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Conflicts of Law—Wrongful Death Action Not Governed by Limitation on Liability of Lex Loci Delecti

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CONFLICTS OF LAW

WRONGFUL DEATH ACTION NOT GOVERNED BY LIMITATION ON LIABILITY OF LEX LOCI DELICTI

The litigation arising out of the crash of a commercial airliner affords a good demonstration of certain instances where our legal system has failed to adjust to the needs of contemporary society. In the course of a single flight, the aircraft and its occupants not infrequently pass through the air space of numerous states with little intention of subjecting themselves to the laws of such states. When a crash does occur, any subsequent rights or liabilities of the respective parties are governed by the body of laws of the place where the accident fortuitously occurred. This results from the settled conflict of laws rule that in a tort action the law of the place of the wrong will be applied. The basic justification for this rule is that it deters forum shopping inasmuch as regardless of the forum, the relative rights and liabilities of the parties will be determined by the same law and thus with considerable uniformity.[1]

The problem comes into sharper focus in the case of a fatal accident. The right of action for wrongful death derives from statutes only, there being no common law cause of action for death.[2] Thus, in addition to the conflicts of laws rules governing tort law which bar application of the law of the forum, there is involved the holdings that wrongful death enactments are to be given no extra-territorial effect.[3] As a result, in the absence of a wrongful death statute in the place of the wrong, there is no cause of action for wrongful death, regardless of the policy of the forum state.[4] While all states now have such statutes,[5] they are far from uniform. However, New York and other jurisdictions have held, with a considerable degree of consistency, that questions such as who may maintain a suit for wrongful death,[6] within what period of time it must be commenced,[7] and the measure of damages,[8] are questions of substantive law and, therefore, governed by the wrongful death statute of the place of the wrong.

In the recent case of *Kilberg v. North East Airlines,*[9] plaintiff's intestate was a passenger on one of the defendant's planes which crashed in Massachusetts in the course of a flight originating in New York. The Massachusetts

1. Goodrich, Conflict of Laws § 3 (3d ed. 1949).
2. Whitford v. Panama R. Co., 23 N.Y. 465 (1861); Baldwin v. Powell, 294 N.Y. 130, 61 N.E.2d 412 (1945).
3. Baldwin v. Powell, supra note 2; Debevoise v. New York L.E. & W.R. Co., 98 N.Y. 377 (1885); McDonald v. Mallory, 77 N.Y. 546 (1879).
4. Crowly v. Panama R. Co., 30 Barb 99 (1859).
5. Prosser, Torts § 105 (2d ed. 1955).
6. Dennick v. Central R. Co. of N.J., 103 U.S. 11 (1880); Baldwin v. Powell, supra note no. 2.
7. Lipton v. Lockheed Aircraft Corp., 307 N.Y. 775, 121 N.E.2d 615 (1954).
8. Slater v. Mexican Nat. R. Co., 194 U.S. 120 (1904); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918). See also cases collected 15 A.L.R.2d 765 (1949); but see Wooden v. Western N.Y. & Pa. R. Co., 126 N.Y. 10, 26 N.E. 1050 (1891).
9. 9 N.Y.2d 34, 211 N.Y.S.2d 133 (1961).

wrongful death statute limits recovery in a wrongful death action to a maximum of $15,000.[10] In an effort to avoid this limitation,[11] plaintiff alleged in his second count, under the New York survival statute,[12] breach of contract to carry the deceased safely, asking $150,000 in damages. Plaintiff's contract argument was not for the wrongful death of the deceased, but for breach of contract as at common law, the damages being the deceased's loss of earning power for the remainder of his normal life expectancy. Special Term held that the action for contract was proper, relying on case law permitting such contract actions in personal injury cases.[13] The Appellate Division reversed, however, and granted defendant's motion to dismiss the second count.[14] They stated that although the second cause of action had "been seductively clothed in form *ex contractu*," the gravamen of the action was tort for negligently causing death and was, therefore, governed by the *lex loci delicti*.[15] The Court of Appeals affirmed.[16]

After dismissing the contract action, Chief Judge Desmond, writing for the majority of the Court, in significant dicta stated that although plaintiff must sue under the Massachusetts wrongful death statute, the New York Court was not bound by that statute's limitation on damages. Frankly stating what is undoubtedly the actual basis for such dicta, that Court said, "Modern conditions make it unjust and anomalous to subject the traveling citizen of this state to the varying laws of other states through and over which they move."[17] The Court then looked to New York's strong public policy against such limitation as embodied in the New York Constitution,[18] and concluded that "for our courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law."[19]

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10. Mass. Gen. Laws Ann. ch. 229 § 2 (1958):
If the proprietor of a common carrier of passengers . . . by reason of his or its negligence . . . causes the death of a passenger, he or it shall be liable in damages in the sum of not less than 2,000 dollars nor more than 15,000 dollars, to be assessed with reference to the degree of culpability of the defendant. . . .
The Statute has since been amended to raise the upper limit of recovery to $20,000. Mass. Gen. Laws Ann. ch. 229 § 2 (1960).

11. See also Snow v. Northeast Airlines, Inc., 176 F. Supp. 385 (S.D.N.Y. 1959); and Pearson v. Northeast Airlines, Inc., 180 F. Supp. 97 (S.D.N.Y. 1960) arising out of the same accident as the principal case. Both were dismissed as to contract actions on grounds that although such actions sounded in contract the gravamen of the action was in tort.

12. N.Y. Dec. Estate Law § 116:
Actions of account, and all other actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators.

13. Dyke v. Erie R. Co., 45 N.Y. 113 (1871).

14. 10 A.D.2d 261, 198 N.Y.S.2d 679 (1st Dep't 1960).

15. Id. at 262, 198 N.Y.S.2d at 681.

16. Supra note 9.

17. Supra note 9 at 39, 211 N.Y.S.2d at 135.

18. N.Y. Const. art. I. § 16:
The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

19. Supra note 9 at 41, 211 N.Y.S.2d at 136.

An exception to the rule, that as to substantive rights the *lex loci* controls and will be enforced in the courts of the forum, occurs when the public policy of the forum forbids it.[20] Invoking this exception and relying on such cases as *Mertz v. Mertz*,[21] the Court refused to enforce one of the provisions of the Massachusetts statute as to damages.[22] As a further basis for refusing to enforce the limitation of the Massachusetts statute the Court classified the measure of damages as procedural. Under conflict of laws rules the procedural laws of the forum governs.[23] It is not clear, however, whether a remedy provided by law is a matter of substance or procedure[24] and the forum normally makes this determination for itself.[25] Finding authority both ways on the question of classifying the measure of damages in wrongful death cases,[26] and finding no controlling New York decision, the Court determined that it was free to decide the question in accordance with New York's public policy.

Judge Fuld, concurring,[27] examined the wrongful death and breach of contract problem and said that while theoretically a contract action might be argued to exist, such an argument was foreclosed by precedent and he therefore agreed with the majority that the second count was properly dismissed. However, he believed that there was not warrant or justification for the Court *sua sponte* considering the question as to the measure of damages.[28]

Although concurring in result, Judge Froessel[29] argued that by improperly considering the cause of action for wrongful death which was not raised by either party, the Court was exercising discretion usually exercised below—a procedure not only unprecedented but beyond the province of the Court. He further argued that on various occasions the Court had affirmed that the measure of damages in such cases is a question of substantive law.[30] Also, in con-

20. Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Loucks v. Standard Oil Co., supra note 8.

21. 271 N.Y. 466, 3 N.E.2d 597 (1936). This case holds in substance that the policy of the forum is found in its laws and judicial opinions and a cause of action contrary to that cannot be maintained in this state. This should be compared with the test of the Loucks case, supra note 8 at 111, 120 N.E. at 202 (which was distinguished in the Mertz case) that to render foreign law unenforceable as contrary to public policy it must "violate some principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." The Kilberg decision appears to be a departure from the stricter test of Loucks and therefore would give the forum greater leeway in refusing to apply the substantive law of a sister state.

22. Supra note 9 at 40, 211 N.Y.S.2d at 137.

23. Lefler, Conflict of Laws § 110 (1959).

24. Id. § 60.

25. Id. § 58; Murry v. N.Y., Ontario & W. R. Co., 242 App. Div. 374, 275 N.Y. Supp. 10 (1st Dep't 1934).

26. Supra note 9 at 41, 211 N.Y.S.2d at 137.

27. Supra note 9 at 42, 211 N.Y.S.2d at 138.

28. Ibid.
But as I have already indicated this does not entitle a court to discuss or decide an issue which not only is not argued by the parties, but actually is not raised or presented by the record.

29. Supra note 9 at 46, 211 N.Y.S.2d at 141.

30. Loucks v. Standard Oil Co., supra note 8; Royal Ind. Co. v. Atchison T. & S.F. R. Co., 272 App. Div. 246, 70 N.Y.S.2d 697 (1st Dep't 1947), aff'd, 297 N.Y. 619, 75 N.E.2d 631 (1947); Whitford v. Panama R. Co., 23 N.Y. 465 (1861).

sidering a question which is in principle identical to that involved in the instant case, the Court had upheld decisions to the effect that interest from the time of death may not be added to the amount of recovery when it is not so provided in the foreign statute.[31] Judge Froessel stated that the decision of the Court conflicted with the overwhelming weight of authority in the United States which follows the principle that the *lex loci delicti* governs not only the existence of the cause of action for wrongful death but also the measure of damages.[32] He further argued that, inasmuch as the right to bring such an action derives entirely from statute, a limitation on the amount of damages recoverable is tantamount to a provision that there shall be no cause of action for wrongful death beyond this amount.

"The size of the right is a part of the right" and, therefore, the "measure of damages should be treated as a substantive rather than a procedural matter."[33] This theory becomes even clearer upon examination of the basic philosophies underlying the New York and Massachusetts statutes. The New York action for wrongful death is based upon the original English enactment, Lord Campbell's Act, which confers a cause of action upon the personal representative of the deceased for the benefit of certain specified relatives. Its purpose is compensatory, the damages being measured by the loss sustained by the surviving beneficiaries as the result of the wrongful death. For a brief period, the amount recoverable in damages was limited by statute.[34] In 1894, however, the State Constitution was amended to provide that this right of action should never be abrogated and that the amount recoverable shall not be subject to statutory limitation.[35] This strong public policy contrary to limiting the damages for wrongful death can be justified in view of the compensatory nature of the action. This same public policy, however, has little justification when applied to the Massachusetts statute. That statute, enacted prior to Lord Campbell's Act and in no way related to it,[36] is punitive rather than compensatory. Its compensatory features are limited to the fact that the cause of action is conferred for the benefit of the family of the deceased. The damages, however, are not computed according to the loss sustained, but, rather, according to "the degree of culpability" of the defendant.[37] In no event can the punishment be less than $2,000 nor more than $15,000. It is noteworthy that this longstanding measure of damages was omitted from the statute when revised in 1947[38] but was soon reinstated in 1949.[39] Thus there can be little doubt as to the intent

31. Kiefer v. Grand Truck R. Co., 12 App. Div. 28, 42 N.Y. Supp. 171 (4th Dep't 1896), aff'd, 153 N.Y. 688, 48 N.E. 1105 (1897).
32. Supra note 8.
33. Lefler, supra note 23, § 65.
34. Laws of 1849, ch. 256.
35. Supra note 18.
36. Loucks v. Standard Oil Co., supra note 8 at 104, 120 N.E. at 199.
37. Supra note 10.
38. Mass. Gen. Laws ch. 506 § 1A (1947).
39. Mass. Gen. Laws ch. 427 § 2 (1949).

of the Massachusetts legislature. The conflict between the theory of this statute and the public policy of New York which occurs on the question of damages is then considerably more fundamental than the decision of the Court indicates. The effect of impressing the *lex loci delicti* with the public policy of the forum is to substantially reconstruct the Massachusetts statute from its very foundations.

Another policy consideration is the effect, of the forum changing the applicable law, on the parties. Declining to enforce a right created by foreign law, however great the resulting inconvenience, in theory does not amount to a deprivation of the right as the plaintiff may still have recourse to the foreign court. The converse situation, expansion of a right derived from foreign law, is quite a different matter, in view of the correlative broadening of the defendant's liability. The same set of operative facts should not give rise to different degrees and bases of liability depending solely on the forum in which liability is judicially determined.

A possible alternative to the *Kilberg* dilemma would be legislation providing for a cause of action in contract, similar to the plaintiff's second count here, with the damages being unlimited. Other alternatives are federal legislation or uniform state laws governing recovery for injuries resulting in death received in an airplane crash. The basic problem, however, is not one for judicial solution.

The *Kilberg* decision upholds the state's public policy of prohibiting the imposition of limits on recovery of damages in wrongful death actions. However, by disregarding the Massachusetts Act's provision as to damages and in its place applying New York's public policy, the Court is inviting forum-shopping and defeating the objective of conflict of laws rules, uniformity of result.[40]

P. W. D.

PUBLIC POLICY DID NOT BAR APPLICATION OF FOREIGN LAW IN CONTRACT ACTION

In *Haag v. Barnes*,[41] an action for support against the putative father of an illegitimate child, the defense was an agreement between the parties for support of the child, fully performed, and in which plaintiff relinquished the right to bring any action for support. Since the agreement was not court approved as required by New York law,[42] it would not bar the suit under the internal law of New York. The agreement was made in Illinois, however, where both parties resided at the time, and it specifically provided that it should be

40. Goodrich, supra note 1, § 4.
41. 9 N.Y.2d 554, 216 N.Y.S.2d 65 (1961).
42. N.Y. Dom. Rel. Law § 121 and New York City Criminal Courts Act § 63 provide: An agreement or compromise made by the mother . . . shall be binding only when the court shall have determined that adequate provision has been made.