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Conflict of Laws Trends - Torts

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CONFLICT OF LAWS TRENDS—TORTS

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UNDER THE traditional choice-of-law rule, the law of the situs governs the rights and liabilities of the parties. This rule still prevails in some states,[1] though the decade of the sixties witnessed a vigorous assault upon this time-honored proposition.

In a landmark case,[2] William Jackson of Rochester, New York, owned an automobile garaged, licensed and insured in New York. Mr. Jackson, his wife and Miss Georgia Babcock left Rochester in his car on a Friday for a weekend in Canada. While Mr. Jackson was driving in Ontario, he lost control of his car, went off the road and crashed into a stone wall, as a result of which Miss Babcock was injured.

Miss Babcock commenced an action in New York against Mr. Jackson to recover damages for her injuries. At the time of the accident, Ontario had a statute which prohibited a guest in an automobile from recovering from the host-owner or driver. The defendant moved to dismiss the complaint upon the ground of the Ontario statute. His motion was granted. The plaintiff appealed to the Appellate Division which affirmed the dismissal with a strong dissenting opinion. On appeal to the New York Court of Appeals, the order of dismissal was reversed.

Judge Fuld, for the majority of the Court of Appeals, rejected the traditional "vested rights theory" of conflict of laws because it failed to take into consideration underlying policy factors. In lieu of this traditional theory, he adopted the "dominant interests" principle, be-

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1. *See e.g.* Goranson v. Capital Airlines, Inc., 345 F.2d 750 (6th Cir. 1965); Glick v. Ballantine Produce, Inc., 343 F.2d 839 (8th Cir. 1965); Friday v. Smoot, 211 A.2d 594 (Del. 1965); McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965).

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

cause it afforded the appropriate approach for accommodating the competing interests in tort cases with multi-state contacts.

Evaluating the competing interests, Judge Fuld held that New York had a greater interest in insuring that the plaintiff, its domiciliary, had a right to recover than did Ontario in denying that right.

> Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile garaged, licensed and undoubtedly insured in New York, in the course of a weekend journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.[3]

While the plaintiff's right to recover would be governed by New York law, the law of Ontario—that Province having the greater interest in compelling obedience to its standards of conduct on its own highways—would govern the issues of negligence and contributory negligence.

> Where the defendant's exercise of due care in the operation of his automobile is an issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.[4]

In substance, the New York Court of Appeals, by this decision, abandoned an inflexible and easily predictable principle of the conflict of laws for a more flexible and less predictable one which, it considered, would produce fairer and more just results. On the basis of this decision, all of the issues arising out of a tort having a choice-of-law need not be resolved by reference to the law of one jurisdiction. Such issues may be treated separately, and a qualitative evaluation made of the various factors to determine which laws of the different jurisdictions will govern specific issues.

Since the *Babcock* case there has been a virtual avalanche of decisions in New York and elsewhere applying the new choice-of-law doctrine. The policy considerations supporting the new rule has

3. *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.
4. *Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

been thusly expressed by the New York Court of Appeals:

> The difficulty which we found with this rule [traditional choice-of-law rule] was that in giving controlling significance to the law of that jurisdiction in which the accident took place, without considering the purpose of the laws in conflict, the rule "ignore[d] the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues."[5]

The appeal of the "dominant interest" approach is evidenced by the fact that in addition to New York,[6] Alaska,[7] Arizona,[8], California,[9] Idaho,[10] Illinois,[11] Indiana,[12] Iowa,[13] Kentucky,[14] Maine,[15]

5. Miller v. Miller, 22 N.Y.2d 12, 15, 237 N.E.2d 877, 878, 290 N.Y.S.2d 734, 736 (1968).

6. Ciprari v. Servicos Aeros Cruzeiro, 245 F. Supp. 819 (S.D.N.Y. 1965); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Thomas v. United Air Lines, Inc., 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973 (1969); Miller v. Miller, *supra* note 5; Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); Long v. Pan American World Airways, Inc., 16 N.Y.2d 377, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *See also* pre-*Babcock* death actions, Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963); Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); and post-*Babcock* death action, Gore v. Northeast Airlines, Inc., 373 F.2d 717 (2d Cir. 1967). (Each of these three actions arose out of the same air crash that occurred in Massachusetts, whose Wrongful Death Act sharply limited the amount which might be recovered for wrongful death and which measured damages on the basis of the degree of defendant's culpability. The courts in these cases provided that the New York unlimited measure of damages should control where the decedent-passengers were New Yorkers at the time of their deaths, without regard to the states in which the next of kin were domiciled when the action was prosecuted. These decisions, however, were apparently not premised upon a predominant interest analysis of conflicting laws, but rather upon New York's state constitutional history and strong public policy against limitations on recoveries for wrongful death of its domiciliaries, even for out-of-state occurrences.)

New York State applies its own conflict of laws rule even where jurisdiction is quasi in rem—*i.e.* based on attaching defendant's insurance contract. Tjepkema v. Kenney, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't. 1969).

7. Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968).

8. Schwartz v. Schwartz, 447 P.2d 254 (Ariz. 1968).

9. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

10. Rungee v. Allied Van Lines, Inc., 92 Idaho 718, 449 P.2d 378 (1968) (contract case).

11. Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

12. Watts v. Pioneer Corn Company, 342 F.2d 617 (7th Cir. 1965).

13. Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965). *Cf.* Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968).

14. Story v. Burgess, 420 S.W.2d 548 (Ky. 1967); Wessling v. Paris, 417 S.W. 2d 259 (Ky. 1967).

15. Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970).

Minnesota,[16] Mississippi,[17] Missouri,[18] New Hampshire,[19] New Jersey,[20] North Dakota,[21] Oregon,[22] Pennsylvania,[23] Rhode Island,[24] South Dakota,[25] Texas,[26] Wisconsin,[27] and the District of Columbia,[28] have already apparently adopted the rule since its formulation.

16. Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968). *See also* Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966).

17. Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968). (Mississippi applied its own comparative negligence rule rather than the Louisiana contributory negligence rule to a Louisiana accident involving a Mississippi decedent.)

18. Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969).

19. Dindo v. Whitney, 429 F.2d 25 (1st Cir. 1970); Doiron v. Doiron, 109 N.H. 1, 241 A.2d 372 (1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963).

20. Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129 (1970); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Maffatone v. Woodson, 99 N.J. Super. 559, 240 A.2d 693 (1968).

21. Trapp v. 4-10 Investment Corp., 424 F.2d 1261 (8th Cir. 1970).

22. Casey v. Manson Construction and Engineering Company, 247 Ore. 274, 428 P.2d 898 (1967).

23. Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964) (death action—*lex loci* rule overruled and Pennsylvania applied its own liberal Wrongful Death Act to its domiciliaries to an action arising out of an air crash in Colorado which had a statutory limit on recovery); Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966) (Pennsylvania law of liability for simple negligence held applicable to Georgia airplane crash); Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1968), *cert. denied*, 393 U.S. 979 (1968); Prince v. Trustees of University of Pennsylvania, 282 F. Supp. 832 (E.D. Pa. 1968); Gatenby v. Altoona Aviation Corp., 259 F. Supp. 573 (W.D. Pa. 1966) (death action—plaintiffs' intestate and beneficiaries, British citizens, governed by Pennsylvania law because of dominance of Pennsylvania "contacts"); [*Cf.* Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970) (Delaware Guest Statute applicable to Delaware accident, involving Delaware host and automobile registered and garaged in Delaware)].

24. Woodward v. Stewart, 243 A.2d 917 (R.I. 1968), *cert. dismissed*, 393 U.S. 957 (1968).

25. *See* Merchants' Nat. Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409 (D.N.D. 1967) (prediction that South Dakota would adopt grouping-of-contacts rule).

26. *See*, Seguros Tepeyac, S.A. v. Bostrom, 347 F.2d 168, 175 (5th Cir. 1965); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968); Garza v. Greyhound Lines, Inc., 418 S.W.2d 595 (Tex. Civ. App. 1967); *But cf.* Doss v. Apache Powder Company, 430 F.2d 1317, 1320 (5th Cir. 1970) which holds that under Texas choice of law rules, in tort cases, the *lex loci delicti* governs.

27. Geehan v. Monahan, 382 F.2d 111 (7th Cir. 1967); Castonzo v. General Cas. Co. of Wisconsin, 251 F. Supp. 948 (W.D. Wis. 1966); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

28. Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965); Tramontana v. S.A. Empresa De

The criteria for determining which law is applicable under the new rule are as follows:

> Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
> These contracts are to be evaluated according to their relative importance with respect to the particular issue.[29]

The law of the situs will control insofar as what *standards of conduct* are applicable to a case. It has the dominant if not exclusive interest in the care exercised by persons within the jurisdiction. Thus, for example, in automobile cases, the state where the accident occurred has the greatest interest in seeing to it that motorists observe its rules of the road for the safety of all persons in that state, and these rules will determine whether due care was exercised under the circumstances of the case.

On the other hand, in determining what standards govern the question of damages, the courts, in automobile cases, will normally look to: (1) where the plaintiff was domiciled at the time of the occurrence of the accident; (2) where the defendant was domiciled at the time of the occurrence of the accident; (3) the domicile of the parties as of the time of the commencement of the action if that should vary with the parties' domiciles at the time the accident occurred; (4) the state in which the automobile was registered; (5) the state in which the automobile was garaged; (6) the state in which the insurance policy, if any, was written and the terms of its coverage; (7) the state where the host-guest relationship arose, in passenger-guest cases; (8) the nature of the trip involved in the subject accident and suit; (9) the length of time the parties were sojourning in the state where the accident occurred; (10) *the conflicting policies, if any, upon which the laws of the competing states having an interest in the controversy are based, to determine whether there is a specific impediment to recovery*; and (11) all other relevant factors bearing on the

Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966).

29. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, Part II § 145 (P.O.D. 1968). New York apparently does not adopt "(d)" of this section. See n.32, *infra*.

interest of the various states having some concern with the subject multistate tort.

APPLICATION OF THE NEW RULE TO SPECIFIC TYPES OF CASES

GUEST STATUTES AND OTHER LIMITATIONS ON RECOVERY IN EFFECT IN THE STATE OF THE ACCIDENT

A very common personal injury case that has felt the impact of the new choice-of-law rule is the one where the defendant asserts that a guest-passenger is precluded from recovering from his host-driver because of the guest statute in effect in the state where the accident occurred. In this type of case the defendant usually attempts to have the forum bar recovery by applying the statute in effect in the state where the accident occurred.

These statutes, where they permit any recovery at all, normally require that a guest establish "gross negligence" or "wanton, wilfull or reckless" conduct on the part of the driver as a condition of recovery. These enactments are usually premised upon a legislative policy consideration of attempting to prevent collusive suits between guests and hosts or to discourage free passengers from suing their hosts and *to protect local carriers and local insurers* from such claims.

In *Babcock v. Jackson, supra,* defendant, a New Yorker, with an automobile registered, garaged, and insured in New York, while weekending in Ontario, Canada with plaintiff, a fellow New Yorker, ran off the roadway into a stone wall. New York refused to enforce the Ontario Guest Statute as Ontario had no interest in protecting a New York owner and insurer under the circumstances of that case.

In *Macey v. Rozbicki, supra,* defendants, New Yorkers, had a summer home in Ontario, Canada to which plaintiff, a New Yorker and sister of one of the defendants, had gone on a ten day visit. A week after plaintiff arrived in Canada, the parties, while on a purely local trip, were involved in an automobile accident. The Court of Appeals refused to apply the Ontario Guest Statute and instead applied the simple negligence rule of New York, the common domicile of both the guest and the host.

In *Miller v. Miller, supra,* the accident happened in Maine. The automobile was registered, garaged, and insured in Maine. Defendants were residents of Maine. Plaintiff's testate, a New Yorker

and a passenger in defendants' automobile, was related to defendants, and had stayed in Maine on several occasions in connection with a common family business he had with defendants in Maine. The projected trip was planned and was to take place wholly in Maine. The unlimited, New York measure of recovery for wrongful death, rather than the Maine Wrongful Death Act, which limited recovery to twenty thousand dollars, was held applicable.

In some instances where death ensues from an accident, the conflicts issue does not involve a choice between a statute which provides a specified limited monetary recovery and one that has no such limit. Thus, in a recent case,[30] a Pennsylvania domiciliary was struck in New Jersey by a vehicle operated by a resident of New Jersey, which was owned by a second New Jerseyan who insured it in New Jersey. The decedent's estate was administered in Pennsylvania. The measure of recovery under Pennsylvania's law of damages in survival actions was far more generous to the plaintiff than the comparable New Jersey statute. On the issue of which law of damages governed, the Court, applying New Jersey's "governmental interest" choice-of-law rule, wrote:

> In view of the strong policy and concern of Pennsylvania with the administration of the estates of its decedents and the comparable lack of strong policy in the State of New Jersey, it is held that Pennsylvania law should apply under the facts of this case as to the amount of damages recoverable in this survival action.[31]

As of this writing, *Tooker v. Lopez, supra,* represents the latest significant development in this field. In that case the plaintiff's intestate and the defendant, both New Yorkers, were fellow students in Michigan and were involved in a one-car accident in Michigan, while on a purely local trip in that state. The motor vehicle involved was insured in New York. The New York Court of Appeals, reversing its prior decision in *Dym v. Gordon,*[32] held that New York and not

30. Foster v. Maldonado, 315 F. Supp. 1179 (D.N.J. 1970), *leave to appeal denied* 433 F.2d 348 (3rd Cir. 1970).

31. *Id.* at 1183.

32. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). The facts in the *Dym* case were substantially identical with those in the *Tooker* case with the exception that the former was a two-car collision and involved the application of the Colorado "guest statute", while the latter was a one-car accident that involved the application of the Michigan "guest statute." In *Dym* the New York Court of Appeals, Judge Burke writing, held that Colorado was the "seat of the guest-host relationship," there was an interest under the Colorado "guest statute" of denying a guest a priority in the assets of the negligent defendant in favor of the "non-guests"

Michigan law governed the standard for recovery:

> The only justification for discrimination between injured guests which can withstand logical as well as constitutional scrutiny [citing authorities] is that the legitimate purpose of the statute—prevention of fraudulent claims against local insurers or the protection of local automobile owners—is furthered by increasing the guest's burden of proof. *This purpose can never be vindicated when the insurer is a New York carrier and the defendant is sued in the courts of this State. Under such circumstances, the jurisdiction enacting such a guest statute has absolutely no interest in the application of its law.*[33]

An interesting example of how complex a conflict of laws case may become is illustrated by a recent case tried in the United States District Court for the Southern District of New York. K. Kevin Hepp, Jr., an Illinois resident, and William Ireland, a New Yorker, were fellow students in residence at a Colorado college. The latter borrowed a jeep from his roommate, a Kansan. The vehicle was registered and insured in Kansas. In the course of a local trip in Colorado, while Ireland and Hepp were in the jeep, it went out of control and was involved in a one-car collision with a mountain. Hepp sued Ireland alleging that the latter negligently operated the jeep and that as a result he was injured. By happenstance, Colorado, the situs of the accident, Illinois, the plaintiff's domicile, and Kansas, the owner's domicile, all had guest statutes. The defendant set up the Colorado guest statute as an affirmative defense, and, at trial, asserted the Illinois and Kansas Guest Statutes as possible alterna-

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in the second motor vehicle. In *Tooker* the New York Court of Appeals rejected both these considerations and Judge Burke, joining the majority, specifically indicated "[F]rom all that has been written, it is apparent that our decision in *Dym* is overruled." *But cf.* Hancock v. Holland, 63 Misc. 2d 811, 313 N.Y.S.2d 455 (Sup. 1970), where a New York domiciliary passenger in vehicle #1, registered in Georgia and owned and operated by defendant—Georgian, was involved in a head-on collision in Georgia with vehicle #2, also registered in Georgia and owned and operated by a Georgian. Occupants of vehicle #2 commenced suit in Georgia against the owner-operator of vehicle #1 for personal injuries and property damage. In this in rem action brought by the New York domiciliary against his host, it was *held* that Georgia Guest Statute was applicable, since "Georgia's policy is to give some preference to injured non-guests by requiring guests to prove gross or wilful negligence before permitting guests to partake in the assets of the host-driver."

33. Tooker v. Lopez, *supra* note 6 at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524. (emphasis added) *Cf.* Neumeier v. Kuehner, 313 N.Y.S.2d 468, 63 Misc. 2d 766 (Sup. 1970) (Ontario resident-passenger in defendant-New Yorker's vehicle was killed in a collision with co-defendant Canadian Railway's train in Ontario. *Held*, the law of Ontario, including its guest statute was applicable. The purpose and intent of that statute was to prevent the fraudulent assertion of claims by passengers in collision with drivers and was binding on an Ontario domiciliary plaintiff, particularly where co-defendant was likewise a domiciliary of Ontario).

tive lines of defense.

The evidence established that defendant resided with his father, who owned several automobiles. Each of these automobiles was garaged, registered, and insured in New York. These insurance policies afforded coverage to the defendant as a member of the family and household of the owner under their "omnibus provisions." Indeed, these carriers arranged for the defense in the subject litigation and, if necessary, for indemnity.

The court, applying New York's conflicts rule, held that the New York simple negligence rule rather than any of the asserted guest statutes governed the plaintiff's right to recover. While none of the mentioned states having guest statutes had any interest in their application to the subject litigants,

> New York does have a policy of financial responsibility for motorists, and that's usually thought of in terms of owners, but as its insurance law reflects, and as the omnibus provisions we have been talking about reflects, it does not stop with owners. It extends to all members of the family who are able to drive cars and New York's paramount policy of relevancy here is that people injured by the negligence of motorists reachable by New York policy should have available insurance recovery.[34]

INTRAFAMILIAL IMMUNITIES FROM LIABILITY IN THE STATE OF THE ACCIDENT

A number of states preclude, or make extremely difficult, interspousal suits or suits between parent and child. If an accident occurs in such a state, will the forum which has no such immunity recognize the immunity? Several jurisdictions who have adopted the new choice-of-law rules have refused, under such circumstances, to pay homage to this immunity upon the ground that the domicile of the parties, and not the situs, has the most substantial interest in the issue as to the permissibility of suits between members of the same family.

STATUTORY VICARIOUS LIABILITY OF OWNER FOR DRIVER'S NEGLIGENCE

In some states an owner is not liable for a driver's negligence absent proof of agency. Other states, such as New York,[35] impose liability upon owners for negligent operation of motor vehicles in the

34. Hepp v. Ireland, 66 Civ. 2128, unreported trial decision by Judge Marvin E. Frankel on April 8, 1970.

35. N.Y. VEH. & TRAF. LAW, § 388 (McKinney 1960).

state if the vehicle is operated or used with the knowledge or consent of the owner, express or implied. The question has arisen whether the provisions of such a statute will be given effect to an accident occurring outside the state.

In *Farber v. Smolack*,[36] New York's Vehicle & Traffic Law was held applicable to a North Carolina accident, and in *Maffatone v. Woodson*, the same statute was held applicable by a New Jersey court to an accident in New Jersey.[37]

LOSS OF HUSBAND'S CONSORTIUM

The Supreme Court of Oregon in *Casey v. Manson Construction and Engineering Co., supra*, held that Washington's rule which does not recognize a wife's right of action for loss of her husband's consortium, controls where the action arose out of a Washington accident and was against two Washington corporations.

"BETTER LAW" RULE

Assuming the laws of the domicile of the plaintiff and/or the defendant are less favorable to the plaintiff than the law of the situs, will a court employing the new dominant interest analysis in choice-of-law cases apply the less favorable domiciliary law? Judge Van Voorhis anticipated this problem in his dissenting opinion in *Babcock*.

> One wonders what would happen if contributory negligence were eliminated as a defense by statute in another jurisdiction? Or if comparative negligence were established as the rule in the other State?[38]

Those courts thus far confronted with this choice have applied the "better law" rule.[39]

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36. *Supra* note 6.

37. *Accord*, Johnson v. Hertz Corporation, 315 F. Supp. 302 (S.D.N.Y. 1970) (New York held to have the predominant interest and its law of vicarious responsibility applicable to diversity suit by Massachusetts residents against Delaware corporation owning a New York registered vehicle involved in a New Jersey accident. The New York automobile insurance laws "express a policy aimed at protecting innocent victims of New York vehicle registrants, whether injured or harmed in New York State or elsewhere.")

38. Babcock v. Jackson, *supra* note 6, at 487, 191 N.E.2d at 287, 240 N.Y.S.2d at 754 (Van Voorhis, J., dissenting).

39. In Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112 (1929), the accident took place in the Province of Ontario. The plaintiff was contributorily negligent and thus, under New York law, had no cause of action. He sued on the theory that the law of the situs, Ontario, governed. Ontario then had a comparative

Kell v. Henderson[40] was *Babcock* in reverse. All parties to the action were Ontario residents. In the course of a weekend trip to New York the driver lost control of his car and struck a bridge in New York, resulting in personal injuries to the infant plaintiff. The court, holding that the Ontario Guest Statute was not applicable, said:

> In our view *Babcock v. Jackson* (12 N.Y.2d 473) is inapplicable here because *Babcock (supra)* was not intended to and did not change the established law of the State of New York that a guest has a cause of action for personal injuries against a host in an accident occurring within this State whether those involved are residents or domiciliaries of the State or not.[41]

In *Heath v. Zellmer, supra*, the host-driver from Ohio was operating an automobile owned by her father, an Indiana resident. The vehicle was garaged and insured in Indiana and the two passengers, the driver's mother and sister, resided in Indiana. The trip commenced and was expected to end in Indiana. While travelling through Wisconsin, the host collided with another vehicle, resulting in injuries to the mother and sister. Indiana had a guest statute; Wisconsin did not. The issue was whether the Indiana Guest Statute limited the host-driver's liability to her Indiana guests. The Supreme Court of Wisconsin, which had previously adopted the new choice-of-law rule in *Wilcox v. Wilcox*, held the guest statute inapplicable and the host liable under the common law of the situs-forum. In arriving at its decision, the court considered that the law of the forum-situs was the "better law" since guest statutes "are not consistent with the present-day conditions in the field of motor-vehicle control and automobile-accident law."[42]

In *Zelinger v. State Sand & Gravel Co., supra*, the issue before the Supreme Court of Wisconsin was whether the Illinois Guest Statute or the Wisconsin common law rule should be applied. The accident, involving an automobile registered, garaged, and insured in Illinois, oc-

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negligence rule. The Court of Appeals held that Ontario law controlled. *Cf.* Frummer v. Hilton Hotels International, Inc., 60 Misc. 2d 840, 304 N.Y.S.2d 335 (1969). *But see* Watts v. Pioneer Corn Company, *supra* note 12.

40. 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966). *Accord*, Fosillo v. Matthews, 59 Misc. 2d 539, 299 N.Y.S.2d 872 (Sup. Ct.), *aff'd* 30 App. Div. 2d 1049, 295 N.Y.S.2d 327 (4th Dep't 1969), *leave to appeal denied*, 23 N.Y.2d 646 (1969).

41. *Supra* note 35 at 1553.

42. 35 Wis. 2d 578, 151 N.W.2d 664.

curred when the automobile, driven by an Illinois resident, struck a tree in Wisconsin during the course of a trip which began and was to end in Illinois. The injured passengers were Illinois residents. The court refused to recognize the Illinois Guest Statute as an affirmative defense. In so doing it favored the advancement of the forum's better rule of law. Wisconsin's rule of liability to a passenger for ordinary negligence, according to the court, was the better rule in contrast with the "outworn" Illinois Guest Statute.

In New York, a lower court was confronted with the problem whether it would apply New York's recently pronounced doctrine of intrafamilial liability for nonwilful torts to a suit brought by an infant against his stepfather, both Floridians, and some others, defendants, New Yorkers, where the accident occurred in New York. Florida still retains the long-standing defense of parental immunity for unintended torts. The Court held that New York law governed and the immunity doctrine was not available to the stepfather. The wrong was committed in New York, the forum was in New York and New York would permit a New York infant domiciliary to recover, unfettered by the immunity doctrine. Moreover, the interests of the stepfather's co-defendants were totally New York oriented and the payment of money damages would rest upon them alone if the stepfather were removed from the action by virtue of the ancient defense.[43]

RES JUDICATA AND COLLATERAL ESTOPPEL

Questions have arisen, and undoubtedly will continue to arise involving the issue of the applicability of the doctrine of collateral estoppel in multistate litigation. For example, an American Airlines craft crashed in Covington, Kentucky killing and injuring passengers from various states. One passenger brought an action against the carrier in Texas and prevailed in the federal trial and appellate courts. Other passengers, New Yorkers as well as non-New Yorkers, sued the same defendant in the state court in New York.

As to non-resident plaintiffs, the New York courts refused to preclude the defendant from relitigating the issue of liability.[44] On the

43. Pierce v. Helz, 64 Misc. 2d 131, 314 N.Y.S. 2d 453 (Sup. 1970).

44. Hart v. American Airlines, Inc., 31 App. Div. 2d 896, 297 N.Y.S.2d 587 (1st Dep't 1969).

other hand, as to New York residents, the court held that the defendant was so precluded, and directed summary judgment against the carrier.[45] The decision in the non-resident's case was based upon the strong policy consideration of deterring non-residents from forum shopping—*i.e.* suing in New York because of its favorable conflicts and res judicata rules. On the other hand, as to New Yorkers, the state would appear to have the dominant interest in the application of its estoppel rule, and neither full faith and credit nor due process would appear to preclude such an application.

It is the New York courts which would have the burden of relitigating an issue which has already been adjudicated. By contrast, the sole basis for Texas' concern is the fortuitous circumstance that the initial decision was rendered in Texas. No Texas resident will be prejudiced by permitting the offensive use of the Texas judgment by a New York plaintiff. There is no indication that application of the New York rule will affect the integrity of Texas' requirement of mutuality of estoppel in wholly domestic suits.[46]

Thus, in states such as New York, which no longer recognize the doctrine of mutuality,[47] collateral estoppel may be applicable to prevent a defendant from relitigating its liability, once determined, if it had a full and fair opportunity to litigate that issue in the prior case.

CONSTITUTIONALITY

To date it has been argued that the application of the new "dominant interest", conflicts rule which disregards the law of the situs, and applies the forum's extraterritorially, is unconstitutional in that it violates the full faith and credit clause of the federal constitution. This argument has been rejected.[48]

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45. Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969); DePaul v. George, 34 App. Div. 2d 620, 309 N.Y.S.2d 90 (1st Dep't 1970). In action #1 a passenger secured a judgment against a driver; in action #2 a second passenger sued the same driver. It was held that the first judgment collaterally estopped the defendant from relitigating liability and plaintiff was entitled to summary judgment and an assessment of damages in action #2.

46. 68 Col. L. Rev. 1590, 1600 (1968).

47. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Schwartz v. Public Administrator, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969) *accord*, Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942) (Traynor, J.); Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 130, 172 Atl. 260, 262 (1934).

48. Pearson v. Northeast Airlines, Inc., *supra* note 6; Miller v. Miller, *supra* note 5.

TRANSFER OF ACTIONS—FORUM NON CONVENIENS

Certain state courts, such as those of New York, have held that they are bound to try an action based on a foreign tort where either the plaintiff or the defendant is a resident of the forum.[49] On the other hand, a federal district court has the power to change the venue of the action from one district to another (including a district in another state), for the convenience of parties and witnesses, in the interest of justice.[50] However, if such a transfer is made, the plaintiff does not lose the advantages and benefits of the substantive law of the transferor forum because the transferee court must apply the substantive law of the transferor state rather than that of the state in which it sits.

In a case[51] involving more than forty persons who were killed in an air crash that occurred in Massachusetts, death actions were brought in a federal district court in Pennsylvania. The defendants moved to change the venue from the district court in Pennsylvania to the district court in Massachusetts, in whose jurisdiction it was alleged, most of the witnesses resided and over one hundred other actions were pending, arising out of the same crash. The importance of the proposed change of venue lay in the fact that if the Wrongful Death Act of Massachusetts governed (and it would govern if the action were transferred to the Massachusetts district court, and that court applied the substantive law of Massachusetts), the plaintiffs would be limited in their recovery of damages to a maximum of $30,000, and the measure of damages would be the degree of the defendants' culpability. On the other hand, if the Pennsylvania law[52] were applicable there would be neither a limitation on the recovery, nor damages commensurate with the defendant's culpability.

The United States Supreme Court, in holding that the substantive law of the transferor state, including its conflict of laws rules, governed, notwithstanding the propriety of the transfer under 28 U.S.C.

49. de La Bouillerie v. de Vienné, 300 N.Y. 60, 89 N.E.2d 15, 96 N.Y.S.2d (1949); Wagner v. Braunsberg, 5 App. Div. 2d 564, 173 N.Y.S.2d 525 (1st Dep't 1958), Parente v. Kisner, 34 App. Div. 2d 244, 312 N.Y.S.2d 480 (3rd Dep't 1970); McHugh v. Paley, 63 Misc. 2d 1092, 314 N.Y.S. 2d 208 (Sup. 1970).

50. 28 U.S.C. § 1404(a) (1964).

51. Van Dusen v. Barrack, 376 U.S. 612 (1964).

52. Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

§ 1404(a) (1964), significantly noted:

[W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. This purpose would be defeated in cases such as the present if nonresident defendants, properly subjected to suit in the transferor State (Pennsylvania), could invoke § 1404(a) to gain the benefits of the laws of another jurisdiction (Massachusetts). What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most insatnces this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the Federal District Court which decides the case and the courts of the State in which the action was filed.

We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the *transferee District Court must be obligated to apply the state law that would have been applied if there had been no change of venue.* A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms. We, therefore, reject the plaintiffs' contention that the transfer was necessarily precluded by the likelihood that a prejudicial change of law would result.[53]

CONCLUSION

With all of the inducements and necessities for travel in contemporary life, it is predictable that the number of citizens of one state who will be involved in mishaps in other states and countries will significantly increase, and thus, it will become increasingly more common for courts to deal with conflicts of law cases. This factor coupled with expanding concepts of state jurisdiction will offer attorneys and courts new challenges and new opportunities for refashioning the traditional rules of law governing the rights and liabilities of parties. All of this will be done with the avowed purpose of properly accommodating the competing interests of different states and of securing more just results for litigants.

53. *Supra* note 51, at 638-39 (1964); *Accord,* Healy v. American Airlines, — F. Supp. — (E.D. Ky. 1970); Ryer v. Harrisburg Kohl Brothers, Inc., 315 F. Supp. 7 (M.D. Pa. 1970) (conflict of laws rules of transferor forum applicable in transferee forum even where original action was based upon jurisdiction *quasi in rem,* by attaching insurance contract).