Kentucky Law Journal

Volume 61 | Issue 4 Article 1

1973

Misreading the Erie Signs: The Downfall of Diversity

M. T. Hertz
Coudert Freres

Misreading the *Erie* Signs: The Downfall of Diversity

By M.T. HERTZ*

> . . . [T]he simple fact is that more and more, more federal courts are being overruled by more state courts on local issues upon which such federal courts have undertaken to read the *Erie* signs. . . .[1]

Federal diversity jurisdiction is under attack—by the American Law Institute,[2] by legal commentators,[3] and, most importantly, by members of the federal judiciary[4] who themselves doubt the need for federal courts to continue to provide a forum for resolving questions of state law. Yet the issue involves more than merely whether the additional federal forum is needed. There is the basic question of whether, under the reign of *Erie R.R. v. Tompkins*,[5] the federal courts can be truly consistent in providing a "neutral" forum which neither attracts nor repels state law litigants. *Erie* neutrality is considered a keystone of diversity jurisdiction. If that neutrality is illusory, diversity jurisdiction may

---

* J.D., 1970, Harvard. Mr. Hertz is a member of the Massachusetts and Federal Bars, and is currently associated with Coudert Freres in Paris.

1 W. S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 264 (10th Cir. 1967) (Brown, J., concurring and dissenting), *rev'd*, 391 U.S. 593 (1968).

2 AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *See generally* Field, *Proposals on Federal Diversity Jurisdiction*, 17 S.C.L.Q. 669 (1965); Wright *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185 (1969).

3 *E.g.*, C. WRIGHT, FEDERAL COURTS § 23 (1970); Note, *Federal Interpretation of State Law—An Argument for Expanded Scope of Inquiry*, 53 MINN. L. REV. 806, 825 (1969).

4 Gibson v. Phillips Petroleum Co., 352 U.S. 874, 875 (1956) (Frankfurter, J., dissenting); Lumberman's Cas. Co. v. Elbert, 348 U.S. 48, 53-60 (1954) (Frankfurter, J., concurring); Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 889 n.5 (5th Cir. 1968); Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 658 (5th Cir. 1968) (Jones, J., concurring).

5 304 U.S. 64 (1938). *See generally* Broh-Kahn, *Uniformity Run Riot-Extensions of the Erie Case*, 31 KY. L.J. 99 (1943); Clark, *State Law in Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Note, *How a Federal Court Determines State Law*, 59 HARV. L. REV. 1299 (1946).

create a method for achieving different outcomes in state law cases. The possibility of disparate results between forums would roil the placid assumptions underlying arguments to continue diversity jurisdiction.

To achieve "neutrality" in the application of state law, federal diversity courts have tended to use "a pair of scissors and a pastepot"[6] and become mere annotators of state law— deviations therefrom suffering the slings and arrows of even the most humble judge.[7] The exceptional federal court will go so far as to analyze the very philosophy upon which the decisions of the state tribunals are founded;[8] however, most federal appeals courts abdicate such efforts to the touchstones of orthodoxy in "finding" state law, deferring to the words of even lower state courts[9] or to the federal district courts as being closer to the path of *Erie* righteousness.[10]

Rote method, unfortunately, is not sufficient; of highest priority is the ability (and the luck) to predict the state law outcome. The *Erie* doctrine implicitly assumes that the federal courts can find the state law consistently. However, the marksmanship of the federal courts is not notable for its accuracy, and, even on purely legal questions, the diversity court is therefore hardly a "neutral" forum.

I.

Williams v. United States[11] is illustrative. It involved a suit under the Federal Torts Claim Act[12] and, as such, was not

---

[6] Corbin, *The Laws of the Several States,* 50 YALE L.J. 762, 775 (1941).

[7] *See, e.g.,* Tennessee Enamel Mfg. Co. v. Stores, Inc., 192 F.2d 863, 869 (6th Cir. 1951), *cert. denied,* 342 U.S. 946 (1952). *Accord,* Smoot v. State Farm Mutual Ins. Co., 299 F.2d 525 (5th Cir. 1962).

[8] *E.g.,* Pomerantz v. Clark, 101 F. Supp. 341, 346 (D. Mass. 1951).

[9] West v. A. T. & T. Co., 311 U.S. 223 (1940); Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-78 (1940). ..*Compare* Clark, *State Law in Federal Courts: The Brooding Omnipresence of Erie v. Thompkins,* 55 YALE L.J. 267, 292 (1946) *and* Corbin, *The Laws of the Several States,* 50 YALE L.J. 762, 766-70 (1941), *with* Note, *Federal Interpretation of State Law—An Argument for Expanded Scope of Inquiry,* 53 MINN. L. REV. 806, 812 n.31 (1969).

[10] *See* Lomartira v. American Auto Ins. Co., 371 F.2d 550 (2d Cir. 1967); Delduca v. U.S. Fidelity & Guaranty Co., 357 F.2d 204 (5th Cir. 1966); Bartch v. United States, 330 F.2d 466 (10th Cir. 1964); Campbell v. Village of Silver Bay, 315 F.2d 568 (8th Cir. 1963); Wisconsin Screw Co. v. Fireman's Fund Ins. Co., 297 F.2d 697 (7th Cir. 1962); Bower v. Bower, 255 F.2d 618 (9th Cir. 1958).

[11] 435 F.2d 804 (1st Cir. 1970).

[12] 28 U.S.C. §§ 1346(b), 2671-80 (1964).

maintainable in a state court.[13] No federal issues were presented; rather, the outcome depended on the interpretation of the Rhode Island wrongful death statute,[14] incorporated by reference into the federal act.[15] A nine-year-old boy, son of a Navy petty officer, was taken to a Navy hospital where, due to the grossly negligent diagnosis by the hospital, he died. The government admitted liability; therefore, the sole question was the measure of damages under Rhode Island law. Both parties agreed that the formula for damages was expressed in *McCabe v. Narragansett Electric Co.*:[16]

> . . . the loss sustained by the plaintiff here is the present value of the net result remaining after his personal expenses are deducted from his income or earnings. To ascertain this it is, of course, necessary first to ascertain the gross amount of such prospective income or earnings; then to deduct therefrom what the deceased would have to lay out as a producer to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means and personal habits, and then to reduce the net result so obtained to its present value.[17]

The district court assumed that the boy would have become a chief petty officer like his father, and used the salary for that rank to compute the gross income over the deceased's working lifetime. But, in computing expenses, the district court had relied on the fact that the Navy pays its men a living allowance and assumed that this allowance would cover the "personal expenses." Consequently, the lower court awarded damages based on the present value of the cumulated full salary. The Court of Appeals for the First Circuit reversed on the matter of "personal expenses"[18] because "by not deducting the cost of supporting the dependents that an adult male may reasonably be expected to have,"[19] the district court failed to follow Rhode Island law.

Clearly, the *McCabe* case (referred to by the court of appeals

---

[13] 28 U.S.C. § 1346(b) (1964).
[14] R.I. GEN. LAWS ANN. § 10-7-1 (1956).
[15] 28 U.S.C. § 2674 (1964).
[16] 59 A. 112 (R.I. 1904).
[17] *Id.* at 115.
[18] 435 F.2d at 805 n.1, 806-07.
[19] *Id.* at 807.

as *McCabe I* to distinguish it from the same case on rehearing)[20] did not intend the expenses of supporting a family to be considered as "personal expenses." The *McCabe I* court, after announcing its formula,[21] cited cases from three other jurisdictions,[22] all of which rejected the inclusion of the cost of a family as a "personal expense." But, on rehearing in *McCabe II,* the Rhode Island court explained in greater detail that the suit was for the benefit of the estate of the deceased, not for the survivors; therefore, the damages were for, and were to be measured by, the loss resulting to the estate of the deceased.[23] The *Williams* court relied heavily on this use of the word "estate" as showing that Rhode Island intended the recovery to be equal to probable accumulations by the decedent.[24]

Although the word "estate" appears in *McCabe II,* there is no indication that it was meant to modify the meaning of "personal expenses" as used in *McCabe I.*[25] The *McCabe II* court plainly intended to explain the difference between the Lord Campbell's Act type statute (assessing damages to each beneficiary) and the Rhode Island statute (assessing damages to the estate). Aside from the use of the word "estate," there is nothing to indicate that the *McCabe II* court meant for damages, as an asset of the estate, to be measured by decedent's probable savings rather than by a calculation of his net earnings.[26] In fact, there

---

[20] McCabe v. Narragansett Elec. Lighting Co., 61 A. 667 (R.I. 1905) (hereinafter cited as *McCabe* II).

[21] *See* text accompanying footnote 16 *supra.*

[22] 59 A. at 115, *citing* Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 163, 47 Pac. 1019, 1027 (1897); Central R.R. v. Rouse, 3 S.E. 307 (Ga. 1886); Ohio & Mississippi Ry. Co. v. Voight, 23 N.E. 774 (Ind. 1889).

[23] *McCabe II,* 61 A. at 670. *See* Read v. Dunn, 138 A. 210, 212 (R.I. 1927).

[24] 435 F.2d at 806.

[25] *See* text accompanying note 17 *supra.*

[26] The *Williams* court admitted that Rhode Island had never relied on the term "accumulated estate" or "savings." 435 F.2d at 806 n.4. In point of fact, the former term has never been used, whereas the latter appeared only in Gill v. Laquerre, 152 A. 795 (R.I. 1931). In *Gill* the court held that inquiry as to what a minor child would have been able to "save" as a teacher was improper, as there was no way of showing that the child would have become a teacher. The *Williams* court pointed out that *Gill* did not criticize the concept of savings as supplying a measure of damages. A reading of the briefs in *Gill* shows that two unmarried teachers testified at the trial. Testimony by the first teacher was stricken. Brief for Defendant at 4. Of the second teacher's salary, "approximately ¾ was used for living expenses, . . . and ¼ was saved." Brief for Plaintiff at 5. Under the theory of the *Williams* court, defendant should have objected that there was no proof adduced as to what the child would have spent on dependents, but did not. Instead, defendant argued that "[t]here was, and of course could be no proof of what little five year old Adelaide Gill would earn after majority or expend after majority to produce her gross income." Brief for Defendant at 12.

is every reason to believe that *McCabe II* was consistent with *McCabe I* on this point. The *McCabe II* court noted that the Rhode Island statute:

> makes the amount recovered to be, as it were, assets of the estate, to be distributed nevertheless arbitrarily as intestate estate, even though the decedent should have left a last will and testament whose residuary clause may have donated the residuum of his estate to a charity, *or even if he should have deceased insolvent.*[27]

It goes without saying that a decedent could go insolvent from supporting his many dependents.[28]

As the *Williams* court noted, *McCabe* and the cases which follow it are entirely consistent with one another.[29] A review of the succeeding cases demonstrates that support of dependents was *not* considered a personal expense in Rhode Island. The clearest example is *Underwood v. Old Colony Street Railway Co.*,[30] in which the Rhode Island Supreme Court upheld the following jury instruction:

> . . . in ascertaining the amount to be deducted for his personal expenses, you should estimate what the deceased would have to lay out for the rest of his probable life to support himself according to his station in life, his means and personal habits, counting in not only his purely personal expenses, as for medical attendance, clothing, tobacco, and the like, but also his fair share at least of the general expense of maintaining the home where he lived in the style in which he was accustomed to maintain it, including in such general expense food, fuel, wages of domestic servants and the like, and also including a reasonable amount for what he would probably have had to pay as rent for such a house as the one he lived in if he had not owned it. After deducting the amount so

---

[27] *McCabe II*, 61 A. at 670 (emphasis added).

[28] The *McCabe II* court also cited a Pennsylvania case, Pennsylvania R.R. v. Butler, 57 Pa. 335, 338 (1868), as defining the rule which should prevail on damages. The rule was much the same as those cited by the *McCabe I* court, *see* text accompanying note 17 *supra*, except that the statute was for the benefit of the wife and children directly and not for the decedent's estate. The survivors were to get whatever they would have gotten from decedent's personal efforts during the remainder of his lifetime. A later statute followed the Rhode Island rule of loss to the decedent. *See* Fisher v. Dye, 125 A.2d 472 (Pa. 1956); Murray v. Philadelphia Transp. Co., 58 A.2d 323 (Pa. 1948).

[29] 435 F.2d at 806, n.3.

[30] 80 A. 390 (R.I. 1911).

> ascertained, you should reduce the net remainder to its present value.[31]

Although the printed opinion notes that the 80-year-old decedent was survived by his daughter, only from reading the briefs does one learn that one of the daughters lived with the decedent and that he *provided her total support.*[32] Furthermore, another daughter brought her children to live with the decedent during the summer.[33] Neither of these expenses was included in decedent's "personal expenses," as can readily be seen from the holding that decedent need be allotted only his "fair share" of household expenses, even though he paid for them all. Moreover, the *Underwood* defendant clearly accepted *McCabe* as compelling this result,[34] and urged that decedent be allotted the expense of half the household expenses *after* subtracting the expenses incurred by the visit of the second daughter and her children,[35] nor did the defendant argue that the money which decedent gave to his daughter should be termed his "personal expense."[36]

In *Zanelle v. Pettine,*[37] which involved the death of a 14-year-old boy, the trial court was affirmed when it excluded questions relative to the expenses of the boy's brothers for automobiles, amusements, and tobacco, which defendant had asked in an attempt to determine what the boy's own personal expenses would have been when he reached age 21. The briefs show that the only evidence as to income was that the father earned $30 weekly and the boy's brothers earned $25 to $40 weekly, whereas decedent had still been in school. On the issue of expenses, the evidence established merely that all the sons lived at home, and that the ones over 21 paid the father $10 weekly for room and board. One of the sons who was over 21 paid $200 annually for other necessities, such as clothing. Defendant, referring to *Underwood* and *McCabe,* asked:

---

[31] *Id.* at 394.
[32] Brief for Defendant at 4.
[33] *Id.* at 138-39.
[34] *Id.* at 4.
[35] *Id.*
[36] *Id.*
[37] 155 A. 236 (R.I. 1931).

> Can anyone, from the evidence presented, say what it would cost a person making $25 or $30 a week after he was married and established his own home?[38]

The implications of this question were obviously rejected by the court when it upheld the verdict as being supported by the evidence.[39]

Any doubt concerning Rhode Island practice prior to *Williams* was laid to rest by the reaction of the state legislature to the case. Although the damages section of the death statute had remained undisturbed since before *McCabe,* immediately after *Williams* the Rhode Island legislature—for the first time—provided a statutory explanation of damages, and ignominously rejected the *Williams* case.[40]

II.

If *Williams* erred in interpreting state law, it was in good company; such mistakes are common, as the federal courts have often admitted[41] and state courts have often charged.[42] The

---

[38] Brief for Defendant at 8.

[39] 155 A. at 238.

[40] R.I. GEN. LAWS ANN. § 10-7-1 .1 (Supp. 1972). PECUNIARY DAMAGES—HOW DETERMINED—Pecuniary damages to the beneficiaries described under § 10-7-2 of this chapter and recoverable by such persons shall be ascertained as follows:

> 1. Determine the gross amount of the decedent's prospective income or earnings over the remainder of his life expectancy, including therein all estimated income he would probably have earned by his own exertion, both physical and mental.
>
> 2. Deduct therefrom the estimated personal expenses that the decedent would probably have incurred for himself, exclusive of any of his dependents, over the course of his life expectancy.
>
> 3. Reduce the remainder thus ascertained to its present value as of the date of the award. In determining said award, evidence should be admissible concerning economic trends, including but not limited to projected purchasing power of money, inflation and projected increase or decrease in the costs of living.

[41] In addition to cases cited elsewhere herein, *see, e.g.,* St. John v. Wisconsin Employment Relations Bd., 340 U.S. 411 (1951); Huddleston v. Dwyer, 322 U.S. 232 (1944); Sioux County v. National Surety Co., 276 U.S. 238 (1928); Messinger v. Anderson, 225 U.S. 436 (1912); Wade v. Travis Co., 174 U.S. 499 (1899); Morgan v. Curtenius, 60 U.S. (20 How.) 1 (1857); Pease v. Peck, 59 U.S. (18 How.) 595 (1855); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847); United States v. Morrison, 29 U.S. (4 Pet.) 124 (1830); B. F. Avery & Sons Co. v. Davis, 226 F.2d 942 (5th Cir. 1955); Jones v. Schellenberger, 225 F.2d 784, 786-87 (7th Cir. 1955), *cert. denied,* 350 U.S. 989 (1956); Madden v. Metropolitan Life Ins. Co., 138 F.2d 708, 709 (5th Cir. 1943), *cert. denied,* 322 U.S. 730 (1944); Toole County Irrigation Dist. v. Moudy, 125 F.2d 498 (9th Cir. 1942), *cert. denied,* 316 U.S. 690 (1942); Missouri P. R. Co. v. Baldwin, 117 F.2d 510 (8th Cir. 1941);

(Continued on next page)

record of the First Circuit is certainly no worse than the other circuits;[43] in fact, it has tended to approach state law questions with unusual caution. For example, in *Miner v. Commerce Oil Refining Corp.*,[44] the district court for Rhode Island held that a malicious prosecution action based on misuse of process was governed by a six year, rather than a two year, statute of limitations. The precise question had never been answered by the state supreme court. After failing to convince the district court that the action should be dismissed, the defendant brought a declaratory action before the state court. The federal district court enjoined the state suit, and the First Circuit reversed. Holding the injunction "in all ways inappropriate," the court said that "[a]

(Footnote continued from preceding page)
Laughorn v. Bank of America, 88 F.2d 551 (9th Cir. 1937), *cert. denied*, 301 U.S. 699 (1937); Groner v. United States, 73 F.2d 126 (8th Cir. 1934); Trapp v. Metropolitan Life Ins. Co., 70 F.2d 976 (8th Cir. 1934), *cert. denied*, 293 U.S. 597 (1934); Hubbell v. Helvering, 70 F.2d 668 (8th Cir. 1934); American Surety Co. v. Bankers' Sav. & Loan Ass'n, 67 F.2d 803 (8th Cir. 1933), *cert. denied*, 291 U.S. 678 (1934); Pacific Am. Fisheries v. Hoof, 291 F. 306, 310-11 (9th Cir. 1923), *cert. denied*, 263 U.S. 712 (1923); Sanford v. Poe, 69 F. 546 (6th Cir. 1895), *aff'd sub nom.* Adams Express Co. v. Ohio, 165 U.S. 194 (1897); Louisville & N. R.R. v. Public Serv. Comm'n, 294 F. Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968); Johnson v. Jordan, 22 F. Supp. 286 (E.D. Okla. 1938); National City Bank v. Board of Pub. Instruction, 11 F. Supp. 571 (S.D. Fla. 1934); Tradesmen's Nat'l Bank & Trust Co. v. Johnson, 54 F.2d 367 (D. Md. 1931); Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180 (C.C.N.D. Ga. 1903); Southern Ry. v. North Carolina Corp. Comm'n, 99 F. 162 (C.C.E.D. N.C. 1900); Leslie v. Urbana, 15 F. Cas. 394 (No. 8276) (C.C.S.D. Ill. 1879); Perrine v. Thompson, 19 F. Cas. 262 (No. 10,997) (C.C.S.D. N.Y. 1879); The Princess Alexandra, 19 F. Cas. 1335 (No. 11,430) (C.C.E.D. N.Y. 1879); Nessmith v. Sheldon, 18 F. Cas. 8 (No. 10,125) (C.C.D. Mich. 1848).

[42] *E.g.*,, Market Street Ry. v. State Bd., 137 Cal. App. 2d 87, 290 P.2d 20 (1955); Parker v. Parker, 270 A.2d 21 (Conn. 1970); Clay v. Sun Ins. Office, 133 So.2d 735 (Fla. 1961); Bauer Int'l Corp. v. Cragie's Inc., 171 S.E.2d 314 (Ga. 1969); Holland v. Froklis, 81 S.E.2d 317 (Ga. 1954); Ray Schools-Chicago, Inc. v. Cummins, 146 N.E.2d 42 (Ill. 1957) (decision of bankruptcy referee); Tate v. Stanolind Oil & Gas Co., 240 P.2d 465 (Kan. 1952); New Orleans & N.E. R.R. v. Public Serv. Comm'n, 164 So.2d 300 (La. 1964); J. R. Watkins Co. v. Floyd, 119 So.2d 164 (Ct. App. La. 1960); Smithpeter v. Wabash R.R., 231 S.W.2d 135 (Mo. 1950); Simmons v. Friday, 224 S.W.2d 90 (Mo. 1949); Continental Motors Corp. v. Muskegon, 112 N.W.2d 429 (Mich. 1961); *In re* Summitt and Elizabeth Trust Co., 268 A.2d 21 (N.J. Super. 1970); River Development Corp. v. Liberty Corp., 133 A.2d 373 (N.J. Super. 1957), *aff'd*, 144 A.2d 180 (N.J. Super. 1958); Kaiser Steel Corp v. W. S. Ranch Co., 467 P.2d 986 (N. M. Super. 1970); Mt. Pleasant v. Patterson, 276 App. Div. 819, 93 N.Y.S.2d 451 (1949); Moore v. MacKay, 132 N.Y.S.2d 813 (Sup. Ct. 1954); Northwestern Nat'l Ins. Co. v. Ferstman, 181 N.E. 499 (Ohio App. 1932); Truck Ins. Exch. v. Seelbach, 339 S.W.2d 521 (Tex. 1960); State *ex rel.* Strickland v. Melton, 165 S.E.2d 90 (W. Va. 1968); *In re* Salvini's Estate, 397 P.2d 811 (Wash. 1964).

[43] The Fifth Circuit has been particularly frank about its mistakes. *See, e.g.*, United Services Life Ins. Co. v. Delaney, 328 F.2d 483, 486 (5th Cir. 1964) (Brown, J., concurring), *cert. denied*, 377 U.S. 935 (1964); Maryland Cas. Co. v. Hallatt, 326 F.2d 275 (5th Cir. 1964); Ford Motor Co. v. Mathis, 322 F.2d 267, 269 n.1 (5th Cir. 1963); Andrus v. Hutchinson, 17 F.2d 472 (5th Cir. 1927).

[44] 198 F. Supp. 887, 894 (D.R.I. 1961).

decision on pertinent state law is to be welcomed at any time,"[45] and even suggested that the district court might stay the action before it pending the state decision. This prudence was justified; the state court found the two year law to be applicable.[46]

The *Williams* decision did not involve a novel point, but rather one in which state decisions were available but unclear. The question of whether dependents were to be considered a "personal expense" had been previously entertained by the state courts. However, the inconclusiveness of the reported decisions required the federal court to divine the answer the state courts would most likely select.

This need for weighing probabilities figured similarly in cases involving New Jersey law. In *Morrisville Trust Co. v. Moon*,[47] the federal district court disallowed plaintiff's claim against an insolvent estate on the authority of the New Jersey corporation act,[48] which prevented corporate agents from conveying corporate assets after insolvency. An exception was provided for bona fide purchasers buying before the suspension of ordinary business. The question before the court of appeals was whether this act had been superseded by New Jersey's adoption of the Uniform Fraudulent Conveyances Act,[49] allowing a bona fide purchaser without notice to prevail even after the suspension of ordinary business. The defendant argued that corporations were not covered by the latter act, since they were not mentioned in it. The federal court of appeals disagreed, reading corporations into the Fraudulent Conveyances Act through a general New Jersey statute regarding statutory construction. Three years later, a New Jersey lower court rejected the federal court's reasoning, noting that:

> It is quite significant that the "Uniform Fraudulent Conveyances Act" has been in force in this state during more than a decade, notwithstanding which the courts of this state during this period have uniformly held that a conveyance by an insolvent corporation for an antecedent debt is void as against creditors irrespective of notice of such insolvency.[50]

---

[45] Commerce Oil Refining Corp. v. Miner, 303 F.2d 125, 128 (1st Cir. 1962).
[46] Commerce Oil Refining Corp. v. Miner, 199 A.2d 606, 610 (R.I. 1964).
[47] 21 F.2d 716 (3rd Cir. 1927).
[48] N.J. STAT. ANN. § 14A:14-2 (1969).
[49] N.J. STAT. ANN. § 25:2-7 (1940).
[50] First Nat'l Bank v. Bianchi & Smith, 150 A. 774, 776 (N.J. Eq. 1930).

The Third Circuit subsequently acquiesced in this ruling.[51]

The *Williams* court and the *Moon* court made similar errors. Just as the latter ignored the fact that no state court had found the Uniform Fraudulent Conveyances Act to overrule the earlier act, so the *Williams* court ignored the significance of the fact that the state courts had never dealt directly with the classification of expenses of maintaining dependents.

An early example of misconstruction of a state statute is found in *Harris v. Runnells*,[52] in which the Supreme Court construed a Mississippi slave statute[53] involving certificates for slaves brought into the state. In *Harris*, the defendant relied upon this statute, arguing that the plaintiff could not recover upon defendant's note "as it was given for an illegal consideration from the plaintiff's having failed, before he sold the negroes, to comply with the directions of the fourth section."[54] The Court reasoned that, since violation of the statute made plaintiff subject to a penalty, the statute was intended to be penal only and not to invalidate the underlying contract.[55] The Court noted that "[w]e are aware, that decisions have been made in the courts of Mississippi seemingly in conflict with this; but they are only so in appearance . . . ,"[56] and even pointed out that *subsequent* legislation *had* made contracts in violation of the statute void.

In *Deans v. McLendon*[57] the Mississippi High Court of Appeals and Errors rejected the Supreme Court's conclusion, cited one of its own cases as clear precedent, and stated:

> The rule recognized in *Green v. Robinson* has since been repeatedly affirmed by this court. It applies fully to the questions under consideration, which, indeed, could not, properly, be considered an open question in this court.[58]

Since the court reporter in *Harris* did not show *Green* as being cited by the parties, one wonders whether the Court either misconstrued the meaning of *Green* or failed to take note of the case at all. Federal courts have done both.

---

[51] *In re* J. Rosen & Sons, Inc., 130 F.2d 81 (3rd Cir. 1942).
[52] 53 U.S. (12 How.) 38 (1851).
[53] Act of June 18, § 4 [1822].
[54] 53 U.S. (12 How.) at 41.
[55] *Id.*
[56] *Id.* at 43.
[57] 30 Miss. 343 (1855).
[58] *Id.* at 360.

As an example of the first type of problem, consider *Gerr v. Emrick.*[59] In *Gerr*, the Third Circuit held that, if the Pennsylvania Supreme Court was faced with the question, it would deny immunity in tort to the Pennsylvania Turnpike Commission. The court noted that six state lower courts had passed on the question, and all six had granted immunity; conversely, three out of four federal district courts had denied immunity.[60] The Third Circuit relied heavily on *Litchtenstein v. Pennsylvania Turnpike Commission.*[61] In an earlier case, *Pennsylvania Turnpike Commission v. Smith,*[62] the Pennsylvania Supreme Court had considered whether the Commission was liable for interest on a condemnation award for detention damages and held that it was not. *Litchtenstein* overruled *Smith* and held that the Commission would have to pay such interest. The federal court of appeals interpreted this as a determination that the Commission did not have the sovereign immunity enjoyed by the Commonwealth of Pennsylvania. But later, the Pennsylvania Supreme Court held that the Third Circuit had misinterpreted *Litchtenstein,* pointing out that in a subsequent case the Commonwealth itself had been held liable for interest on detention damages.[63] Neither *Litchtenstein* nor the succeeding case had imposed liability for tort, and *Litchtenstein* did not deprive the Commission of the benefits of sovereign immunity.

Federal courts have done worse than merely misinterpret state cases; frequently they have failed to find them at all. In *Boston Mutual Life Insurance Co. v. Varone,*[64] the First Circuit noted (in dictum) that "relevant pleadings are at the very minimum conditionally privileged" against a libel suit, and cited cases involving analogical situations to prove that Rhode Island followed the general rule. Six years before, Rhode Island had specifically decided that "libelous matters in pleadings filed in judicial proceedings are absolutely privileged where the statements are material, pertinent or relevant to the issues therein."[65]

---

[59] 283 F.2d 293 (3rd Cir. 1960).
[60] *Id.* at 294-95 nn. 4, 5 & 6.
[61] 158 A.2d 461 (Pa. 1960).
[62] 39 A.2d 139 (Pa. 1944).
[63] Rader v. Pennsylvania Turnpike Comm'n, 182 A.2d 199 (Pa. 1962). *See* Wolf v. Commonwealth, 170 A.2d 557 (Pa. 1961).
[64] 303 F.2d 155, 160-61 (1st Cir. 1962).
[65] Vierra v. Meredith, 123 A.2d 743, 744 (R.I. 1956).

Fortunately, this failure to find the proper decision did not affect the outcome of the case, as it once did in the Fourth Circuit. In June, 1938, that court closed its term with a case involving the question of whether heart failure in the course of a transfusion constituted bodily injury by accidental means.[66] A search of the statutes and decisions under the law of Virginia had produced nothing bearing upon the issue involved, and the question was answered negatively. Upon rehearing, the losing party presented the court with a newly discovered case which redefined Virginia law. The court then reversed its earlier position and affirmed the lower court.[67]

III.

Unfortunately, mere caution in approaching state law is not enough. For example, where a state intermediate appellate court has rendered an opinion on a point of law, the federal court is required to follow it unless there is good reason to suspect that the state supreme court would decide otherwise.[68] This rule, while sensible enough as a rule of thumb, may easily lead to mistakes. In a pre-*Erie* case,[69] the issue was whether the plaintiff's suit, brought in February, 1874, was barred by Ohio's four year statute of limitations. Plaintiff was a married woman, and the statute of limitations, by its own terms, did not begin to run until the "disability" of the married state was removed. However, in April, 1870, Ohio enacted legislation permitting a married woman to sue on her own behalf concerning her separate property. The federal lower court followed the only state decision, rendered by the Superior Court of Cincinnati, in holding that the Act of 1870 repealed the exception in favor of married women, and held the four year statute of limitations to be fully applicable. The United States Supreme Court reversed, because before review the Ohio Supreme Court held that there was no bar until four years after the passage of the 1870 Act, *i.e.*, until April, 1874, three months after the action was commenced.[70]

---

[66] American Nat'l Ins. Co. v. Belch, 100 F.2d 48 (4th Cir. 1938).
[67] *Id.* at 51.
[68] West v. American Tel. & Tel. Co., 311 U.S. 223, 237 (1940).
[69] Moores v. National Bank, 104 U.S. 625 (1881).
[70] The Supreme Court no longer attributes such weight to state trial court rulings. *See* King v. Order of Travelers, 333 U.S. 153, 160-61 (1948).

Similar problems arise where the state courts have never interpreted a statute and consequently, the federal court is left to its own devices. In *Abraham v. National Bisquit Co.*,[71] the question presented was whether a third party defendant impleaded by the original defendant could be held jointly liable to the plaintiff when the plaintiff had brought no action against him. The Third Circuit had previously construed the relevant Pennsylvania statute as forbidding joint liability,[72] and the federal district court had dutifully followed this construction in instructing the jury. After the judgment below, the Supreme Court of Pennsylvania considered the statute for the first time and reached a different conclusion.[73] The Third Circuit then had to overrule both the trial court and its own earlier interpretation.

Where the state courts have not followed a settled rule, the federal courts must still make a choice, and the chances for mistakes are obvious.[74] Yet ignoring dictum can be just as hazardous. In one instance, the Fifth Circuit had to decide whether the failure of an insured to attend trial was prejudicial as a matter of Florida law.[75] The majority surveyed a number of Florida cases which discussed the issue indirectly, but decided, over a strong dissent, that the pronouncements in these cases were obiter dicta which could be safely ignored. A retrial was ordered and, in accordance with the majority opinion, the appellant prevailed. However, less than a month after judgment was entered, a Florida intermediate appellate court "categorically and by name" rejected the opinion of the Fifth Circuit and "specifically adopted the dissenting opinion as correctely enunciating the law of Florida."[76] Consequently, the federal court of appeals reversed its earlier decision, admitting that "we were 'dead wrong'" and adopted the view espoused by the dissent in the original appeal.[77]

Even when the state law is settled, the federal court may find

---

[71] 89 F.2d 266 (3rd Cir. 1937).
[72] Yellow Cab Co. v. Rogers, 61 F.2d 729 (3rd Cir. 1932).
[73] Majewski v. Lempka, 183 A. 777 (Pa. 1936).
[74] *See* Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4 (1939), where the Supreme Court was forced to withdraw one opinion in the light of a clarifying decision.
[75] Maryland Cas. Co. v. Hallat, 295 F.2d 64 (5th Cir. 1961).
[76] Maryland Cas. Co. v. Hallat, 326 F.2d 275, 276 (5th Cir. 1964). *See* Barnes v. Pennsylvania Thresherman & Farmers Mutual Cas. Co., 146 So.2d 119 (Fla. App. 1962), *cert. denied*, 153 So.2d 305 (1963).
[77] *Id.* at 277.

that the state courts have not recognized an emerging trend. In *Vandenbark v. Owens-Illinois Glass Co.*,[78] the federal court of appeals affirmed an order of the district court dismissing, as failing to state a cause of action, a petition in a suit by an employee to recover damages for an occupational disease contracted as a result of the employer's negligence. The Ohio state courts had consistently held that the state constitution and statutes had withdrawn the common law right and denied any statutory right to recovery for such diseases.[79] After the district court dismissed, the Ohio Supreme Court expressly overruled its earlier decisions and declared that occupational diseases were compensable under the common law.[80] The Supreme Court of the United States held that the new rule must be followed.[81]

A subtler version of the same problem exists when the state court has intimated one rule in dictum and has subsequently changed its mind.[82] On at least one occasion a state court has abandoned one rule, announced a new rule, and then returned to the previous rule, thereby catching the federal courts in a judicial "double-take."[83]

The policies behind *Erie* conflict with the purposes of diversity when a subsequent state case involves one or more of the parties to the federal suit in situations where res judicata principles may not apply. Prior to *Erie*, the Supreme Court recognized that

> the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views.[84]

In one case the question of state law had been settled by the highest state court and followed by the federal district court. Then the state court, in a subsequent case involving one of the parties to the federal suit, made an about-face on the issue. The

---

[78] 110 F.2d 310 (6th Cir. 1940).
[79] Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 540 n.4 (1941).
[80] Triff v. National Bronze & Aluminum Foundry Co., 20 N.E.2d 232 (Ohio 1939).
[81] 311 U.S. 538 (1941).
[82] *See* Metzger Motor Car Co. v. Parrott, 233 U.S. 36 (1914).
[83] Connecticut v. Drew, 250 F. 852 (5th Cir. 1918).
[84] Burgess v. Seligman, 107 U.S. 20, 34 (1882).

federal court of appeals hastened to follow,[85] very much in accord with the *Erie* rules.[86] Thus, the logical extension of *Erie* policy seems opposed to one of the basic rationales for diversity jurisdiction.

The "mistakes" of the federal tribunals in applying state law are not always to be laid at the door of the courts, but rather to the occasional impossibility of interpreting unsettled, confused or undetermined state policy. On the other hand, the federal courts have, on occasion, studiously ignored state law in order to achieve a more equitable result. In *New York Times Co. v. Connor*,[87] the Fifth Circuit ruled that no cause of action arose under Alabama law where an alleged libel concerning an Alabama man appeared in a newspaper primarily published and distributed in New York. The federal court relied on *Age-Herald Publishing Co. v. Huddleston*,[88] in which a newspaper published in Birmingham mailed copies to subscribers in nearby Blount County. The Alabama Supreme Court held that venue was improperly laid in Blount. Following dismissal in *Connor*, the Alabama Supreme Court held, in now famous *New York Times Co. v. Sullivan*,[89] that the Fifth Circuit had incorrectly applied *Age-Herald*. The state court pointed out that *Age-Herald* had been distinguished as a mere venue case,[90] and that the venue statute did not apply when a foreign corporation had not qualified to do business in Alabama.

In political cases such as *Connor* and *Sullivan*, it is hard to say whether the federal court misread the state law or the state court contorted the state law to fit the needs of the moment. Either way, of course, one thing is certain: the two courts inevitably would not, and did not, agree.

IV.

As the First Circuit has noted, federal interpretation of state law is a matter of necessity, not of superior ability.[91] The federal

---

[85] American Sugar Refining Co. v. New Orleans, 119 F. 691 (5th Cir. 1902).

[86] *See, e.g.*, Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Commerce Oil Refining Corp. v. Miner, 303 F.2d 125 (1st Cir. 1962).

[87] 291 F.2d 492 (5th Cir. 1961).

[88] 92 So.2d 193 (Ala. 1921).

[89] 144 So.2d 25 (Ala. 1962), *rev'd on other grounds*, 376 U.S. 254 (1964).

[90] Johnson Publishing Co. v. Davis, 124 So.2d 441 (Ala. 1960).

[91] Commerce Oil Refining Corp. v. Miner, 303 F.2d 125, 128, n.5 (1st Cir. 1962).

courts are constantly being called upon to make difficult decisions, and the possibility of knowing the answer in every instance is, of course, nonexistent. In a case decided at the same time as *Williams,* the First Circuit had to make a highly difficult interpretation, without any real help from state decisions, concerning the Rhode Island joint tortfeasors statute.[92]

In November, 1962, a fire and explosion damaged construction site property owned by the Gilbane Building Company and the Industrial National Bank. The New Amsterdam Casualty Company satisfied their claims and, as subrogee, sought indemnification from four defendants: two subcontractors, Homans-Kohler and O'Rourke, the architect, Holmes, and a materialman, Air-Lite. The federal district court held that New Amsterdam had no right to bring an action against the subcontractor O'Rourke as it had also been an insured under Gilbane's and the bank's policy and no fraud had been alleged.[93] O'Rourke then moved to dismiss the cross-claims for contribution brought by the other defendants. The district court granted the motion.[94]

The district court reasoned as follows: the Uniform Contribution Among Tortfeasors Act,[95] passed to create a right of contribution which did not exist at common law,[96] declared that "[t]he right of contribution exists among joint tortfeasors."[97] However, the term "joint tortfeasors" was defined in the statute as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been rendered against all or some of them."[98] The court interpreted "liable in tort" as meaning that "there can be no contribution unless the injured person has a right of action in tort against both the party who seeks contribution and the party against whom contribution is sought."[99] Since New Amsterdam, the plaintiff, had no right of action against O'Rourke, O'Rourke could

---

92 R.I. GEN. LAWS ANN. § 10-6-1 *et seq.* (1956, 1969 Reenactment).
93 New Amsterdam Cas. Co. v. Homans-Kohler, Inc., 305 F. Supp. 1017 (D.R.I. 1969).
94 New Amsterdam Cas. Co. v. Homans-Kohler, Inc., 310 F. Supp. 374, 377 (D.R.I. 1970).
95 R.I. GEN. LAWS ANN. § 10-6-1 *et seq.* (1956, 1969 Reenactment).
96 Hackett v. Hyson, 48 A.2d 353 (R.I. 1946).
97 R.I. GEN. LAWS ANN. § 10-6-3 (1956, 1969 Reenactment).
98 R.I. GEN. LAWS ANN § 10-6-2 (1956, 1969 Reenactment).
99 310 F. Supp. at 376.

not be liable to the other defendants for contribution as a joint tortfeasor.

The First Circuit found this reading of the statute too narrow. It pointed out that in *Zarella v. Miller*[100] the plaintiff had been barred from suit against one of two alleged negligent parties by the rule of interspousal immunity, but that, nonetheless, contribution could be required from the immune but negligent spouse. The Rhode Island Supreme Court in *Zarella* framed the question of liability in tort in terms of "culpability," therefore procedural defenses to direct suit were irrelevant in passing on contribution cross-claims.[101] The federal court extrapolated *Zarella* by denying that "liable in tort" demanded "present liability to whoever is the particular plaintiff," and held that when the statute "speaks in terms of the 'same injury', this must be the initial injury occasioned by the justly negligent parties and not something definable in terms of who brings the suit."[102]

While the reasoning of the First Circuit is quite persuasive, its decision was not necessarily an accurate reflection of what the Rhode Island Supreme Court might have decided in a similar case. If the federal district court read the statute narrowly, its interpretation was certainly not indefensible. For instance, if Gilbane had acted as its own insurer and had contractually waived negligence suits against O'Rourke, it would be difficult to say that O'Rourke was "liable in tort" to Gilbane. The only difference is that in *New Amsterdam* there is an interposed third-party insurer, and the waiver of liability is read in by the law of insurance. Also, *Zarella* can be read even more narrowly (if pedantically) than the court of appeals viewed it; the negligent spouse's liability in tort still persisted, despite the procedural impossibility of bringing suit. O'Rourke was never liable to the insurance company as a matter of substantive, not procedural, law. In other words, the Rhode Island Supreme Court might well have followed the line of reasoning espoused by the district court, rather than that of the court of appeals.

---

[100] 217 A.2d 673 (R.I. 1966).

[101] New Amsterdam Cas. Co. v. Holmes, 435 F.2d 1232, 1234 (1st Cir. 1970).

[102] *Id.* The court distinguished its own decision in Newport Air Park, Inc. v. United States, 419 F.2d 342 (1st Cir. 1969), cited by the district court, explaining that it was bottomed on a legislative intent in the workmen's compensation statute involved to override the general purposes of the contribution statute.

Conclusion

The policy underlying *Erie* requires that state law litigants achieve the same results regardless of whether they proceed in federal or state court. Yet the two court systems will not always interpret applicable state law in the same way. The federal court, looking at state law, may find that the state decisions are unclear or that the state courts have not spoken, and even settled law may be overruled. Finally, federal courts may not find the relevant state decisions or, having found them, may misinterpret the cases. Therefore, in crucial cases, the litigant may indeed hope to gain something by "forum-shopping." *Erie's* assumptions may be based on an impractical hope of consistent interpretation, and opponents of continued diversity jurisdiction are therefore provided with yet another argument in the growing debate.