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CURRENT AVIATION DECISIONS IN CONFLICT OF LAWS

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DURING the last several years, many notable decisions have been handed down which involve both aviation litigation and "conflict of laws" or "choice of law" problems. The term "conflict of laws" has been defined as the conflict existing between litigants as to which sovereignty's laws will be invoked to determine the issues in controversy. It concerns the rights of persons within the territory and dominion of one sovereignty by reason of acts, public or private, done within the territory of another sovereignty, and is based on the broad general principle that one sovereignty or forum will respect and give effect to the laws of another so far as can be done consistently with its own interests.[1] Many in-roads have recently been made into this general statement of the basis of conflict of laws rules.

This paper does not extend to a discussion of (1) those acts which may subject a manufacturer to jurisdiction in a certain state, except insofar as those acts may be a basis for the exercise and application of the law of the forum, or the *"lex fori,"* or (2) to any situation other than those normally involving tortious liability, whether it be in the form of negligence, strict liability, or breach of warranty, including closely related matters. In other words, this paper does not extend to questions of choice of law involving contracts, or other matters, except as they may arise by virtue of the contractual aspects of actions for breach of warranty. Similarly, when no aviation cases have been decided, but a general principle

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[1] 15A C.J.S. *Conflict of Laws* § 1(2) (1967); 12 TEX. JUR.2d *Conflict of Laws* § 1 (1960).

is necessary for better understanding, non-aviation cases or general reference materials including A.L.R. Annotations have been used as a beginning point for further research.

GENERAL PROPOSITIONS

Historically, a long established rule in resolving conflicts of law has been that the law of the place of the wrong, the *lex loci delicti*, governs the substantive rights of the parties to a tort action. This rule has in years past been universally recognized, and is recognized today by a large number of jurisdictions.[2] In recent years, especially since 1963, an almost equal number of jurisdictions have departed from the *lex loci delicti* rule and have adopted one or more variants of a doctrine known as the "most significant contacts or relationship" doctrine. This doctrine requires that the forum court analyze

> all of the facts and factors involved to determine what law is most appropriate for application, under the particular analytical theory or process employed, to govern the party's rights and liabilities with respect to any issue in tort.[3]

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[2] Annot., 29 A.L.R.3d 603,613 (1970). A recent review indicates that the following jurisdictions remain adherents of the doctrine of *lex loci delicti* as their choice of law rule in multi-state tort situations: Alabama—Spencer v. Malone Freight Lines, 298 So. 2d 20 (Ala. 1974); Arkansas—McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 891 (1966); Connecticut—Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Delaware—Folk v. York—Shipley, Inc., 239 A.2d 236 (Del. 1968); Florida—Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967); Georgia—Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969); Guam—Pederson v. United States, 191 F. Supp. 95 (D. Guam 1961); Illinois—Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Kansas—McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1019 (1965); Maryland—Cook v. Pryor, 251 Md. 41, 246 A.2d 271 (Md. Ct. App. 1968); Massachusetts—Doody v. John Sexton & Co., 411 F.2d 1119 (1st Cir. 1969); Michigan—McVickers v. Chesapeake & Ohio Ry. Co., 194 F. Supp. 848 (E.D. Mich. 1961); Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969); Nebraska—Epperson v. Christensen, 324 F. Supp. 1121 (D. Neb. 1971); Nevada —Wells Fargo & Co. v. Wells Fargo Exp. Co., 358 F. Supp. 1065 (D. Nev. 1973); New Mexico—Smith v. Greyhound Lines, Inc., 382 F.2d 190 (10th Cir. 1967); North Carolina—Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965); Puerto Rico—DeVane v. United States, 259 F. Supp. 18 (D.P.R. 1966); South Carolina—Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964); South Dakota —Heidemann v. Rohl, 194 N.W.2d 164 (S.D. 1972); Tennessee—Winters v. Maxey, 481 S.W.2d 755 (Tenn. 1972); Texas—Marmon v. Mustang Aviation, 430 S.W.2d 182 (Tex. 1968); Utah—W. W. Clyde & Co. v. Dyess, 126 F.2d 719 (10th Cir. 1942); Virginia—McDonough v. Kellogg, 295 F. Supp. 594 (D. Va. 1969); Washington—Huddleston v. Angeles Cooperative Creamery, 315 F. Supp. 307 (D. Wash. 1970); West Virginia—Chase v. Greyhound Lines, Inc., 195 S.E.2d 810 (W.Va. 1973).

[3] Annot., 29 A.L.R.3d 603, 622 (1970); Alaska—Armstrong v. Armstrong,

It will be noted from review of these cases that while there has been a definite trend away from *lex loci delicti* in the past twelve years, there have been numerous instances in which courts recently have reviewed the doctrine of *lex delicti* and have refused to abandon it for the "most significant relationship" doctrine.[4]

Furthermore, it frequently becomes necessary to determine where the tort was committed or the "place" of the tort. The general rule is that the "place" of the tort, within the contemplation of the *lex loci delicti* rule, is the place where the injury or death was inflicted and not the place where the allegedly wrongful act or omission took place.[5] This rule has been applied in the majority of claims for recovery for tortious acts, whether the right to recover was alleged in terms of negligence,[6] or on grounds of strict liability or defective

441 P.2d 699 (Alas. 1968); Arizona—Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); California—Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Colorado—First Nat'l Bank in Fort Collins v. Rostek, 514 P.2d 314 (Colo. 1973); D.C.—Meyers v. Gaither, 232 A.2d 577 (D.C. App. 1967); Idaho—Rungee v. Allied Van Lines, Inc., 92 Idaho 718, 449 P.2d 378 (1968); Illinois—Graham v. General U.S. Grant Post No. 2665, 97 Ill. App. 2d 139, 239 N.E.2d 856 (1968); Indiana—Witherspoon v. Salm, 237 N.E.2d 116 (Ind. App. 1968); Iowa—Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Kentucky—Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Louisiana—Romero v. State Farm Mutual Auto. Ins. Co., 277 So.2d 649 (La. 1973); Maine—Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Minnesota—Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Kopp v. Rechlzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Mississippi—Mitchell v. Craft, 211 So.2d 509 (Miss. 1968); Missouri—Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); North Dakota—Issendorf v. Olsen, 194 N.W.2d 750 (N.D. 1972); New Hampshire—Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); New Jersey—Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); New York—Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Ohio—Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971); Oklahoma—Williams v. Texas Kenworth Co., 307 F. Supp. 748 (W.D. Okla. 1969); Oregon—Casey v. Manson Construction and Eng'r Co., 247 Ore. 274, 428 P.2d 898 (1966); Pennsylvania—Kuchinic v. McCory, 422 Pa. 620, 222 A.2d 897 (1966); Rhode Island—Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968), *cert. denied*, 393 U.S. 957 (1968); Wisconsin—Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). It is beyond the scope of this paper to attempt to go into the numerous variants that have been employed by these jurisdictions in determining which contacts or interests are most significant and controlling. For an analysis of this nature *see* Annot., 29 A.L.R.3d 603, 622, *et seq.* (1970).

[4] Winters v. Maxey, 481 S.W.2d 755 (Tenn. 1972); Heidemann v. Rohl, 194 N.W.2d 1964 (S.D. 1972); Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969).

[5] Annot., 77 A.L.R.2d 1266, 1273 (1961); Page v. Cameron Iron Works, Inc., 155 F. Supp. 283 (S.D. Tex. 1957), *rev'd on other grounds*, 259 F.2d 420 (5th Cir. 1958); Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957); RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

[6] Seguros Tepeyac, S.A. v. Bostrom, 347 F.2d 168 (5th Cir. 1965).

design.[7] This same rationale is also applicable to situations involving airplane accidents.[8] Certain courts have avoided the need for the use of this rule by characterization of the plaintiff's action as one for breach of warranty, breach of implied warranty for fitness or similar warranties. In such a case the courts have utilized the contractual aspects of that action to declare that the law of the state of *sale* or *delivery* of the allegedly defective article governs the extent and scope of the plaintiff's action and recovery.[9]

In those jurisdictions which have abandoned *lex loci delicti*, a determination of the "place" of the tort has lost some of its significance since under the "significant relationships" doctrine, the forum state will not necessarily apply the law of the "place" of the tort. Determination of the "place" of the tort might be factually necessary, however, so that the forum court would know from which jurisdiction its ultimate selection of applicable laws might come.

With this background, the remainder of this article will examine some of the current aviation decisions concerning conflict of laws.

I. NEGLIGENCE CASES

A. Lex Loci Delicti

In 1964, an airliner operated by Trans World Airlines crashed in Rome, Italy, resulting in twelve cases for death and injury against Boeing and Trans World Airlines. Applying Illinois conflict of laws principles as substantive law, the United States District Court for the Northern District of Illinois in *Manos v. Trans World Airlines, Inc.*[10] held that Italian law should be applied to determine liability, *i.e.*, whether a tort had been committed. Italy was not, however, concerned with the measurement of damages; therefore, the court applied the law of the states of the passengers or their estates in evaluating damages. The court further interpreted the Illinois conflict of laws rule as a "relaxation of the *lex loci delicti* rule" and stated that the plaintiffs' fears about the rendition of many different decisions if the *lex loci delicti* rule was not applied were

[7] Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957).

[8] Annot., 77 A.L.R.2d 1266, 1277 (1961).

[9] *See* Section IV(C) *infra.*

[10] 295 F. Supp. 1170 (N.D. Ill. 1969); *see also* the related cases of Manos v. Trans World Airlines, Inc., 324 F. Supp. 470 (N.D. Ill. 1971); and Manos v. Trans World Airlines, Inc., 295 F. Supp. 1166 (N.D. Ill. 1968).

unfounded since mainly "false conflict" questions were presented because of the similarity of the laws of the various states. The court did recognize, determine, and resolve, however, the true conflicts questions regarding statutes of limitations and plaintiff's allegations of breach of express or implied warranty.

In *Heidemann v. Rohl*,[11] a case involving a claim for wrongful death arising out of an aircraft crash occurring in Nebraska, the South Dakota Supreme Court refused to adopt "a modern fragmented approach to the settlement of multi-state conflict of laws problems because of the lack of discernable and suitable guidelines." South Dakota has a "borrowing" statute which incorporates foreign statutes of limitation applicable to foreign causes of action. Although the South Dakota Supreme Court interprets this "borrowing" statute as allowing the enforcement in South Dakota courts of causes of actions for wrongful death arising under foreign state statutes, in a case of apparent first impression in South Dakota, the court adopted *lex loci delicti.*

> We prefer to retain the traditional 'place of wrong' rule with its built-in virtues of certainty, simplicity, and ease of application. An impressive number of other courts have recently assessed the merits of the 'modern rule' and have refused to adopt any variant of it. (citing cases)[12]

It is interesting to note that the flight involved was a trip from Colorado Springs, Colorado, to the decedent's home in Sioux Falls, South Dakota, and Nebraska had absolutely nothing to do with the parties to the lawsuit.

Similiarly, in *Pratt v. Royder*,[13] a Texas Court of Civil Appeals affirmed the trial court's dismissal of the plaintiff's petition for wrongful death and damages to the estate under the Texas Survival Act.[14] The controversy arose from the death of plaintiff's husband in an aircraft accident occurring in Mexico. Plaintiff's decedent was a resident of Maine, the defendant was a resident of Texas, and the only other contact that Texas had with the crash was that a portion of the flight originated from Dallas. The Texas Supreme

[11] 194 N.W.2d 164 (S.D. 1972).

[12] *Id.* at 167.

[13] 517 S.W.2d 922 (Tex. Civ. App. 1975).

[14] TEX. REV. CIV. STAT. ANN. art. 5525 (1958).

Court decision in *Marmon v. Mustang Aviation, Inc.*,[15] holding that the Texas Wrongful Death Statute[16] has no extra-territorial effect, served as a partial basis for dismissal of the action. The rule enunciated in *Marmon* required that the law of Mexico, rather than of Maine or Texas, would determine both the defendants liability and the measure of any damages.

B. "Most Significant Relationship" Doctrine

In 1973, the Colorado Supreme Court in *First National Bank v. Rostek*,[17] dealt with an aircraft accident that occurred in South Dakota in which a husband and wife, both Colorado residents, were killed in an aircraft registered in Colorado. The court rejected the trial court's use of *lex loci delicti* in applying the South Dakota Aviation Guest Statute and adopted as the Colorado rule the "most significant relationship" doctrine found in Section 145 of the *Restatement (Second), Conflict of Laws*. The court adopted this doctrine because of its belief that a more flexible approach was necessary. The Colorado Supreme Court noted disagreement between various commentators as to which approach should be used and indicated its general disregard for the "ad hoc" approach which presents no guidelines at all. In considering the conflict of laws issue in a guest-host situation, the *Rostek* court reviewed the recent *Neumeier v. Kuehner* decision[18] and adopted the first two sections of Judge Fuld's rules set forth in the *Neumeier* decision.[19] Going

[15] 430 S.W.2d 182 (Tex. 1968).

[16] TEX. REV. CIV. STAT. ANN. art. 4678 (1940).

[17] 514 P.2d 314 (Colo. 1973); *cf.* Murphy v. Colorado Aviation, Inc., 353 F. Supp. 1095 (D. Colo. 1973) decided before *Rostek, supra.*

[18] 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

[19] The first two sections to Judge Fuld's rule state:

> 1. When the guest-passenger and 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 his guest.
>
> 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

31 N.Y.2d at —, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.

further, the court adopted the *Restatement's* "most significant relationship" doctrine for situations in multi-state tort controversies involving questions *other* than the host-guest issue, and indicated that it would in the future "lay down more specific choice of law rules governing other areas, as we have done today in the area of guest statutes."[20]

In *Brickner v. Gooden*,[21] the Oklahoma Supreme Court was faced with a suit involving personal injuries sustained by Oklahoma residents in an airplane crash which occurred near Mexico City, Mexico, during a trip that began and was to end in Oklahoma. The court addressed itself to the applicability of the *lex loci delicti* doctrine and determined that in multi-state tort actions litigated in Oklahoma, the rights and liabilities of the parties with respect to a "particular issue" in tort will be determined by the local law of the state which, *with respect to that issue*, has the "most significant relationship" to the occurrence and the parties. This language is taken almost verbatum from the *Restatement (Second), Conflict of Laws*, Section 145 (1969).

O'Keefe v. Boeing Company,[22] a very complex negligence and products liability case, arose out of the crash of an Air Force B-52 bomber manufactured by Boeing. Though at least nine individuals were on board, of whom seven were killed, the opinion is not clear as to which parties were actually plaintiffs, thus limiting the opinion's usefulness. The aircraft was designed, manufactured, sold, and delivered by the defendant to the Air Force in the state of Washington and thereafter stationed in Massachusetts. It crashed in Maine and the crew members were from different parts of the United States. Decedent O'Keefe was the only citizen of New York where suit was brought. Citing New York law, the federal district court held that a New York forum, essentially neutral in a given death action, could ignore the *lex loci delicti* and apply the "most significant relationship" doctrine espoused in *Babcock v. Jackson*.[23] The *O'Keefe* court, therefore, found that the law of the place of design, manufacture, sale, and delivery of the aircraft in question (the state of Washington) governed the plaintiffs' claims for both

[20] First Nat'l Bank v. Rostek, 514 P.2d 314, 320 (Colo. 1973).

[21] 525 P.2d 632 (Okla. 1974).

[22] 335 F. Supp. 1104 (S.D.N.Y. 1971).

[23] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

negligence and breach of warranty, as opposed to Maine, the place of the accident, or any other jurisdiction. The court concluded that insofar as this case against Boeing was concerned, the state of Washington was the state with the greatest concern with the specific issues of manufacturer's liability.

C. Comment

Though not an aviation case, the recent decision of *Neumeier v. Kuehner*[24] is interesting to note in connection with those states that have adopted the "most significant relationship" doctrine, since this doctrine comes from the state that originated the move away from the doctrine of *lex loci delicti.* It is also appropriate to comment thereon since the Colorado Supreme Court adopted the first two parts of the *Neumeier* rule in *First National Bank v. Rostek.*[25] In *Neumeier,* the New York Court of Appeals recognized that the decision in *Babcock v. Jackson*[26] resulted in quite inconsistent decisions by the New York courts. The *Neumeier v. Kuehner* decision, coming just nine years after *Babcock v. Jackson,* formulated more precise rules[27] to reinject the element of consistency removed by the *Babcock v. Jackson decision.* The Rhode Island Supreme Court in *Labree v. Major,*[28] interpreted *Neumeier v. Kuehner,* as signalling a retreat by New York courts from their earlier adoption of the "most significant relationship" doctrine and a reacceptance of the *lex loci delicti* rule. In effect, the *Neumeier v. Kuehner* rule, as adopted in *Rostek,* is one of (1) *lex loci* "domicile" and (2) *lex loci delicti.* The Colorado Supreme Court has not gone so far as to adopt the third portion of the *Neumeier* rule, which, of course, is by its own terms "normally" *lex loci delicti,* but has elected to cast the Colorado courts adrift into the same sea of "significant relationships" from which New York has recently and substantially returned.[29]

[24] 31 N.Y.2d 121, 286 N.E.2d 454, 334 N.Y.S.2d 64 (1972). As previously noted, this decision concerns the application of confiict of laws principles to host-guest situations.

[25] 514 P.2d 314 (Colo. 1973).

[26] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1971).

[27] *See* text accompanying note 19, *supra.*

[28] 306 A.2d 808, 817 (R.I. 1973).

[29] *See* Rogers v. U-Haul Co., 342 N.Y.S.2d 158 (App. Div. N.Y. 1973), an automobile case in which the defendant resided in New York, while plaintiff's decedent, a passenger, lived in Alabama. The defendant, U-Haul Company, was

II. STRICT LIABILITY

Generally speaking, the doctrine of strict liability is an action sounding in tort rather than contract.[30] The applicable choice of law rules will therefore either be *lex loci delicti* or the "most significant relationship" doctrine, depending on the forum state.[31] This is not true with regard to those cases involving claims for breach of implied warranties in which emphasis, for choice of law purposes, is placed upon the contractual aspects of the action, thus selecting the place of sale or delivery of the items as the source of applicable law. This dichotomy is remarkable in light of the generally recognized view that strict liability in tort and liability under implied warranty without the requirement of privity are merely different ways of describing the very same cause of action.[32]

Compare, for instance, the unusual result reached in the second *Manos v. Trans World Airlines, Inc.* decision[33] and the third *Manos* decision,[34] both of which dealt with the crash of a TWA airliner in Rome, Italy. In the second *Manos* case, the district court, noting that Illinois conflict of laws principles require the application of the law of the *place* of the tort to determine whether or not a tort was committed, nevertheless held that the plaintiffs' allegations of express or implied warranty must, under other applicable Illinois conflict of laws principles, be defined and limited by the law of the state where the article was sold, i.e., Washington.[35] In the third *Manos*

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also doing business in New York, and the motor vehicle was leased in New York for a one-way trip to Alabama. During that trip, an accident occurred in Pennsylvania. The trial court followed *Neumeier v. Kuehner*, and held that section 3 of Judge Fuld's *Neumeier* decision was applicable, and concluded that the law of the place of the accident, Pennsylvania, would be applied, all of which resulted in dismissal of the complaint against the defendant, U-Haul. It is interesting to note that the court found no compelling reason to apply New York policy and law, and further declined to apply the law of the plaintiff's residence, Alabama, which the court noted to be the ". . . state most interested. . .," all in adherence to *Neumeier*. The trial court obviously abandoned the "most significant relationship" doctrine, stating that the question was only whether New York or Pennsylvania law was applicable. Affirmance by the Appellate Division indicates a correct resolution of the issue under *Neumeier*.

[30] Doss v. Apache Powder Co., 430 F.2d 1317 (5th Cir. 1970).

[31] Smith v. General Motors Corp., 382 F. Supp. 766 (N.D. Tex. 1974).

[32] O'Keefe v. Boeing Company, 335 F. Supp. 1104, 1114 (S.D.N.Y. 1971).

[33] 295 F. Supp. 1170 (N.D. Ill. 1969).

[34] Manos v. Trans World Airlines, Inc., 324 F. Supp. 470 (N.D. Ill. 1971).

[35] 295 F. Supp. at 1176.

case,[36] the court looked to the law of Washington to "define and limit" the action for alleged breach of implied warranty, and found that Washington did not have such a cause of action, but that the law of Washington was strict liability, a tort concept, under Section 402A of the *Restatement of Torts (Second)*. The district court, therefore, applied Washington law regarding a Washington tort cause of action; if, however, the true tortious nature of the action for breach of warranty had been recognized under Illinois choice of law rules, rather than the contractual "place of sale" aspects of the action, the litigation possibly would have been governed by the substantive tort law of Illinois, Italy, or another jurisdiction. The most rational explanation for the court's characterization of this breach of warranty action as contractual rather than tortious, and its resultant selection of the applicable Illinois choice of law rule, is found in the rule that the law of the forum will always be applied to characterize the *nature* of the cause of action for choice of law purposes.[37]

III. BREACH OF WARRANTY

A. Lex Loci Delicti:

A recent aviation case applying the choice of law rule of *lex loci delicti* to allegations of breach of warranty is *Uppgren v. Executive Aviation Services, Inc.*[38] *Uppgren* concerns a helicopter crash in Minnesota which took the life of a Minnesota resident. The helicopter was sold and delivered in Maryland to the United States Interior Department. Despite the contentions of both parties that either the law of Maryland or the law of the District of Columbia should control the cause of action which was based on breach of warranty, the district court noted the historical background in tort law of the action for breach of warranty and found it to be so closely related to tort that it should be subject to the *lex loci delicti* rule of Maryland, the state in which the district court was sitting. The court then held Minnesota law, the site of the crash, to be applicable to plaintiff's breach of warranty claims, thereby making applicable the Minnesota statutory wrongful death damage limitation.

[36] 324 F. Supp. 470 (D.C. Ill. 1971).

[37] Parrish v. B.F. Goodrich Co., 46 Mich. App. 85, 207 N.W.2d 422, 424 (1973).

[38] 326 F. Supp. 709 (D. Md. 1971).

It clearly would seem that actions for wrongful death or personal injury based upon allegations of breach of implied warranty of fitness or merchantability, or upon other similar breaches of warranty, are more closely related to a tort than a contract,[39] but the reluctance of some courts to recognize this leads to such possibilities as that almost faced by the Third Circuit in *Paoletto v. Beech Aircraft Corporation.*[40] *Paoletto* was decided by a federal district court sitting in Delaware under diversity jurisdiction in a wrongful death cause of action arising out of an airplane crash in Alaska. The plaintiff alleged negligence and breach of warranty. The court applied Delaware choice of law rules and found that the characterization of the action as breach of warranty created a problem. Since breach of warranty was alleged, the Delaware choice of law rules would select as controlling the law of the state of the sale, Kansas in this case; whereas, had the action been characterized a multi-state tort, then the Delaware choice of law would apply the law of Alaska under the doctrine of *lex loci delicti.* In this particular case, the Third Circuit found the law of Alaska in strict liability cases to be the same as Kansas product liability law in breach of warranty cases, thus presenting a "false conflict" which did not require the resolution of the choice of law question. Nevertheless, the possibility of a divergent characterization of a breach of warranty cause of action for wrongful death or personal injuries as either tortious or contractual in nature, particularly in cases where allegations of both negligence and breach of warranty are encountered, continue to pose potential problems, which may in fact, constitute "real conflicts." The more enlightened view would seem to be that taken by the Third Circuit in *Raritan Trucking Corporation v. Aero Commander, Inc.,*[41] in which the court stated:

> Although actions based on breach of implied warranty of fitness and those based on strict liability in tort may be distinguished, in New Jersey the two actions have tended to become merged.[42]

The merger of the two doctrines, if the end result is deemed to be tortious in nature, would eliminate the possibility of the type of

[39] McDevitt v. Standard Oil Co. of Texas, 391 F.2d 364 (5th Cir. 1968).

[40] 464 F.2d 976 (3rd Cir. 1972).

[41] 458 F.2d 1106 (3rd Cir. 1972); *see also* O'Keefe v. Boeing Co., *supra* note 20.

[42] 458 F.2d at 1113.

conflict almost experienced by the court in *Paoletto* and the type of conflict which will almost always be experienced by a court when both negligence and breach of warranty are alleged by the plaintiff in the same suit and breach of warranty is deemed contractual by the forum state for choice of law purposes.

B. "Most Significant Relationships" Doctrine

As previously noted, the federal district court in *O'Keefe v. Boeing Company* [43] held, within the context of New York's "most significant relationship" doctrine, that the law of the state of Washington, the place of design, manufacture, sale, and delivery of the B-52 bomber governed the plaintiffs' claims for recovery under allegations of both negligence and breach of warranty.

C. Place of Sale or Delivery:

A not uncommon approach to choice of law when allegations of breach of warranty are concerned is that set forth in *Quandt v. Beech Aircraft Corporation*[44] in which the Delaware federal district court applied the Delaware conflict of laws rule to breach of warranty actions and held that the substantive law of Kansas, the state of manufacture and sale of the aircraft would govern. In the same case, the court, applying the Delaware choice of law rule with regard to torts, held that the allegations of negligence against Beech Aircraft Company would be governed by the law of Italy, the place where the accident occurred. Thus, *Quandt* represents a true case of a *Paoletto*-type conflict, which arises from the mere characterization of the nature of the claim. Reference should also be made to *Manos v. Trans World Airlines, Inc.*[45] in which a federal district court in Illinois applied the Illinois choice of laws rule to plaintiffs' allegations of breach of express and implied warranties, and upon finding that the aircraft in question had been manufactured, sold, and delivered by Boeing in Washington state, declared Washington law to govern the definition and limits of the action.

In *Holcomb v. Cessna Aircraft Company and Continental Motors*,[46] a suit to recover for engine defects in a Cessna aircraft, the

[43] 335 F. Supp. 1104 (S.D.N.Y. 1971).

[44] 317 F. Supp. 1009 (D. Del. 1970); *see also* Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3rd Cir. 1958); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967).

[45] 295 F. Supp. 1170 (D.C. Ill. 1969).

[46] 439 F.2d 1150 (5th Cir. 1971).

Fifth Circuit apparently approved the Florida trial court's holding that the liability of the defendant under allegations of breach of expressed and implied warranties was to be governed by the law of Kansas, the place of the sale. The aircraft, however, was delivered to the purchaser in Louisiana. The court also stated that a manufacturer could not be held liable on the theory of implied warranty in absence of proof of a defect in the article "on the date of delivery."[47] If the date of *delivery* is controlling, an unresolved question arises whether the law of Louisiana, the place of delivery, should control, as opposed to the law of Kansas, the state of the sale.

D. Uniform Commercial Code:

The advent of the Uniform Commercial Code and its effects in situations involving allegations of breach of warranty has not yet been fully felt. In the absence of relevant aircraft cases dealing with the implied warranties found in Sections 2.314 and 2.315 of the U.C.C., it is enough to note the choice of law provisions set forth in Section 1.105 and the four-year statute of limitations set forth in Section 2.725. *Parrish v. B. F. Goodrich Company*[48] is indicative of the manner in which one court attempted to reconcile the U.C.C. provisions to its tort oriented breach of warranty actions and its general tort statute of limitations.

IV. Limitations of Actions

While statutes of limitations in a choice of law context normally are termed either (1) substantive, as in statutory wrongful death causes of action (and hence *lex loci delicti* is applicable), or (2) procedural, when the statute of limitation merely bars the remedy and not the right (and hence the *lex fori* applies),[49] the whole "substantive-procedural" discourse may be rendered moot by the application of the "most significant relationship" doctrine. This was done in *Sergeant v. Eagle Flight Ways, Inc.*[50] An Oregon circuit court there allowed a statutory cause of action for wrongful death to be heard in Oregon although it was barred by the statute of limitation under

[47] *Id.* at 1156.

[48] 46 Mich. App. 85, 207 N.W.2d 422 (1973).

[49] Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970); Francis v. Herrin Transportation Co., 432 S.W.2d 710 (Tex. 1968).

[50] 12 CCH Av. Cas. 18,128 (Ore. Cir. Ct. 1973).

the law of British Columbia, the place of the accident since the court found that Oregon was the state with the most significant contacts.

In *Ramsay v. Boeing Company*,[51] the lower court had applied the Mississippi "center of gravity" choice of law doctrine, adopted from the *Restatement (Second), Conflict of Laws*. The trial court found that Belgium had the most contacts with the accident and the application of Belgian law, where the accident occurred, as well as the statute of limitations of that jurisdiction barred the plaintiff's claims. None of the plaintiffs were residents of Mississippi, the forum state. Plaintiffs had selected Mississippi simply to take advantage of the six-year statute of limitations, but the Fifth Circuit approved a finding that the five-year Belgium statute of limitations was substantive and would be applied under Mississippi choice of law rules to bar the plaintiffs' actions.

When the limitation is part of a foreign statutory right of action, the expiration of which extinguishes the right to sue, and the forum state adheres to the *lex loci delicti* rule, then that foreign statute of limitations will generally be held applicable to suits based upon that statutory case of action and brought in the forum state.[52] Frequently, however, this general scheme is complicated by the presence of a "borrowing" statute or the "Uniform Statute of Limitations on Foreign Claims Act."[53] These "borrowing" statutes generally provide that:

> The period of limitation applicable to a claim *accruing* outside of this state shall be either that prescribed by the law of the place *where the claim accrued* or by the law of this state, whichever bars the claim (emphasis added).[54]

Thus, when the statutes of limitations outside the forum state are shorter than those of the forum state, a choice of law question is presented which requires a determination of the place where the claim "accrued." This question may provide different answers depending upon whether the claim is characterized as a tort in the nature of strict liability or negligence, or a breach of warranty with

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[51] 432 F.2d 592 (5th Cir. 1970).

[52] Pack v. Beech Aircraft Corp., 50 Del. 413, 132 A.2d 54 (1957).

[53] *See, e.g.*, MICH. COMPILED LAWS ANN. § 600.5861; N.Y. C.P.L.R. § 202.

[54] MICH. COMPILED LAWS ANN. § 600.5861(2).

contractual aspects. The greatest problems will occur with breach of warranty actions which may be characterized in either manner by different courts.

In *Manos v. Trans World Airlines, Inc.*,[55] for instance, the federal district court applied the Illinois "borrowing statute" which had been interpreted by Illinois' courts to require a determination and application of the law of the "place where the last act occurred to create liability" to determine whether the statute of limitations of that "place" would bar plaintiffs' action. The court in *Manos* found that the lack of proof of the statute of limitations of Italy (the air crash having occurred in Rome), was sufficient to prevent the granting of a summary judgment in favor of defendant based upon the defense of limitations. Such "borrowing statutes"[56] are really statutory embodiments of the rule of *lex loci delicti* in connection with statutes of limitation which will be applied even though the forum state has adopted the "most significant relationships" doctrine of choice of law.

The same choice of law inquiry is found in *O'Keefe v. Boeing Company*.[57] The New York "borrowing statute"[58] is slightly different from that of Michigan since it provides that New York residents will be affected only by the New York statute of limitations. In *O'Keefe* the effect of the statute's application was a determination by the district court that plaintiffs' cause of action "accrued" for limitation purposes in Washington state. The Washington statute of limitations period for the negligence alleged was three years, which began to run from the time of the *crash*, thus allowing the maintenance of the negligence cause of actions. The New York "borrowing statute" did not, however, prevent application of the six-year New York statute of limitation for actions based upon breach of implied warranty of fitness. Since the New York statute

[55] 295 F. Supp. 1170 (N.D. Ill. 1969).

[56] The "borrowing statute in *Manos* stated:

> When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state.

ILL. REV. STAT. ch. 82 § 21 (1967). *See* 295 F. Supp. at 1175.

[57] 335 F. Supp. 1104 (S.D.N.Y. 1971); *see also* Braniff Airways, Inc. v. Curtis-Wright Corp., 424 F.2d 427 (2d Cir. 1969); George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir. 1964).

[58] CIVIL PRAC. L. & RULES § 202 (McKinney 1954).

ran from the date of sale which was more than six years before the commencement of the action, the statute barred only O'Keefe's cause of action as the only New York resident.

V. CONTRIBUTION AND INDEMNITY

Under the law as it prevails today, it is well settled that the right to contribution or indemnity between joint tortfeasors is governed by the law of the place where the tort has been committed, or *lex loci delicti*.[59] Nevertheless, a determination of which jurisdiction's law of contribution and indemnity should be applied has also been reached through the application of the "most significant relationship" doctrine which could result in the application of a law from a jurisdiction other than the place of the injury or place of the tort.[60] Conversely, in some states the application of the doctrine of contribution, and, by probable implication the doctrine of indemnity, is held to be procedural, remedial law, therefore making the law of the *forum* applicable to questions of contribution and indemnity.[61]

Nevertheless, and despite this well-established body of state law, the Seventh Circuit, in *Kohr v. Allegheny Airlines, Inc.*,[62] reversed the trial court in part, and held that in a mid-air collision case under the jurisdiction of the Judicial Panel on Multi-District Litigation, it was unnecessary to determine the availability of contribution or indemnity under state choice of law rules. The Seventh Circuit reached this conclusion by declaring that a federal law of contribution and indemnity governed "mid-air collisions" such as that involved in this diversity case. The court based its decision on the commerce clause of the United States Constitution, the federal interest in uniform air law regulation, Section 1108 of the Federal Aviation Act of 1958, the fact that a mid-air collision was involved, the presence of the United States as a party under the Federal Tort Claims Act, and the fact that the litigation was under the control of the Multi-District Litigation Panel. The Seventh Circuit concluded that there was no reason why federal law should *not* be applied to determine the rights and liabilities of the parties involved in "avia-

[59] Annot., 95 A.L.R.2d 1096, 1099 (1964).

[60] Kantlehener v. United States, 279 F. Supp. 122 (E.D.N.Y. 1967).

[61] Perez v. Short Line Inc., 231 A.2d 642 (Del. 1967).

[62] 504 F.2d 400 (7th Cir. 1974).

tion collisions" insofar as contribution or indemnity was concerned, and declared that the federal rule for contribution or indemnity in such cases should be based on "comparative negligence" among the responsible defendants. The court also discussed a situation in which settlement had occurred, holding that the burden of proof upon the party claiming contribution would also be to establish that the amount paid in settlement was a reasonable settlement under the circumstances before contribution or indemnity would be allowed for the full extent of the voluntary settlement payment. An application for a writ of certiorari to the United States Supreme Court is now pending,[63] and it would appear that the Seventh Circuit has obviously ignored the mandate of *Erie Railroad Company v. Tompkins*,[64] unless the matter of contribution and indemnity is truly procedural and goes only to the remedy, rather than substantive rights. In this event, and under the analysis spoken of above,[65] such a rule may be sustainable on the basis that it is actually a rule of federal procedural law and not an invasion into the domain of state substantive law. The opinion was not grounded on this premise, however, and clearly, the decision is one which is contrary to other multi-district panel litigation cases that have been previously decided. One example is *In re Air Crash Disaster Near Dayton, Ohio on March 9, 1967*[66] in which the Ohio District Court applied Ohio law regarding rights to contribution or indemnification among joint tortfeasors.

VI. RELEASES

It has been generally held that the law of the place of the wrong, *lex loci delicti*, governs the question whether the release of one tortfeasor operates to release all joint tortfeasors.[67] This rule was recently reaffirmed in *Heidemann v. Rohl*[68] in which the Supreme Court of South Dakota, in determining the effect of a release of

[63] Since Mr. Kinzy submitted this article, the Supreme Court has denied certiorari. The author's comments have been left intact as representing a criticism of that decision.

[64] 304 U.S. 64 (1938).

[65] *See* text accompanying note 61, *supra*; *see also*, 2 J. MOORE, FEDERAL PRACTICE ¶ 1.04[4], at 227 (2d ed. 1967).

[66] 350 F. Supp. 757 (S.D. Ohio 1972).

[67] Annot., 69 A.L.R.2d 1034, 1035 (1960).

[68] 194 N.W.2d 164 (S.D. 1972).

liability for damages arising from an air crash which occurred in Nebraska, held that the law of Nebraska must be applied since "the effect of a release is governed by the substantive law of the place where the alleged tort occurred,[69] even though the release itself was executed in South Dakota in favor of a South Dakota resident defendant.

In other jurisdictions it has been held that the law governing the effect of a release given by an injured party to one tortfeasor may be determined either under the analysis of the "most significant relationship" doctrine[70] or the *lex fori*.[71]

VII. Res Judicata and Collateral Estoppel

The effect of a state court judgment under doctrines of *res judicata* or collateral estoppel may also involve choice of law considerations, *i.e.*, what law prescribes the effect to be given to a prior judgment under one or both of the doctrines for those claiming the benefit or protection of the former judgment? In *Lowenstein v. Executive Air Fleet Corporation*,[72] it was held that since "the nature and extent of the estoppel effect of a judgment depended on the law of the state in which the judgment was rendered" New York law should govern the effect of a previously rendered New York state court judgment.

Normally federal district courts must apply the substantive law of the state in which it sits, or in the case of a court which hears a case from another district referred to it by the Judicial Panel on Multidistrict Litigation, the law of the transferor court. Consider, however, the case of *In re Air Crash Disaster Near Dayton, Ohio on March 9, 1967*,[73] in which the court decided that the predominant federal interest in the effective and efficient administration of the federal judicial system required that federal law rather than state law should determine the effect of the doctrine of collateral estoppel.

[69] *Id.* at 170.

[70] *See* Root v. Kaufman, 265 N.Y.S.2d 201 (1965), where in obedience to Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the New York City Civil Court held that the effect of a release executed in New Jersey concerning liability arising out of a New York accident would be construed by the law of New Jersey, the state with the "preponderance of contacts between the parties."

[71] Annot., 69 A.L.R.2d 1034 (1974 Later Case Service).

[72] 11 CCH Av. Cas. 17,895 (E.D.N.Y. 1970).

[73] 350 F. Supp. 757 (D. Ohio 1972).

The specific issue concerned whether a previously rendered federal court judgment in diversity actions should control subsequent federal suits involving the same issue. The court noted that it had earlier assumed, without benefit of briefs, that it should apply the choice of law rules of the transferor state of Michigan to the issue of the effect of a prior federal court judgment, and a Michigan choice of law rule would direct the application of the law of Ohio where the tort occurred to determine the estoppel effect of the prior judgment. The court reversed itself, however, and in doing so avoided the mandate of *Erie Railrad Company v. Tompkins*[74] by characterizing the *res judicata* effect of a former federal court judgment as a procedural, as opposed to a substantive, matter which did not go to the "essence of a state-created cause of action." The district court found "entirely different considerations" to be involved in this case so "related to an overriding federal interest in the effective administration of justice in the federal court system," that federal law must govern the preclusive effect, or *res judicata* issues, raised in that litigation. The court then utilized the applicable collateral estoppel rules to hold that in the context of mid-air collision multi-district litigation it was not a violation of due process to bar a plaintiff from relitigating the issue of a defendant's liability for the mid-air disaster if the defendant's liability had been previously fully litigated in a prior action, even though the instant plaintiff had not been a party to that previous action.

In *Humphreys v. Tann*,[75] the aggrieved plaintiff appealed this ruling to the Sixth Circuit which reversed the trial court's opinion. The Sixth Circuit found that due process was violated by the application of collateral estoppel against one who was never a party to the prior action. In reaching this ultimate decision, the Sixth Circuit, while noting that the trial court had clearly applied federal law to determine the applicability of collateral estoppel, did not reverse the trial court on the grounds that there was an improper resolution of the applicable law. Instead, the Sixth Circuit evaded the question by stating that "unless there exists a federal rule of collateral estoppel which is different from that of Ohio, however, it is not necessary to decide which law controls."[76] The court then

[74] 304 U.S. 64 (1938).

[75] 487 F.2d 666 (6th Cir. 1973).

[76] *Id.* at 669.

found inferentially that there was no difference which required this decision. Accordingly, it is entirely possible that a federal law of collateral estoppel will be applied by federal courts in the future, especially in multi-district mid-air collision disasters.

VII. Res Ipsa Loquitur

In *O'Keefe v. Boeing Company*,[77] the court held that the applicability and availability of the doctrine of *res ipsa loquitur* would be governed by New York law, the *lex fori*, since *res ipsa loquitur* is a "procedural rule of evidence" and a matter of procedure is to be controlled by the law of the forum even though the accident involved occurred out of the forum state.

Conclusion

It appears that a practical and effective way to attack a question of conflict of laws is to proceed by the following steps:

1. Determine the state of the forum court;
2. Determine the legal theories and issues alleged by the plaintiffs, *i.e.*, negligence, breach of warranty, strict liability, *res ipsa loquitur*, or availability of limitations, *etc.*;
3. Determine the choice of law rule or doctrine, whether statute or case law, of the forum state applicable to the plaintiff's allegations of legal theories of action, or defensive issues;
4. If necessary, determine the forum state's characterization of the nature of plaintiff's causes of action or other issues, and,
5. Determine and simplify the basic facts of the case to see which jurisdiction's law will control under the applicable choice of law rule and characterizations determined above, *i.e.*, determine the plaintiff's residence, the defendant's residence, the place of design, manufacture, sale, and delivery of the aircraft in question, the place of the accident, and any other outstanding interests or contacts that one jurisdiction may have in the matter.

Upon conclusion of this analytical approach, it should be possible to determine the jurisdiction whose law will control the resolution of the material issues in litigation by fitting the simplified fact situation to the applicable choice of law rules.

[77] 335 F. Supp. 1104 (S.D.N.Y. 1972); *see also* Citrola v. Eastern Airlines, Inc., 264 F.2d 815 (2d Cir. 1959). In *O'Keefe* the plaintiff also offered evidence of specific acts of negligence.

Notes