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The Kentucky Approach to Choice of Law: A Critique

BY WILLIS L.M. REESE*

This is a close case. Reasonable men could easily differ on whether the law of Kentucky or of Ohio should have been applied. And many persuasive reasons can be advanced to support the conclusion of a majority of the Court that Kentucky law was applicable. What is of principal interest—at least to this writer—is the rationale or principle employed by the Court in reaching that conclusion. Accordingly, a major portion of this paper will be devoted to an analysis of the Court's reasoning and then only at the end will there be a discussion of whether the case was correctly decided and of how it could perhaps have been better decided. What will be done here is typical of most of the recent writing on choice of law, which has been directed primarily to theory or method. By and large, there has been far less disagreement with the results reached by the courts than with the reasoning employed to attain these results. And the same can be said of the major disputes in the so-called scholarly writing. Without question, the prime problem in choice of law today is in the area of approach or method.

All might agree that, in order to assist rather than to hinder the development of the law, a principle or rationale employed by a court in an opinion must meet the following requirements. It should actually have influenced the court and not simply have served as window-dressing for a result reached on other grounds. It should state the reasons which, in the court's view, support the conclusion expressed. Otherwise, there will be little basis for evaluating the conclusion or for knowing how it was reached. Finally, any principle or rationale should be expressed with sufficient precision to make reasonably clear the proper boundaries

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of its application; otherwise, it will not provide much guidance to the courts in the decision of future cases. More serious is the danger that it will be applied in situations which involve different values but which do fall within its literal terms.

It seems reasonably apparent that the rationale of the Court for applying Kentucky law in *Foster v. Leggett* does not satisfy at least the last two requirements. Essentially, this rationale is that “[w]hen the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law”¹ and that accordingly if there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied. No reasons are given in support of this rationale, and there is therefore no way of knowing the process by which it was reached by the Court. Certainly, it would seem to be wrong in its generality. A court should not apply its own law—even if there are sufficient contacts—if the policy underlying the particular rule would not be served by its application. Likewise, a court should at the least be hesitant to apply its law when to do so would disappoint the legitimate expectations of the parties. And, although this is perhaps more arguable, it seems reasonable to say that, in the absence of an express legislative directive, a court should not apply its own law in a situation where some other state has an appreciably greater interest in the resolution of the particular issue. Finally—and this is also arguable—it is suggested that, again in the absence of an express legislative directive, a court should be hesitant to apply its law in contravention of a well-established and currently accepted rule of choice of law. To be sure, a court can be expected to be more aware of, and sympathetic to, the policies embodied in its own law than of those embodied in the law of other states. Also, in close cases, it is perhaps to be expected that a court will be inclined to apply its own law instead of the law of another state. To this extent at least, the rationale of the Kentucky Court has validity. But surely it is not valid in the full sweep of its literal application.

Foster v. Leggett is a close case where much can be said for the application of Kentucky law. Accordingly, it does not provide a good example of the difficulties implicit in the rationale em-

¹ 484 S.W.2d 827, 829 (Ky. 1972).

ployed by the Court. A better example is provided by the Court's earlier decision in *Arnett v. Thompson*.² That case involved an action by an Ohio wife to recover against her Ohio husband for injuries suffered as a result of his alleged negligence while driving their Ohio-registered automobile in Kentucky. The husband's defense was twofold: first, that under Ohio law a husband is immune from tort liability to his wife and second, that also under Ohio law an automobile host is only liable for injuries caused his guest by willful and wanton conduct. The Court found for the wife by applying the contrary Kentucky law to the decision of both issues. It reasoned that "the conflicts question should . . . be determined . . . simply on the basis of whether Kentucky has *enough* contacts to justify applying Kentucky law. Under that view if the accident occurs in Kentucky (as in the instant case) there is enough contact from that fact alone to justify applying Kentucky law."³

Surely, this is unsatisfactory. No reasons are given for the conclusion reached. Ohio would appear to have had a far greater interest than Kentucky in the decision of the case. More puzzling still, the opinion gives no indication of what interest, if any, of Kentucky was served by the application of its law. Under the circumstances, one cannot help surmising that perhaps the principal motivating factors behind the decision were the Court's desire to give recovery to the wife and its dislike for the Ohio interspousal immunity rule and the Ohio guest-passenger statute. If this surmise is correct, the rationale of the Kentucky Court fails to satisfy not only the last two of the three requirements mentioned above but the first one as well. Namely, it does not reflect the actual reasoning of the Court but serves as window-dressing for a result reached on other grounds.

The difficulties implicit in the Court's rationale can perhaps be made clearer by consideration of two hypothetical situations. Let us first suppose that it is Kentucky which has the guest-passenger statute while Ohio does not, and that a Kentucky domiciliary is injured in Ohio while riding as a guest in the automobile of his Ohio host. Would the Kentucky Court apply its own law in this situation to bar recovery by the Kentucky plaintiff? Clearly, it

² 433 S.W.2d 109 (Ky. 1968).

³ *Id.* at 113.

would if it applied its rationale literally, since surely the Kentucky domicile of the plaintiff would be enough contact with Kentucky to justify application of Kentucky law. And the same might be true if the Court were to amend its rationale to provide that Kentucky law should only be applicable in these circumstances if a purpose underlying that law would be served. For it seems probable that at least one purpose of the typical guest-passenger statute is to guard against the ingratitude of the guest.⁴ And if this were true of our imaginary Kentucky statute, it would not be absurd to suggest that its purpose might be advanced by its application to prevent Kentuckians, wherever they may have been injured, from evincing ingratitude by suing their hosts in Kentucky courts for injuries caused by simple negligence.

Now, for the second hypothetical, let us assume that Kentucky law provides for interspousal immunity while the law of Ohio does not, and that an Ohio wife is injured in Kentucky through the negligence of her husband. Again would the Kentucky Court apply its law to bar recovery by the wife? Clearly, it would if it were to take literally its statement in *Arnett v. Thompson* that Kentucky law should be applied whenever Kentucky has enough contact to justify such application and "if the accident occurs in Kentucky . . . there is enough contact from that fact alone."⁵ And the same might be true even if the Court were to amend its rationale to require that some purpose underlying the Kentucky law must be served. For the policy, if indeed there was a policy, underlying the common law rule of interspousal immunity has become obscured by the passage of time. Quite possibly the rule was based on no firmer ground than the notion that in contemplation of law husband and wife are one and that a person cannot sue himself.⁶ If this was its basis, the imaginary Kentucky rule might be thought to concern a type of litigation that may not be brought in the local courts. If so, the purpose of the rule would be served by its application to bar the wife's suit.

The purposes attributed to these two imaginary Kentucky rules may seem far-fetched. The fact remains, however, that it is frequently not possible to know with any degree of certainty what

⁴ Cf. *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); Trautman, *Comments on Kell v. Henderson*, 67 COLUM. L. REV. 465, 469-70 (1967).

⁵ 433 S.W.2d at 113.

⁶ RESTATEMENT (SECOND), CONFLICT OF LAWS § 169, comment b (1969).

purpose, or purposes, were originally sought to be achieved by a common law rule. And the same is likely to be true of the typical state statute whose legislative history is obscure. If therefore a court were to take seriously a principle that its local law should be applied in every case where there are sufficient contacts and where a purpose of its law would be served, it would have to be extremely liberal in determining what might be a purpose. Otherwise, it would run the danger of being result-selective, that is of attributing a purpose to a rule in order to reach a result it deemed desirable.

It seems as certain as anything can be certain in the law that the Kentucky Court would not apply Kentucky law in either of the two hypothetical cases discussed above. But, in order to avoid doing so, it would have to abandon, or at least substantially modify, the rationale it employed in its opinions in *Foster* and *Arnett*. This in turn suggests that this rationale does not provide a good basis for deciding cases and indeed may lead the courts to bad results, as it very probably did in *Arnett*. It may be interesting to note that in each of the three cases involving guest-passenger statutes that were decided by the Kentucky Court since its abandonment of the place-of-injury rule,⁷ the chosen Kentucky rule granted recovery to the plaintiff while recovery would have been denied by the rule whose application was rejected. One cannot therefore help wondering whether these three decisions were not based at least in part on the notion that when, in a personal injury action, the choice is between a rule that will grant and a rule that will deny recovery to the plaintiff, the rule that will grant recovery should be applied provided that it belongs to a state having sufficient contacts with the parties and the occurrence. There might well be merit in such a notion, since one of the most basic purposes of tort law is to provide compensation to a plaintiff for his injuries.⁸ And surely at least one of a judge's objectives in a choice of law case should be to further the basic policies underlying the particular field of law that is involved.⁹ But if this notion played a part in the Court's reasoning, should it not have been explicitly so stated in the opinions? Judicial

⁷ The first of these cases was *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967). The others were *Arnett v. Thompson* and *Foster v. Leggett*.

⁸ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 22-23 (4th ed. 1971).

⁹ *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 6 (1969).

candor is a virtue. An opinion cannot aid substantially in the development of the law unless it accurately sets forth the reasons that led the court to its conclusion.

Let us now turn to the question of how *Foster v. Leggett* should have been decided. It is difficult to imagine a case where the contacts were more equally divided or where the interests of the states involved were in greater equipoise. Under the circumstances, one could hardly criticize application of either Kentucky or Ohio law. The more interesting question is the route that the Court should ideally have taken in arriving at its conclusion.

If I were forced to decide, I think I would probably conclude that Ohio law should be applied. I cannot, however, be as confident as was Judge Reed in his dissenting opinion that Section 175 of the *Restatement (Second)* would call for this result. To be sure, this section, in company with many of the other sections in the Torts Chapter, creates a presumption in favor of application of the law of the place of injury. But this is a rather weak presumption, since the law of the place of injury is not to be applied where some other state has a more significant relationship under the principles stated in Section 6 to the occurrence and the parties. This latter section, which is the basic choice of law section of the *Restatement (Second)*, requires the court to consider a number of factors in arriving at a choice of law decision. These factors would not, it is thought, clearly point in *Foster v. Leggett* to the application of the law of Ohio, the place of injury, since the contacts were so closely divided between Kentucky and Ohio. In particular, the defendant was a resident, although not a domiciliary, of Kentucky; the relationship between the parties was undoubtedly centered in that state; and the trip began, and was to end, in Kentucky.¹⁰ The factors listed in Section 6 do, however, give some indication of the route to follow by including among their number certainty, predictability and uniformity of result as well as ease in the determination of the law to be applied.

By way of contrast, it seems reasonably clear that the *Restatement (Second)* would call for a result different from that reached by the Kentucky Court in *Arnett v. Thompson*.¹¹ In that case, it

¹⁰ RESTATEMENT (SECOND), CONFLICT OF LAWS § 145, comment *e* and § 146, comment *d* (1969).

¹¹ 433 S.W.2d 109 (Ky. 1968).

will be recalled, Kentucky had no contact with the parties other than the fact that the accident took place within its territory, and it was at least not apparent that application of Kentucky law would advance any of its purposes. Ohio clearly had the greater, if not the only, interest, and under the *Restatement (Second)*, and Section 6 in particular, this would be an important factor favoring application of Ohio law. In addition, interspousal immunity was one of the issues involved in the *Arnett* case; with respect to this issue the *Restatement (Second)* is quite precise, since it calls for the usual application of the local law of the state of the parties' domicile on the ground that this state will almost invariably be the state of greatest concern.¹² In *Arnett*, this state was Ohio, and no substantial reason was advanced by the Court for not applying Ohio law.

Let us now turn once again to *Foster v. Leggett*. It bears reiteration that this was an extremely close case and that, at least in this writer's opinion, much could be said in favor of applying either Kentucky or Ohio law. The more interesting question is whether the Kentucky Court is doing justice either to itself or to the parties by the approach it is now taking in deciding whether or not to apply the guest-passenger statute of another state. At the present time, the Court decides each case on an ad hoc basis: the majority by inquiring whether Kentucky has enough contact to justify application of Kentucky law and Judge Reed by asking, in line with the *Restatement (Second)*, whether the presumption in favor of application of the law of the place of injury has been overcome. Neither of these approaches provides much predictability of result and, as a consequence, the Court can expect to be faced with many appeals and the parties to a case will not know whether to settle before suit or the amount for which to settle. A better approach would be to attempt to develop choice of law rules that are precise enough and clear enough to cover at least the easier cases involving the guest-passenger. To be sure, choice of law rules have worked badly in the past, but this was primarily because the rules were few in number and broad in scope and, quite understandably, sometimes led to bad

¹² RESTATEMENT (SECOND), CONFLICT OF LAWS § 169 (1969).

results in situations that fell within their literal terms.¹³ On the other hand, the applicability of a foreign guest-passenger statute would appear to be an issue which is sufficiently narrow and about which enough is known to justify the expectation that at least some definite choice of law rules could be stated that would work well in practice. Chief Judge Fuld of the New York Court of Appeals tried his hand at stating such rules in his concurring opinion in *Tooker v. Lopez*¹⁴ and these rules received the approval of a majority of the court in *Neumeier v. Kuehner*.¹⁵ These rules are:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to the guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who had come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.¹⁶

These are the sort of rules, it is suggested, which courts should seek to develop. They are directed to a narrow issue which has

¹³ As, for example, the rule that rights and liabilities in tort are governed by the law of the place of injury and that the validity of a contract is governed by the law of the place of making.

¹⁴ 24 N.Y.2d 569, 585, 249 N.E.2d 394, 403 (1969).

¹⁵ 31 N.Y.2d 121, 286 N.E.2d 454 (1972).

¹⁶ *Id.* at 125, 286 N.E.2d at 457-58.

been many times in various aspects before the courts and whose confines are reasonably clear. They give precise solutions (in rules 1 and 2) to aspects of the issue that seem clear and then with respect to the remaining aspects leave the door open for further exploration (in rule 3) while at the same time offering some guidance to the courts, much in the vein of the *Restatement (Second)*, by providing that "[n]ormally" the applicable rule of decision will be that of the state where the accident occurred. No rule made by man can be expected to be perfect. Undoubtedly, Chief Judge Fuld's rules will on occasion lead to a result that might not be considered ideal. But it is confidently believed that they will work well in the great majority of cases, and the predictability, certainty and ease of application that good rules bring are well worth the occasional price they may entail.

Chief Judge Fuld's rules would have led to a different result in *Foster v. Leggett* than that reached by the Kentucky Court. Since the defendant was domiciled in Ohio and the accident occurred there the second of these rules would have called for application of the Ohio guest-passenger statute. It would be difficult to criticize such a result. The parties almost certainly did not act in reliance upon the application of either Kentucky or Ohio law, and the respective interests of the two states in the decision of the case would seem to be almost equally balanced. But, of course, there would be nothing to prevent the Kentucky Court from amending Chief Judge Fuld's rules or from devising new rules of its own. Few could seriously object, for example, to amending the first rule to provide that the law of the state where guest-passenger and host-driver reside (instead of "are domiciled") should determine the standard of care which the host owes the guest even though the automobile is not registered in that state. Such a rule would have led to application of Kentucky law in the *Foster* case. The only point made here is that well-thought-out rules should have as important a role to play in choice of law as they have in other areas of the common law. Probably, these rules will have to be large in number and narrow in scope. Undoubtedly, not enough is known about many areas of choice of law to justify an attempt at the present time to regulate them by rule. Until we learn more about these areas, we will have to remain content with an ad hoc approach, perhaps aided by a

broad presumption of the sort found in the *Restatement (Second)*. But the courts should be on the lookout for issues and situations about which enough is known at the present time to justify an attempt at the statement of rules. Perhaps the rules first stated will prove defective in the light of later experience, as has also been true of many other common law rules. In any event, these rules will form the basis on which other courts can build and should eventually bring to choice of law some measure of certainty, predictability and ease of application, which are important values in all areas of law. It is believed that enough is known about the problems raised by guest-passenger statutes in choice of law to warrant an attempt to state some precise rules. It is hoped that the Kentucky Court will try its hand at stating such rules on some later occasion.