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Turbulent Times or Clear Skies Ahead: Conflict of Laws in Aviation Delict and Tort

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TURBULENT TIMES OR CLEAR SKIES AHEAD?:
CONFLICT OF LAWS IN AVIATION DELICT AND TORT

MICHAEL S. GILL* **

TABLE OF CONTENTS

I. INTRODUCTION .................................. 196
II. THE EFFECT OF THE WARSAW CONVENTION. 199
     A. GENERAL .................................. 199
     B. ARTICLE 24 .................................. 201
     C. NON-CONVENTION CARRIAGE BY AIR ............ 207
     D. PRODUCT LIABILITY CLAIMS AGAINST AIRCRAFT MANUFACTURERS .................................. 209
III. UNITED KINGDOM CHOICE OF LAW RULE IN DELICT AND TORT .................................. 210
     A. THE COMMON LAW POSITION .................... 210
     B. THE WRITERS .................................. 211
     C. THE LAW COMMISSIONS’ APPROACH ............ 212
     D. PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995 ........................ 215
IV. DEVELOPMENTS IN TORT CHOICE OF LAW IN THE UNITED STATES .......................... 218
     A. LEX LOCI DELICTI ............................ 218
     B. COUNTING OF CONTACTS OR CENTER OF GRAVITY APPROACH .................................. 222
     C. RESTATEMENT (SECOND) CONFLICT OF LAWS, 1971—MOST SIGNIFICANT RELATIONSHIP TEST . 224
     D. GOVERNMENTAL INTERESTS APPROACH ........ 226
        1. California .................................. 228
        2. New York .................................. 229

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I. INTRODUCTION

The horror of aircraft accidents continues to plague modern society. They remain vivid in our collective consciousness, reminding us of our vulnerability to random tragedy. Yet, the legal problems raised by an aviation delict or tort case have received little examination in the United Kingdom, either by the courts or commentators.

It is rare that such a case will be entirely focused in a domestic context. Aviation is by its nature transitory and "the speed, mobility, and range of modern aircraft . . . and the resulting multi-state or multi-country contacts with aircraft supply, operations, and accident or incident" mean that in any one case it is likely that several legal systems may appear to be applicable.

This Article will examine what choice of law rule a court in the United Kingdom, when faced with an aviation delict or tort case, would and should apply. It will examine the effect of international convention on the subject and then look to the example of the United States where most aviation disaster litigation has been focused over the years. It will trace the evolution of choice of law theories that has taken place in the United States, which, although not exclusive to the field of tort or aviation tort, can be clearly seen in this field. But this Article will limit itself to the problem of the law applicable to an aviation delict or tort case, touching only peripherally issues of jurisdiction.

The aim of this Article is open to the criticism that the exercise is futile. Aviation litigation has been concentrated in the United States, while courts in the United Kingdom have had little opportunity to deal with the problems that arise. But one cannot be sure that this will always be the case. A coherent and sophisticated legal system should be prepared and willing to cope with future developments.

The future of the airline industry in Europe is uncertain; but it seems probable that the deregulation that took place in the

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1 See In re Air Disaster at Lockerbie, Scot. on Dec. 21, 1988, 37 F.3d 804, 810-11 (1994).

2 STUART M. SPEISER & CHARLES F. KRAUSE, 1 AVIATION TORT LAW 60 (1978).
United States domestic markets in 1978 will extend to Europe. Following a series of Council "packages" of measures from 1987 until 1993, national airline monopolies are no longer permitted. Airlines may charge whatever fares they wish, subject to the right of a member state to intervene if they are excessively high or low, and can generally operate between any two points of their choice within the European Community. The manifest consequence of this liberalization has been the setting-up of low-cost airline companies flying more routes. The danger is, that in an endeavor to keep operating costs and therefore fares to a minimum, airlines will adopt laxer security standards and working procedures that might lead to more aircraft mishaps. While the rules on jurisdiction in the United States are flexible, it will not always be possible to bring an action there, and cases will start to be brought before the United Kingdom courts.

Changes in legal culture may also lead to more aviation litigation in the United Kingdom. Developments in other areas of tort and delict, notably in the area of defamation, have brought to public attention the possibility of recovering large sums of damages. Furthermore, the first hand effects of the Lockerbie disaster and the Piper Alpha disaster, have been to highlight awareness as to the causes of mass disaster and the possibility of obtaining legal redress. There is no longer a conceptual problem in demanding high levels of financial compensation for injury or death.

A further possible development is the arrival of contingency fees in the United Kingdom. Although Scots lawyers are permitted to act on a "no win, no fee" basis, a development introduced for the first time in England in 1995, agreements by which the amount of the fee is related to the sum recovered have always been outlawed. However, there are signs that this situation may be changing. The contingency fee is almost a necessity to litigating an aviation disaster case that involves a lengthy process of pre-trial discovery and production. It allows potential claimants who might not otherwise have the means to obtain legal representation to do so on the basis that they will have to pay lawyers' fees only if they are successful in obtaining compensation and, in that event, will pay fees related to the amount recovered.

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5 See John M. Balfour, EC Air Transport Liberalisation on 1st April 1997 - Big Bang or April Fool?, 9 WIG & GAVEL 22 (1997).

4 Conditional Fee Agreements Regulations 1995, S.I. 1995, No. 1675 (Eng.).
The underlying aim of this Article is to highlight the choice of law issues that an aviation disaster raises and to suggest the possible solutions as to choice of law, which courts in Scotland and in England and Wales might adopt if they were faced with such a case. It is conceded that this is a speculative exercise, but it is not a fruitless one. If the issues can be raised and debated before the problems arise, it might be possible that Scots and English law might arrive at coherent and workable solutions and thereby avoid what has been termed in the United States as the "veritable jungle, which . . . leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess' as to what some other state than the one in which he sits would hold its law to be."5

An aviation delict or tort case provides the perfect example of the hybrid nature of International Private Law rules. While the area has been partially dealt with by international convention,6 choice of law considerations are vital in this area. This highlights the fact that while the aims of uniformity and unification in International Private Law are desirable, they are often not realistic.7 The need for a coherent and sophisticated system of

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II. THE EFFECT OF THE WARSAW CONVENTION

A. GENERAL

With the growth of the international air transportation industry at the turn of the century, it became clear that the legal regime that was to apply to the rights of passengers and the liability of carriers required clarification. It developed largely on the model of the law concerning carriage by land and sea, but it was evident that this model was inappropriate for carriage by air. The Warsaw Convention, which was the work of a specialist committee of the Conférence Internationale de Droit Privé Aérien, was drawn up in 1929 and sought to provide a uniform set of rules that would eliminate any conflict of laws issues that might otherwise arise.

The Convention is founded upon a fault-based system of liability, but liability that is expressly limited. Thus, while guaranteeing recovery for the passenger upon proof of damage, it also assured the financial liability of carriers. "It was hoped that the limitation would provide a favorable environment for the growth of the then infant international air transportation industry."9

The overriding aims of the Convention were uniformity and the elimination of all conflict of laws problems. It has been suggested that "judicial interpretation . . . threatens to destroy the uniformity which was a principal objective of its authors."10 It is common ground among all commentators that the aim of uniformity was the crucial one at the outset. In one of the earliest judgments dealing with the Convention,11 Greene L.J. saw its purpose and major advantage to be "the desirability of excluding considerations of different systems of law and any possible conflict between them."12

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12 Id. at 79-80.
This may well have been the praiseworthy aim of the Convention, but given the manner in which the Convention was drafted, uniformity was never a realistic nor possible outcome. The Convention contains several glaring lacunae that prevent it from constituting anything like a uniform code of rules. Its very title, Convention for the Unification of Certain Rules Relating to International Carriage by Air, implies that an all-encompassing code of international aviation law was never a possibility. So many important questions were left for resolution by the choice of law system that a uniform system of law was never achievable.

The scope of the Convention is expressly confined to a particular definition of international air transportation, and there will be cases that raise choice of law elements, which remain outwith this scope. The Convention does not provide a rule of substantive law for all the matters which may arise. And, importantly, the Convention only covers the relationship between passenger and carrier, ignoring the liabilities of aircraft manufacturers.

The Convention lays down a certain number of rules of law, which take the questions concerned out of the realm of domestic delictual and tortious concepts. The main area of controversy is whether the Convention creates its own independent cause of action, which, when relied upon, is outwith the scope of domestic law, including choice of law rules. Related to this is the question of whether the cause of action under the Convention is an exclusive one or if misconduct that falls outwith its scope may nonetheless be acted upon.

Chapter III of the Convention establishes the overall scheme of liability. Under Articles 17-19 the carrier is prima facie liable for death, wounding or any bodily injury, damage to baggage or cargo, and damage caused by delay on proof of damage. The major defense available to the carrier is to prove that it took all necessary measures to avoid the damage or that it was impossible to avoid it. However, since the burden of proof of this defense rests with the carrier, this is a form of strict liability. In any event, the amount of the carrier’s liability is limited to certain maximum sums laid down in the Convention. This cap is lifted if the plaintiff can prove that the damage was caused by intentional or reckless misconduct on the part of the carrier, his

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13 Article 17 deals with death, wounding, or any other bodily injury; Article 18 with damage caused to cargo and baggage; and Article 19 with damage caused by delay.

14 See Warsaw Convention, supra note 6, art. 20.

15 See id. art. 22.
servants, or his agents. These provisions relate to provable damages and are not due as of right to the passenger or his representative. In these areas, therefore, the Convention provides uniform rules of law, which exclude any conflict of laws considerations.

However, more importantly for present purposes are the matters for which a uniform rule of law is not provided. Questions of contributory negligence, the form of payment of damages, matters of procedure, the method of calculation of the Convention’s two year limitation period, and in the original version of the Convention, the scope of the term “wilful misconduct,” which was required to lift the carrier’s liability limitation, are all governed by the lex fori.

B. Article 24

No choice of law rule is provided for issues relating to recoverable damages. Article 24(1) refers to “any action for damages” without specifying which law will govern the heads of damages for which compensation may be sought. In an action for death or injury, Article 24(2) states that any action brought under the Convention is “without prejudice . . . to who are the persons who have the right to bring a suit and what are their respective rights.” Such issues fall to be determined by the domestic law of states that are parties to the Convention, which must include their choice of law rules.

The provisions of Article 24 raise two questions: first, whether the Warsaw Convention creates its own cause of action, which therefore excludes the application of domestic law and thus conflict of laws problems; and second, whether conduct that falls outside the scope of the Convention is precluded from an action in domestic law.

The issue is far from settled. Early cases held that “the Convention was effective only to impose its terms on actions other-

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16 See id. art. 25.
17 See id. art. 21.
18 See id. art. 22(1).
19 See id. art. 28(2).
20 See id. art. 29(2).
21 See id. art. 25. This was amended by the Hague Protocol to cover acts and omissions done with intent and knowledge that damage would probably result, and the reference to lex fori was removed.
22 See id. art. 24.
wise founded in law.” It has been the subject of recent judicial activity both in the United Kingdom and in the United States. The American case of Benjamins v. British European Airways arose out of the 1972 crash at Staines, England of a British European Airways (BEA) Trident en route from London Heathrow to Brussels. The crash was caused by the premature retraction of the forward flaps on the main wings during take off that produced a stall. One hundred and twelve passengers and crew were killed. This was the first American case to hold that “the Warsaw Convention creates causes of action, thereby enabling plaintiffs to sue under its terms directly.”

Focusing on the overriding aim of uniformity that guided the drafters of the Convention, a majority of the court found that “[w]hile it is not literally inconsistent with [the Convention’s] universal applicability to insist that a would-be plaintiff first find an appropriate cause of action in . . . domestic law . . . , it is inconsistent with its spirit.”

However, there was a strong dissenting opinion from Judge Van Graafeiland who noted that since the Convention does not specify who is entitled to sue under it, and what heads of damages a plaintiff is entitled to sue for, “Article 17 at best goes only half way towards creating a cause of action.” In effect, Article 24 “had the effect of subjecting whatever remedy might locally be at hand to the conditions and limits imposed by the treaty.”

The Benjamins decision left the issue open for a judicial debate. In Floyd v. Eastern Airlines, Inc., it was held that the Convention pre-empts only those aspects of a plaintiff’s claim that are incompatible with it. The court declined to take a view on whether the Convention wholly precluded any state cause of action in any tort arising from an international aviation accident.

Recently, the issue has been confronted head on. In one case arising from the bombing of Pan Am Flight 103 over Lockerbie in 1988, which dealt with the availability of punitive damages

24 572 F.2d 913 (2d Cir. 1978).
26 Benjamins, 572 F.2d at 917-18.
27 Id. at 921.
under the Convention, it was held that “state causes of action are preempted when the state claim falls within the scope of the Convention.” This was found to flow from “the need for a single, unified rule on such points as the recoverability of punitive damages.”

The weakness of this argument is immediately obvious, since the issue of recoverable damages is one for which the Convention does not provide a uniform rule of law. Importantly, the Second Circuit maintained the right to a cause of action for conduct that did not arise under the Convention.

The issue received its most thorough examination by the United States Supreme Court in Zicherman v. Korean Air Lines Co., Ltd. This case arose from the shooting down of a Korean Air Lines flight that strayed into Soviet air space. The particular issue was the availability of damages for loss of society. The opinion of the Court by Justice Scalia concluded that Articles 17 and 24(2) together “permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum’s choice-of-law rules.”

It would seem therefore that while the Convention unifies liability issues, it merely provides a conduit for the application of the substantive law on damages and title to sue, which would apply in the absence of the Convention.

This decision represented a major retreat from the previous position and was endorsed in a subsequent Lockerbie case. In Pescatore v. Pan American World Airways, Inc., which has gained notoriety because of the jury award of $19,000,000 to the wife of a thirty-three year old victim of the Lockerbie disaster, it was held that “the law that governs damages ... must be determined in accordance with the choice of law rules of the forum jurisdiction.”

It is submitted that this is the correct position. The Warsaw Convention sets down uniform rules on liability which protect a plaintiff from an unfortunate domestic lex loci delicti that might, for instance, exclude the liability of a state air carrier for an aircraft crash. However, it leaves open damages issues for resolu-

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30 In re Air Disaster at Lockerbie, Scot. on Dec. 21, 1998, 928 F.2d 1267, 1273 (2d Cir. 1991).
31 Id. at 1274.
33 Id. at 231.
34 97 F.3d 1 (2d Cir. 1996).
35 Id. at 5.
tion by domestic law. This recognizes that it would be unrealistic to search for a uniform rule on recoverable damages and title to sue, "which are basic to the laws of tort and contract and therefore of wide-reaching significance, for the sole purpose of unifying and accommodating all matters relating to the law of the air carrier’s liability." The right to sue for damages and the amount that may be recovered is personal to each case, and, as will be argued later in this Article, it is not wrong in principle that there should be different levels of recovery by victims of the same accident.

More recently, the Second Circuit has reaffirmed its position on the issue of exclusivity in the clearest terms. In *Tseng v. El Al Israel Airlines, Ltd.*, the court held that "state claims are not precluded by the Warsaw Convention where the event or occurrence giving rise to the injury is found to be outside the Convention." In a searching examination of the Convention’s text itself and its drafting history, the court found that both as a matter of construction of the scheme of the Convention and consistent with its goal of protecting passengers, state law claims arising outwith the Convention should not be excluded.

Unfortunately, judicial development in the United Kingdom has not gone in the same direction as the American jurisdictions.

The case of *American Express Co. v. British Airways Board* was concerned with the liability in bailment of the defendants under Article 18 of the Convention. The plaintiffs had given a package of traveler’s cheques to the defendants for delivery to Switzerland. The package was stolen in the course of loading at the airport. The defendants admitted liability, but claimed statutory immunity under the Post Office Act 1969.

The plaintiffs contended that although an action in tort was excluded by the 1969 Act, the Carriage by Air Act 1961, which gave effect to the Warsaw Convention, gave rise to an independent and free-standing cause of action from which the defendants could not claim immunity.

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36 Mankiewicz, supra note 7, at 741.
38 At the time of writing, an appeal to the Supreme Court in *Tseng* was pending. The result of this may well reverse the position.
40 Post Office Act, 1969, ch. 48, § 29(3) (Eng.). Section 29(3) extends the immunity from proceedings in tort of the Post Office to "any person engaged in or about the carriage of mail."
Rejecting this approach, Lloyd J. assumed, without deciding, that the Convention did indeed create an independent cause of action, which became a statutory cause of action by the effect of the Carriage by Air Act 1961. However, although this cause of action was free-standing, it still fell within the ambit of the immunity from “proceedings in tort” established by the 1969 Act. The judge had no doubt that “the phrase ‘proceedings in tort’ was used in the more general sense, and therefore included breaches of the statutory duty imposed on the defendants” by the 1961 Act.\footnote{[1983] 1 All E.R. 557, 564.}

The judge was of the view that in this case “the law . . . is almost as simple as the facts.”\footnote{Id. at 559.} The reasoning fails to comprehend the scheme of the Convention and reveals a serious incoherence. On the one hand, the judge assumes that the Convention creates its own cause of action on liability which, it has been shown from United States authorities, flows from the very scheme of the Convention. The plaintiff is entitled to recover on proof of damage, in return for which the carrier finds the extent of his liability limited. Only exceptionally can the carrier exonerate himself from liability, and only exceptionally may the plaintiff overcome the liability limitation. However, by finding that the carrier’s liability is excluded by the effect of a further statutory provision, the entire system is undermined. The Convention creates its cause of action because it is supposed to provide uniform rules of law on the matters within its regime. On matters which do not fall within its terms, it is submitted that the Convention is not the exclusive source of a cause of action.

However, in a recent House of Lords case, the weaknesses of the American Express judgment were endorsed and the incoherence of the position compounded. The joint appeals of Sidhu and Abnett v. British Airways plc.\footnote{1997 App. Cas. 430 (appeal taken from Scot. and Eng.).} arose from the same incident, one case being raised in England, the other in Scotland. The claimants were passengers aboard a British Airways flight from the United Kingdom to Malaysia via Kuwait. The aircraft landed for refueling in Kuwait about five hours after Iraqi troops had begun to invade Kuwait at the start of the Gulf War in 1990. The passengers and crew were taken prisoner by the Iraqi forces and detained in Baghdad for about three weeks. The claimants
brought actions in common law negligence against the airline, since their possible action under the Convention was time-barred and in any event did not fall within the terms of Article 17. They had not suffered a bodily injury nor had the act complained of taken place "on board the aircraft or in the course of... embarking or disembarking."\(^{44}\)

The speech of Lord Hope of Craighead identified the main issue as "whether the Warsaw Convention... provides the exclusive cause of action and sole remedy for a passenger who claims against the carrier for loss, injury and damage sustained in the course of, or arising out of, international carriage by air."\(^{45}\)

Lord Hope held that on the issue of the carrier's liability, the Convention provided the exclusive remedy, which prevented the plaintiffs from relying on the common law. Lord Hope found that the Convention rests upon a compromise. On the one hand, the carrier surrenders its right to limit or exclude its liability,\(^ {46}\) while the passenger is restricted in the claims for damages which he can bring in cases covered by Article 17.\(^ {47}\) Therefore, "[t]he idea that an action of damages may be brought by a passenger against the carrier outside the Convention in the cases covered by Article 17... seems to be entirely contrary to the system which these two articles were designed to create."\(^ {48}\)

By addressing the matter in this way, Lord Hope highlights the weakness in his own argument. The negligence complained of by the passengers in this case was not covered by Article 17, since it did not constitute a bodily injury and did not take place on board or in the course of embarking or disembarking. It seems strange to fasten onto the system that these two Articles of the Convention create to deal exclusively with a matter that is not within the express ambit of those Articles.

Lord Hope, of course, interprets the Convention to mean that all tortious misconduct that arises in the course of international carriage by air does fall within the Convention scheme. In his view, the Convention is exclusive in the matters with which it deals, and the "liability of the carrier" in the broadest sense of the term is one such matter. However, would it not be equally convincing to argue that the question on which the scheme of

\(^{44}\) Warsaw Convention, \textit{supra} note 6, art. 17.
\(^{45}\) 1997 App. Cas. at 435.
\(^{46}\) See Warsaw Convention, \textit{supra} note 6, art. 23.
\(^{47}\) See id. art. 24.
\(^{48}\) Sidhu and Abnett, 1997 App. Cas. at 447.
the Convention is exclusive is the “liability of the carrier from an accident arising in the aircraft or in the course of embarking or disembarking,” which is, after all, what Article 17 says?

It is conceded that for those matters with which it expressly deals, the Convention does provide the sole cause of action and exclusive remedy. For the matters that are not provided for, the forum court must apply its own domestic law to fill the lacunae and this includes its choice of law rules.

In an attempt to make the Convention an all-encompassing code dealing with all matters arising from international carriage by air, Lord Hope pushes to the limits the purposive interpretation that was favored in an earlier House of Lords case on the Warsaw Convention. In the light of the resulting injustice to the plaintiffs in this case, it is hard to see what purpose the Convention serves in excluding liability for conduct outwith its terms.

Furthermore, Lord Hope considered but disregarded the earlier case of 

Gatewhite Ltd. v. Iberia Lineas Aereas de Espana S.A. in which Gatehouse J. held that: “As the Convention does not expressly deal with the position by excluding the . . . right of action (though it could so easily have done so) the lex fori . . . can fill the gap.”

In Abnett the judges in the Outer and Inner Houses distinguished Gatewhite on the basis that it dealt with a different aspect of the Convention, namely title to sue, for which the Convention was not exhaustive. The House of Lords cast further doubt on the Gatewhite judgment while not expressly overruling it. No longer did it seem so vital to look at the Convention as a whole.

C. NON-CONVENTION CARRIAGE BY AIR

The Convention is limited to certain types of international carriage by air. It applies to international carriage by air, which it defines as carriage where the place of departure and destination are within the territories of two High Contracting Parties, or within the territory of a Single High Contracting Party, if

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49 Fothergill v. Monarch Airlines Ltd., 1981 App. Cas. 251 (appeal taken from Eng.). Lord Diplock argues for "a purposive construction to the Convention looked at as a whole." Id. at 279.
51 Id. at 334.
52 1996 S.L.T. 529, 537 (Lord Marnoch).
53 See id. at 546 (Lord Clyde).
there is an agreed stopping place within the territory of another state, even one which is not party to the Convention.\textsuperscript{54}

Thus, a flight between Edinburgh and Paris will fall within the terms of the Convention, as will a flight from Edinburgh to Glasgow, with an agreed stopping place in Paris. However, the Convention would not apply to a flight from Edinburgh to London, nor from Edinburgh to Bangkok, since Thailand is not a signatory of the original Convention nor its amended versions.

The Carriage by Air Acts (Application of Provisions) Order 1967, Schedule 1,\textsuperscript{55} governs cases concerning carriage by air to which the Warsaw Convention does not apply, notably purely domestic United Kingdom carriage. It basically applies the rules of the Warsaw Convention to non-convention carriage in cases that come before the United Kingdom courts. The scope of the schedule was a matter of some controversy. The broad wording of the Order in Article 3, applying to "all carriage by air, not being carriage to which the . . . Convention applies," suggested that the Schedule would apply to all non-convention carriage irrespective of the parties, the place of departure, or the destination.\textsuperscript{56}

This was the view taken by Shawcross and Beaumont,\textsuperscript{57} but it was expressly rejected by the House of Lords in \textit{Holmes v. Bangladesh Biman Corporation}.\textsuperscript{58} The plaintiff was the widow of a passenger who was killed when the defendants' aircraft crashed on an internal domestic flight in Bangladesh. She sought to have the Schedule to the 1967 Order applied, relying on the broad wording of Article 3, in order to escape the low liability limit of Bangladeshi domestic law, and benefit from the more favorable liability limitations of the United Kingdom provision.

The House of Lords gave a restrictive interpretation to the 1967 Order, and the enabling provision of the 1961 Act, so that Parliament would not be presumed to "legislate in the affairs of foreign nationals who do nothing to bring themselves within its jurisdiction."\textsuperscript{59} Thus, the variation of the Warsaw rules that the 1967 Order introduces were to apply only to wholly domestic

\textsuperscript{54} See Warsaw Convention, \textit{supra} note 6, art. 1(2).
\textsuperscript{56} Id. art. 3.
\textsuperscript{57} See \textit{SHAWCROSS & BEAUMONT}, \textit{supra} note 10, at 73.
\textsuperscript{58} 1989 App. Cas. 1112 (appeal taken from Eng.).
\textsuperscript{59} Id. at 1127 (Lord Bridge).
United Kingdom carriage and carriage from the United Kingdom to another non-convention country.

The result shows yet another gap in the Warsaw system which would have to be filled by the normal choice of law rules. If a United Kingdom court "had to address cases in . . . excluded categories . . . they would have to apply the normal rules of the conflict of laws to determine the applicable law, as do courts in jurisdictions with no equivalent of the 1967 Order."\(^{60}\)

So, if jurisdiction could be found in the United Kingdom, for instance as the place of incorporation of the carrier, to bring an action arising out of a crash on a domestic flight in another country that was not party to the Convention, a choice of law rule would have to be formulated to determine the applicable law.

D. Product Liability Claims Against Aircraft Manufacturers

The other major gap in the Warsaw system relates to the fact that it only deals with the liability of air carriers. Many aircraft mishaps arise from fundamental defects with the aircraft itself rather than the manner in which it is operated. This leads to a claim in product liability against the aircraft manufacturer.

This is a major consideration in an aviation disaster case, since "aircraft manufacturing is concentrated in a few countries, but the results of any negligence in manufacture may show themselves anywhere in the world."\(^{61}\) It is submitted that such considerations would be subject to the normal rules on choice of law in delict and tort, which will be examined in more detail below.

The Warsaw Convention has therefore had a certain measure of success in creating a uniform regime to deal with international aviation law; but there are several important topics that it fails to address. These topics, namely issues of recoverable damages and title to sue, carriage outwith the defined scope of the Convention and the product liability of aircraft manufacturers, remain subject to conflict of laws rules.

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\(^{60}\) Shawcross & Beaumont, supra note 10, at 63.

\(^{61}\) Id. at 53.
III. UNITED KINGDOM CHOICE OF LAW RULE IN DELICT AND TORT

A. THE COMMON LAW POSITION

The common law rule on choice of law in delict and tort was based on the old authority of Phillips v. Eyre,62 which required that for a claim to succeed, it must be actionable by the lex fori and not justifiable by the foreign lex loci delicti.

This was a slight variation on the Scottish position, expressed in McElroy v. McAllister,63 which held that for a claim to succeed, the requirements of both the lex loci and the lex fori had to be met. In McElroy, the action of a Scottish widow whose husband had been killed in a road accident in England was dismissed on all three grounds of her claim. Her claim for solatium failed since this was not available under English law. Her claim as executrix of his estate for suffering caused between the time of the accident and the time of death failed because under Scots law such a claim did not survive the victim's death. Her claim under the Fatal Accidents Acts failed because it was outwith the prescription period of English law.

A leading case that purported to transform the choice of law rule in this area was Chaplin v. Boys.64 Two speeches in the House of Lords upheld the general rule that double actionability was required, but formulated an exception to it based on the more flexible approaches that were developing in the United States. Lord Hodson held that there may be a legal system that would displace the application of the double actionability rule if, because of its relationship with the occurrence and with the parties, it had a greater concern with the case.65 Similarly, Lord Wilberforce formulated something resembling a "proper law" exception.66

This was further developed by the Privy Council in Red Sea Insurance Co. Ltd. v. Bouygues S.A.,67 where it was held that a plaintiff could, in appropriate circumstances, raise a claim in respect of conduct actionable under the lex loci delicti even if it was not actionable under the lex fori.

63 1949 Sess. Cas. 110.
64 1971 App. Cas. 356 (appeal taken from Eng.).
65 See id. at 380.
66 See id. at 391.
The common law position was greatly criticized. The *lex fori* was given too prominent a position, even though it might have no relevant connection with the delict in question. It also led to injustice by effectively affording a defendant a defense under two systems of law. If either defense applied, the claim would fail. It was also unclear whether or not the *Chaplin v. Boys* exception applied in Scotland, and exactly how it was to be applied in England.

**B. The Writers**

It is surprising how cursorily the problem of the choice of law relating to aviation delict and tort is dealt with by the writers. Anton merely concludes that "there is no relevant authority on choice of law rules in relation to delicts committed in flight." Elsewhere, it is suggested that "the ordinary choice of law rules are, in theory, applicable." Dicey and Morris also take the view that the common law choice of law rules on tort would apply to torts committed on board aircraft or collisions between aircraft. This raises the immediate problem of what, for the purpose of the normal choice of law rule on tort, should be considered the *lex loci delicti*. Here, there is a conflict of opinion.

Dicey and Morris opt for the law of the country of registration of the aircraft, introducing the concept of nationality of the aircraft, similar to the law of the flag of a ship. The other possibilities are to apply the law of the country over whose territory the aircraft happens to be at the time of the act complained of, the English common law if the aircraft is over the high seas, or the general maritime law in the case of a collision. Dicey and Morris reject these "because the connection of the aircraft and its passengers and crew with the territory of the countries over which it flies is fortuitous and fleeting."

Their criticisms seem well-founded and raise obvious anomalies. If, for example, a delict occurs in the course of a flight

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68 For a summary of the criticisms of the common law position, see 17 The Laws of Scotland: Stair Memorial Encyclopedia, ¶¶ 301-306 (1987) [hereinafter Stair Memorial Encyclopedia].
70 Stair Memorial Encyclopedia, supra note 68, ¶ 300.
72 Id.
between Edinburgh and Milan, there are at least five potential accident sites\textsuperscript{73} and therefore potentially applicable laws, which might change within a matter of minutes. If the delict were committed by a Korean citizen on a Chinese plane in the course of a flight over the open waters of the Pacific Ocean, the applicable law would appear to be the English common law. If an American and a Dutch plane collided over the open waters of the Atlantic, the general maritime law of England or Scotland would seem to be applicable.

McNair suggests that it is inappropriate to draw an analogy between a ship and an aircraft for these purposes. Carriage by sea takes place over a longer period of time and predominantly on the high seas, which explains the need to assimilate a ship to the territory of its country of registration. Aircraft operate in a completely different context and "there is . . . much less connection between persons and goods aboard an aircraft and the country of its registration than in the case of a ship."\textsuperscript{74} It is more accurate to compare an aircraft to a motor car driven across a country with which the driver and the passengers have no connection.

In McNair's view, torts committed on-board aircraft or collisions between aircraft would be governed by the law of the country through whose airspace the aircraft was flying at the time of the incident. If the incident occurred over the high seas, the common law, in the case of acts internal to the aircraft, or the general maritime law of Scotland or England, in the case of collision between aircraft, would therefore be applicable.

C. The Law Commissions' Approach

The most authoritative statements on the state of English and Scots choice of law in this field come in the joint working paper\textsuperscript{75} and report\textsuperscript{76} of the English Law Commission and Scottish Law Commission.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{73} Scotland, England, France, Italy, English Channel.
\item \textsuperscript{74} Lord McNair, The Law of the Air 263 (M.R.E. Keir & A.H.M. Evans eds., 1964).
\end{enumerate}
\end{footnotesize}
The Working Paper found the state of law to be that for torts confined to one aircraft over the high seas, the *lex fori* should apply, the law of the state of registration being irrelevant. In all other cases, the same rule as that for ships would apply, the relevant *locus delicti* being the subjacent territory or territorial waters. The effect of the uniform rules of the Warsaw Convention was also recognized in the Working Paper. In a case to which the rules contained in the Convention apply, the choice of law rule in delict and tort would be inapplicable.

The Law Commissions thereafter submitted certain models of proposed reform. The working paper contains the extraordinary statement that "whatever the present law may be in this limited field, we are not aware that it gives rise to any problem." Surely the fact that not even the Law Commissions were able to give a definitive answer as to the existing state of the law in this area is a problem enough. Furthermore, this approach implies that only those areas of delict and tort in International Private Law that quantitatively can be said to be important merit adequate treatment by the study that the Law Commissions undertook.

The Law Commissions submitted that the proposed reformed choice of law rule should not apply to collisions occurring on the high seas, to which the principles of maritime law extend. For torts internal to one aircraft, the law of the state to which the aircraft belongs should apply. For the rare case of conduct not confined to a single aircraft, but which was not covered by the general maritime law, occurring over the high seas to which the Law Commissions proposed new rule would apply, the law of the state to which the aircraft belongs would apply.

The Law Commissions attempt to formulate a rule for aircraft that might bring them within the ambit of the proposed new choice of law rule on tort and delict in general. They go to ex-

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78 *See* id.
81 *See* id.
82 *See* id. ¶ 5.76-.77.
83 One of the examples given in the Working Paper is of a defamatory statement communicated from one plane to another.
84 Ultimately the law on defamation is expressly excluded from the scope of the new choice of law rule.
treme lengths to locate a territorial attachment for the event which constitutes the delictual or tortious act. The solutions they devise are unnecessarily artificial and complex.

The Law Commissions proposed that a uniform approach be adopted for both ships and aircraft. This is somewhat short-sighted, since the Commissions previously recognized that "the legal treatment [in other areas of the law] accorded to aircraft is not entirely analogous to that accorded to ships." There is recent judicial authority for this proposition, where in the context of arrestment of an aircraft in the hands of its owner, it has been held that: "[w]hile there are certain similarities between aircraft and ships, it does not follow that the special rule which allows arrestment of ships in their owners' hands applies to, or ought to be extended to apply to, aircraft."

The Law Commissions expressly declined to make special provision for cases involving aircraft. This was something of a missed opportunity. Instead, they maintained the artificial distinction between events occurring over territorial waters and those occurring over the high seas. As to the former, the proposed choice of law rule would apply. As to the latter, no proposed changes were made. "Implementing legislation should not extend to those torts and delicts occurring on the high seas to which, at present, our choice of law rules do not apply."

The result we are left with is a confused series of examples to which a different applicable law might be applied, instead of what one might have hoped for, a uniform and workable choice of law rule. The Law Commissions' analysis rests on the search for a territorial attachment for aircraft, the inappropriate analogy drawn between ships and aircraft, and the artificial division drawn between territorial waters and the high seas.

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87 Emerald Airways Ltd. v. Nordic Oil Services Ltd., 1996 S.L.T. 403, 405 (Lord Hamilton).
D. PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995

Part III of the Private International Law (Miscellaneous Provisions) Act 1995\(^9\) was the result of the Law Commissions' consultation paper\(^9\) and report. Section 10 of the new Act abolishes the common law rules to the extent that the double actionability rule applied. Section 14(2) provides that nothing in the new Act "affects any rule of law (including rules of private international law) except those abolished by section 10 above."\(^9\)

It is not clear whether or not the new statutory provisions will have any effect on the choice of law rule applicable to aviation delict and tort. If these situations were not covered by the old common law rule, neither will they now be covered by the scheme of the Act.

The new Act applies to delictual and tortious conduct whether occurring in the United Kingdom or overseas. The applicable law will be that of the country in which the events constituting the delict or tort occur.\(^9\) The Act further provides a displacement rule. If it would be "substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of . . . [an]other country,"\(^9\) the general rule in section 11 may be set aside. This implicitly allows for the concept of *dépêçage*, which, although contrary to the recommendation of the Law Commissions,\(^9\) is in line with modern thinking in the United States.\(^9\)

If the incident involves a collision over the high seas, it would appear that maritime law as applied by the forum would be ap-


\(^92\) Private International Law Act, supra note 89, § 10.

\(^93\) Id. § 14(2).

\(^94\) See id. § 11(1). According to section 11(2), this is to be taken as being (a) for a claim in personal injury or death arising from personal injury, the law of the country where the individual was when he sustained the injury; (b) for a claim for damage to property, the law of the country where the property was when it was damaged; (c) in all other cases, the law of the country in which the most significant elements of the event occurred.

\(^95\) Id. § 12.


\(^97\) See Reese, infra notes 205-207 and accompanying text.
plied, drawing on a comparison between aircraft and ships. If the tort was internal to the aircraft over the high seas, Dicey and Morris suggest that the English common law would apply.\footnote{See Dicey & Morris, supra note 71, at 190 (3d ed. Supp. 1996).} These situations are not affected by the new Act, since the rules abolished by section 10 did not previously apply.

However, Dicey and Morris are of the opinion that “the flexibility of sections 11 and 12 of the 1995 Act could probably satisfactorily accommodate such situations.”\footnote{Id.} By ascribing a nationality to an aircraft on the grounds of its country of registration, the tort could be regarded as having taken place in the country of registration. This would bring the case more easily within the scope of the abolished common law rules, and thus within the scope of the new statutory scheme.

If the collision or internal incident occurs over the territory or territorial waters of a country, then the law of the country to which the airspace belongs would apply. Again, Part III of the 1995 Act would not be applicable, since the common law would not have been applicable in such a case. Again, however, the common law rule could be viewed as having encompassed these situations so that the new Act would apply. This would bring to aviation delict and tort cases the flexibility for which the new Act seeks to provide.

It would appear, therefore, that unless all situations involving aircraft are held to fall within the scope of the Act, there will be a different law applicable depending on whether the delict or tort occurs on the high seas, in territorial waters, or over land.\footnote{See James Blaikie, Choice of Law in Delict and Tort: Reform at Last!, 1 ELR 361, 364 (1997).} In view of the fortuitous nature of an aircraft’s connection with the airspace over which it flies, this result seems merely to add to the sense of obscurity and injustice.

All of these solutions attempt to draw inappropriate analogies with ships and motor-cars to find a choice of law solution. As a
result, they are unnecessarily complicated and focus on the wrong issues. Graveson observed that the “common law developed on the basis of the separate activities of movement on land, sea, and in the air.” 101

Morse warns us that the exclusion from the scope of the 1995 Act of aerial torts that did not fall within the old common law rule is “not free from difficulty.” 102 Nonetheless, he is of the opinion that as a whole, the Act is a “sensible statutory framework within which courts will have a creative role to play in the development of the law.” 103 As a whole, that is a fair comment, but in the particular situation of aviation delict and tort, the Act fails adequately to take into account the particular nature of the problems which arise. 104 There was a confused view of what the law was before the reform process began which has led to a missed opportunity to clear up what the relevant choice of law rule should be.

The consequences of wrongful acts connected with aircraft go far beyond what might result from any other examples of delictual liability, and our choice of law rule should reflect this. Personal injury or wrongful death in any circumstances are traumatic for the victims and their relatives. However, when an aircraft is involved, the manner of death or injury is horrific, the pre-accident trauma of the victim is almost inconceivable, and the distress of relatives and friends equally so. As an example of the horrific results of a wrongful act committed in connection with an aircraft, the Department of Transport report on the Lockerbie disaster found that “[t]he results of the post mortem examination of the victims indicated that the majority had experienced severe multiple injuries at different stages, consistent with the in-flight disintegration of the aircraft and ground impact . . . The bodies of 10 passengers were not recovered.” 105

103 Id. at 902.
As to the choice of law problems to which an aviation case gives rise, there are so many potentially applicable laws, which would arise by virtue of numerous connecting factors, such as nationality of aircraft and passengers, country of departure, stop-off or destination, country over whose airspace the aircraft is flying at the time of the incident, and place of manufacture of the aircraft and its component parts.

Our system of International Private Law requires formulation of a choice of law rule that will adequately deal with these considerations and choose from what one writer has called "this embarrassing heap of connecting factors," the one that is most appropriate to the very particular nature of aviation delictual and tortious liability. As a starting point, we will examine the developments in this field in the United States.

IV. DEVELOPMENTS IN TORT CHOICE OF LAW IN THE UNITED STATES

As one leading writer in the field has observed, "although aviation cases represent only a small fraction of tort cases generally, they constitute a remarkably large percentage of the historic choice of law cases." It is thereby possible to trace the evolution of choice of law thinking in the United States through a series of aviation tort cases. Choice of law plays a more important role in the United States in view of the federal nature of the legal system. Conflicts of laws arise not only on an international scale, but also at an inter-state level.

The choice of law evolution is remarkable in that it has been focused in a short period of time. Until the mid-1960s, the choice of law rule in tort was settled and uniform throughout the United States.

A. LEX LOCI DELICTI

The standard and uniform rule on choice of law in tort which was applied in all jurisdictions in the United States was that of lex loci delicti, which submitted all issues arising out of the commission of a tortious act to the law of the state where the act was committed. This rule was based on the theory of vested rights, which formerly guided the formulation of choice of law rules.

and justified the existence of the subject. This theory, which was also defended at one time in the United Kingdom, notably by Dicey, suggests that courts merely apply rights that have been acquired under foreign law without actually applying the substantive law of a foreign country.

This theory has been shown to be fundamentally flawed. It is based on the now out-dated view that "the enforcement of foreign law within a country necessarily constitutes an infringement of that country's territorial sovereignty." Furthermore, to suggest that the enforcement of a right that has been acquired in another country does not equate to the enforcement of that country's law is simply a play on words. However, the vested rights theory became the cornerstone of the Restatement of Conflict of Laws of 1934, which stated, "The law of the place of wrong determines whether a person has sustained a legal injury."

The advantages of the rule are obvious. It is simple and predictable. In a mass tort case, it means that the same substantive law will be applicable to all plaintiffs. It has been retained by some states in the United States for these very reasons. One court recently advocated its retention on the basis that "[t]he newer approaches to choice of law problems are neither less confusing nor more certain than the traditional approach. 'Until it becomes clear that a better rule exists, we will adhere to our traditional approach.'"

This argument for the status quo shows at best a lack of imagination, at worst conservative inertia. The *lex loci delicti* rule is rigid and inflexible, allowing for no exception in cases where its application will result in obvious injustice. In seeking to provide a neutral choice of law rule, it fails to look to the underlying policies of the conflicting laws, nor the needs of the parties. And in an aviation context, the *lex loci* is often fortuitous.

Moreover, as Reese observed, "[p]redictability of result and uniformity of decision are not . . . values of particular significance" in tort law. The parties are not regulating their future affairs according to what the substantive law applicable to their relationship will be. In particular, the issue of recoverable dam-

109 *Restatement (First) of Conflict of Laws* § 378 (1934).
ages is individual to each case, so uniformity is an irrelevant consideration in any event.

There was a growing dissatisfaction with the traditional *lex loci delicti* rule. The reaction against it was led by modern writers of the policy-evaluation school. Cheatham and Reese argued that the forum should have regard for the policies behind potentially applicable foreign laws and give effect to interests broader than those expressed in its own substantive rules of law.\(^{112}\)

Cavers proposed a different approach.\(^{113}\) He argued that the court should not stop at inquiring which of the competing jurisdictions should provide the substantive law by which a case will be decided, but should analyze the policy behind the different substantive rules and choose the correct system of law according to its content.\(^{114}\) "The choice of that law would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision."\(^{115}\)

In the courts, the strict rule was gradually eroded by the creation of exceptions and by questionable characterization. In *Kilberg v. Northeast Airlines, Inc.*,\(^{116}\) a case arising out of a fatal plane crash in Nantucket, Massachusetts, the New York court purported to uphold its traditional choice of law rule, while using the forum's public policy exception to avoid the limitation of recoverable damages of the locus law.\(^{117}\) The court was heavily influenced by the fortuitous nature of the place of the accident. It pointed out that an aircraft "may meet with disaster in a State [it] never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another."\(^{118}\)

In another non-aviation wrongful death case, a different court used the technique of characterization to circumvent the traditional *lex loci* rule.\(^{119}\) The court characterized the issue of the survival of the decedent's cause of action as one of "administra-

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\(^{114}\) See id. at 192-93.

\(^{115}\) Id. at 193.


\(^{117}\) See id. at 528.

\(^{118}\) Id. at 527.

\(^{119}\) See Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953).
tion of estates,” which was a purely procedural matter to be decided according to the *lex fori*.

In cases where the traditional rule has been applied, the focus has been on the place of actual death or injury, rather than on the negligent acts that contribute to the eventual accident. In *In re Aircrash Disaster Near Roselawn, Indiana on October 31, 1994*, the court held that the relevant locus was where “the last event takes place, that is necessary to render the actor liable.” Similarly, in a product liability action, the place of the accident, which is where the injury is suffered, will apply rather than the place where the product was manufactured.

The fortuitous nature of the *lex loci delicti* should not be over-emphasized. If an aircraft crashes on take-off or landing, it can hardly be said that the place of the crash was fortuitous. It was well known that the aircraft would be involved in those operations at those particular places. Even when an aircraft crashes in mid-flight, the impact that it will have on the community directly below surely gives that country an interest in the law applicable to the crash. The Lockerbie disaster of 1988 must still have financial and psychological consequences on the population of that town and further afield in Scotland and the United Kingdom. It would be comforting to know that in some of the litigation arising from that crash, a court applied Scots locus law, which permitted a higher recovery for families of victims than did the other potentially applicable laws.

In Europe, the *lex loci* is still adhered to in many countries, and the escape devices that have been employed in American courts have been badly received. In particular, France, the “paradigm” of *lex loci* countries, is “more tenacious than most in its unwillingness to allow departures from the application of the *lex loci delicti* rule to tort cases.” Morse detects a departure from

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120 Id. at 949.
122 See Kendrick v. Piper Aircraft Corp., 265 F.2d 482 (3d Cir. 1959).
123 In *Shastri v. Pan American World Airways Inc.*, unreported (S.D. Fla. 1996), the court held that Scotland had a strong interest in the litigation since Scottish lives were lost on the ground as a result of the aircraft crash and the financial and psychological impact on the community had been great. This was by application of the Second Restatement’s test (see infra notes 140-41 and accompanying text) but is illustrative of the interests that the locus delicti may have.
125 Id. at 56.
the traditional rule in that certain European countries allow exceptions along the lines of either a "common personal law" or the law of the country that has a closer connection with the parties and the tort than the locus. The extent to which such developments in Europe have been influenced by the American conflicts has been questioned. Many of the ideas which appear in American writing can be traced to much earlier European doctrinal works. The final blow to the traditional lex loci rule in tort came with the landmark case of Babcock v. Jackson, which signaled the move towards policy-evaluation methods of resolving the problems.

B. COUNTING OF CONTACTS OR CENTER OF GRAVITY APPROACH

In Babcock, the plaintiff and defendant were both New York residents who were traveling in the defendant’s car in Ontario, Canada. The plaintiff was injured in an accident that was allegedly caused by the defendant driver’s negligence. The Ontario statute prevented the recovery of damages from the owner or driver of a motor vehicle for the death of or injury to a passenger.

Abandoning the lex loci approach, the New York Court of Appeals, seeking to uphold “[j]ustice, fairness and ‘the best practical result’,” applied “the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised.” In this case, the accident involved a New York plaintiff, injured as a result of the negligence of a New York defendant, operating a car that was garaged, licensed, and insured in New York, in the course of a journey that began and should have ended in New York. These considerations far outweighed the connection of the wholly fortuitous place of the accident.

This flexible approach has the advantage of allowing greater consideration of the interests of states or countries other than the one in which the accident occurred. The lex loci delicti approach would have yielded a harsh and unjust result. Instead,

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126 See id. at 91.
129 Id. at 283.
130 Id.
the court's attention is directed "to the most logical place where the parties' interests intersect."¹³¹

Being so flexible, the *Babcock* decision left unanswered many aspects of the new center of gravity approach. Would it be applicable only to automobile cases, and only automobile cases involving "guest" statutes of the type that Ontario had in this case? Was it applicable only to personal injury cases or would it cover wrongful death actions? Most importantly, would it always lead to the application of the *lex fori*, or could a foreign law equally constitute the law having the greatest concern with the specific issue raised?

Subsequent cases extended the application of the *Babcock* rationale. The approach was applied to aviation cases and to wrongful death actions arising from aviation accidents.¹³² In *Long v. Pan American World Airways, Inc.*,¹³³ the court applied the *Babcock* test to non-domiciliaries, without resolving the question of whether this tends towards almost automatic application of *lex fori* to forum domiciliaries.¹³⁴

The simplicity of the *Babcock* approach is that it would seem to lead to a straightforward adding up of contacts; but unless the points of contact are carefully evaluated, this approach will ultimately become as mechanical as the *lex loci delicti* rule. In *Babcock*, there were clearly more contacts with New York than with Ontario, so the result is fairly uncontroversial, but this will not always be the case.¹³⁵

Another difficulty is that the court in *Babcock* did not set down a methodology whereby competing interests may be fairly balanced. While the result was treated by modern commentators as a welcome inroad into the traditional system, its authority is weakened by the fact that all of the theorists of the policy-evaluation school use the case to support their own theory. In the words of one commentator, "the majority opinion contains items of comfort for almost every critic of the traditional sys-

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¹³³ 213 N.E.2d 796 (N.Y. 1965).


¹³⁵ *See Babcock*, 191 N.E.2d at 284-85.
Nonetheless, viewed in its historical context, Babcock began the development of a modern choice of law approach in tort.

C. RESTATEMENT (SECOND) CONFLICT OF LAWS, 1971—MOST SIGNIFICANT RELATIONSHIP TEST

The Restatement (Second) provided a formal framework in which the modern approach to choice of law in tort could operate. Under its basic test, an issue in tort is determined by “the local law of the state [that] has the most significant relationship to the occurrence and the parties.” Prima facie, this will be the law of the place of injury, “unless . . . some other state has a more significant relationship . . . to the occurrence and the parties.” However, the major improvement which the test has made over the center of gravity test is that “it identifies the principles that should guide the court to evaluate the relative interests of the different jurisdictions on any given issue and . . . it identifies the contacts that have primary importance in a choice of law contest.”

According to section 6, the court should follow its own state directives regarding choice of law, and if the forum has no clear directive, several choice of law principles are suggested. In light of these principles, the court should examine the four potential points of contact that the incident might have. These are the place of the injury, the place where the conduct that caused the injury occurred, the domicile, residence, and place of business or incorporation of the parties, and the place where the relationship between the parties, if any, is centered. Section 145 also specifies that this examination must be done for each

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137 Id. §§ 146, 175.
138 Id. § 145.
139 KREINDLER, supra note 107, § 16.02, at 16-17.
140 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). The six principles are: a) the needs of interstate and international systems; b) the relevant policies of the forum and other interested states and their relative interests in determining the particular issue; c) the protection of justified expectations; d) the basic policies underlying the field of law; e) certainty, predictability, and uniformity of result; and f) ease in the determination and application of the law to be applied. See id.
141 See id. § 145.
individual issue arising out of the tort, introducing expressly the concept of *dépecage*.¹⁴²

With its broad range of principles and alternative connecting factors, the Restatement (Second) allows for maximum flexibility. Moreover, sections 146 and 175 provide for a default rule, that of the *locus delicti*, which is invaluable where two or more states have an interest in having their own law applied.

The corollary of this is the resultant complexity. One writer has commented that the Restatement (Second) makes “possible every result without leading to any of them.”¹⁴³ The range of possible judicial interpretations and factual situations which may be brought within the scope of the test is such that “it is hard to envisage individual decisions converging in time to produce a body of desirable precedents and ultimately, in certain areas, desirable rules.”¹⁴⁴ The only foreseeable method of development of the test is its case-by-case application to the facts.

The section 6 principles are not designed to be exhaustive, nor are they listed in order of importance. Thus, “the method provides only partial guidance to the correct approach to choice of law and furnishes no precise answers.”¹⁴⁵

But the Restatement (Second) does provide some guidance nonetheless, which is an improvement over the *Babcock* approach. It may be that certain commentators and courts have misunderstood what the Restatement (Second) was seeking to achieve. It has been applied as a rule, rather than as a method which provides factors for the court to consider.¹⁴⁶

Nonetheless, the approach of the Restatement (Second) has had considerable success in the United States,¹⁴⁷ as well as recognition abroad.¹⁴⁸ In aviation cases, in particular, it has had widespread application. In *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, the court examined the law applicable

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¹⁴² See id.
¹⁴⁵ Bogdan, supra note 106, at 336.
¹⁴⁷ In *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992), the court reviewed choice of law rules in tort and opted to abandon *lex loci delicti* in favor of the Second Restatement’s approach.
to the issue of the recovery of punitive damages by plaintiffs who were residents of eleven American states, Puerto Rico, and three foreign countries. The court adopted the Restatement (Second)’s test determining “which, if any, of the states having some relationship to the parties or to the crash has the most significant interest in the application of its own substantive law to the merits of the punitive damage issue.”

In *In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, the court had to ascertain the choice of law rule of certain states’ laws in a multi-state action consolidated before a single federal court. The court held that the courts of the states whose law they were applying would have adopted the Restatement (Second)’s test if given the opportunity to do so. This was despite the fact that in this case the court was not sitting in the state whose choice of law rule they decided to change.

**D. Governmental Interests Approach**

The leading proponent of this particular approach in the United States was Currie. His underlying belief was in a movement towards abandoning the traditional, strict conflict of laws rules and the almost uniform application of the *lex fori*. The search is no longer for a rule that indicates the legal system that will furnish the applicable rule of law, regardless of its content, but for a more appropriate rule of decision, taking into account the potentially applicable substantive laws.

A court applying this approach to a choice of law problem must identify the specific substantive law in each state that might be involved in the disputed issue and in doing so determine the precise underlying policies which each law is intended to advance. Finally, the court must determine whether the application of a state’s law would be consistent with the purposes or policies identified as supporting that law.

In Currie’s view, this would mean almost always applying the *lex fori* unless to do so would impair another state’s policies more than it would impair the forum’s. This is further evidenced by his use of terminology in describing the choice of law process. The court should look to the *lex fori* as the source of a “rule of

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149 644 F.2d 594 (7th Cir. 1981).
150 *Id.* at 610.
152 *See id.* at 362.
153 *See Carson, supra* note 131, at 210-212.
decision” not a “choice of law.” 154 This is verging on a return to the long forgotten days of vested rights territorialism.

One leading writer has recognized the application of higher standards as an overriding principle in the governmental interest approach as it relates to the duty of care, the standard of conduct, and the quantum of damages. 155 In other words, a state’s law which is pro-plaintiff should always outweigh a state’s law which is pro-defendant. This thinking clearly undermines the neutral character that a choice of law rule is supposed to have and is not borne out by the case law. 156

Central to this approach is Currie’s alternative definition of a “false” conflict. The conventional thinking was that a false conflict arose when the content of the substantive laws, which were potentially applicable in a given case, were the same. 157 Currie held there to be a false conflict in cases where only one state was held to have an interest in seeing its substantive law applied. 158

While on the face of it this approach seems sensitive to the substantive laws being considered and to their respective purposes and interests, it is not immune from criticism. A state with even a single contact could find in any given case an interest in seeing its own law applied. In always considering prima facie the application of the lex fori and in failing to deal with irreconcilable conflicts, a court applying this approach will, in Cavers’s view, fail “to consult the purposes of relevant laws elsewhere than in the chosen forum,” 159 which will tend to make choice of law dependent on choice of forum.

In this respect, the variations of two states in particular where much aviation litigation has been focused seem to bring improvements to Currie’s original model.

154 See id. at 210-11.
155 See Kreindler, supra note 107, § 16.02, at 16-23.
156 See, e.g., Gordon v. Eastern Air Lines, Inc., 391 F. Supp. 31, 34 (S.D.N.Y. 1975). In this case, which arose out of an airplane crash in the Florida Everglades, the court held that New York’s governmental interest was in protecting its own residents from anachronistic foreign laws denying recovery, and not in enhancing recovery by its residents by application of a more favorable foreign law. This interest was held to be superior to that of Florida, the locus delicti, even to the detriment of plaintiffs who were New York residents. See id.
158 See Currie, supra note 136.
159 Cavers, supra note 144, at 717.
1. California

The Supreme Court of California, in a non-aviation case, explained the government interest approach as follows:

generally speaking the forum will apply its own rule of decision unless a party litigant . . . invokes the law of a foreign state. In such event he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply. 160

This approach has since been characterized as the “comparative impairment” method. 161 It requires the court to determine the “relative commitment of the respective states to the laws involved . . . and the history and current status of the states’ laws.” 162 Thus, if the state’s policy behind a particular law is found to have been stronger in the past than in the current climate, it may have to yield to the more modern and progressive state law.

In the aviation context, the “comparative impairment” analysis received its most notable application in the famous case of In re Paris Air Crash of March 3, 1974. 163 This case provided the prime example of the conflict of laws problem. The judge himself called it “Aegaéonic,” 164 involving as it did the crash of a plane designed and manufactured by residents of California and operated by Turkish Air Lines, and the deaths of 346 residents and domiciliaries of twelve states of the United States and twenty-four foreign countries. The number of dependants and plaintiffs was unofficially estimated at about 1000. The judgment was confined to the issue of recoverable damages 165 against the manufacturer. 166 Applying California’s government interest test, Judge Hall held that all three aspects of a damages claim compelled the application of lex fori. The three state interests identified were (1) that of providing compensation for survivors of the decedents, (2) that of deterring negligent conduct to defendants present within its borders, and (3) that of protect-

162 Id.
164 Id. at 735.
165 Liability having been admitted.
166 Such a claim is not covered by the Warsaw Convention. See generally Warsaw Convention, supra note 6.
ing resident defendants from excessive financial burdens brought on by excessive awards of damages. The first interest only applied to the forum residents, but the cumulative effect of the other two interests along with the desire to provide a "uniform rule of liability and damages so that those who come under the ambit of California's strict product liability law and market their product outside of California . . . may know what risks they are subject to when they make and sell their products" compelled the application of California law.

This final conclusion seems to miss the obvious point. The California resident defendants came within the ambit of that state's strict product law because the suit had been filed in California and it had determined that lex fori should apply to the issue of liability. There was no reason why a uniform foreign law could not have been found to deal with both issues. Furthermore, Judge Hall held California's interest to be greater without even ascertaining the content of the potentially applicable foreign laws.

Perhaps the judge's willingness to apply the lex fori to the damages issue, and hold that the application of the foreign law would not further the interests of the foreign state, arose because to require him to apply the foreign law would require him to "'guess' what the courts in 24 foreign and 12 domestic jurisdictions would hold on the facts in this case." While this would have been an unenviable task for a single judge to undertake, it is precisely the task which a choice of law determination entails.

2. New York

The example of the New York variation of the government interest analysis also highlights certain flaws in the system.

In Neumeier v. Kuehner, the New York Court of Appeals formulated three guiding principles. Briefly summarized, an issue in tort is determined by the law of the parties' common domicile, failing which the lex loci delicti if either party was a domiciliary of the locus state, failing which the lex loci delicti unless the application of another state's laws would "advance the relevant substantive law purposes." These rules have been held to ap-

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167 In re Paris Air Crash, 399 F. Supp. at 743.
168 Id. at 739.
170 Id. at 128-29.
ply to all issues of damages, but it has been held that when liability issues are under examination, “the law of the place of the tort will normally apply.”

It is ironic that New York, the state where dissatisfaction with the traditional lex loci delicti first manifested itself, should have taken a step backwards to a rule that creates a presumption in favor of the law of the place of injury.

The Neumeier rules were applied in an aviation case by the federal appeal court sitting in New York in Barkanic v. General Administration of Civil Aviation of the People’s Republic of China. This case arose out of the crash of a domestic flight in China in which two American passengers died. The Foreign Sovereign Immunities Act implicitly required the application of the choice of law rules of the forum court, in this case the Neumeier rules. The relevant Chinese law strictly limited wrongful death damages to $20,000, while the laws of the decedents’ domiciles, the District of Columbia and New Hampshire, would have allowed for potentially unlimited recovery. The competing interests were identified as being those of the domicile states “to maximize recovery for its domiciliaries, avoid the possibility that its domiciliaries become public charges and . . . ensure that medical creditors in the state will be paid,” and that of China in “the prevention of outflows of capital and resources indispensable to the development of its infant airline industry.”

Holding itself bound by the Neumeier-Schultz rules, the Second Circuit held that because the parties had different domiciles, because the injury occurred in the domicile of the defendant and because that law favored the defendant, so the lex loci, Chinese law, should apply.

It has been suggested that the court misapplied the New York choice of law approach. The Neumeier-Schultz rules dealt with conflicts between what has been termed “loss allocation” laws, and not, as in Barkanic, between a domiciliary law, which pro-

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173 923 F.2d 957 (2d Cir. 1991).
175 Id. at 791-92.
protected and preserved human life and a locus law, which had an economic and national security interest.\(^{176}\)

Barkanic was the first aviation case to apply the Neumeier rules. The wisdom of such a development is debatable. The original rules were intended to have limited scope, dealing only with the frequent question of what effect to give to a foreign guest statute in a motor vehicle accident. The relationship between an air carrier and its fare-paying passenger is entirely different from that existing between a driver and his guest-passenger. The route chosen by the aircraft is not as certain and predictable as that of a motor car and can change in mid-flight. The passenger has no say in the choice of route.

There are obvious weaknesses in interest analysis. There are the problems inherent in ascertaining a single purpose or policy behind a state’s law. The same statute might allow for strict liability, which is favorable to plaintiffs, but then limit the amount of damages recoverable from domiciliary defendants, which is favorable to defendants. Hence most states that have adopted this approach “begin by using interest analysis to weed out false conflicts.”\(^{177}\) This avoids many of the problems that a more intensive search for government interest would entail.

Even if a purpose is discovered, the outcome of the interest analysis is uncertain. The *lex loci delicti* has an interest in applying to tort cases because it seeks to deter negligent conduct, to protect state authorities from bearing the cost of medical care, or altruistically, to protect plaintiffs who reside abroad. But equally convincing is the argument that a plaintiff will probably leave the state of injury anyway, altruism is not the current guiding philosophy in society, and deterrence is an outdated ideal. Furthermore, in the absence of a default rule, if there is no purpose to be found behind a particular law, the system becomes unworkable. The result is often the application of *lex fori* for want of a law of a state with a greater interest.

Government interest analysis, therefore has many unsatisfactory aspects, but on a practical level, it has freed courts from the rigidity of the traditional *lex loci* rule and allowed for more just results without necessarily opening the floodgates. As one lead-

\(^{176}\) See David E. Scidelson, *The Foreign Sovereign Immunities Act: Whose Conflicts Law? Whose Local Law?*, 58 Brook. L. Rev. 427, 452 (1992) (concluding that even under a more flexible interest analysis the same result would have been reached).

ing writer has observed, "the prediction that every potential conflicts case would be litigated and appealed because the outcome was always unpredictable seems not to have come true, at least not with the force and frequency once expected."\textsuperscript{178}

E. LEFLAR'S "CHOICE INFLUENCING FACTORS"

One of the leading academics in this field, Leflar, has proposed an alternative approach to the resolution of the choice of law problem.\textsuperscript{179} Under his theory, applicable to any choice of law problem, the court examines the issue at hand in the light of five factors to determine the applicable law: (1) the predictability of the result; (2) the maintenance of interstate and international order; (3) the simplification of the judicial task; (4) the advancement of the forum's governmental interest; and (5) the application of the better rule of law.\textsuperscript{180}

The last of these considerations is the most innovative. In the context of the flexible choice of law approaches, it seems the most intellectually honest, as it permits a value judgment on the part of the court. It also expressly mentions the needs of the international order, thus making it the least inward-looking of the American theories. Leflar's approach is much more "proactive than the governmental interest analysis because it permits courts to weigh various governmental-interests and determine their current importance to each interested state."\textsuperscript{181}

In the tort context, however, the first two considerations are usually irrelevant. This will usually result in the favoring of the third and fourth considerations and the almost inevitable application of \textit{lex fori}. This theory thereby allows the court to give an "apparently rational basis to a decision that in fact is based on an informed feeling of justice or equity."\textsuperscript{182}

The major conceptual problem with a "better law" approach, which Leflar defines as the "[s]uperiority of one rule of law over another, in terms of socio-economic jurisprudential standards,"\textsuperscript{183} is that it is excessively subjective, granting too much power to the judge. It goes without saying that the parties will scarcely ever agree on what constitutes the better law.

\textsuperscript{178} Lowenfeld, \textit{supra} note 134, at 101.


\textsuperscript{180} \textit{See id.} at 282.

\textsuperscript{181} Carson, \textit{supra} note 131, at 223.

\textsuperscript{182} Hanotiau, \textit{supra} note 143, at 82.

\textsuperscript{183} Leflar, \textit{supra} note 179, at 296.
Leflar's intention was to serve the ends of justice better by setting the litigation in a "more impersonal, less subjective" framework, rather than by choosing one or the other party. But this approach is fallacious. It ignores the reality of the judicial function. The court does not analyze the case in the abstract and state which of two laws has a higher objective standard. It must decide the case and controversy laid before it between two competing parties.

F. Cavers's "Principles of Preference"

Cavers's dissatisfaction with the traditional choice of law process has already been touched upon. In The Choice-of-Law Process published in 1965, he sets out five principles to govern choice of law in tort. He proceeds from the same starting point as Currie's governmental interest analysis, that of eliminating false conflicts. Thereafter in true conflict cases, he argues, the court should "decide the case on its merits, taking into consideration the objectives and policies which govern the law of conflicts." This is to be done in line with certain principles which he proposes, with the aim of yielding results which appreciate the legitimate state interests involved and the needs of justice for individuals.

The five principles of preference, which Cavers stresses are not exhaustive, can be broadly summarized as follows:

(1) Where the liability laws of the lex loci delicti are more favorable to the plaintiff than the defendant's domiciliary law or the law where he acted, then the traditional lex loci rule should apply, in the absence of a pre-existing relationship between the parties, the law of which might govern.

(2) Where the liability laws of the place where the defendant acted or caused injury are more favorable to the defendant than the laws of the plaintiff's domicile, then the former should apply, again in the absence of a pre-existing relationship between parties. This second principle envisages the case where neither party is a domiciliary of the place of injury.

(3) If the state where the defendant acted accords special protection against the kind of conduct complained of, which the lex loci does not accord, the plaintiff should be allowed to benefit

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184 Id. at 297.
185 See Cavers, supra notes 113-115 and accompanying text.
186 See id.
187 Hanotiau, supra note 143, at 80.
from the special protection of the former. This is designed to deal with cases of product liability.

(4) Where the law of the place where a relationship has its seat imposes a standard of conduct or financial protection on one party to that relationship which is higher than the like standard imposed by the state of injury, the former should apply to the benefit of that party protected by that state’s law.

(5) Finally, where the law of the place where the relationship has its seat imposes a standard of conduct or financial protection on one party to that relationship which is lower than the standard imposed by the state of injury, the former should apply to the benefit of the party whose liability that state’s law would deny or limit.  

The problem with these principles is that they are framed in a detailed, formalistic manner. They do not deal with every possible situation arising from a conflict of laws in tort case. Cavers’s intention, however, was that the principles, which were “stated in very broad terms . . . would be subjected to fission as distinctions were drawn . . . What had begun as a principle would be converted into a set of specific rules.”

Using the example of the 1974 Paris air crash, Cavers highlights the problems that some of the other flexible choice of law approaches create. In that case, California law was applied to the issue of damages against a Californian manufacturer, on the basis of California’s government interest in protecting its resident defendants from excessive damages awards. California law turned out to be relatively favorable to the plaintiffs as well. If the result had been the contrary, Cavers inquires “[s]hould . . . the few . . . aircraft-producing States . . . have the unchallenged authority to provide the proper law?” Because the other possibilities were unattractive to him, in that the lex loci delicti is fortuitous, and the multiple contacts approach would lead to multiple suits, Cavers supports a proposal for a no-fault system to deal with aviation disasters with government participation in insurance.

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188 See id. at 80-81.
189 Cavers, supra note 157, at 137.
191 See id. at 749
192 Cavers, supra note 144, at 733.
193 See id.
Cavers’s contentions as to the government interest analysis and as to \textit{lex loci} are sustainable, but it seems that a rule based on multiple contacts is the most suitable approach to take.

G. \textsc{Ecclecticism}

The varying tests and approaches that have been employed by jurisdictions in the United States have led to the development of composite approaches that employ facets of one or more of the modern theories. Few courts apply any of the theories in “pure” form. This phenomenon has been termed “eclecticism”\footnote{See Eugene F. Scoles \& Peter Hay, \textit{Conflict of Laws} § 17.11 (1982).} and allows for maximum flexibility. It allows a court to consider the “same positive and negative features as the facets of the theories it has chosen to merge.”\footnote{Id.}

The major difficulty with the eclectic approach is that a court often has to analyze a case by applying the choice of law rule of another state. This is especially important in the context of mass disaster litigation in the United States when multiple cases are transferred to one federal court. For each case, the court has to apply the choice of law rule of the state from whose court it was transferred. This will be hard to ascertain when the choice of law rule is an amalgam of several theories.

The foregoing survey of the modern approaches to choice of law in the United States provides a wealth of examples of theories and approaches that deal with the particular nature of aviation torts on choice of law. However, the extent to which they differ is unclear. “Although they require the use of different terminologies, the analytical inquiries employed are very similar.”\footnote{Kreindler, supra note 107, § 16.02[7][b], at 16-30.} On any given set of facts, it would be possible to arrive at the same result by applying any one of the theories.

H. \textsc{Reese’s Specific Aviation Rules}

The most radical set of proposals come in an article written in 1982 by Reese, in which he formulates choice of law rules specifically to govern aircraft accidents.\footnote{See Willis L.M. Reese, \textit{The Law Governing Airplane Accidents}, 39 WASH. \& LEE L. REV. 1303 (1982).} He proposes a series of rules to deal with different plaintiffs and different defendants and criticizes the modern approach to choice of law, which he
sees as inappropriate to govern such cases due to their unpredictable nature.

In the same year, in a different article, Reese wrote that predictability and uniformity of result are not of particular significance to the choice of law in tort. Although with his specific Aviation Rules, Reese recognizes the particular nature of aviation tort law, this weakens the credibility of his previous arguments against a rules-based approach. His position is somewhat ironic, given the great influence he has wielded over the modern developments in choice of law in tort. One commentator felt that in this article, Reese writes “as if the American ‘conflict revolution’ never happened.”

However, aside from the inconsistencies that they reveal in his thinking, Reese’s suggestions have the advantage of giving the plaintiff a choice between several available laws, within the framework of established choice of law rules. This allows for great flexibility, but takes the ultimate choice out of the hands of the judge. Reese suggests that the existence of choice of law rules in this field would also allow for speedier settlement of claims and would curtail lengthy litigation. His proposed rules always favor the plaintiff over the defendant, which is “in line with what is thought to be the basic policy underlying the law in the field of personal injuries.”

As between passenger and manufacturer on issues both of liability and damages, Reese suggests that there are four connecting factors that might determine the applicable law to be chosen by the plaintiff: place of design or manufacture, principal place of business of manufacturer, place of departure, or intended destination.

As between passenger and carrier, the issue of liability would be governed by the Warsaw Convention in the international context. With regard to damage issues, Reese suggests that the passenger should have the choice between the place where the carrier maintained, inspected, or repaired the aircraft; their principal place of business; the place of departure; or the place of intended destination.

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198 See Reese, supra note 111, at 135.
199 Bogdan, supra note 106, at 339.
200 Reese, supra note 197, at 1305.
201 See id. at 1310.
202 See id. at 1314 n.45.
203 See id. at 1310.
The issue of punitive damages differs from the rest of Reese’s proposed scheme. Since punitive damages are designed solely to punish the defendant, the applicable law should focus on the defendant’s territorial attachments, such as its place of business or the place where it manufactured or maintained its aircraft.204

Reese’s proposals are worthy of consideration because they give the greatest choice available to the plaintiff to maximize recovery. This should be the overriding aim of a choice of law rule in aviation delict and tort. Unfortunately, Reese expressly excludes the passenger’s personal law, on the basis that it would lead to unequal treatment of persons who have suffered the same fate. Inequality of treatment is not wrong in principle.

Reese is a strong proponent of the concept of dépeçage in choice of law.205 His proposals in this article reflect this. Dépeçage allows for the laws of different states to apply to different issues in the same case. In Reese’s view, “the court should seek to apply the relevant rule of the state which has the greatest concern in the determination of that issue.”206 This seems to him an integral part of the modern approach to choice of law and can lead to results that the exclusive application of a substantive law might preclude. Dépeçage should be avoided only when it would lead to “a situation where the purpose of one or more of the rules applied would be distorted.”207

V. EVALUATION AND CONCLUSION

The contrast between the highly developed and sophisticated choice of law approaches in the United States and the complete lack of judicial authority in the United Kingdom on aviation delict and tort choice of law is striking. There are a variety of reasons which explain this phenomenon.

In terms of size and technology, the United States air transportation system is at least thirty years ahead of Europe. As a consequence, it is hardly surprising that aviation litigation should have been focused in the United States. The liberal rules concerning jurisdiction mean that American courts are reluctant to sustain pleas of forum non conveniens. The advantages for a plaintiff of bringing a case in the United States are

204 See id. at 1317.
206 Id. at 59.
207 Id. at 75.
considerable. American courts award higher damages, particularly punitive damages, and they favor the extensive use of the doctrine of strict liability. Under American law, contingency fees are permitted, which in essence makes the bringing of an action a win-only situation for the plaintiff. Under the United States Constitution, the right to trial by jury, even in civil matters, is guaranteed. \(^{208}\) The amount of damages awarded by a jury will almost always be greater than that awarded by a judge, because a jury will be swayed by the human element of the tragedy involved.

Aviation tort law in the United States has been instrumental in highlighting the shortcomings of the traditional contacts-based approaches to conflict of laws. There has been a movement towards creating uniform substantive rules to deal with air transport. On an international level, this has taken the form of the Warsaw Convention and its subsequent amendments. It has also become important in the United States in the domestic context with calls for the development of uniform federal rules. In Morse's view, this is based on the "notion that all victims of one air disaster should be treated alike." \(^{209}\)

Although American courts have dealt with these matters, frequently modern American approaches to choice of law in aviation may be unsuitable for transplanting to the United Kingdom "due to their inter-provincial background and their almost totally unpredictable results." \(^{210}\)

Fawcett suggests that the modern American approaches succeed only because of the presence of certain background conditions and, conversely, that they require these conditions to exist before they will function. These include "the presence of a 'Supreme Court,' a similarity in the laws of the forum and the other concerned States, an availability of aids to statutory interpretation, a wealth of materials on comparative law and a contingency fee system." \(^{211}\)

The searching examination that interest analysis requires, which is possible on an inter-state level, is unrealistic on an international level. It would be relatively straightforward for a New York court to ascertain the interests and policies of Florida, California, or Louisiana law; but for a Scottish judge to deter-

\(^{208}\) U.S. CONST. amend. VII.
\(^{210}\) Bogdan, supra note 106, at 343.
\(^{211}\) Fawcett, supra note 177, at 166.
mine which of the conflicting interests of Chinese, Norwegian, or Australian law were paramount becomes an almost impossible task. Yet it is just such examples of problems that the conflict of laws in aviation delict or tort could pose. This criticism is borne out by the fact that on the occasions when an American court has had to ascertain the purpose of a foreign law, it has made sweeping assumptions about it.212

Fawcett highlights the weaknesses of the interest analysis approach, again citing the example of the Paris air crash case. "[W]here there are practical difficulties in operating interest analysis . . . the court will automatically end up applying forum law and may not even enquire into the content of the foreign law."213

It would seem, therefore, that the policy-evaluation methods of the type adopted in recent years in the United States would be inappropriate for adoption in the United Kingdom. While certainty of result is not a primary requirement for the conflict of laws rule in tort, the more flexible approaches become too complex. They place too much discretion in the hands of the judge and favor the application of lex fori, but under the pretext of a far-reaching search for a just solution.

The direction that the United Kingdom has taken in this area with the 1995 Act is the correct one. It maintains a contacts-based rule, while allowing for possible exceptions. However, the connecting factor that the new Act sets down, that of the place of the delict, is ill-suited to aviation claims. A different law needs to be applicable to different issues, in particular to liability and to damages. The fortuitous nature of the place of delict when an aircraft is involved is so much stronger than in the ordinary delict case that a more appropriate connecting factor must be sought.

In a claim against air carriers, the regime of the Warsaw Convention provides a uniform rule on liability. As against aircraft manufacturers, a similar uniform rule would be advisable, failing which, the law of its place of incorporation or principal place of business would be most appropriate as its "personal law" to regulate its conduct.


213 Fawcett, supra note 177, at 162.
On questions of recoverable damages, if all victims of the same air disaster should be treated according to the same law, because to hold otherwise would create injustice and inequality between persons who have suffered the same trauma, and if a contacts-based approach is to be preferred to the modern interest-based approaches, the only possible connecting factor is the *lex loci*. However, total equality in the treatment of passengers may not always be possible since, depending on which version of the Warsaw Convention their country is party to, they may not be subject to the same regime anyway. Furthermore, the other advantage of the *lex loci* approach, its predictability, is not always present in an aviation case. The evidence that links the events that constitute the delict to a single jurisdiction may be impossible to recover and the injury may be found to have occurred over several jurisdictions.

The desire for a single applicable law to govern all the victims of an aviation delictual or tortious act is a fallacious one, certainly on the issue of recoverable damages. A more appropriate connecting factor may be what could be generally termed the victim's "personal law," focusing upon the domicile, residence, or nationality of the decedent. In the United Kingdom, the focus has traditionally been on a residence-based approach. It is not within the scope of this work to examine the merits of habitual residence, domicile, or nationality as an appropriate connecting factor.

However, the personal law, in its broadest meaning, has several connections with an aviation delict involving the plaintiff. It is the law most familiar to the passenger, and most in line with the economic and social conditions to which he was accustomed. It is the law that will govern the legal consequences of the passenger's death, such as the administration of his estate or succession. It is likely to be the law of the places where survivors of the victims are living and to which their legal relationships are subject.

If we limit the search for applicable law to issues of damages, such as heads of damages, elements of recovery, and title to sue, the link with the passenger's personal law becomes all the more evident. The question of recoverable damages is a wholly personal one, the loss suffered being entirely different in each case. There is no conceptual difficulty in inequality between victims.

Such a proposal has the support of the aviation industry. The International Air Transport Association (IATA) has approved an intercarrier agreement to waive the limits of the Warsaw Con-
vention so that damages may be governed by the law of the domicile of the passenger.\textsuperscript{214} The agreement received the added impetus of support from the European Commission in December 1995, when the Commission approved a Proposal for a Council Regulation to give effect to the IATA agreement.\textsuperscript{215} This has also been long supported by one commentator who suggested its incorporation into the Warsaw Convention as a uniform choice of law rule.\textsuperscript{216}

If the requirement of equal treatment of all victims is, nonetheless, deemed to be essential, and the \textit{lex loci} is to be avoided, the only other option is to focus on the territorial links of the aircraft, either its operators' principal place of business, or the law of the place of its registration. This law has the advantage of being "easy to establish and foresee for all parties involved."\textsuperscript{217} It seems similar to the application of a nationality to ships, and would inevitably raise the same problems which have arisen in that area of law of flags of convenience. For the reasons already discussed, the analogy between ships and aircraft is inappropriate.\textsuperscript{218}

It has been shown that in the United Kingdom, the provisions of the 1995 Act are neither clear on the question of the law applicable to an aviation delict or tort case, nor adequate to deal with its complexities. It is unclear whether the new Act applies to such cases, and even if it does, it fails to take into account the particular nature of the problem. The guidance that has been sought from the case law of the United States is also unhelpful. Given the differing contexts and environments in which litigation takes place in the United States and in the United Kingdom, the type of inquiry that the policy evaluation methods requires is inappropriate for export to the United Kingdom.

We should endorse the use of \textit{dépeçage} in this area, since it allows the most appropriate law for the resolution of individual issues to be applied. As to the liability of airlines, the quasi strict liability approach of the Warsaw Convention appears to provide an adequate scheme. As to the liability of aircraft manufactur-

\textsuperscript{214} IATA Intercarrier Agreement on Passenger Liability, 1995, Kuala Lumpur.
\textsuperscript{215} Proposal for a Council Regulation on Air Carrier Liability in Case of Air Accidents, 1995.
\textsuperscript{216} See Allan I. Mendelsohn, \textit{A Conflict of Laws Approach to the Warsaw Convention}, 33 J. AIR L. & COM. 624, 628 (1967).
\textsuperscript{217} Bogdan, \textit{supra} note 106, at 346.
\textsuperscript{218} See LAW COMMISSION REPORT NO. 193 AND SCOTTISH LAW COMMISSION REPORT NO. 129, \textit{supra} note 76, ¶¶ 3.26-27.
ers, they could be brought within the regime of the Convention, failing which the personal law of the manufacturers would be most appropriate to regulate their conduct. On questions of recoverable damages, we should adopt a contacts-based approach, founded on the personal law of the victim to take account of the horrific nature of the consequences of delictual or tortious liability in an aviation context and the individual injury and loss suffered.

If aviation litigation develops in the United Kingdom as expected, we can look forward to an interesting and challenging future in the areas which have been examined in this article. The route that those developments will take is unclear. What is evident from this look at United States approaches is that the evolution of the law needs to be coherent. If so, we should expect, if not clear skies ahead, then at least as little turbulence as possible.
Comments