to \$20,000, Mass. Gen. Laws Ann. ch. 299, § 2 (1960).

10. See text at notes 84 & 85 *infra*.

11. 9 N.Y.2d 34, 40-42, 172 N.E.2d 526, 528-29, 211 N.Y.S.2d 133, 136-37 (1961).

12. 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962); 14 Syracuse L. Rev. 106 (1962).

13. Comment, 61 Colum. L. Rev. 1497, 1499 n.14 (1961).

Pearson v. Northeast Airlines, Inc., a federal court decided that where state policies conflict it was violative of the "strong, unifying principle" of the full faith and credit clause for the forum state to allow its policy to control.¹⁴ Upon rehearing en banc the Court of Appeals for the Second Circuit reversed the prior panel decision and held "that the ruling of the New York Court of Appeals in *Kilberg* was a proper exercise of the state's power to develop conflict of laws doctrine."¹⁵ It was a constitutional exercise of the state's power to refuse to apply the Massachusetts provision limiting recovery.

In the recent case of *Babcock v. Jackson*,¹⁶ a guest passenger in an automobile owned and operated by the decedent instituted an action against decedent's executrix for personal injuries arising out of a one car accident which occurred in the Province of Ontario, Canada. The parties are residents of Rochester, New York, where the trip began. Although the complaint does not allege that the automobile was insured in accordance with New York compulsory insurance law, it may fairly be presumed.¹⁷ Defendant's motion to dismiss was granted by the New York Supreme Court, Monroe County, on the ground that recovery was barred by the Ontario guest statute.¹⁸ The Appellate Division affirmed per curiam, Justice Halpern dissenting.¹⁹

The English choice-of-law rule for determining liability in tort is opposed to that which now prevails in the United States.²⁰ Based on both the *lex fori* and *lex loci delicti*, the English rule was formulated in the case of *Phillips v. Eyre*.²¹ It permits a foreign act to be litigated under the law of the forum provided the act is not justifiable under the law of the place of perpetration.²² Thus, for the protection of the defendant the *lex loci delicti* is recognized as a defense.²³

14. 307 F.2d 131, 134 (2d Cir. 1962), reversing 199 F. Supp. 539 (S.D.N.Y. 1961). The court quoted from *Hughes v. Fetter*, 341 U.S. 609, 612 (1951).

15. 309 F.2d 553, 556 (2d Cir. 1962); cf. *Richards v. United States*, 369 U.S. 1, 12-13 (1961).

16. 17 A.D.2d 694, 230 N.Y.S.2d 114 (4th Dep't 1962) (instant case).

17. *Id.* at 699, 230 N.Y.S.2d at 122.

18. Highway Traffic Act, Rev. Stat. Ont. 1950, c. 167, § 50(2):

Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

Although the latter section differs only slightly from Highway Traffic Act, Rev. Stat. Ont. 1960, c. 172, § 105(2), cited 17 A.D.2d at 695, 230 N.Y.S.2d at 115, it should be noted that it was the 1950 Revision which was in effect when the accident occurred in September 1960. See Proclamation, 5 Rev. Stat. Ont. 1960, 311-12. See also The Statutes Revision Act, 1959, 7 & 8 Eliz. 2, c. 94, § 3 (Ont. Can.).

19. 17 A.D.2d 694, 230 N.Y.S.2d 114, 115 (4th Dep't 1962) (dissenting opinion).

20. Goodrich, *op. cit. supra* note 2, at 262; Stumberg, *op. cit. supra* note 5, at 181. See generally Cheshire, *Private International Law* 367-91 (3d ed. 1947) (discussing the English rule); Stumberg, *op. cit. supra* note 5, at 181-201.

21. [1870] 6 Q.B. 1, 28-29. See also *The Halley*, 2 P.C. 193 (1868).

22. *Machado v. Fontes*, [1897] 2 Q.B. 231 (English law applied to determine tort liability for Brazilian libel where under law of Brazil the only sanction was criminal). For a criticism of the decision see Cheshire, *op. cit. supra* note 20, at 378-79.

23. See *Hancock*, *Torts in the Conflict of Laws* 5-12 (1942).

In *Machado v. Fontes*²⁴ recovery in tort was allowed where the *locus delicti* provided no basis for a civil action. Professor Ehrenzweig has approved of that decision and comments that only a vested rights approach could question its soundness.²⁵ Time, however, has sapped the vested rights theory of its vitality.²⁶ Such an approach leads to the attractive doctrine that the only source of obligation is the law of the place where the tort occurred. The notion is that law has only territorial operation and as a consequence the forum is required to enforce a foreign created right if it is to give any relief at all. It would follow that the *lex loci delicti* should determine both the existence and extent of the duty. The attraction in this approach lies in the fact that it leads to a mechanistic solution, usually easy to apply. Part of its weakness is inherent in the same quality, however. "[I]s it inherently probable that courts will achieve socially desirable results if they apply the same conflicts rule to liability for automobile negligence, radio defamation, escaping animals, the seduction of women, economic conspiracies, and conversion? . . . [T]he social factors involved differ too fundamentally for that."²⁷ Furthermore, the proposition that the only source of obligation is the law of the place of the tort will not stand inspection. More than one state or nation may have an interest in the act committed. Courts and legislatures may take cognizance of the act as well as its consequences and it is conceivable that they could occur in different places.²⁸

The prevailing rule in the United States for establishing liability for foreign torts is a remnant of the discarded doctrine of vested rights. The American rule diverged from a choice of law principle which took the *lex fori* as a starting point. An era of ambivalence was accompanied by publication of the eighth edition of Story's treatise on conflict of laws.²⁹ In that edition a footnote appearing in a criminal context³⁰ contained the first treatise statement of the *lex loci delicti* rule, based on a dictum in *Dennick v. Railroad Co.*³¹ Notwithstanding it was in contradiction of the *lex fori* rule formerly applied to foreign torts,³² courts apparently paid scant attention to the logical limits of its application. It seems that the rule must have been intended for choice-of-law cases involving moral wrongs, to effect a purpose similar to the English

24. *Supra* note 22.

25. Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595, 597 n.15 (1960).

26. See Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 Int'l & Comp. L. Q. 268 (1959); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 Harv. L. Rev. 361, 379-85 (1945). See generally Cook *supra* note 2.

27. Morris, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881, 884 (1951).

28. See Restatement (Second), Conflict of Laws §§ 43e-f (Tent. Draft No. 3, 1956). See also Restatement, Conflict of Laws § 382 (1934); Stumberg, *op. cit. supra* note 5, at 201-03.

29. See Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595, 597, 598 & n.25 (1960).

30. Story, Conflict of Laws 845 n. (8th ed. 1883).

31. 103 U.S. 11, 18 (1880). The case concerned litigation commenced in New York on a wrongful death action which occurred under New Jersey law. The Court said that New York could not deny relief merely because the action was based upon a foreign statute rather than common law.

32. *E.g.*, *Anderson v. Milwaukee & St. Paul Ry.*, 37 Wis. 321 (1875).

exception which allows certain defenses that would be available where the wrong was committed.³³ It is undoubtedly true that the rule produced desirable results in some cases outside of the moral wrong category, probably accounting for the consequence that its application generalized before shortcomings were perceived.

Despite this setting the American Law Institute adopted the rule for general application to torts.³⁴ It is beyond doubt that the *Restatement* imparted an aura of credence to the rule and led many courts to apply it with dogmatic consistency.³⁵ Now that the shortcomings are patent it is not surprising that courts find difficulty in explaining deviation from the course that has been set. "It is illustrative of an unsettled attitude . . . which induces . . . [our courts] to seize on artificialities as means for reaching and superficially explaining what are otherwise good results."³⁶ The reasoning used by the New York Court of Appeals to arrive at a good result in *Kilberg* is an excellent example of that uneasiness. A few courts, however, have found it impossible to do justice to the parties under the pale of the *Restatement* rule and have made a qualified retreat from it.³⁷

The first cogent formulation of the New York rule for ascertaining the applicable law to determine liability in actions upon foreign torts was stated in *McDonald v. Mallory*.³⁸

The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury may be enforced in another to which the parties may remove or where they be found, yet the right or liability must exist under the laws of the place where act was done.³⁹

This rule was said to apply whether the acts were "wrongful or negligent"⁴⁰ and it seems to have been so applied.⁴¹ The rule, however, is not entirely

33. Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595, 598 (1960).

34. *Restatement, Conflict of Laws* §§ 377-78 (1934). For a brief survey of the background leading to the 1934 *Restatement* rule see Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595, 596-98 (1960). There is further discussion on the adoption of the rule by the restaters in Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 Minn. L. Rev. 1, 6-14 (1951).

35. See Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934) (citing to an early draft of the *Restatement*); Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 194 N.E. 692 (1935). In the latter case the court was quick to cite the *A.L.I. Proposed Restatement* rather than to arrive at the same result by the more flexible rule of earlier New York cases such as *McDonald v. Mallory*, 77 N.Y. 546 (1879).

36. Leflar, *Conflict of Laws*, 1961 Ann. Survey Am. L. 29, 43.

37. Note 6 *supra*. See also Pearson v. Northeast Airlines, Inc., *supra* note 7, at 559.

38. 77 N.Y. 546 (1879).

39. *Id.* at 550-51; *accord*, *Wooden v. Western N.Y. & Pa. R.R.*, 126 N.Y. 10 (1891).

40. *Wooden v. Western N.Y. & Pa. R.R.*, *supra* note 39, at 14 (dictum).

41. See *Crashley v. Press Publishing Co.*, 179 N.Y. 27, 71 N.E. 258 (1904) (wrongful act: court assumed without discussion that New York law determined whether plaintiff in Brazil had been libeled per se by article published in New York); *Consolidated Coppermines Corp. v. Nevada Consol. Copper Co.*, 127 Misc. 71, 215 N.Y. Supp. 265 (Sup. Ct. 1926) (wrongful act: court assumed without discussion that Nevada law applied to action for removal of ore in that state but merits not decided for want of jurisdiction); see, e.g.,

without limitation. In the absence of contrary statutory policy at the forum, courts will refuse to enforce foreign penal⁴² or fiscal laws and New York courts sometimes refuse to take cognizance of suits for injury to land located without the state⁴³ in spite of the fact that the common-law rule⁴⁴ has been changed in New York by statute.⁴⁵

Public policy⁴⁶ and dissimilarity⁴⁷ are other grounds that have been invoked to refuse relief when the applicable foreign law was anathema to the court. The dissimilarity position is analogous to public policy but "at the present day . . . is probably retained only in Texas and Maryland."⁴⁸ For New York the turning point occurred when the highest court of the state abandoned the similarity test in *Loucks v. Standard Oil Co.*⁴⁹ The actual rationale that caused courts to deny relief when the law of the place was dissimilar to the law of the forum seems to have been public policy. Some decisions have been made on the ground of public policy alone but their infrequency attests caution on the part of courts when using a rule that is highly susceptible to opinion and whim.⁵⁰

The *lex loci delicti* rule has evoked an increasing amount of criticism from legal scholars,⁵¹ but courts, for the most part, continue to accept the principle without giving consideration to the question whether "a determination to the opposite effect would be more in conformity with principles of equity and justice."⁵² Indeed, an English authority on conflict of laws observed in 1951 that "it seems extraordinary that there should be . . . so much uncritical

Johnson v. Phoenix Bridge Co., 197 N.Y. 316, 90 N.E. 953 (1910) (negligent act: action under Canadian death statute).

42. See *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918) (taking narrow interpretation of the word penal); Stumberg, *op. cit. supra* note 5, at 172-74, 199.

43. See Consolidated Coppermines Corp. v. Nevada Consol. Copper Co., *supra* note 41.

44. See generally Stumberg, *op. cit. supra* note 5, at 174-76.

45. N.Y. Sess. Laws 1913, ch. 76 (now N.Y. Real Prop. Law § 536).

46. See generally Paulsen & Sovern, "Public Policy" in the *Conflict of Laws*, 56 Colum. L. Rev. 969 (1956).

47. See generally Hancock, *op. cit. supra* note 23, at 26-29; Paulsen & Sovern, *supra* note 46, at 975-76.

48. Hancock, *op. cit. supra* note 23, at 29 and n.13. *But see* Stumberg, *supra* note 3, at 389 n.6: "It might be added that formerly American courts frequently stated that no effect would be given at the forum to foreign law if that law is substantially different from the law at the forum. This notion seems to have survived only in Texas and there only as to Mexican law."

49. 224 N.Y. 99, 120 N.E. 198 (1918); 32 Harv. L. Rev. 172 (1919); 28 Yale L.J. 67 (1918).

50. See Stumberg, *op. cit. supra* note 5, at 198-99. See also Restatement, Conflict of Laws §§ 382, 612 (1934); Restatement, 1948 Supplement § 612, comment a. As to the position of New York law at the time the *Restatement of Conflict of Laws* was formulated see Restatement, Conflict of Laws—New York Annotations §§ 377-79, 612 (1935).

51. See, e.g., Stumberg, Conflict of Laws 201-12 (2d ed. 1951); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958); Morris, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881 (1951); Stumberg, "The Place of the Wrong" *Torts and the Conflict of Laws*, 34 Wash. L. Rev. 388 (1959). Other pertinent articles are cited in the instant case *passim*.

52. *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 380, 82 N.W.2d 365, 368 (1957) (rejecting the *Restatement* rule).

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acceptance of the rule that tort liability is governed by the law of the place of the wrong."⁵³

Adherence to the rule by which courts almost invariably would apply the law of the place of injury⁵⁴ is not without recommending features, however.⁵⁵ Because it is the prevailing American rule for determining applicable substantive law, it approaches the legal virtue of uniformity. It has the added advantage of being easy for both lawyer and judge to apply in making the initial requisite determination of applicable law. As a result it facilitates prediction, thereby aiding attorneys to counsel effectively, clients and bodies politic to save money and courts either to avoid altogether or to dispose more quickly of tort litigation involving a choice-of-law issue. As a further consideration it has been proposed that "fairness to the parties requires that the fortuitous choice of a geographical place of suit should, as far as possible, not vary the way in which the suit will be decided."⁵⁶ It seems, however, that the latter consideration is of little weight because it is susceptible to counterbalance by noting that the place of the injury may be at least equally fortuitous. Furthermore, pragmatic virtues and underlying theory cannot support a rule of law if justice to the parties does not result.⁵⁷ That mechanical formulae cannot always be employed effectively to determine which state's law should apply was recognized in *Vaston Bondholders Protective Comm. v. Green*,⁵⁸ a case involving contractual obligation. In the opinion of the Court by Mr. Justice Black: "Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order to best accommodate the equities among the parties to the policies of those states."⁵⁹ Although the significant contacts approach may not be a panacea for tort problems it should not be denied that the balancing of interests is applicable to torts as well as to contracts.

An infinite number of hypothetical situations could be posed to show the weakness of the present rule. It might stimulate the imagination to observe a few of the tort circumstances where strict application of the law of the place of injury may have produced questionable results. Multiple contact cases,⁶⁰

53. Morris, *supra* note 51, at 883.

54. See also Restatement, Conflict of Laws §§ 382, 612 (1934).

55. The place of injury generally has been accepted as the place of the wrong because injury is the last event necessary to give rise to tort liability. See Restatement, *op. cit. supra* note 54, § 377.

56. Goodrich, Conflict of Laws 7 (3d ed. 1949).

57. See Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1, 38; Stumberg, *op. cit. supra* note 51, at 201.

58. 329 U.S. 156 (1946).

59. *Id.* at 162.

60. The law of the place of the wrong has been applied to determine liability for a New Jersey automobile bailor when the bailee caused injury in New York, *Young v. Masci*, 289 U.S. 253 (1933); 47 Harv. L. Rev. 349 (1933); 18 Minn. L. Rev. 350 (1934). But in *Levey v. Daniels' U-Drive Auto Renting Co.*, 308 Conn. 333, 143 Atl. 163 (1928), the Connecticut court held the law of the place of the bailment, Connecticut, applicable on a contract ground. In a different situation, an action for libel, a forum opened itself

guest statutes,⁶¹ survivorship statutes,⁶² the single publication rule that some states apply to libel,⁶³ community property states⁶⁴ and interspousal liability versus common-law disability⁶⁵ are among those circumstances.

In the past eight years the highest courts of four states have reached decisions that rebut the pervasive grip of the *Restatement* rule in automobile liability contexts.⁶⁶ It is hoped that other courts will take cognizance of those decisions "at least where the protection of citizens of the forum state so requires. They will then cease to deprive passengers in fully insured cars of their claims against the insurers . . . by virtue of a totally unwarranted reference to the law of a fortuitous place of accident."⁶⁷ New York seems to be flirting with the modern professorial approach in this area of the law⁶⁸ but has not yet taken a position as clear as that of the Minnesota court in *Schmidt v. Driscoll Hotel, Inc.*⁶⁹

A critique of the instant case cannot afford to ignore Justice Halpern's vigorous and scholarly dissent.⁷⁰ As Professor Currie has indicated, that opinion invokes at least five bases of varying utility in an attempt to entice other members of the judiciary down a new path to an opposite result.⁷¹ Those bases are the *Kilberg* precedent, "center of gravity" or "most significant

to a possible multiplicity of suits by applying the *lex loci delicti* when some places of injury did not follow a single publication rule but the forum did. *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948). *But cf. Crashley v. Press Publishing Co.*, 179 N.Y. 27, 71 N.E. 258 (1904) (without discussion the court applied New York libel law despite injury alleged in Brazil). See generally Hancock, *Torts in the Conflict of Laws* 192-256 (1942).

61. See generally Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595 (1960).

62. See *Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 (1929); 28 Colum. L. Rev. 798 (1928); 26 Mich. L. Rev. 932 (1928), 76 U. Pa. L. Rev. 996 (1928). *But see Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953). See also *Restatement, Conflict of Laws* § 390 (1934).

63. See *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1948); 61 Harv. L. Rev. 1460 (1948).

64. See *Traglio v. Harris*, 104 F.2d 439 (9th Cir. 1939); 13 S. Cal. L. Rev. 503 (1940).

65. See generally Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. Pitt. L. Rev. 397 (1954).

66. Ehrenzweig, *supra* note 61, at 602; see Haumerschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (question of interspousal immunity considered family law rather than tort law); *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958) (question of interspousal immunity logically determined by reference to law of family domicile); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957) (express rejection of principles in *Restatement, Conflict of Laws* §§ 377, 378 (1934), under circumstances of action premised on dramshop act); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (question of parental immunity logically determined by reference to law of family domicile).

67. Ehrenzweig, *supra* note 61, at 602 (footnote omitted).

68. Compare *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) with *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

69. 249 Minn. 376, 82 N.W.2d 365 (1957); see Herzog, *Conflict of Laws, 1962 Survey of N.Y. Law*, 14 Syracuse L. Rev. 147, 158-59 (1962). See also Stumberg, "The Place of the Wrong" *Torts and the Conflict of Laws*, 34 Wash. L. Rev. 388, 391 (1959) (discussing the *Schmidt* case).

70. *Supra* note 19.

71. Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1, 34.

RECENT DECISIONS

contacts" theory, contract arising out of the host-passenger relationship consummated in New York, the English rule and renvoi or whole law application.⁷²

Taking this case on an *ad hoc* basis there are numerous factors to indicate that a dismissal of the complaint does not contribute to justice between the parties. The alleged negligence occurred while New York residents were traveling in a car owned and operated by one of them. That vehicle was presumably of New York registration, insured in accordance with the compulsory insurance law.⁷³ Under these circumstances it could not have been within the travelers' expectations that each time they crossed political boundaries their legal relationship might be altered significantly. Assureds are at least indirectly aware that their automobile liability insurance does not terminate upon leaving the state. Modern conditions make travel without the state a commonplace occurrence and automobile owners know that they are not expected to purchase separate policies to obtain liability coverage in other political territories. Similarly, residents are generally aware that state law assures them of liability coverage when they are passengers in automobiles of New York registry. As insurance follows the car a reasonable expectation would be that the ability to recover for injury likewise is stable rather than fluctuating.

There appears to be no convincing argument that would sustain the relevancy of the Ontario guest statute to defeat liability which would have accrued under the law of New York. Defendant's testator could not have relied on the circumstances to its disadvantage. An insurance company has the ultimate financial interest and as to its dismissal will be a windfall. Furthermore, any trend in recovery that might be attributed to sustaining actions such as this can be accounted for 'by the actuarial process.'⁷⁴ If the result required a change in rates the change would occur in the assured's Rochester territory, not Ontario.⁷⁵ It seems more equitable to face the possibility that some New York residents may have to pay a little more for their insurance than to deny automobile guests a cause of action that would have been theirs but for the guest statute of another forum. "One purpose, at least, of a conflict-of-laws system is, or should be, to effectuate the policies of the states concerned."⁷⁶ Granted in this case the court cannot look to the New York Constitution as it did in *Kilberg*⁷⁷ for evidence of public policy, but the

72. *Id.* at 35-36, analyzing the possibilities suggested by Justice Halpern.

73. Instant case at 699, 230 N.Y.S.2d at 122.

74. See generally Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L.J. 554 (1961).

75. "It is important to keep in mind that these territories are aggregates of assureds, not aggregates of claimants or accidents. Thus, [in the actuarial process a claim is allocated to the assured's] . . . territory even if the accident giving rise to the claim was outside the territory, the claimant resided outside the territory, or suit was brought in a remote jurisdiction." *Id.* at 565. See also *id.* at 567-69 (auto liability rates).

76. Currie, *supra* note 71, at 12.

77. 9 N.Y.2d 34, 39-40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961).

Legislature's several refusals to enact a guest statute in New York indicate its unwillingness to yield to the lobbying of liability insurance companies on that consideration.⁷⁸

From an Ontario point of view it is true that there usually would be an interest warranting some policy application by virtue of the fact that a wrong occurred there. Among the possible interests might be discouragement of particular conduct and protection of local creditors as well as the victim's financial security. In the instant case, however, these seem unimportant to Ontario. The purpose of the guest statute protects insurance companies rather than individuals and, as has been previously indicated, the injury caused by a New York car is irrelevant to Ontario insurance premiums.⁷⁹ It can not be thought that the statute will have a deterrent effect on negligent driving because it protects the driver when liability insurance is absent and otherwise protects the insurance company. The individual put at a disadvantage is the guest, normally having little control over the driver.⁸⁰

From a consideration of these factors it seems clear that substantial justice has not been done. The case is similar to *Grant v. McAuliffe*⁸¹ in that under the circumstances, the policy at the place of the wrong is irrelevant.⁸² There a rational result was achieved by applying the law of the California forum on the issue of survival of a personal injury action after the tortfeasor's death. Although it might be well for the court to take cognizance of that case, a decision for reversal in the instant case will probably have to contend with at least two previous New York decisions.⁸³ Neither the opinion in *Jesselson v. Moody* nor that in *Metcalf v. Reynolds* indicates the residency of the

78. See instant case at 696, 230 N.Y.S.2d at 117.

These acts [in slightly more than half the states] have been the result of persistent lobbying on the part of liability insurance companies. One argument advanced in support of them is that in guest cases the insurance company, which is required to pay the damages, is peculiarly exposed to collusion between the injured guest and a host anxious to see compensation paid—so that the truth does not come out in court, and there is a resulting increase in insurance rates Whether this is a good social policy is at least debatable.

Prosser & Smith, *Cases on Torts* 215 (3d ed. 1962). See also 2 Harpur & James, *Torts* 961 (1956). See generally Prosser & Smith, *op. cit. supra* at 214-16 (discussing guest statutes in the United States).

79. See Robinette, *Ontario, Survey of Canadian Legislation*, 1 U. Toronto L.J. 364, 365 (1936) (indicating that the Ontario statute was motivated by considerations like those underlying similar statutes in the United States).

80. When an employer drove his employee to get her belongings, as a condition to retaining her services, it was not regarded as a use pursuant to the employment contract and recovery was precluded. *Jurasits v. Nemes*, 8 D.L.R.2d 659, [1957] Ont. Weekly N. 166 (C.A. 1957). However, the statute has been held not applicable to a baby sitter killed while being taken home by her employer with whom there was an agreement for carriage. *Dorosz v. Koch*, [1961] Ont. 442, 28 D.L.R.2d 171 (H.C.), *aff'd*, [1962] Ont. 105, 31 D.L.R.2d 139 (C.A. 1961).

81. 41 Cal. 2d 859, 264 P.2d 944 (1953).

82. See Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958) (discussing *Grant v. McAuliffe*).

83. See *Jesselson v. Moody*, 309 N.Y. 148, 127 N.E.2d 921 (1955); *Metcalf v. Reynolds*, 267 N.Y. 52, 195 N.E. 681 (1935). Compare *Sellers v. Smith*, 4 N.Y.2d 412, 151 N.E.2d 838, 176 N.Y.S.2d 267 (1958); *Smith v. Clute*, 277 N.Y. 407, 14 N.E.2d 455 (1938); *Miranda v. LoCurto*, 249 N.Y. 191, 163 N.E. 557 (1928) (per curiam).

parties or the registry of the car, however. It seems, therefore, that the Court of Appeals should not find that the weight of past decision precludes it from a reasoned approach to the facts in the instant case.

If in *Kilberg* the Court of Appeals effected for the victim of an airplane crash a result that was consistent with its policy, there would seem to be no reason why the same measure of justice should not be extended to victims of other accidents occurring without the state, at least when the interests of New York outweigh the interests of the foreign jurisdiction as greatly as they did in *Kilberg*. It seems that Judge Fuld, at least, would be receptive to an argument for reversal in *Babcock* because of his opinion in *Kilberg*.⁸⁴ He favored "the most significant contact or contacts" approach but considered himself bound by the weight of prior decisions to the contrary in wrongful death cases. Such precedent has not been established in actions for common-law negligence like *Babcock*.⁸⁵ Admittedly, *Kilberg* has been rendered inscrutable by *Davenport v. Webb*. Nevertheless, the *Kilberg* decision arrives at a just result and the equities seem to justify a proliferation that will reverse and reinstate the complaint in *Babcock*.

JOHN O. DELAMATER

OBSCENITY IN NEW YORK: LAW, FACT—OR BOTH?

A number of cases in recent years have defined, redefined and refined the tests of what constitutes actionable obscenity in printed matter under state and federal obscenity statutes.¹ Two fundamental problems form the core of the need for such constant adjustment (1) the necessarily vague construction of most of the relevant statutes;² and (2) the delicate distinctions imposed in striking a balance between objectionable pornography and freedom of artistic expression.³ The decision that has had the broadest effect upon each of these considerations, if volume of interpretive and critical comment

84. 9 N.Y.2d 34, 42, 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 138 (1961) (separate opinion). Judge Fuld concurred with the majority on affirmance of the judgment dismissing the cause of action premised on contract but was opposed to deciding any other issue.

85. On the theory of *lex loci contractus* New York law has been applied in an action against a carrier in order to avoid a Pennsylvania statute limiting recovery. *Dyke v. Erie Ry.*, 45 N.Y. 113 (1871).

1. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957); *Alberts v. California*, 354 U.S. 476 (1957); *Butler v. Michigan*, 352 U.S. 380 (1957); *People v. Richmond County News*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

2. *Roth v. United States*, *supra* note 1, at 495 (concurring opinion of Warren, C.J.); *Id.* at 498-500 (dissenting opinion of Harlan, J.); Hayes, *Survey of a Decade of Decisions on the Law of Obscenity*, 8 Catholic Lawyer 93, 95 (1962); see generally Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 70-73 (1938).

3. *Roth v. United States*, *supra* note 1, at 491; *Bantam Books, Inc. v. Sullivan*, 31 U.S.L. Week 4192, 4194 (U.S. Feb. 18, 1963); Lockhart and McClure, *Obscenity in the Courts*, 20 Law and Contemp. Problems 587, 587 (1955); Lockhart and McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368, 373 (1955); see generally Alpert, *supra* note 2, at 70-73.