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CHOICE OF LAW—MASS DISASTER CASES INVOLVING DIVERSITY OF CITIZENSHIP

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NOWHERE is the need for a functional and flexible approach to the problem of choice of law more urgent than in the mass disaster aircraft cases involving wrongful death and devastating personal injuries.[1] Since these cases will primarily be decided in the federal court system, they are subject to the federal venue provisions and will inevitably fall within multidistrict litigation rules.[2] Thus, when a case is commenced in a given district, it may either be: (i) transferred pursuant to section 1404(a)[3] for all purposes including trial; or (ii) when the case is determined to

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[1] *See* note 49 *infra*. Add the following to the citations of authority: D. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts* in 20TH CENTURY COMPARATIVE AND CONFLICTS LAW 349, 357-58 (1961). *See* Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under all Foreseeable and Insurable Laws*, 69 YALE L.J. 595 (1960).

[2] 28 U.S.C. § 1407 (1970) provides in part: "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded."

[3] 28 U.S.C. § 1404(a) (1970).

have been commenced in the wrong district, the case may be transferred to any district where the action should have been properly brought under section 1406;[4] or (iii) the case may be transferred to any district for coordinated or consolidated pretrial proceedings under section 1407,[5] then remanded at or before the conclusion of the pretrial proceedings from the transferee district.

Notwithstanding these transfer provisions, the choice of law rule of the original transferor forum remains when venue was properly laid initially.[6] Although as a matter of federal policy a case may be transferred to a more convenient court,[7] those rights that the parties have acquired pursuant to the laws of the jurisdiction where the case was originally brought remain intact in all respects. The only change effected by the transfer of the case for the convenience of the judicial system is a change of location. Thus, when a case is transferred pursuant to section 1404(a) or section 1407, the law of the forum where the action was originally brought governs the rights of the parties.[8] Furthermore, the original forum may select the law of any jurisdiction having substantial contact with the issue in the case.[9]

Thus, except when the action was originally brought in an improper jurisdiction, the rights of the litigant become fixed in accordance with the law of the forum, including the choice of law rule of that forum.[10] It is clear that the selection of the forum where to bring the action is of paramount importance. Moreover, the provisions of federal law with respect to change of venue[11] and multidistrict litigation[12] do not derogate from the significance of the selection of the forum made by counsel.

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[4] 28 U.S.C. § 1406 (1970).

[5] 28 U.S.C. § 1407 (1970).

[6] Van Dusen v. Barrack, 376 U.S. 612 (1964).

[7] *Id.*

[8] *Id.*

[9] Richards v. United States, 369 U.S. 1, 15 (1962). *See*, Crider v. Zurrich Ins. Co., 380 U.S. 39 (1965); Clay v. Sun Ins. Office, 377 U.S. 179 (1964); Watson v. Employer's Liability Assurance Corp., 348 U.S. 66 (1954); Griffin v. McCoach, 313 U.S. 498 (1941); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[10] Richards v. United States, 369 U.S. 1 (1962).

[11] *See* notes 3 and 8 *supra.*

[12] *See* note 2 *supra.*

I. SIGNIFICANCE OF THE CHOICE OF LAW RULE

To illustrate the selection process, assume that an attorney has been retained by the estate of the person killed in an airplane crash occurring in Massachusetts. At the time of death, the deceased and his survivors are domiciliaries of New York, jurisdiction and venue may properly be laid in either Massachusetts or New York.[13] Assume further that the investigation by the attorney discloses that Massachusetts has a maximum limitation on recoveries in wrongful death cases[14] and is based on the degree of culpability, while New York has unlimited recovery.[15] Upon discovering that the New York courts will not apply the Massachusetts rule limiting damages in wrongful death cases[16] he would, of course, select New York as the forum.

Although this is a simple illustration and the significance of New York being selected as the forum for this hypothetical lawsuit is easily ascertained, the cases arising out of mass disasters involve issues far more complex and require closer scrutiny to select properly the forum to institute the action. A striking example is *Manos v. Trans World Airlines, Inc.*[17] which involved an aircraft that crashed in Italy but was manufactured and sold in the state of Washington. The suit was instituted against the air carrier for negligence and against the manufacturer for breach of warranty. The law of the state of Washington was favorable to the plaintiff concerning the breach of warranty claims both on the substantive law[18] and on the statute of limitations. In addition the law of Italy was favorable concerning the negligence claim.[19] The Illinois court, where the action was brought, applied the law of Italy on the negligence claim because Italy was the place of injury.[20] Since the

[13] *See* note 31 *infra* (referring here to jurisdiction over the subject matter and assuming that jurisdiction over the defendant can be obtained in the place of the domicile of the plaintiff).

[14] MASS. GEN. LAWS ANN. ch. 229, §§ 1, 2 (as in effect 1958).

[15] N.Y. ESTATES, POWERS & TRUSTS LAW, Article 5, §§ 5-4.3 (1971).

[16] *See* note 31 *infra.*

[17] 295 F. Supp. 1170 (N.D. Ill. 1969).

[18] *Id.*

[19] *Id.*

[20] The court in Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969), relied upon Klaxton v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941), and Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

state of Washington was the place of manufacturer, sale and delivery of the aircraft, the Illinois court applied Washington law on the breach of warranty claim.[21] In addition the court held that the law of the domicile of the deceased at the time of death would govern the damages claim.[22] The defendants were eventually held liable.[23]

Clearly the court in *Manos*[24] applied a flexible standard by first isolating the issues and then determining the law of the several jurisdictions that would apply in resolving that issue. If the case had been brought in a jurisdiction that adheres to the outmoded and rigid approach[25] that postulates the application of the law of the place of injury in all respects, then the ultimate result might have been disastrous to the plaintiffs. Thus because the law of the forum originally selected plays such a significant role in the ultimate determination of the rights of the accident victim, a thorough investigation is essential to ascertain whether a full measure of recovery can be obtained under the substantive and choice of law rules of the jurisdiction.[26]

For this reason it is necessary to understand the significance of the choice of law rules of lex loci, the "significant contacts," and the "governmental interest" as they may determine the applicable law in a given case under the particular choice of law rule of the forum where the action has been instituted.

II. CHOICE OF LAW RULE

Over a decade ago the choice of law rule was that the law of the state where the injury occurred governed tort actions and the law of the state where the contract was made governed contract

[21] *See* note 17 *supra* at 1176, *citing* Hardman v. Helene Curtis Industries, Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

[22] *Id.* at 1173.

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

[24] *See* note 17 *supra.*

[25] For a discussion of this issue see Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). *Reviews of Leading Cases, Griffith v. United Airlines,* 31 AM. TR. LAW. L.J. 546 (1965).

[26] *See* Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270 (10th Cir. 1967); George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir.), *cert. denied,* 379 U.S. 904 (1967); Murphy v. St. Paul Fire & Marine Ins. Co., 314 F.2d 30 (5th Cir. 1963), *cert. denied,* 378 U.S. 906 (1964); Schultz v. Tecumseh, 310 F.2d 426 (6th Cir. 1962); Krause v. Republic Aviation Corp., 196 F. Supp. 856 (E.D.N.Y. 1961); Kellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957).

actions.[27] But the inequities engendered by this rigid concept, which was outmoded by the advancing technology of the society, impelled the courts to seek other standards to conform the law with the changing patterns of life. Thus the United States Court of Appeals for the Second Circuit, sitting *en banc*, struck out against the ritualistic thinking of the nineteenth century in *Pearson v. Northeast Airlines, Inc.*,[28] by holding that the New York courts were not bound by the Massachusetts maximum limitation on damages on wrongful death of 15,000 dollars,[29] notwithstanding the accident having occurred in Massachusetts. More significant, however, was the court's recognition of the need for an articulate selection of laws governing multistate transactions:

> The field of conflict of laws, the most underdeveloped in our jurisprudence from a practical standpoint, is just now breaking loose from the ritualistic thinking of the last century. Recent opinions of the Supreme Court and the great wave of academic writing reinforce this trend toward flexible and articulate selection of the laws governing multistate transactions. The development will be stillborn if we impose inflexible constitutional strictures in the name of national unity, restrictions which could not be repaired by state or federal legislation.[30]

This search for flexibility has been difficult and fraught with confusion. In *Kilberg v. Northeast Airlines, Inc.*[31] the New York court held that the maximum recovery of 15,000 dollars in wrongful death actions in Massachusetts was offensive to public policy. Since the plane crashed in Massachusetts, the traditional *lex loci* rule would cause obvious injustice. Indeed, the court in *Kilberg* stated: "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."[32]

The court found an expedient method of applying the public policy principle of full and just compensation to accident victims

[27] The significance of the choice-of-law rule adopted by the forum is well demonstrated in Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969).

[28] 309 F.2d 553 (2d Cir. 1962).

[29] *Id.* at 555 n.1.

[30] *Id.* at 563.

[31] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[32] *Id.* at 135.

without destroying the accepted *lex loci* rule. The court avoided a direct confrontation with the anachronistic *lex loci* doctrine by treating the measure of damages as a procedural matter controlled by the law of the forum.[33] But the significance of *Kilberg* rests in the recognition that public policy of the forum overrides conventional configurations of the conflict of law rules.

Viewed in this light, the cases that follow *Kilberg* applied a new principle, "grouping of contacts," as a criteria to be used in the selection of the applicable law.[34] But the "grouping of contacts" principle was actually a new version of the older approach to the conflicts of law problem. Thus the rigid application of the "grouping of contacts" theory eliminate one rigid rule (*lex loci*) and the substitution of the a new one (grouping of contacts). The same infirmity existing under the old rule began to be manifest in the new one. Although the courts gave pious recognition of the need for flexibility in applying "grouping of contacts"[35] theory and though this theory was modified by the term "significant,"[36] nevertheless the courts persisted in mechanically counting contacts to ascertain the applicable jurisdictional law in a given case.

An illustration of the dilemma that ensued from the mechanical application of the grouping contact theory may be found in *Babcock v. Jackson* when the New York Superior Court announced that justice and fairness would best be achieved in tort cases with multistate contacts by giving controlling effect to the jurisdiction that has the greatest concern with the issues involved in the lawsuit because of its contact with the occurrence or the parties.[37] In *Babcock*, the court abandoned the traditional *lex loci* rule in favor of the "center of gravity" or "grouping of contacts" theory. In addition, the court roundly condemned any choice of law rule that

[33] *Id.* at 137.

[34] Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966). A fine discussion of the historical development of the movement in New York of the choice-of-law doctrine, "all grouping of contacts" to the "governmental interests" is found in the concurring opinion of Judge Breitel in Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

[35] *See* note 37 *infra.*

[36] Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463, 466 (1965).

[37] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

would require the application of the law of the jurisdiction based merely upon the fortuitous circumstance of the wrong or injury occurring in that jurisdiction. Unfortunately, the *Babcock* decision compared the relative contacts and interest of New York (the forum) with Ontario, Canada (the place of injury). Thus it applied the law of New York because the action involved injuries sustained by a New York domiciliary, the defendant was also a New York domiciliary, the automobile involved was garaged, licensed and insured in New York and the accident, which occurred in Ontario, was an incident of a weekend journey that began and was to end in New York. In effect, the *Babcock* decision set the stage for the contact counting that later transpired.[38]

In the 1965 case of *Dym v. Gordon*[39] the court held that the Colorado guest statute would be applied by the New York court notwithstanding that the parties to the action were New York domiciliaries. There the facts selected as criteria for the application of the Colorado guest statute were: the accident occurred in Colorado; the parties were summer students at the University of Colorado and had arrived there at separate times; there had been no arrangement between defendant and the plaintiff to meet in Colorado; there was no prior arrangement made in New York for plaintiff to ride in defendant's automobile; and the accident occurred during an automobile trip that began and terminated within the borders of Colorado.

Significantly, the court held that the factual contacts required the application of Colorado law and further that public policy, per se, plays no part in a choice of law problem.[40] As a result, these cases illustrate the difficulty in applying the "grouping of contacts" theory because of the tendency to mechanically count the number of contacts and arrive with the objective criteria for the choice of law.

The terrible injustice of this rigid mechanical application of the "grouping of contacts" theory can at once be seen in comparing *Dym*[41] with *Miller v. Miller*.[42] In *Miller*, a New York resident was

[38] *See* note 34 *supra*.

[39] 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

[40] *Id.* at 469.

[41] *See* note 39 *supra*.

[42] 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S. 734 (1968).

killed while riding in a car on a business trip to Maine. The question presented was whether the New York forum would apply the maximum limitation of 20,000 dollars on recovery in a wrongful death action pursuant to the laws of Maine. The court admitted with admirable candor that the rule, which had evolved under various headings such as "grouping of contacts" and "center of gravity," lacked precise consistency.[43] The facts or contacts considered significant would be those that defined the interests of the forum state as relating to the conflicting law. Contact counting was specifically rejected. In addition, the court refused to apply the Maine statute because of New York's concern for compensating the wife and children of the New York decedent for the loss of their breadwinner.[44]

Thus, in *Miller* the favorable law of the forum was applied notwithstanding that the defendants were residents of Maine, the projected trip was planned and was to take place wholly in Maine, the trip was connected with Maine business, the automobile was registered and garaged in Maine and the accident occurred in Maine.

By any fair interpretation, the plaintiff in *Dym* was as entitled to the same choice of law as was the plaintiff in *Miller*.

The true significance of *Babcock* was not articulated, however, until the 1969 decision of *Tooker v. Lopez*.[45] While the court in *Babcock* announced that the "grouping of contacts" theory does not require contact counting, nevertheless it did just that and the result was a mechanical application of the doctrine. Finally, in *Tooker*, the court announced that the public policy of the forum state concerning the issue in the lawsuit would determine the choice of law as long as the legitimate interest of another state is not countervened.

A close analysis of the facts in *Tooker* reveals the rejection of contact counting as a criteria to be used in choice of law.[46] The plaintiff was the passenger in a car being driven by a classmate when the accident occurred on a pleasure trip in Michigan. In applying the law of the forum, the court refused to indulge in

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[43] *Id.* at 737.

[44] *Id.* at 739.

[45] 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

[46] *See* Thomas v. United Air Lines, Inc., 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973 (1969).

contact counting and instead plainly stated that the forum state had a paramount interest in seeing that the deceased adequately recovered. The court concluded that: "To state the matter simply, we are concerned with rational and just rules and not with merely simple rules."[47]

In *Tooker*, both the plaintiff's intestate and the defendant's intestate were students at Michigan State University, they were both New York domiciliaries and the vehicle involved was registered and insured in New York. The *Tooker* opinion, however, turned on the consideration of New York public policy with respect to compensation for injured accident victims. More recently, the New York Court of Appeals in *Neumeier v. Kuehner*[48] applied the law of Ontario in a case that involved a domiciliary of Ontario who was killed in an automobile owned and driven by a New York resident. The accident occurred in Ontario.

The facts in *Neumeier* are readily distinguishable from those of *Tooker*, since in *Tooker*, both parties were domiciliaries of New York. Thus, the *Neumeier* case would be unremarkable except for the court's extensive statement with respect to the developing choice of law issue. The court explained that in *Tooker*, New York had a vital interest in protecting its own residents, injured in a foreign state, against unfair or unanachronistic statutes of that foreign state. But New York had no legitimate interests in ignoring the public policy of that foreign jurisdiction when the plaintiff-guest is domiciled and injured in the foreign jurisdiction. Thus, the New York court acknowledged the significance of its public policy in determining the choice of law that it would apply. It insisted, however, that the public policy considerations applied only to its own domiciliary.

The New York court in *Neumeier* reiterated the wisdom of discarding the single, all-encompassing rule of *lex loci* because it was too broad and resulted in injustice. Chief Judge Fuld stated in the opinion, however, that there is no reason why choice of law rules more narrow than those previously devised, should not be developed.

Thus, by drawing upon the concurring opinion in *Tooker*, Judge Fuld writes for the majority in *Neumeier* outlining the following

[47] *See* note 45 *supra* at 579 n.16.

[48] 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

set of rules that are to be applied in cases involving guest-passengers:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
> 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.
> 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants. (Citation omitted.)[49]

In dissenting, Judge Bergan commented, in part, as follows:

> Neither because of 'interest' nor 'contact' nor any other defensible ground is it justifiable to say in a court of law that the rights of one man whose suit is accepted shall be adjudged differently on the merits on the basis of where he happens to live.[50]

The point is that no court of law should feel constrained to apply a rule that is plainly contrary to justice as defined by public policy. In an emerging era of population mobility, heretofore unparalleled, courts applying doctrines doing violence to justice may reasonably expect that the community will find other means of resolving disputes without recourse to courts. When the announced

[49] *Id.* Chief Judge Fuld cites the following authorities as an indication of the need for a greater degree of predictability and uniformity: Cavers, THE CHOICE OF LAW PROCESS, 121-22 (1968); Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 555, 561-62 (1971); Reese, *Choice of Law: Rule or Approach*, 57 CORNELL L. REV. 315, 321 *et seq.* (1972); Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.A. L. REV. 641, 642, 646-47 (1968).

[50] 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (dissenting opinion).

public policy of the state is to allow for adequate and just compensation to the innocent tort victims, how can the court find justification for the contravention of its policy through the application of narrow strictures and rigid rules? In the field of choice of law the answer to this rhetorical question is to be found in the adoption of a flexible and functional approach that allows maximum application of rules consistent with public policy.

III. The Flexible and Functional Approach

The flexible and functionable approach, as recited in the cases, primarily depends upon the public policy of the forum. When that public policy contemplates full and just compensation to innocent tort victims, then the law of the jurisdiction that provides for fulfillment of its public policy should be applied. In other words, the choice of law is the handmaiden of justice and justice finds its definition in terms of the public policy of the forum.[51]

In multidistrict airplane crash litigation, the attorneys must first closely analyze the choice of law problem of all the potential jurisdictions to select a forum that properly and adequately compensates the innocent victim of the airplane crash. If counsel is ultimately constrained to bring the case in a jurisdiction that has not adopted the modern flexible approach, which seeks criteria for the application of the jurisdictional law conforming to the public policy of the forum state, then it becomes the obligation of the attorney to fight for a change in the law to achieve this purpose. It is no longer acceptable to denude the victims of their right to full and just compensation by reason of the arbitrary application of a rigid principle governing choice of law.

[51] Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129 (1970); *Reviews of Leading Cases, Griffith v. United Air Lines*, 31 Am. Tr. Law. L.J. 546 (1965); Comment, *Products Liability and the Choice of Law*, 78 Harv. L. Rev. 1452, 1459 (1965); Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 Texas L. Rev. 141 (1967).