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Conflict of Laws--Torts--Lex Loci Delicti Yielding to Significant Contracts

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rehabilitation and fitness to again be an active, productive member of the profession. A preliminary fixed time attached to suspension is unimportant. The important factor is that the suspension remains in force until the attorney has borne the responsibility of regaining his prior rational condition to the satisfaction of the court. The deterrent factor and protection for the public exist, because, as long as the attorney shows no rehabilitation, it is as effective as a disbarment, as the suspension will never be lifted. But, in addition, the future status of the attorney is considered in allowing him the opportunity to *prove* rehabilitation and repentance, with a resulting reward of reinstatement.

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Conflict of Laws—Torts—Lex Loci Delicti Yielding to Significant Contacts

W, who was a passenger in an automobile driven by *H*, brought an action against *H* seeking damages for personal injuries sustained from *H's* alleged negligent operation of the automobile. The trip originated and was to have ended in New Hampshire, the domicile of the parties. The accident occurred in Vermont which has a guest statute. The action was instituted in New Hampshire, which has no guest statute, and *W* moved for a pre-trial order that the substantive law of New Hampshire govern the rights of the parties. All questions of law raised by the motion were reserved and transferred without ruling. *Held*, Vermont's guest statute will not govern the rights of these parties simply because the injury occurred in Vermont. The circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence will be determined by the local law of their common domicile, if, at least, this is the state from which they departed on their trip and the state to which they intended to return. *Clark v. Clark*, 222 A.2d 205 (N.H. 1966).

The court in the *Clark* case adopted the "significant contacts" doctrine,[1] often referred to as the center of gravity theory, with limited comment on its merits or shortcomings and proceeded to discuss what it considered to be the relevant considerations upon which choice of law decisions ought to be based. The court concluded that such decisions ought to be based directly on predictability of result, maintenance of reasonable orderliness and good relationship between the states, simplification of judicial task, advancement of state governmental interest and preference for sounder rule of law. The decision which resulted was simply an example of applying a fact situation to this "standard" laid out by the court. Although the decision does not give the New Hampshire practitioner the measure of predictibility he had under the old "place of the injury" rule, he does, however, have a workable standard for weighing his client's facts in predicting the choice of law which the court will make. This is a refinement of *Babcock v. Jackson*[2] which left the New York court with the necessity of determining *ad hoc* the jurisdiction having the paramount relation.[3] Such refinement stands as an answer to the critics of the modern trend who contend that only if the law of the place of the tort is applied can there be any practical method for determining the law governing the particular case.[4]

In holding that *lex loci delicti* is no longer a workable rule in tort cases, the courts have almost uniformly pointed to the prior dissolution of the rule in contract cases.[5] One writer argues that if the "significant contacts" doctrine is accepted for contracts, then

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[1] The well established conflict of laws rule in tort actions is that the law of the state where the tort was committed governs the substantive rights of the parties. There is a growing number of states which are abandoning this rule in favor of a balancing of the "significant contacts" approach. See Comment, 67 W. VA. L. REV. 304 (1965), for a general discussion on the initial development of this trend. Also see Comment, 68 W. VA. L. REV. 407 (1965), for a discussion of the influence this trend has had on interspousal immunity. The scope of the present comment has been limited to complementing these two previous comments.

[2] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). This was the first case to apply the "significant contacts" test, as such, to a tort situation.

[3] O'Rourke, *Analysis of the Contacts Test: A Numerical Evaluation of Babcock v. Jackson*, 11 PRAC. LAW. 87 (May 1965).

[4] Sparks, *Babcock v. Jackson— A Practicing Attorney's Reflections Upon the Opinion And Its Implications*, 31 INS. COUNSEL J. 428 (1964).

[5] Watts v. Pioneer Corn Co., Inc., 342 F.2d 617 (7th Cir. 1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

surely it should be applied in tort situations.[6] His argument is based on two contentions: (1) the doctrine would be less cumbersome in torts than in contracts because there are fewer variables and in most situations there would be no need to look beyond the law of the place of the wrong, and (2) the doctrine has been adopted in contract law while subject to a major objection which does not affect tort law, *i.e.*, produces uncertainty in business matters.

West Virginia through adoption of the Uniform Commercial Code has given legislative approval to the "significant contacts" doctrine in contract law.[7] Since positive acts of the legislature resulting in statutory law are a part of the "public policy" of West Virginia,[8] there is little question but that in West Virginia *lex loci* will yield to *lex fori* in cases involving the Uniform Commercial Code. The argument naturally follows that such legislative approval of the "significant contacts" doctrine supplies the court with one ground for judicial endorsement in tort cases.[9]

Babcock v. Jackson[10] pointed to a variety of decisions, both recent and of earlier origin, which though not expressly adopting the "center of gravity" theory did in fact weigh the contacts or interest of the involved jurisdictions in determining which law should be applied. These included cases relating to workmen's compensation, torts arising out of contracts, survival of a tort claim, intrafamiliar immunity and statutory liability. Though the differences in these cases are many, there is a common thread running through all these decisions, *i.e.*, by one rationale or another the court did not apply the law of the "pace of the tort," but rather applied the law of a more interested jurisdiction. Though this line of cases cannot be said to be precedent for a court's adopting the "center of gravity" theory, they certainly do show that its adoption would not be a sudden break with traditional holdings but rather would be the result of the gradual, orderly development of the law.

It is in these early cases, which Judge Fuld[11] felt were mere forerunners to the "center of gravity" theory, that it could be argued

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[6] Morris, *The Proper Law of A Tort*, 64 HARV. L. REV. 881 (1951).
[7] W. VA. CODE, ch. 46, art. 1, § 105 (Michie 1966).
[8] 116 W. Va. 187, 179 S.E. 604 (1935).
[9] Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).
[10] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).
[11] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

the West Virginia court has prepared itself to go along with the modern trend. In *Poling v. Poling*[12] the court did not apply the law of the place of the tort but rather applied the law of the forum state, *i.e.*, West Virginia. In that decision the court reasoned that "the Alabama rule, permitting a husband or wife to sue the other for damages for personal injury . . . is out of harmony with pronounced public policy of this state."[13] In light of this old case it is interesting to note that in 1966 the Supreme Court of Minnesota reached the same result in a family immunity situation, *i.e.*, applied the law of the domicile (forum) state, citing and following the reasoning of the "center of gravity" cases.[14] Another West Virginia case which fits into Judge Fuld's forerunner cases is *Gooding v. Ott*.[15] This was a workmen's compensation case resulting in a recovery by a widow whose husband was injured while temporarily at work in a part of a mine extending into Maryland. The Workmen's Compensation Act contained the provision that disbursement of the fund could be made only when the employees "shall have received injuries *in this state* in the course of and resulting from their employment."[16] Notwithstanding this express language to the contrary, the court allowed recovery for the out of state injury stating that to hold otherwise "would be out of harmony with other provisions of the act, and will work gross injustice to those required to contribute to the compensation fund."[17] These two cases would seem to provide adequate groundwork for the West Virginia court to do away with the "place of the injury" concept without having to take a position completely adverse to past holdings.

In direct opposition to the above argument are the many West Virginia cases applying the "place of the injury" rule.[18] In fact the court has had much experience in dealing with gross

[12] 116 W. Va. 187, 179 S.E. 604 (1935); The rule was also applied in Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960).

[13] Poling v. Poling, 116 W. Va. 187, 192, 179 S.E. 604, 606 (1935).

[14] Balts v. Balts, 142 N.W.2d 66 (Minn. 1966). Minnesota has likewise abandoned the *lex loci delicti* rule in a case involving a guest statute. Kopp v. Rechtzigel, 141 N.W.2d 526 (Minn. 1966).

[15] 77 W. Va. 487, 87 S.E. 862 (1916).

[16] *Id.* at 489, 87 S.E. at 862.

[17] *Id.* at 490, 87 S.E. at 863.

[18] See, *e.g.*, Forney v. Morrison, 144 W. Va. 722, 110 S.E.2d 840 (1959); Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1936); Schade v. Smith, 117 W. Va. 703, 188 S.E. 114 (1936); Clise v. Prunty, 108 W. Va. 635, 152 S.E. 201 (1930); Owen v. Appalachian Power Co., 78 W. Va. 596, 89 S.E. 262 (1916).

negligence under the guest statutes of other states.[19] Apparently the court, in the past, has rejected the idea that failure of the legislature to adopt a guest statute in West Virginia established a public policy against their being applied to West Virginia citizens in West Virginia courts.[20] In fact, without specifically stating it, the court in these guest statute cases has been following the rule that difference with respect to the degree of negligence (gross v. simple) between *lex loci delicti* and *lex fori* will not be grounds for the forum court to find the law of the place of the injury repugnant to the law of the forum.[21] In light of these foreign guest statute cases in West Virginia, it becomes apparent that the final determination when the "center of gravity" concept is tested in the West Virginia court will depend upon the weight the court gives to stare decisis. Other courts confronted with precedent in these cases have almost uniformily stated that stare decisis has little significance with respect to unintentional torts where the wrongdoer's conduct is not planned.[22]

The principal case refines *Babcock v. Jackson* by combining the "center of gravity" rule in torts with a workable standard that can be applied in every case. There is West Virginia statutory and case law similar to that which in other jurisdictions proved to be somewhat persuasive in adopting the "significant contacts" concept. Whether the West Virginia court, when confronted with the issue, will yield to such persuasion or whether they will wait for further refinement is a question which depends largely on the weight the court will give to stare decisis.

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[19] See, *e.g.*, Thornsbury, Adm'r. v. Thornsbury, 147 W. Va. 771, 131 S.E.2d 713 (1963); Dodrill v. Young, 143 W. Va. 429, 102 S.E.2d 724 (1958); Grim v. Moore, 121 W. Va. 299, 3 S.E.2d 448 (1939); White v. Hale, 118 W. Va. 85, 188 S.E. 768 (1936); Wood v. Shrewsbury, 117 W. Va. 569, 186 S.E. 294 (1936).

[20] Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) where it was reasoned that since the legislature had not seen fit to adopt a guest statute it would be contrary to legislative policy to apply other than Wisconsin (forum) law.

[21] Annot., 84 A.L.R. 1268 (1933).

[22] Balts v. Balts, 142 N.W.2d 66 (Minn. 1960); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).