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## A THAW IN THE REIGN OF LEX LOCI DELICTI†

By J. B. WOLENS††

### I. THE PROBLEM

ON 8 DECEMBER 1963, a commercial airliner left San Juan, Puerto Rico enroute to Philadelphia, Pennsylvania. Passengers included United States citizens residing in various states, one of whom was a Pennsylvania resident and domiciliary. After having successfully completed most of its flight plan, the airliner disintegrated over the Delaware-Maryland border; by chance the bulk of the wreckage fell in the vicinity of Elkton, Maryland.<sup>1</sup> What law should be applied to determine the rights, if any, of those injured and killed as a result of such tragedy? The flight commenced in San Juan; should its law be applied? The airliner was over Delaware when the trouble developed; the wreckage fell in Maryland; the flight was to terminate in Pennsylvania; passengers resided and purchased tickets in various states. Each of these jurisdictions had a link with this particular tragedy and, conceivably, some interest in seeing its own laws and policies applied.<sup>2</sup>

The vagaries which can result from the application of the laws of various jurisdictions to such factual situations are obvious. But equally obvious is the injustice which can result from the rigid application of the law of a predetermined jurisdiction to every fact situation.

Probably no area of the law presents more complex and sensitive problems for determination by a court than those cases which involve conflict-of-laws. The problem is one of reconciling the conflicting, and sometimes competing, interests of two or more sovereign states. The court is not supposed to judge the validity or justness of the competing policies, but

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† The problem of conflict-of-laws is common to all types of multi-party tort actions, but it comes spectacularly to the fore in airline incidents involving the loss of hundreds of lives. Due to the relatively few airline cases, other types of cases involving automobiles, etc., were resorted to in order for the author to present a complete statement of the status of the law. Regardless of the situations involved, the decisions are precedents and will, undoubtedly, influence the outcome of any airline case that arises subsequently.

*The Editors*

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<sup>1</sup> See facts developed in *Long v. Pan Am. World Airways, Inc.*, 23 App. Div. 2d 386, 260 N.Y.S.2d 750, reversed, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

<sup>2</sup> The extent to which this problem has occupied the minds of judges and scholars can best be illustrated by the rash of recent articles concerning the application of the rule of *lex loci delicti* in multi-state tort actions. See, e.g., O'Rourke, *A Numerical Evaluation of Babcock*, 37 N.Y. S. B. J. 243 (1965); Webb and Brownlie, *Survival of Actions in Tort and the Conflict of Laws*, 14 INT'L & COMP. L.Q. 1 (1965); and Ker, *New York and the Conflict of Laws: A Retreat*, 18 STAN. L. REV. 699 (1966). See generally, Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233 (1963); Keeffe, *Piercing Pearson*, 29 J. AIR L. & COM. 95 (1963).

merely ascertain them and then give the policy of the appropriate jurisdiction effect so far as possible. Normally, a determination made by the court in a conflict-of-laws case involves nothing less than a finding that the legitimate policy as declared by the statutes of one sovereign state must yield to policy considerations of another. This the court is supposed to do even though one of the states involved may be the one in which the court sits and to which the court owes its existence. It is the function of the conflict-of-laws rule to direct the court in making the choice between such conflicting and competing policies.

Unlike the usual rule of law, the conflict-of-laws rule does not constitute a predictor of the ultimate result in any particular situation. The "rule" only points the direction in which the result may be found and, theoretically, when consistently applied produces uniformity of result for any given set of transactions.<sup>3</sup>

In the past these conflict-of-laws rules were conceived as fixed and immutable principles which, when applied with consistency by the courts, would yield uniformity of decision among the various sovereign states and prevent that dread disease of the legal system known in the vernacular as forum shopping. To produce this result it was thought necessary to establish fixed rules so that the judge could, in modern terms, feed the data into the computer, turn the crank, and grind out a decision—a decision untouched by human hands, prejudices, or reason. The court was not to adjudicate the question; "that is, to bring its intelligence to bear upon the reason and policy and history of the laws in question, and their application to the facts at hand so as to do justice to the parties under law."<sup>4</sup>

Rules of law must serve some social or economic interest, and rules which fall out of general favor with society must eventually yield thereto. The lawmaking body, be it legislative or judicial, cannot be too far out of touch with the general social weal of the community.<sup>5</sup> Therefore, it should have been quickly recognized that the time would come when a court, working with such a mechanistic principle, would rebel against the results to which such principle forced its decision and seek to circumvent a result that the court considered unsound or unjust.

In tort, the conflict-of-laws rule originally proclaimed that all rights of the parties to a tort were governed by the law of the place where the injury occurred, the *lex loci delicti commissi*.<sup>6</sup> Needless to say, it was im-

<sup>3</sup> As the late Professor Brainerd Currie has put it,

Such rules are made by theorists in an effort to impose an external order upon the states; they do not come naturally from legislatures, which are interested in foreseeable results. Whatever virtues such rules may have lie in their tendencies to foster uniformity of result from state to state; but, even if a legislature should be convinced that this is the highest goal of conflict of laws, it cannot enact the ideal into reality, because the legislature cannot control the decision of courts in other states. For purposes of uniformity, a choice of law rule is worthless unless other states which may be concerned will voluntarily adhere to it.

Currie, *Survival of Actions: Adjudication v. Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 247 (1958) [hereinafter cited as Currie].

<sup>4</sup> *Id.* at 215.

<sup>5</sup> Tate, Book Review, 39 TUL. L. REV. 163, 169 (1964).

<sup>6</sup> RESTATEMENT, CONFLICT OF LAWS §§ 377-90 (1934).

possible for the courts to completely close their eyes to the results which such a mechanized formula wreaked upon the parties. Thus, it was not long before the courts began engrafting exceptions on, or refusing to apply, the "rule" in given cases. This is true not only of the "rule" in tort but also in other areas as well.

## II. CONTRACT DEVELOPMENT

A brief discussion of the development of the conflict-of-laws rule in contract cases will serve to preview the current tort developments. The old contract rule stated that suits involving a contract were to be governed by the law of the place of contracting.<sup>7</sup> In England the validity of a contract was governed by its proper law, that is the law intended, or presumed to have been intended, by the parties to govern the contract.<sup>8</sup> The "rule" in contract has undergone a substantial change. The present majority view in the United States was succinctly stated by the Louisiana Third Circuit Court of Appeals:

To decide a case by the application of formal conflict-of-laws principles is often not so much a matter of logic and the determination of the single correct answer by the logic-dictated application of such principles, as it is the selection by the court of the forum from among the competing intra-state and extra-state factors those which the court regards to be significant and which justify application of the particular conflict-of-laws principle or principles which afford weight to the intra- (or extra-) state factors found to be significant by the court of the forum.<sup>9</sup>

Thus, the court in a contract case now determines the center of gravity of the facts or the grouping of contacts of the parties and transactions with the various jurisdictions involved. The law of the jurisdiction to which such contract then gravitates, or is impelled by the most significant group of contacts, is the law which determines the validity of the contract in question.<sup>10</sup>

This center of gravity theory does not afford the certainty and predictability provided by the old contract approach; however, the new theory does afford the flexibility which is required if a court is to render substantial justice upon the facts to the parties before it in any given instance. The policy of that jurisdiction most intimately concerned with the outcome of the particular litigation can now be applied.<sup>11</sup> The flexibility is twofold: (1) It enables the court to concentrate not so much on what law governs the validity of the contract as what law governs the particular question before the court, and (2) It allows the court to segment the problem before it and to weigh and evaluate the various attributes and factors of any given situation.

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<sup>7</sup> *Id.* § 332.

<sup>8</sup> For a discussion of the English rule see Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951) [hereinafter cited as Morris].

<sup>9</sup> *Universal C.I.T. Credit Corp. v. Hulett*, 151 So. 2d 705, 710 (La. Civ. App. 1963).

<sup>10</sup> *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

<sup>11</sup> *Id.* at 102.

## III. TORT DEVELOPMENT

A distinct parallel to the development in the contract area has begun in the conflict-of-laws tort area. A brief examination of the old rule which says that "the law of the place of wrong determines whether a person has sustained a legal injury"<sup>12</sup> reveals that, "it is immaterial whether by the law of the forum, or by the law of the place where the actor acted, the harm in question was or was not a legal injury."<sup>13</sup> The place of wrong is defined to be the place where the harmful force takes effect upon the body. The person harmed may thereafter go into another state and die from the injury or suffer other loss therefrom and these last events will also be immaterial.

Thus, the rule of *lex loci delicti* determines not only whether a person has sustained a legal injury but also: the recognition of that wrong in another jurisdiction;<sup>14</sup> the survival of a claim for tort damages on the death of the tortfeasor;<sup>15</sup> wrongful death actions;<sup>16</sup> the distribution of wrongful death proceeds;<sup>17</sup> the parties to such suit;<sup>18</sup> the limitation on such actions;<sup>19</sup> and, the measure of damages for a tort of any kind.<sup>20</sup> One of the clearest judicial statements of the *lex loci* rule is found in the opinion of Mr. Justice Holmes as set forth in *Slater v. Mexican Nat'l R.R.*<sup>21</sup>

When such a liability (wrongful death) is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was not subject to law having force in the forum, it gave rise to an obligation, an *obligatio*, 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 . . . .<sup>22</sup>

Implicit in this statement by Mr. Justice Holmes is the theory and policy underlying the *lex loci* rule. This argument runs thusly: every state possesses exclusive sovereignty and jurisdiction within its own territory and its law encompasses all property and persons resident there and all contracts and acts done within such state. Conversely, no state by its laws can directly affect or bind property or persons outside of its own territory. This is the "territoriality" concept. The argument then continues: any rights created by the laws of a state are capable of vesting and permanently adhering in a person until destroyed by the operation of

<sup>12</sup> RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

<sup>13</sup> *Id.* § 378, at 458.

<sup>14</sup> *Id.* § 384 (1), at 470.

<sup>15</sup> *Id.* § 390, at 477.

<sup>16</sup> *Id.* § 391, at 479.

<sup>17</sup> *Id.* § 393, at 481.

<sup>18</sup> *Id.* § 394, at 482.

<sup>19</sup> *Id.* § 397, at 484.

<sup>20</sup> *Id.* § 412, at 493.

<sup>21</sup> 194 U.S. 120 (1904).

<sup>22</sup> *Id.* at 126-27.

such law—the “vested rights” concept. Thus, in the tort area the conclusion is reached that the law of the place in which an act occurs determines whether such act is tortious, with such territorial law covering all aspects of the act including questions of negligence, defenses, parties, remedies and all other matters inherent in the transaction.

Stated differently, we may say that the territorial theory of vested rights tells us that laws exist only within geographical limits and that by these laws rights are created. Rights so created exist until destroyed by operation of the same law. Further, there are principles which give these rights the power of migrating from state-to-state inherent in the person in whom created and that by virtue of such principles these rights so created and vested are recognized and enforced in foreign courts.<sup>23</sup>

#### A. Recent Pressures

The traditional view is said to provide uniformity of result and thus prevent forum shopping. The difficulty with such an a priori argument, from which conflict-of-laws rules are deduced, is that it leads to rigidity which produces unacceptable and unjustified results in specific cases. If uniformity is our only goal in conflict-of-laws, then this should cause us no grief. However, as fluidity of movement of persons across state boundaries becomes easier, the instances increase in which the inflexible traditional rule is lacking. Adherence to the traditional rule makes it apparent that an immutable principle, no matter how brilliantly conceived, cannot do substantial justice in every situation. Social and economic factors produced an ever-increasing number of instances in which the old rule fails to reach results which meet with our traditional notions of fair play. This time lag between social development and legal development has created the upheaval which is currently taking place in this area.

Consider the commercial interstate (or international) airline carrier with routes honeycombing the country. On one of these routes passengers, none of whom are residents of State X, purchase both one-way and round-trip tickets at numerous points along such route. Assume that due to the negligence of one of the airline's employees, the plane crashes in State X, where the airline has no offices and does not do business, and all passengers are killed instantly. The law of State X permits no recovery for wrongful death. What interest does State X have in whether the representatives and beneficiaries of the deceased passengers recover from the airline or the amount of such recovery? Certainly, the airline company did not intentionally crash in State X to avoid liability, and there could be no reliance upon the laws of that state in this context.

#### B. Old Rule Flexibility

Most writers speak of the traditional rule as inflexible, yet inherent in

<sup>23</sup> For a discussion and criticism of the territorial theory of vested rights see Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); LEFLER, *CONFLICT OF LAWS* §§ 110-11 (1959); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 467 (1928). *Contra*, Keefe, *Piercing Pearson*, 29 J. AIR L. & COM. 95 (1963).

the system itself is a certain amount of flexibility. The traditional Restatement method consists of reference to a body of abstract conflict-of-laws rules with ancillary principles indicating the manner in which these rules are to apply. These conflict-of-laws rules do not become accessible until the problem is characterized—a determination of what body of abstract rules is to be employed. Thus, the forum under its law may characterize a given matter as substantive or procedural. Under established conflict-of-laws rules, substantive matters are governed by *lex loci*, and procedural matters are governed by *lex fori*.<sup>24</sup> Many characterizations are of course possible, for example: survival of a cause of action may be characterized as distribution from an estate so that the law of the domicile governs;<sup>25</sup> survival may also be characterized as procedural and a matter to be determined by *lex fori*;<sup>26</sup> damages have been treated as procedural to be governed by *lex fori*;<sup>27</sup> suit for injuries from the negligent operation of a rented car have been characterized as suit upon contract so that contract conflict-of-laws rules applied rather than tort rules;<sup>28</sup> and, a suit by a wife against her husband and their insurance company for injury sustained as a passenger in an automobile accident has often been characterized as a marital matter to which the law of the domicile applied.<sup>29</sup> Further flexibility within the system is provided by the theory that the public policy of the forum prohibits the enforcement of such claim as permitted by *lex loci*,<sup>30</sup> or through the device whereby the forum presumes that where *lex loci* has not been proved, it is the same as *lex fori* and the court is then free to apply its own law.<sup>31</sup> Regardless of which of these methods the court uses to achieve flexibility, the motivating factor is to reach substantial justice in the individual case.

Are these "solutions" intellectually honest? Can a judge in all honesty rule that an accident case is really one of contract so that the forum may apply its own law and permit one of its residents to recover for injuries sustained? There is no clear answer. Certainly any such flexibility is a tool which, while useful and beneficial when wisely and rationally applied, can be subject to abuse. When such tools are used to perpetuate a rule that is no longer adequate for the society it serves, they become subject to legitimate criticism. Clearly *lex loci delicti* is failing to accomplish substantial justice with increasing frequency, and, in order to compensate, courts are being forced to stretch the loopholes of the system to achieve a just result in particular cases.<sup>32</sup> If we reject a forced stretching of the loophole system to avoid the repugnant results of a mechanistic applica-

<sup>24</sup> RESTATEMENT, CONFLICT OF LAWS §§ 584-85 (1934).

<sup>25</sup> *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23 (1934).

<sup>26</sup> *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

<sup>27</sup> *Walton School of Commerce v. Stroud*, 248 Mich. 84, 226 N.W. 883 (1929); *Dorr Cattle Co. v. Des Moines Nat'l Bank*, 127 Iowa 153, 98 N.W. 918 (1904), *rehearing denied*, 102 N.W. 836 (1905).

<sup>28</sup> *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928).

<sup>29</sup> *Haumschild v. Connecticut Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

<sup>30</sup> *Hartness v. Aldens, Inc.*, 301 F.2d 228 (7th Cir. 1962).

<sup>31</sup> *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

<sup>32</sup> *Bastrom v. Segurous Tepeyac*, 225 F. Supp. 222 (N.D. Tex. 1963).

tion of *lex loci* in multi-state torts, we must either accept the "rule" and its results in every instance; or, change the "rule."

### C. Alternative Rules

If we assume, as most of the writers in this field apparently have, that a change in the "rule" is desirable, what change should be made? The following have been suggested as possible alternatives:

(1) apply a proper law rule which would permit a choice based upon the jurisdiction with the most significant connection with the chain of facts and consequences in the particular situation;<sup>33</sup>

(2) apply *lex fori* unless a good reason exists for doing otherwise;<sup>34</sup>

(3) apply the law of the state with the most significant contacts or relationships with the particular issues, placing emphasis on the analysis of the policies underlying the conflicting laws and the relation of the contacts to these policies;<sup>35</sup> or

(4) select one or more of the factors involved as determinative of which law should control, such as: the residence of the plaintiff, the residence of the defendant, the place of negligence, the availability of insurance protection, and so on *ad infinitum*.

## IV. THE NEW TORT RULE

At least two states, New York and Pennsylvania, have apparently made the choice. An examination of the leading authority in these jurisdictions will be made in an attempt to ascertain the new rule or at least the trend toward the establishment of such a "rule."

In 1963, the New York Court of Appeals decided *Babcock v. Jackson*,<sup>36</sup> a case involving an automobile accident which occurred on a weekend excursion to Ontario, Canada. Miss Babcock, the plaintiff, was injured while a guest in the defendant's car. All the parties were residents and domiciliaries of New York, and no other person or property in Ontario was involved. Ontario's guest statute precluded liability but, under New York law, the plaintiff could recover. The majority of the court rejected the territorial vested rights doctrine because it did not recognize practical considerations as well as the legitimate interests of other jurisdictions.<sup>37</sup> The court further noted the similar inflexibility of the old conflict-of-laws rules in the field of contracts which led New York, in *Auten v. Auten*,<sup>38</sup> to abandon such mechanical rules in favor of the center of gravity theory.

In *Kilberg v. Northeast Airlines, Inc.*,<sup>39</sup> the same motivation began the

<sup>33</sup> Morris 888.

<sup>34</sup> Currie 245.

<sup>35</sup> RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 24 April 1964).

<sup>36</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>37</sup> 191 N.E.2d at 281, 240 N.Y.S.2d at 746-47.

<sup>38</sup> 308 N.Y. 155, 124 N.E.2d 99 (1954).

<sup>39</sup> 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

Modern conditions make it unjust and anomalous to subject the traveling citizen of this state to the varying laws of other states through and over which they move . . . the place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own state's people against unfair and anachronistic treatment of



trend toward the new theory through the process of weighing the contacts and interests of the respective jurisdictions to determine the specific bearing these matters have on the issue before the court. It was this weighing of contacts or interests which the majority in the subsequent *Babcock* case found to be consistent with the approach adopted in *Kilberg*<sup>40</sup> and with the most recent revision of the Restatement of the Conflict-of-Laws in the field of torts.<sup>41</sup> In *Babcock*, the majority concluded that Ontario's sole interest was the enforcement of its rules of the road—the prevention of negligent accidents. The issue was not the correctness of the defendant's conduct under such rules of the road. Rather, the question was whether a New York guest riding in an automobile licensed, garaged, and normally operated in New York could recover from her New York host for an accident which prevented the completion of a trip which started and was to have terminated in New York. The rights and liabilities of the parties certainly arise as much from the guest-host relationship which was created in New York as they do from the accident which occurred in Ontario.

The policy considerations of the two jurisdictions are also material. Ontario's concern is to prevent fraudulent claims against its insurance carriers resulting from collisions involving a guest-host relationship. New York, on the other hand, is more concerned with the injured guest. The New York court concluded that Ontario could have no legitimate interest or complaint if New York permitted a recovery which would further its declared policy allowing injured guests to recover from their negligent hosts while at the same time not offending any declared policy of the province of Ontario.<sup>42</sup> Thus, the New York court made the initial break

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the law suits which result from these disasters. 172 N.E.2d at 527-28, 211 N.Y.S.2d at 135.

Unfortunately, the court escapes a headlong collision with the *lex loci* rule by virtue of the characterization loophole stating that the limitation provisions on recovery for wrongful death is a procedural matter to which *lex fori* is applicable.

<sup>40</sup> *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 282-83, 240 N.Y.S.2d 743, 747-49 (1963).

<sup>41</sup> RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (1), (3) (Tent. Draft No. 9, 24 April 1964):

(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort. . . .

(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

<sup>42</sup> *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750-51. Judge Fuld, writing for the majority:

Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.

New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence cannot be doubted . . . and our courts have neither reason nor warrant for departing from that policy simply because the accident, solely effecting New York residents and arising out of the operation of a New York based automobile, happened beyond its borders. . . . The object of Ontario's guest statute, it

with the traditional rule so as to take into account the essential interests of the competing jurisdictions involved.

One year after the *Babcock* decision, the Pennsylvania Supreme Court reached a similar conclusion in *Griffith v. United Airlines, Inc.*<sup>43</sup> The case involved a Pennsylvania domiciliary, George Hambrecht, who purchased a ticket in Pennsylvania from United Airlines for a round-trip flight from Philadelphia to Phoenix, Arizona. On the return trip the plane crashed while attempting a scheduled landing in Denver, Colorado. Hambrecht died instantly. United Airlines is a corporation regularly doing business in Pennsylvania. Under Colorado law, damages are recoverable only for loss of earnings and expenses prior to death whereas, under Pennsylvania law, damages are recoverable for the present value of lifetime earnings less maintenance. Since the decedent died instantly, it is apparent that under Colorado law there would be little, if any, recovery while under Pennsylvania law a recovery could be substantial. Justice Roberts, writing for the majority, began his analysis by noting,

In this age of increasingly rapid transit of people and goods that segment of the law known as conflict of laws, or perhaps more accurately, choice of law, has become more and more significant. . . . The basic theme running through the attacks on the place of the injury rule is that wooden application of a few overly simple rules, based on outmoded "vested rights theory" cannot solve the complex problems which arise in modern litigation and may often yield harsh, unnecessary and unjust results.<sup>44</sup>

After a thorough review of the alternatives and cases in which the *lex loci* rule has been avoided by the inherent flexibility in the methodology, Justice Roberts cast aside the strict application of *lex loci* in favor of the new rule which permits analysis of the "interplay and clash of conflicting policy factors." He noted that the adoption of this more flexible rule

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has been said, is "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies" (Survey of Canadian Legislation, 1 U. Toronto L.J. 358, 366) and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers. Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction. . . .

[T]he issue here, however, is not whether the defendant offended against a rule of the road prescribed by Ontario for motorists generally or whether he violated some standard of conduct imposed by that jurisdiction, but rather whether the plaintiff, because she was a guest in the defendant's automobile, is barred from recovering damages for a wrong conceivably committed. As to that issue, it is New York, the place where the parties resided, where the guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and the superior claim for application of its law. Although the rightness or wrongness of defendant's conduct may depend upon the law of the particular jurisdiction through which the automobiles passes, the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place. Indeed, such a result, we note, accords with "the interests of the host in procuring liability insurance adequate under the applicable law and the interests of his insurer in reasonable calculability of the premium." (Ehrenzweig, Guest Statutes in the Conflict of Laws, 69 Yale L.J. 595, 603.)

<sup>43</sup> 416 Pa. 1, 203 A.2d 796 (1964).

<sup>44</sup> *Id.* at 801.

would be no more difficult or troublesome than the concepts of reasonableness or due process of law with which courts have had to deal to reach substantive justice.<sup>45</sup>

Thus, Justice Roberts set the stage for his analysis of the "clash of conflicting policy factors." He speculated on the intent of the limitation on damages in the Colorado statute and found that such limitation could be to:

(1) prevent Colorado courts from engaging in what they might consider speculative computation of expected earnings and the difficult mathematical reduction thereof to present worth;

(2) protect Colorado defendants from large verdicts; or

(3) protect an interest in Colorado policy where the defendant has acted in reliance upon that state's statutes.

Following careful reflection, the majority considered these factors to be of purely local concern and Colorado should not be concerned where (a) a Pennsylvania forum is willing to engage in such computations; (b) the defendant is not a domiciliary of Colorado and therefore Colorado should not be concerned with a judgment against the defendant; and (c) the defendant does business in many states including Pennsylvania and should, therefore, reasonably anticipate that it might be subject to the laws of Pennsylvania and could and should financially protect itself against that eventuality. Justice Roberts then concluded,

Pennsylvania's interest in the amount of recovery, on the other hand, is great. The relationship between the decedent and United was entered into in Pennsylvania. Our commonwealth, the domicile of decedent and his family, is vitally concerned with the administration of decedent's estate and the well-being of the surviving dependents to the extent of granting full recovery, including expected earnings. This policy is so strong that it has been embodied in the Constitution of Pennsylvania . . . .<sup>46</sup>

Of course this new trend does not proceed without its dissenters. Chief Justice Bell, dissenting in *Griffith*, turned the argument of the majority against it by noting, "[T]he court's opinion creates a new test or formula which has *no clear and definite application to many varied factual situations which are certain to arise.*"<sup>47</sup> He found the new rule,

so indefinite and flexible that it will also almost inevitably create instability, uncertainty, confusion and conflict of law throughout our country, and will undoubtedly greatly increase the volume of litigation which is already swamping courts, and thereby further delay speedy justice. Practically speaking,

<sup>45</sup> *Id.* at 806.

It must be emphasized that this approach to choice of law will not be chaotic and anti-rational. The alternative to a hard and fast system of doctrinal formulae is not anarchy. The difference is not between a system and no system, but between two systems; between a system which purports to have, but lacks, complete logical symmetry and one which affords latitude for the interplay and clash of conflicting policy factors. Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 Yale L.J. 1155, 1157-1158 (1947). Moreover, in evaluating qualitatively the policies underlying the significant relationship to the controversy, our standard will be no less clear than the concepts of "reasonableness" or "due process" which courts have evolved over many years. . . .

<sup>46</sup> *Id.* at 807.

<sup>47</sup> *Id.* at 809.

the only thing certain about the new rule is that plaintiffs will bring their suits in or under the law of the state which allows them to collect the most damages.<sup>48</sup>

In *Babcock*, Judge Van Voorhis, in his dissent, recognized the difficulties presented by our ever-improving methods of transportation; but he doubted the wisdom of curing the problems so created by giving extra-territorial effect to the laws of a particular jurisdiction. In his dissent he ascribed to a solution of the problem through uniform state laws or federal legislation. He viewed the importation of extra-territoriality principles into conflict-of-laws situations as compounding existing confusion; the revival of the ancient Roman law idea that the rights of the citizens under Roman law attached to them in their travels throughout the world and so were enforceable even though they might not be honored by "lesser breeds without law."<sup>49</sup>

#### V. CURRENT ANALYSIS

*Babcock* was first to expressly adopt a new conflict-of-laws rule in the tort area, making a clear and distinct break from the old Restatement rule. *Griffith* followed with an even clearer enunciation. Whether or not the new trend has eroded the established rule to a significant degree can probably best be determined by a review of the jurisdictions which have expressly considered this matter since the announced break with tradition declared in *Babcock*.<sup>50</sup> For analysis, the jurisdictions are divided into:

- (1) Trend Jurisdictions—those which have expressly adopted the modern rule in one or more tort areas;
- (2) Waivering Jurisdictions—those which have not fully adopted the modern rule but show a tendency toward flexibility in their approach to tort conflict-of-laws problems; and
- (3) Traditional Jurisdictions—those which have expressly refused to adopt the modern rule.

##### A. Trend Jurisdictions

*New York*. As might be expected, the new doctrine has received considerable probing by New York litigants and hence substantial development by its courts since the announcement of *Babcock*. There can be no doubt that New York is firmly committed to the significant contact theory, and that New York courts are willing to extend that doctrine into additional phases of tort law. By an analysis of competing state policies, if the New York court finds that the jurisdiction where the tort occurred has no significant interest, it may be expected that the court then will apply the law of that jurisdiction which it finds to have the most significant policy to be furthered by the decision in the case. The development in

<sup>48</sup> *Ibid.*

<sup>49</sup> *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 286, 240 N.Y.S.2d 743, 752 (1963).

<sup>50</sup> This discussion analyzes a relatively complete list of all cases decided directly on this point since 1963. Expressly excluded are those cases in which the decision indirectly involved this development.

New York can be illustrated by the factual problem outlined in the introduction.<sup>51</sup> There, the legal representative of an estate brought an action in New York, the state of incorporation of the defendant, to recover for the alleged wrongful death of a Pennsylvania resident who purchased a round-trip ticket to Puerto Rico in Pennsylvania and was killed on the return flight when the plane experienced malfunctions over the Delaware-Maryland border, apparently exploded, and fell to earth on Maryland soil. Under Maryland's statute, the legal representative of a decedent does not have a cause of action for wrongful death. Pennsylvania's statute includes the decedent's estate among those entitled to bring an action and recover for wrongful death. The trial court held Pennsylvania had the greatest contacts with the transaction and was most concerned with the parties, hence its law controlled.

The Appellate Division, dividing three to two and sounding very much like the dissent in *Babcock*, held the decision in that case inapplicable to wrongful death actions because to do so would give extra-territorial effect to Pennsylvania's statute for events which transpired over Delaware and terminated in Maryland. None of the acts leading up to the disaster occurred in Pennsylvania save the purchase of the ticket and the origin of the trip. The appellate court noted, as have other courts,<sup>52</sup> that the grouping of contacts theory does not supersede the traditional rule of *lex loci* and that for the new contact theory to apply, there must at least be a cause of action under *lex loci delicti*. The court went so far as to say that there was no interest in the forum state which could create a cause of action where one did not exist under its own laws and did not arise under the laws of another jurisdiction upon which the party had to rely.<sup>53</sup> The dissent, by listing the contacts with the state of Pennsylvania, apparently construed *Babcock* to require only a quantitative analysis of the problem with a decision to be based on the jurisdiction with the majority of contacts with the transaction.<sup>54</sup>

The New York Court of Appeals unanimously rejected both the majority and dissenting opinions advanced by the Appellate Division.<sup>55</sup> The opinion emphasized the concern which each jurisdiction has with the matter in issue and the respective interest of each in the resolution of the matter in terms of its particular declared policy. The court noted that New York was relatively neutral in the case for, though the defendant was incorporated in New York, such contact was formalistic only since the defendant did a substantial amount of business in Pennsylvania, the place where the contract for transit was executed. The court found that

<sup>51</sup> *Long v. Pan Am. World Airways, Inc.*, 23 App. Div. 2d 386, 260 N.Y.S.2d 750, *reversed*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

<sup>52</sup> *Flogel v. Flogel*, 133 N.W.2d 907 (Iowa 1965); *Freund v. Spencer*, 46 Misc. 2d 472, 260 N.Y.S.2d 149 (Sup. Ct. 1965); and *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 230 F. Supp. 240 (S.D.N.Y. 1964).

<sup>53</sup> *Long v. Pan Am. World Airways, Inc.*, 23 App. Div. 2d 386, 260 N.Y.S.2d 750, 753, *reversed*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

<sup>54</sup> *Id.* at 755.

<sup>55</sup> *Long v. Pan Am. World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

in this case of wrongful death of a Pennsylvania citizen, the interest of that state in the matter was paramount. It is the domicile of the deceased which is vitally concerned with the administration of its decedents' estates and the enforcement of its own wrongful death and survival statutes. It is these statutes which provide for the indemnification of the estate for the expenses occasioned by virtue of such wrongful death and for the present value of the decedent's anticipated lifetime accumulations.<sup>56</sup>

The court had no difficulty with the extra-territorial problem and mentioned it only indirectly. It concluded that it was not unjust to hold the defendant liable under Pennsylvania's wrongful death and survival statutes since the airline was doing business in Pennsylvania and had no cause to complain about liability flowing as a consequence of its negligence under the laws of that state in favor of passengers solicited by it therein.<sup>57</sup> The court suggested that Maryland might have a stronger policy toward shielding defendants from such actions, but finding no such contentions being made in this case, dismissed it from consideration. The fact that Maryland's statute omitted the plaintiff from the class entitled to sue should be sufficient evidence of Maryland's policy to shield defendants from such actions.

The New York court emphasized the policy considerations which underlie the various issues in a given case. The court then weighed these competing policies against an unarticulated standard so as to determine which policy is to be recognized as most significant. The fact that the court *assumed the standard* against which competing policies must be measured is the critical factor in the New York development. This unarticulated standard leaves much flexibility for each court. Should two or more courts consider an identical problem, compare and weigh identical policies, the decisions may well be different. Lawyers are not unfamiliar with such possible divergent results due to the variety of available approaches to any given problem. Here, however, the same approach and evaluation of the same factors may readily yield different results—this is uncertainty compounded.

*Pennsylvania.* Pennsylvania expressly adopted the "analysis of competing policy factors" in *Griffith*.<sup>58</sup> That decision has been construed by the federal courts sitting in that state on only two occasions, one involving an auto accident and the other negligent surgery. In the former case the court recognized *Griffith* as controlling and determined that Pennsylvania's interests in its defendant-resident, plus its contacts with the transaction, were so significant as to justify the application of Pennsylvania law.<sup>59</sup> In the latter the court, while recognizing *Griffith* as controlling law, found on an apparent quantitative basis that the majority of significant contacts pointed to the use of *lex loci*.<sup>60</sup>

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<sup>56</sup> *Id.* at 797.

<sup>57</sup> *Id.* at 798.

<sup>58</sup> *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 22, 203 A.2d 796, 805-06 (1964).

<sup>59</sup> *Goulding v. Sands*, 237 F. Supp. 577 (W.D. Pa. 1965).

<sup>60</sup> *Christopher v. United States*, 237 F. Supp. 787 (E.D. Pa. 1965).

Since the Pennsylvania Supreme Court has not had occasion to consider another case involving the significant contact theory, no real conclusions as to further developments in that jurisdiction are possible. However, the varying approaches taken by the two federal court decisions are indicative of the difficulties the trial courts will have in understanding and applying the new theory.

*Wisconsin.* There are apparently two fruitful areas in which the significant contact theory has developed. One is illustrated by the airline accident cases involving wrongful death and survival statutes. The other arises from automobile accidents and involves interspousal suits and guest statutes. In 1959 Wisconsin broke with the old *lex loci* formula in automobile accident cases and, in effect, applied the significant contact theory to this type of situation. The court found that the jurisdiction of the domestic domicile has the greatest concern with interspousal suits so as to override any interest of the place of injury in the outcome of such litigation.<sup>61</sup> But even here the Wisconsin court has not been entirely consistent, having held in a wrongful death action that the domestic domicile alone is not a sufficient contact to avoid the application of *lex loci*.<sup>62</sup> Arguably, this latter holding may be justified on the basis that where one partner to the marriage is deceased, the domestic domicile does not have the same vital interest in the outcome as in a situation where the parties survive.<sup>63</sup>

### B. *Wavering Jurisdictions*

While the states of New York, Pennsylvania, and Wisconsin are now attempting to define and delineate the limits and extent of their new doctrine, nine states<sup>64</sup> and the District of Columbia are wrestling with the problem of whether to adopt the new theory and if so, to what extent. These jurisdictions have considered the new trend cases and have either adopted the new theory with supporting characterization arguments or, in recognizing such theory, held there were not significant contacts for its application in the particular case. Most of the courts following the latter approach tend to apply a quantitative measure for the application of the significant contact theory with no real analysis of the clash of competing policies. These jurisdictions have interpreted the significant contact theory to mean that *lex loci applies unless*: it is contrary to the public policy of the forum;<sup>65</sup> the forum has the most significant contact;<sup>66</sup> the most con-

<sup>61</sup> *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962); and *Haumschild v. Connecticut Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

<sup>62</sup> *Brunke v. Popp*, 21 Wis. 2d 458, 124 N.W.2d 642 (1963).

<sup>63</sup> Note, however, that where one spouse has obtained a divorce and remarried subsequent to the accident for which suit was brought, *Haumschild* was nevertheless relied upon to prevent the operation of Wisconsin law in favor of that of the domestic domicile. *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

<sup>64</sup> California, Colorado, Connecticut, Indiana, Iowa, Minnesota, New Hampshire, North Carolina, and Tennessee.

<sup>65</sup> *Flogel v. Flogel*, 133 N.W.2d 907 (Iowa 1965); *Wiener v. United Airlines, Inc.*, 237 F. Supp. 90 (S.D. Cal.), *aff'd and modified*, 335 F.2d 379 (9th Cir.), *cert. dismissed, sub nom.*, *United Airlines, Inc. v. United States*, 379 U.S. 951 (1964); and *Taylor v. Royal Ins. Co.*, 235 F. Supp. 891 (W.D. Mo. 1964).

<sup>66</sup> *Willenbucher v. McCormick*, 229 F. Supp. 659 (D. Colo. 1964).

tacts;<sup>67</sup> or, the matter involves intermarital relations where the laws of the domestic domicile must control.<sup>68</sup> Therefore, *lex loci* has been held controlling on the basis of having the most significant relationship with the parties and the tort<sup>69</sup> or where the forum has no contact at all with the transaction.<sup>70</sup> In some instances courts have attempted the distinction noted in the New York development by determining the existence of a cause of action under *lex loci* but applying *lex fori* to questions of parties, damages, and procedure.<sup>71</sup>

The Fourth Circuit Court of Appeals, in a suit for damages against an insurance company for negligent delay in acting upon a policy application, held that the North Carolina Supreme Court, if presented with the problem, would determine the question upon the "most significant relationship with events constituting the alleged tort and with the parties."<sup>72</sup> At about the same time the North Carolina Supreme Court was rejecting the use of the domestic domicile for determining a wife's capacity to sue her husband in tort.<sup>73</sup>

### C. Traditional Jurisdictions

Several jurisdictions have expressly rejected the new trend while others have not had occasion to rule upon it. Nine states<sup>74</sup> have decided multi-state tort cases since 1963 and have not given effect to any law other than the place of injury. These decisions find bases in: federal court refusal to speculate on the present attitude of state courts and hence *lex loci* controls;<sup>75</sup> no extra-territorial effect for purely statutory cause of action;<sup>76</sup> a spouse's capacity to sue his mate as part of the substantive rights granted by *lexi loci*;<sup>77</sup> and an express rejection of the significant contact theory because of need for certainty and uniformity in the law.<sup>78</sup> At least one court, noting the confusion presently existing in this area, has refused to deviate from the old rule at this time.<sup>79</sup>

<sup>67</sup> *Watts v. Pioneer Corn Co.*, 342 F.2d 618 (7th Cir. 1965); *Gianni v. Fort Wayne Air Serv., Inc.*, 342 F.2d 621 (7th Cir. 1965).

<sup>68</sup> *Johnson v. Johnson*, 216 A.2d 781 (N.H. 1966); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963).

<sup>69</sup> *Roberson v. Bitner*, 221 F. Supp. 279 (E.D. Tenn. 1963).

<sup>70</sup> *Tramontant v. S. A. Empresa De Viacao Aerea Rio Grandense, t/a Varig*, 350 F.2d 468 (D.C. Cir. 1965).

<sup>71</sup> *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); *Fabricius v. Horgen*, 132 N.W.2d 410 (Iowa 1965); and *Cardamon v. Iowa Lutheran Hosp.*, 256 Iowa 506, 128 N.W.2d 226 (1964).

<sup>72</sup> *Lowe's No. Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469 (4th Cir. 1963).

<sup>73</sup> *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963).

<sup>74</sup> Arkansas, Delaware, Illinois, Kansas, Missouri, Oklahoma, Oregon, South Carolina, and Texas.

<sup>75</sup> *Goranson v. Capital Airlines, Inc.*, 345 F.2d 750 (6th Cir. 1965); *Glick v. Ballentine Produce, Inc.*, 343 F.2d 839 (8th Cir. 1965); *Taylor v. Royal Ins. Co.*, 235 F. Supp. 891 (W.D. Mo. 1964); and *Bastrom v. Seguros Tepeyac*, 225 F. Supp. 222 (N.D. Tex. 1963).

<sup>76</sup> *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965) (Wrongful Death Statute); *Bassi v. Morgan*, 60 Ill. App. 2d 1, 208 N.E.2d 341 (1965) (Guest Statute); *Liff v. Haezbroeck*, 51 Ill. App. 2d 70, 200 N.E.2d 525 (1964) (Dram Shop Act); and *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963) (Dram Shop Act).

<sup>77</sup> *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966) (*lex loci* determines if cause of action, *lex fori* determines if one spouse has the capacity to sue another); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964) (wife's capacity to sue husband part of substantive right and governed by *lex loci*).

<sup>78</sup> *Friday v. Smoot*, 211 A.2d 594 (Del. 1965).

<sup>79</sup> *Gunderson v. Barry*, 239 Ore. 279, 397 P.2d 196 (1964).



## VI. EMERGENT RULE

What is the new rule? Even a cursory analysis of the cases documented herein will show that at this time there is no clear answer. The court in *Babcock* spoke in terms of adopting the center-of-gravity theory of contracts to the tort area. Theoretically, the forum will determine both the interests of the states involved and which state's interest is most intimately connected with the outcome of the particular litigation. The law of the state with the greatest interest is then applied.

The interest of a state is a nebulous concept and the court in *Babcock* seems to be using it interchangeably with what generally has been termed contacts (*i.e.*, domicile of parties, place of injury, etc.). This leads to the problems encountered by the lower courts in the application of this theory as illustrated in *Long*. The New York rule seems to reduce to a consideration of the underlying policies and then weighing these against some standard. A state's interest also must be determined in relation to a state's policies and interests in having certain issues determined in a particular way. Thus, the New York position is similar to that of Pennsylvania in *Griffith*.

In *Griffith*, the Pennsylvania court adopted a rule which permits the forum to analyze the policies and interests underlying the particular issues before the court.<sup>80</sup> This is apparently an adoption of the position taken by the second Restatement which would apply the law of the state which has the most significant contacts with the particular issues. The emphasis is on the relation of the contacts to the respective policies which underlie the conflicting laws. The Restatement now enumerates the "significant contacts" as:

- (1) place of injury;
- (2) place of conduct;
- (3) domicile of parties;
- (4) place where the relationship of parties is centered; and
- (5) place where the action is brought.

In turn then, these contacts must be analyzed by the court in terms of (a) the nature of the tort involved, (b) the issues, and (c) the policies underlying the specific conflicting tort rules involved.<sup>81</sup>

## A. Constitutionality

In *Richards v. United States*,<sup>82</sup> the United States Supreme Court had before it a wrongful death action involving the Federal Tort Claims Act and the conflicting statutory liability limits of Missouri and Oklahoma. The act requires the court in multi-state tort actions to look to the law of the place where the acts of negligence occurred and the Supreme Court held this to mean the entire law of that jurisdiction, including its con-

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<sup>80</sup> See *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964) (see court's discussion under headnote 7, at 805).

<sup>81</sup> RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 24 April 1964).

<sup>82</sup> 369 U.S. 1 (1961).

flict-of-laws rule. Chief Justice Warren, writing the opinion of the court said:

[W]here more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity. Thus, an Oklahoma state court would be free to apply either its own law, the law of the place where the negligence occurred, or the law of the place where the injury occurred, to an action brought in its courts and involving this factual situation.<sup>83</sup>

This should foreclose any claim of unconstitutionality in the application of the new rules where the jurisdiction whose law is applied has some significant contact with the multi-state tort involved.<sup>84</sup>

## VII. CONCLUSION

Clearly, *lex loci* has failed to provide a satisfactory solution to our present day multi-state tort problems and it will continue to be deficient with increasing frequency in the future. The complex and, surely to some trial courts, confusing alternatives suggested to date have not developed sufficiently for proper evaluation. The new theory places squarely upon the shoulders of the trial courts the burden of weighing competing governmental interests in order to apply that jurisdiction's policy which the court *believes* to be more intimately involved or socially valuable. In spite of Pennsylvania's attempt to enunciate meaningful guidelines, no clear standards or values are set out to assist the courts in making their determinations. Competing governmental interests are matters to be resolved by state legislatures, or Congress if necessary; but these matters in no event should become an additional burden to be heaped upon the trial court.<sup>85</sup>

In practice, the trial courts have not undertaken such an evaluation. New York courts seem either to have applied a new mechanical rule, with the greatest number of contacts being determinative or, alternatively, to have used *lex fori* where the court determines that New York has a strong public policy or local interest in having a particular issue decided according to New York law. If there is no such local interest the New York trial courts have gone ahead and applied the old *lex loci* rule. Thus, in a New York court, a New York domiciliary or resident may expect, but not always obtain, application of the laws of New York in a multi-state tort where New York law permits a recovery that would otherwise be denied. However, a non-resident of New York may find that in no instance does New York have sufficient contacts to justify the application of its laws over those of the place of the wrong. High sounding general philosophies of what a court must and must not do will continue to be of little

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<sup>83</sup> *Id.* at 15.

<sup>84</sup> *But cf.* Keefe, *Piercing Pearson*, 29 J. AIR L. & COM. 95 (1963).

<sup>85</sup> Tate, *supra* note 4, at 166; Currie 247-48.

practical value until fully developed, with standards upon which value judgments may be made at the trial level. As the decisions of the lower New York courts indicate, the trial judge does not want to undertake the task of deciding between the competing legitimate interests of sovereign states. The judges seem to be looking for firmer, more mechanical grounds upon which to rest their decisions. The integrity of the courts in their attempt to administer justice in each case is not questioned; but, as a practical matter, the judges cannot divorce themselves from their environment, constituents, and state loyalties so as to decide conflicting and competing state policy matters on a purely philosophical basis.

The late Professor Currie suggested that the decision as to the proper advancement of the forum state's policies should be made by the legislature by specifying in each remedial statute those instances in which the remedy would be applicable.<sup>86</sup> This would be a delightful situation and certainly would relieve the courts of the odious task of decreeing that the legitimate policies and interests of one sovereign must yield to that of another. Of course, this is the advantage of the old rule. Realistically, we may expect that not many legislatures will enact such conflict-of-laws statutes. The courts will be left where they are now—either to speculate on legislative intentions and forge ahead so as to achieve acceptable results or, in bewildered frustration, rely mechanically upon the old system and ignore the results.

Both the old and the new rules have this to commend them—they were designed to achieve a just result. The solution, if there is *a* solution, is not yet at hand. The decisions to date would seem to indicate not one but several "rules." Which of these, if any, will ultimately prevail is anybody's guess.

As alternatives to the complex and wholly unsatisfying task of choosing without guidelines between competing governmental interests, the decisions suggest several methods. One solution would be to apply *lex loci* unless the forum has a strong public policy in the matter which should be enforced. Alternatively, the English method of looking to the place of injury to determine if a cause of action exists and then to the law of the forum for all other matters has much to recommend it. If the courts are not worried about forum shopping, let the forum apply its own law, *lex fori*, in every instance unless there is some overpowering reason to apply the law of some other jurisdiction.

Each of these solutions has its related problems, none is the panacea to reach the perfect result in *every* case. Unfortunately every rule, though defined for the purpose of adding flexibility to the system, invariably tends itself to become rigid and fixed in its application. At least now the ice has been broken, the thaw begun, and hopefully a practical, intellectually honest solution can be found before the next freeze.

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<sup>86</sup> Currie 246-48.