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Choice of Law in Products Liability

Gunther Kühne*

Various theories of products liability have developed in highly industrialized countries such as the United States, France, and Germany. With the present increase in world trade and consequent economic interdependence of nations, the number of products liability cases involving more than one country will proliferate. Problems of conflict of laws based on these various theories are bound to arise, and it is no wonder, therefore, that preparations are presently being made within the Hague Conference on Private International Law\(^1\) to draft a convention that will deal with problems of choice of law in the products liability area.\(^2\)

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1. The Hague Conference on Private International Law is a permanent international institution dating back to the end of the 19th century. Its objective is to draft unified rules on private international law matters. The present member countries are listed in note 166 infra.


It is important to emphasize the general difference between jurisdiction and choice of law problems, since each field involves its own interests. The rules of jurisdiction determine under what conditions a forum can reasonably be entitled to decide a given case. Choice of law or private international law, on the other hand, indicates the most appropriate substantive law to be applied in a given case. Notwithstanding this difference, both areas sometimes are confused or even equated with each other. See, e.g., Abbott-Smith v. Governors of the Univ. of Toronto, supra (relying on choice of law considerations to decide the jurisdictional question). In-
The consideration of these problems on an international level makes comparative analysis of choice of law in products liability especially appropriate at this time. This Article analyzes the various choice of law rules that have been used in different countries, concentrating primarily on American and German law, and suggests the choice of law approach that should be adopted if the Hague Conference drafts a convention.

I

THE SUBSTANTIVE LAW OF PRODUCTS LIABILITY

Before examining the choice of law theories propounded in this area, it is useful to examine the leading substantive theories of products liability in the United States and Germany. An understanding of the leading substantive theories of products liability is essential in analyzing choice of law problems in this area. Lack of space must limit the discussion to the United States and West Germany; nevertheless, these countries occupy important positions as major producers of industrial products and might therefore be considered representative of other industrialized nations.

A. Law of the United States

Despite their similar common law bases, the various states employ considerably different theories of products liability. There is, however, a common trend towards extending the rights of consumers and other persons against the manufacturer. This may be seen as an attempt to spread the cost of injury due to a defective product over the largest group possible.

1. The Negligence Theory

According to the negligence theory of products liability, a manufacturer is liable for harm caused by a defective product if he has failed to exercise reasonable care in its manufacture, thus creating an unreasonable risk of harm to those lawfully using it for the purpose for which it was manufactured. The manufacturer is also liable to those whom the supplier should expect to be in the vicinity of its prob-
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This rule has been adopted throughout the United States, Mississippi being the last jurisdiction explicitly to do so. While the interpretation and implementation of this rule varies slightly among jurisdictions, differences are not so substantial as to raise serious interstate choice of law problems.

2. The Breach of Warranty Theory

An injured person may also have a cause of action against a manufacturer for breach of an express or implied warranty. Thus, in Baxter v. Ford Motor Co., a manufacturer was held liable for breach of an express warranty where he had advertised specific qualities of his product that were in fact not present. Variations of this theory still exist among states concerning such questions as what constitutes an express warranty and what kind of damage is recoverable. Where there is no express warranty, the traditional privity of contract concept has long barred direct recovery by a consumer from a manufacturer, thereby causing courts to devise a variety of constructions to circumvent this requirement.

3. The Strict Liability Theory

In some jurisdictions, courts have abandoned the classical bases of liability—tort (negligence) and contract (breach of warranty)—in favor of a strict liability theory. Under this theory, the plaintiff must prove that he has suffered injury due to the normal use of a product that was defective when it left the manufacturer's hands; he need not prove specific acts of negligence on the part of the manufacturer. However, while there is agreement on this general theory, differences exist in its application. For example, courts differ as to the categories of persons who can be held strictly liable: in New Jersey and California, vendors of realty have been held strictly li-

10. W. Prosser, supra note 7, at 672-73.
able, whereas other jurisdictions have rejected the extension of strict liability to this class.14

B. Law of West Germany

Like the situation found in the United States, the German law on products liability is composed of two major ingredients: contract and tort law.

1. The Contract Theory

While they theoretically recognize actions for breach of contract when brought by parties in privity with the manufacturer, German courts have constantly dismissed direct actions by persons lacking such privity when based on breach of warranty.16 This rule even applies to cases where the manufacturer has drawn the attention of the consumer to his articles through extended publicity and advertisements.17 In several cases the courts have awarded recovery on the basis of a third-party beneficiary theory.18 In essence, this doctrine states that every contract (Schuldverhältnis) imposes primary as well as secondary duties of care between the parties; these ancillary duties must also be fulfilled with regard to third parties with whom the obligee has a special relationship and of whom the obligor has reason to be aware.19 Thus, in products liability cases, the Federal German Supreme Court (Bundesgerichtshof) has awarded damages to an employee of the obligee where the manufacturer-obligor had been able to foresee that the employee would come into contact with the defective machine.20

2. The Tort Theory

Contractual relief normally being unavailable to the plaintiff due to the privity requirement, the basis of liability invoked in most cases is in tort. According to the basic torts provision, "one who intentionally or negligently injures life, body, health, freedom, property or any right of another is bound to compensate the other for the harm resulting therefrom." The plaintiff's burden of proving negligence or intentional injury under this rule has long been mitigated by the principles of prima facie evidence (the German counterpart to the American doctrine of res ipsa loquitur). But in a landmark decision in 1968, the Bundesgerichtshof, desiring to provide increased consumer protection, finally strengthened the consumers' position through an outright shift of the burden of proof from the plaintiff to the defendant manufacturer.

3. Inapplicability of Strict Liability

Although the Bundesgerichtshof has explicitly recognized the need for strengthening consumer rights, it has refused to impose strict liability upon the manufacturer, arguing that to take this step is within the province of the legislature. The Bundesgerichtshof accordingly rejected several strict liability theories advanced by a number of German scholars following closely the American development in the last decade. Nevertheless, despite its still greater leniency towards the manufacturer as compared with present American standards, German law is slowly moving in the direction of strict liability, as seen by the allocation of burden of proof to the manufacturer in negligence cases.

II

CHOICE OF LAW IN PRODUCTS LIABILITY: TRADITIONAL APPROACHES

A. The United States

The traditional choice of law system epitomized by the first Restatement of Conflict of Laws, subdivided the entire substantive legal system into categories labelled "torts," "contracts," and so forth. For determining the applicable law, connecting factors such as "place

21. BGB § 823 (Kohlhammer 1970).
23. See, e.g., U. Diederichsen, Die Haftung des Warenherstellers (1967). See the discussion of these theories in Mankiewicz, supra note 22, at 108 passim.
of the wrong" and "place of making of a contract" were attached to the respective categories. In a given choice of law case, the judge was directed to the governing law of a jurisdiction by way of these hard and fast rules. Thus, cases involving products liability were not separately categorized; rather, the choice of law solution turned upon the doctrinal basis (tort or contract) on which the particular action was predicated. This process of "characterization," albeit mechanistic and blind to policy considerations, is crucial in the traditional choice of law approach. Yet American courts have seldom gone beyond a mere statement of the rule, and in the majority of multistate and international products liability cases, the choice of law question involved has not even been mentioned.

1. Tort

Where the particular action was based on negligence, courts usually have followed the rule of the lex loci delicti commissi (place of the wrong). In most multistate and international products liability cases, however, the different elements of negligence (breach of duty, harmful impact) are distributed over at least two jurisdictions so that the place-of-the-wrong rule alone is not determinative. The courts, therefore, have fashioned a separate rule, applying the law of the jurisdiction in which the last event—the injury—occurred. The leading case in this line of decisions is Hunter v. Derby Foods, where canned beef processed in South America was sold to a distributor in New York and resold to a wholesaler in Ohio, where the consumer died from poisoning. The court applied Ohio law because the last event required to produce liability occurred there. The last-event rule has been followed in a number of cases, including recent decisions.

25. See text accompanying notes 3-14 supra.
27. See Ehrenzweig, supra note 2, at 797.
28. See the analysis in Ehrenzweig, supra note 2.
29. E.g., Hunter v. Derby Foods, 110 F.2d 970 (2d Cir. 1940). For an extensive collection of cases, see Annot., 76 A.L.R.2d 130 (1961).
30. 110 F.2d 970 (2d Cir. 1940).
2. Contract

When the liability arising is characterized as one of contract (breach of warranty), most courts have applied the law of the place of the last sale prior to the occurrence of the injury. There are, on the other hand, a few decisions applying the law of the place of injury to actions based on a contract theory. In Conlon v. Republic Aviation Corp., an airplane passenger sued the manufacturer for breach of an implied warranty when he was injured in an airplane crash. The court, relying on prior decisions involving negligence characterizations, held that "since the accident happened in Michigan, the New York conflict of laws rule requires that the substantive law of the State of Michigan be applied."34

3. Strict Liability in Tort

Lack of uniformity in the choice of law approaches taken in those cases relying on strict liability theories precludes the restatement of a traditional rule in this area. This is not surprising, since the advent of strict liability in tort in cases like Greenman v. Yuba Power Products, Inc. and Goldberg v. Kollsman Instrument Corp. coincided with the sharp decline of traditional choice of law doctrine.37

Occasionally the decision in George v. Douglas Aircraft Co. is cited as authority for the proposition that strict liability in tort entails


Although courts agree on applying this rule to the issue whether a warranty existed in the first place, several courts have held that whether there was a breach of that warranty, and what legal consequences result, are issues governed by the law of the place of the seller's performance. E.g., Texas Motorcoaches v. A.C.F. Motors Co., 154 F.2d 91 (3d Cir. 1945). This splitting of contractual issues is in accord with traditional choice of law rules for contracts. Compare Restatement of Conflict of Laws § 332(f) with §§ 358, 413 (1934).

37. See text accompanying notes 62-66 infra.
38. 332 F.2d 73 (2d Cir. 1964), cert. denied, 379 U.S. 904 (1964).
the application of the lex loci delicti. Close analysis of Judge Friendly's opinion, however, suggests that this is unwarranted. The case involved an airplane crash in Florida, the plane having been manufactured and sold in California by defendants. Members of the crew sued defendant in New York for injuries sustained in the crash. The applicable New York statute forbade the bringing of an action by a nonresident to enforce a cause of action "arising" outside New York "after the expiration of the time limited by the laws of a state or country where the cause of action arose, for bringing an action upon such cause of action . . . ." California had established a one-year statute of limitation for personal injury actions, whereas Florida had a four-year period for tort and a five-year period for contract actions. Judge Friendly, in interpreting the terms "where the cause of action arose" in the New York statute, referred to Florida as the place of injury and the jurisdiction to which New York, under *Poplar v. Bourjois*, would normally look in its choice of law. Yet this was a dictum since California law was in fact applied.

B. West Germany

1. The Basic Approach

The basic technique of German choice of law or private international law is similar to the traditional American approach of selecting jurisdictions through various connecting factors attached to particular categories of the substantive legal system. However, unlike the American concept, the German conflicts method was never linked to the vested rights ideology, but instead followed the basic conception propounded by Savigny that the objective of every conflicts solution consists in finding the jurisdiction where the particular legal relationship (Rechtsverhältnis) has its seat. The choice of law provisions contained in articles 7 through 31 of the Introductory Law (Einführungsgesetz) to the Civil Code (Bürgerliches Gesetzbuch) are intended merely as suggested factors in deciding where the legal relationship is seated. This fundamental concept prevented German courts from indulging in the rigid syllogisms characteristic of the traditional American method. The prevailing West German attitude towards choice of law thinking is well illustrated by the positions adopted by one of

41. 298 N.Y. 62, 80 N.E.2d 334 (1948).
42. 332 F.2d at 76.
44. 8 F. Savigny, System des heutigen römischen Rechts 28, 108 (1849).
45. Art. 7-31 EGBGB (Kohlhammer 1970).
Germany's most prominent conflicts scholars, Gerhard Kegel. Professor Kegel, while adhering to traditional rules and vigorously rejecting modern American theories, advocates flexible, interest-oriented solutions. While West German courts have yet to report an opinion involving choice of law problems in products liability, several scholarly pieces have been written on the subject. The following discussion must therefore be limited to decisions pertaining to the substantive law ingredients of products liability and the application to these decisions of scholarly choice of law theories.

2. Characterization and the Choice of Law

Questions of choice of law in tort and contract cases are linked to different jurisdictional connecting factors, necessitating a characterization process similar to that employed in the United States. It is appropriate, therefore, to review briefly the different choice of law rules applicable in contracts, torts, and strict liability.

a. Choice of law in contracts. West German courts unanimously recognize the principle of party autonomy, that is, the rule by which the applicable law can be determined by the contracting parties themselves. But, in most cases involving products liability, party autonomy will not provide a solution because there is no stipulation of an applicable law. In such cases the prevailing German opinion looks to the presumed intention of the contracting parties (hypothetischer Parteiwille). This theory, although couched in subjective terms, in practice amounts to a process of ascertaining the objective "center of gravity" (Schwerpunkt) of the individual contractual relationship.

b. Choice of law in torts. Since most West German products liability cases are characterized as tort, the German choice of law principles in torts deserve particular attention. While the rule of the lex loci delicti

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47. See, e.g., his views on the problem of characterization in G. Kegel, INTERNATIONALES PRIVATRECHT 121-25 (3d ed. 1971).
49. See text accompanying notes 24-28 supra. Several writers have suggested an abandonment of characterization in products liability cases in favor of applying the law of the place of sale, regardless of whether the action is based on tort, contract, or strict liability. E.g., W. Bröcker, supra note 48, at 153-66.
51. G. KEGEL, supra note 47, at 257-60.
53. See text accompanying note 29 supra.
is not directly expressed in statute, West German courts and doctrine agree that it is the basic choice of law principle applicable in this area.64 In determining the place of wrong in products liability cases where the negligent act and the resulting injury are located in different jurisdictions, the courts,55 supported by most writers,56 have applied the law that is most favorable to the plaintiff (Günstigkeitsprinzip). These opinions, in effect, admit that the traditional jurisdiction-selecting method does not work in such cases. They do not, however, explain why it is the law most favorable to the plaintiff, rather than that most favorable to the defendant, that has to be applied. While Professor Kegel has also suggested that the injured plaintiff deserves more sympathy than the defendant tortfeasor,57 others, like Professor Steindorff,58 have objected to the arbitrary favor accorded the plaintiff. This argument is slightly mitigated, however, by the rule denying any right of election to the plaintiff and requiring the judge to ascertain the "most favorable law."59

c. Choice of law in strict liability. Strict liability, characterized as a special class of tort law, requires the application of normal torts choice of law principles.60 Discussion of the wisdom of this characterization is highly speculative, since as noted previously,61 West German courts have not extended the principle of strict liability to defendants in products liability cases.

III

THE SEARCH FOR A PROPER CHOICE OF LAW APPROACH IN PRODUCTS LIABILITY

The traditional approach to choice of law, mentioned above as it was applied in both the United States and West Germany, was eventually recognized, at least in the United States, as a highly arbitrary and sometimes unfair method of resolving cases involving conflicts of laws. Rigid connecting factors such as "place of injury" and "place

57. G. Kegel, supra note 47, at 268. See also S. Simitis, supra note 48, at 89-92 (1965), endorsing the law-most-favorable-to-the-plaintiff rule in products liability cases but arguing that this normally will be limited to a selection between the law of the place of manufacture and that of the place of injury.
59. See G. Kegel, supra note 47, at 268.
60. Id. at 267, 270.
61. See text accompanying note 23 supra,
of making of a contract" too often had little connection with the equi-
ties of a given case, and the preliminary exercise of characterization
was itself highly fictional and susceptible to manipulation by courts.
Thus, while there have been recent cases in the United States holding
that choice of law questions hinge upon the theory of recovery in-
voked, the tendency has been to mitigate the importance of charac-
terization in deciding choice of law issues. Instead, they have turned
to more modern "center of gravity" and "governmental interest" approaches that cut across the once neatly fixed boundaries of tort, contract, and strict liability.

This abandonment of characterization is especially apropos in the
area of products liability. The law of contracts and torts has
distinctive underlying social purposes: while contract law sets the
standards and sanctions to be applied in a relationship purposefully
entered by two parties, the law of torts deals with the standards of
conduct owed by a person to individuals at large, where the plaintiff-
defendant relationship is fortuitous. The underlying policies differ
accordingly. Yet in the realm of products liability, contract and tort
concepts, in order to meet the new consumer protectionist philosophy,
have been strained to the point of merging indistinguishably into strict
liability. In the process, the courts have little basis to characterize
products liability as in tort or contract or to utilize connecting factors
originally conceived to satisfy distinct underlying policies.

The following section examines the theories developed by Ameri-
can and continental scholars and evaluates their ability to provide a
satisfactory solution to the choice of law problem involved in inter-
state and international products liability cases. In the course of this

62. E.g., Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270 (10th Cir. 1967);
63. E.g., Hardman v. Helene Curtis Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d
681 (1964) (whether considered as a tort or contract action, Illinois law applied as the
state in which the transaction had its "center of gravity"). Cf. Public Adm'r v.
64. See text accompanying notes 72-87 infra.
65. See text accompanying notes 88-105 infra.
66. It is interesting to note that Professor Weintraub, in 1966, predicted that in
choice of law relating to products liability the theory on which a particular action
is predicated would gradually lose its importance as the determining factor for the
applicable law. Weintraub, supra note 26, at 1438.
67. One might dispute the necessity of looking for a special choice of law solu-
tion in products liability, arguing that it necessarily shares the same principles app-
licable in those fields of law of which products liability is a part, namely, torts and
contract. This, however, would amount to begging the question, since characterization
would inevitably reenter the scene. Even if, as seems appropriate, products liability
must be characterized as belonging to torts rather than to contracts, the principles of
tort choice of law are themselves uncertain and controversial. Therefore, it is prefer-
able to embark on a separate analysis of products liability.
analysis, the interdependence of products liability and the more general categories of tort law becomes apparent.

A. The Jurisdiction-Selecting Method

The traditional approach to this problem involves the use of single connecting factors that are especially appropriate to products liability cases. Four such factors deserve attention: the place of manufacture, the place of sale, the place of injury, and the personal status (in most cases, the residence) of the plaintiff. The selection of any one of these would thereby lead to predictability in products liability choice of law.

The place of manufacture may be an appropriate connecting factor both from the manufacturer's and the consumer's point of view. As the locality where the manufacturer performs the activity that gives rise to the potential hazards involved in the later use of the products, the place of manufacture normally sets the manufacturer's standard of conduct. Furthermore, the substantive law of the place of manufacture provides a safe basis for the manufacturer to draw his insurance. At the same time, the consumer, when venturing into the market, often relies on the origin of a product for its quality.

On the other hand, there are equally strong reasons for picking the place of sale as the dispositive factor in products liability choice of law. The place of sale is the locality where the duty to respect the public safety arises with regard to the individuals coming into contact with the manufacturer's goods. The manufacturer, in the interest of a balance between profit and risk of damages, can justly be held responsible by the laws of all those states or countries of which he avails himself for marketing his goods. One may also argue that the consumer, rather than looking to the place of origin, will often rely on the safety of products according to local standards at the place of sale.

The third factor—the place of injury—provides a relatively high degree of legal certainty. Moreover, it might seem justified to protect a legal interest (health, property) only to the extent granted by the law of the jurisdiction in which the interest is situated at the time of its invasion. Nevertheless, in modern American choice of law the place of the injury is widely discredited as a connecting factor. One must bear in mind, however, that the fact situations that gave rise to the decline of the lex loci delicti involved personal relationships...
between the parties, a circumstance generally absent in multistate and international products liability cases.

The application of the plaintiff's personal law (law of residence) can be supported on the basis of equally strong policy considerations. Since products liability is a field of law in which the plaintiff's interests play a prominent part, this policy might be advanced by the selection of such a plaintiff-oriented connecting factor.

As the above discussion shows, each of the arguments advanced in favor of the different connecting factors can be offset by arguments against them. One conclusion is certain, however: the selection of only one of the aforementioned connecting factors as the basis of a firm choice of law rule covering all multistate and international products liability cases would yield too many arbitrary results to justify mere legal certainty. It is appropriate, therefore, to examine those choice of law theories that purport to achieve justice on a case-by-case basis.

B. The Center-of-Gravity Approach

In the 1950's and 1960's, American courts, disenchanted by the rigidity of the First Restatement's ironclad conflicts rules, began to grope for more individual justice when dealing with choice of law problems. To this end, New York's Court of Appeals in Auten v. Auten\(^7\) and Babcock v. Jackson\(^8\) inaugurated a "center of gravity" or "grouping of contacts" approach for both contract and tort cases.

Auten involved a marital separation between English parties. A support agreement was made in New York, calling for the husband to make payments to a New York trustee for transmission to the wife in England. The wife performed acts in England that, by New York law, might have constituted a breach of the contract, but which would have no such effect in English law. The court held, after "examination of the respective contacts with New York and England,"\(^7\) that the most significant contacts were in England, and the center-of-gravity approach dictated the application of that country's laws.

The same court took a similar approach in Babcock, which involved an accident in Ontario in which both the driver and guest were New York residents. The court did not apply the Ontario guest statute on the ground that the host-guest relationship between the parties had its seat in New York.\(^7\)

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74. 308 N.Y. at 161, 124 N.E.2d at 102.
75. The court's decision is supplemented with a governmental-interest analysis holding that New York, with its common law full recovery rule, had virtually the only interest in seeing its law applied. The center-of-gravity approach can be distinguished
It is New York, the place where the parties resided, where their guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and the superior claim for application of its law.\textsuperscript{76}

In applying the center-of-gravity approach in products liability cases, most courts have, in the absence of any special relationship between the parties,\textsuperscript{77} simply counted the number of contacts per jurisdiction and applied the law of the jurisdiction having the greatest total. For example, in \textit{Bowles v. Zimmer Manufacturing Co.},\textsuperscript{78} a suit alleging breach of an implied warranty, the defendant-manufacturer, an Indiana resident, supplied an intramedullary pin to a Michigan distributor; the distributor, in turn, forwarded it to a Michigan hospital, where the pin was inserted into the plaintiff's broken femur. The court applied the Michigan requirement of privity in plaintiff's suit for personal injuries suffered as a result of the defective pin. After stating the rule that the law of the state with which the transaction is most closely associated is to apply, the court held:

Following these tests, we are convinced that the transaction, originating with the sending of the order by G.A. Ingram Co. from Michigan to defendant, in Indiana, and terminating in the insertion of the pin in plaintiff's leg in Michigan, was 'most closely associated' with the state of Michigan. Hence we apply the law of Michigan pertaining to implied warranties in the sale of chattels.\textsuperscript{79}

\begin{footnotes}
\item[76] 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 751.
\item[77] See note 75 supra.
\item[78] 277 F.2d 868 (7th Cir. 1960).
\item[79] Id. at 874. In \textit{Hardman v. Helene Curtis Indus., Inc.}, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964), this decision was relied on to discard the application of the law of the place where the product was manufactured.
\end{footnotes}
The contacts are not weighed as to their relative importance.

Later opinions are hardly less laconic or devoid of arguments. In *Public Administrator v. Curtiss-Wright Corp.*, plaintiff sued for personal injuries and wrongful death arising out of a crash of an airplane equipped with engines manufactured by defendant. After stating that New York applies the grouping-of-contacts or center-of-gravity approach to both tort and contract choice of law problems, the district court implemented the theory as follows:

It appears that the engine was manufactured in New Jersey and sold to Douglas in California. The crash occurred in Florida, which was also the place of origin of the flight. The only contact, albeit a tenuous one, between the parties took place in Florida where the injuries were sustained. We hold, therefore, that the cause of action is governed by Florida law.

Yet the court fails to show why the single Florida contact should prevail over other contacts. Such an enigmatic approach hardly leads to a guarantee of uniformity and justice.

There is an additional reason why the center-of-gravity approach cannot work properly in multistate and international products liability cases. This approach presupposes that every case does in fact have a center of gravity or seat in one of the jurisdictions concerned. There are, however, fact situations where the different elements are so evenly distributed over more than one jurisdiction that there is nothing that can reasonably be called "center of gravity" at all. In the language of private international law, these fact situations are "absolutely international"; they have no seat in a single jurisdiction, or, to use a famous metaphor, they are "seated on two—or more—chairs." Clearly falling

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82. 224 F. Supp. at 239.
83. Equally unrevealing as to its line of reasoning, yet interesting in result, is the later case of *Southland Milling Co. v. Vege Fat, Inc.*, 248 F. Supp. 482 (E.D. III. 1965). In this case a Georgia plaintiff sued an Illinois manufacturer for damages caused by a shipment of toxic vegetable fat. The court felt unable to solve the choice of law problem for insufficiency of facts, although it was clear that the damage occurred in Georgia. As a tentative choice of law solution, however, it simply stated that "the factual allegations at the present state of this action indicate that the transaction is most closely associated with the state of Illinois as concerns the liability of defendant." *Id.* at 485.
84. This notion dates back to the Dutch scholar Jitta, who, for purposes of choice of law, distinguished three types of fact situations: the "national," the "relatively international," and the "absolutely international." "Absolutely international" fact situations are those that have almost equally strong connections to at least two jurisdictions. J. Jitta, *La méthode du droit international privé* 200 (1890); cf. E. Steindorff, *supra* note 58, at 23.
85. E. Steindorff, *supra* note 58, at 47.
within this category are those multistate and international tort cases where the various elements of the tort (harmful conduct and resultant injury) are themselves distributed over more than one jurisdiction—the so-called "long distance torts." Products liability cases, predominantly tortious in nature, present many situations in which the place of manufacture (harmful conduct) and the place of sale (and resultant injury) are in different jurisdictions. Both elements being indispensable and interrelated requirements of liability, the determination of a center of gravity in most cases would imply an arbitrary and often tortured process of "nationalization."

C. The Governmental-Interest Approach

In the late 1950's, Professor Brainerd Currie presented the then-revolutionary idea that every choice of law solution to a given case had to start from the ascertainment of the interests that the various states or countries might have in applying their own substantive laws. "Governmental-interest analysis," as the theory was later termed, found quick yet lasting support in the courts.

Apart from the fundamental problem whether governmental interests ought to play any part at all in choice of law, this theory is particularly exposed to serious objections as to its practical application. It is beyond the capacity of most courts to determine state policies, even if there are any, with regard to the spatial applicability of foreign law. This is particularly true in international conflicts situations, where mere ascertainment of the foreign law itself is often a time-consuming and only partially successful undertaking. Additional consideration must then be given to the nature and purpose of the substantive law involved. Most choice of law problems in recent years have arisen.

86. The German term is "Distanzdelikt." Id. at 154. Steindorff, adhering in principle to the distinction drawn by Jitta, has dealt at length with this kind of tort as a paradigm for an "absolutely international" fact situation and has stressed the need for applying substantive policy-oriented criteria. Id. at 116-91.

87. In the terminology of Steindorff, "nationalization" means that an "absolutely international" fact situation is squeezed entirely into the legal system of a single state or country. E. Steindorff, supra note 58, at 43 passim. This process is fairly analogous to what modern American choice of law thinking refers to as the "jurisdiction-selecting" method. See text accompanying notes 68-71 supra.


90. See the principal discussion by Kegel, supra note 46, at 97-207.

91. See the criticism expressed in Kahn-Freund, Delictual Liability and the Conflict of Laws, 124 RECUEIL DES COURS 1, 60-61 (1968).
in connection with certain statutes or with rigid common law rules such as interspousal immunity, where courts have had great difficulties choosing which of several possible purposes lay behind a particular rule.22 Lacking an indication as to what purpose should be paramount, the choice, where not arbitrary, is simply a reflection of the policy ideas of the forum. Neither alternative reflects favorably on the governmental-interest approach.

Given the character of products liability as a predominantly judge-made law, the above uncertainties are bound to multiply.23 This judge-made character of the law results in differing products liability rules from jurisdiction to jurisdiction, each governing narrow groups of fact patterns and each resulting not so much from a different evaluation of policies as from a difference in the caseload that the courts of the respective jurisdictions have to handle. This situation is well evidenced by the difficulties with which the federal courts are confronted when, according to the Erie-Klaxon doctrine,24 they try to effectuate the policies of their forum states.25 It does not make much sense to further transplant these difficulties to interstate conflicts or even international conflicts.

The methodological difference between handling case law and statutory law being slight, it is not surprising that similar problems may arise in dealing with conflicts relating to statutory substantive law. For example, A, a resident of state X, drives with his car to adjacent state Y. On his way he picks up B, a resident of state Y, who pays for one tank of gasoline. In an accident negligently caused by A in state Y, B is injured. Both X and Y have literally identical guest statutes. The courts in X have repeatedly decided that passengers contributing to the transportation expenses are not “guests” within the meaning of the X guest statute. The courts in Y, on the other hand, have decided that mere contribution to expenses does not prevent a passenger from being a “guest” within the Y guest statute. In

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22. See, e.g., Dym v. Gordon, 16 N.Y.2d 120, 124, 209 N.E.2d 792, 794, 262 N.Y.S.2d 463, 466 (1965), where Judge Burke discerned not less than four different purposes underlying the Colorado guest-statute.

23. This is true even in countries which, like West Germany, are governed by civil law: the draftsmen of such aged codes as the German BGB never thought of the complexities with which modern judges have to cope.

24. Under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the federal courts, in a diversity case, are obliged to apply the substantive law of the state in which they sit. In Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the Erie rationale was extended to the conflict of laws area.

such a case, given the existence of literally identical guest statutes in both \( X \) and \( Y \), any attempt to ascertain the "governmental interests" of \( X \) and \( Y \) cannot rely on the normally available difference in general, broad legislative policies (in this case, protection of host-drivers and their insurance companies). Instead, the investigation must be narrowed to the specific fact pattern of passengers sharing expenses, certainly a most unenviable task for even the smartest judge. Although that kind of case may be the exception in the area of guest statutes, it will be far more typical in products liability.

Several writers\(^{96} \) have tried to apply the governmental-interest approach in the field of multistate products liability. Although they aptly articulate many of the policy considerations that may underlie a state's products liability law, they do not produce a workable guideline for any given instance. In both analyses the governmental-interest approach is implemented in a kind of hypothetical way: they are predicated upon interests an abstract jurisdiction might have as to the application of its substantive products liability law. Thus, both analyses in fact corroborate the principal objection to be raised against the governmental-interest approach: How is the court to decide what constitutes a state's policy and interest?

A close examination of three cases involving products liability and wrongful death problems and implementing the governmental-interest analysis provides no argument for overcoming this objection. In \( \text{McC} \text{Crossin v. Hicks Chevrolet, Inc.}^{97} \), the plaintiff, a resident of Maryland, sued a car dealer in the District of Columbia and General Motors to recover the purchase price of his automobile damaged by fire as a result of an explosion that occurred in Maryland. The District of Columbia Circuit held that the law of the District of Columbia was applicable, arguing that this jurisdiction rather than Maryland had the "more substantial interest in the resolution of this issue."\(^{98} \) According to the court, the occurrence of the fire in Maryland was strictly fortuitous, and it pointed out that the particular case was not a true conflict of laws case:

The rule in the District, dispensing with the requirement of privity in implied warranty cases, is for the benefit and protection of all who buy in the District, not for residents of the District alone; and affording that protection to a Maryland resident who buys here would surely not violate any Maryland policy.\(^{99} \)

\( \text{Reich v. Purcell,}^{100} \) the leading California case, may also not have been a true conflicts case. It involved an accident in Missouri

\(^{96.} \) Weintraub, supra note 26; Note, supra note 31.
\(^{98.} \) Id. at 921.
\(^{99.} \) Id.
\(^{100.} \) 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
between the defendant, a California resident, and the plaintiff's decedent who, although an Ohio resident at the time, was moving to establish residence in California. The defendant alleged application of Missouri law as the place of injury in order to take advantage of a statutory limitation on damages. Neither California nor Ohio limited the amount of recovery. In his majority opinion, Chief Justice Traynor characterized the plaintiff as an Ohio resident, obviating any interest of California in plaintiff's full recovery, and held that "[u]nder these circumstances giving effect to Ohio's interests in affording full recovery to injured parties does not conflict with any substantial interest of Missouri."101

In Ryan v. Clark Equipment Co.,102 a wife sued a Michigan manufacturer in California for wrongful death of her husband as a result of improper construction of a vehicle the husband was operating when he was killed. Both husband and wife were Oregon residents and the accident occurred in Oregon. The wife, who had obtained a $35,000 settlement from a third party, sued for remaining damages. At that time Oregon had a wrongful death statute limiting recovery to $20,000, whereas Michigan had no limit on potential recovery in a wrongful death action. The court dismissed plaintiff's appeal, holding Oregon law applicable. The court relied on Reich v. Purcell103 for its general choice of law proposition:

Oregon is the only state which has any real interest in how the decedent's survivors are to be compensated. Accordingly, we conclude that under the test of Reich the interest of the involved states and the litigants compel the application of Oregon law to this case. Oregon's interest in the compensation of her residents for wrongful death overrides any possible concern of Michigan in the regulation of the activities of manufacturers. Neither California nor Michigan has any interest in extending to Oregon residents any greater rights than are afforded by the state of residence.104

If the governmental-interest approach is to be taken seriously, the McCrossin and Ryan cases raise the question how the courts found the extraterritorial effect of the District of Columbia law on one side (McCrossin) but no Michigan interest in extraterritoriality of its recovery provisions on the other (Ryan). With respect to wrongful death statutes, most courts,105 including the California supreme court in Reich v. Purcell, have usually avoided their application in view of another state's interest to see their residents, the survivors, adequately

101. Id. at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35.
103. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
104. 268 Cal. App. 2d at 683, 74 Cal. Rptr. at 331-32.
protected against indigence. How does this apply in the Ryan case where unlimited recovery would not have thwarted Oregon's interest in protecting its residents? If, on the other hand, Oregon's interest should be that of equal treatment of all its residents in matters of recovery for wrongful death arising out of accidents within its boundaries, can it be assumed that Maryland, in a McCrossin-type case, does not have a similar interest of equal treatment in matters of recovery for losses sustained by its citizens and residents within its boundaries? These considerations cast doubt on the workability of the governmental-interest approach in products liability cases.

D. The Most-Significant-Relationship Approach

The notion of the "most significant relationship" is the key to the choice of law philosophy underlying the Proposed Official Draft of the Restatement (Second) of Conflict of Laws, published in 1968.100 The draft does not specifically deal with products liability either in its general provisions on contracts and torts or in any of the sections that apply the general provisions to particular contracts or torts. Nevertheless, given the preponderance of tortious characteristics in products liability, it seems appropriate to focus attention on section 145, the basic torts provision. Section 145 states:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(2) 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 domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.107

107. Id. Besides enumerating the important connecting factors in torts choice of law, section 145 makes reference to the general choice of law principles enunciated in section 6, which, quite in accordance with the Second Restatement's objective, tries to amalgamate all the relevant choice of law approaches presently followed by American courts. This method, of course, has both virtues and deficiencies. On the one hand, it leaves room for flexibility in this area of law. Perhaps future development will teach that the different choice of law approaches espoused by courts and scholars are not so mutually exclusive as their proponents understand them to be. After all, different methods may be indicated for different kinds of fact patterns. On the other hand, the Second Restatement neither specifies which fact patterns should be tied to a given
 Aside from the center of the relationship between the parties (generally absent in products liability), it is not difficult to recognize the affinity between these factors and those considered under the jurisdiction-selecting method. Besides the clear-cut "place of injury," the places of manufacture and sale are simply applications of the "place of harmful conduct"; the plaintiff's residence is the paradigm for the personal-law approach underlying section 145(2)(c). As to the defendant, the places of incorporation and business can be set aside in products liability because these factors are not related to the rationale underlying the imposition of standards of conduct and liability on the defendant. Those standards are not imposed on manufacturers for merely being incorporated or doing business, but are exclusively related to certain activities—production and distribution of goods—and their harmful consequences.

Before embarking on the search for the most significant relationship in products liability, it might be advisable to see whether there can be ascertained a "least significant relationship" that, without impairment of individual justice, can be eliminated in order to advance the uniformity and predictability of results to be obtained while furthering the ease of the administration of justice. These two policies underlie the principal choice of law guidelines set forth in section 6 of the Second Restatement.

The factors most likely to be dispensable in weighing significant relationships in the area of products liability are those referring to the parties' personal status. Aside from cases involving personal relationships, the Second Restatement attaches importance to personal status in torts only when the interests invaded are person-oriented, such as reputation, right of privacy, and marital affection. In all other cases the impact of personal law in torts should depend on how the contacts are grouped in the individual instance. Assuming that the Second Restatement discards any form of contract counting, it is difficult to understand the relevance of personal-law-oriented factors in areas, such as products liability, that do not involve these personal interests.

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108. See note 75 supra.
109. See text accompanying notes 68-71 supra.
111. Id. § 145, comment e at 420-21. See the last sentence of section 145(2): "These contacts are to be evaluated according to their relative importance with respect to the particular issue."
112. Id. § 145, comment e at 420-21.
113. See the analysis in Note, supra note 31, at 1466, where the author rejects a personal law approach.
An argument for considering the plaintiff's personal law in weighing the most significant relationship could, however, be made on the basis of the increasingly recognized policy in products liability of protecting the consumer. This plaintiff-oriented character of substantive products liability law might arguably be enhanced by the selection of a plaintiff-oriented connecting factor. Such reasoning would be incorrect, however. The law of his residence or nationality may be as favorable or unfavorable to the plaintiff as the law designated by any of the other connecting factors involved. Substantive policies cannot be effectuated through the abstract choice of a content-blind connecting factor.

Personal law and center-of-the-relationship being inappropriate contacts in products liability cases, the conflicts question is narrowed down to a choice between the place of injury (section 145(2)(a)) and the place of the harmful conduct (section 145(2)(b))—or, in more concrete terms, between the places of injury, manufacture, and sale. The Second Restatement does not clearly indicate how the guidelines set forth in section 6 should operate in a conflict between the laws of the place of injury and those of the place of harmful conduct, not to mention the triangular conflict (place of injury, manufacture, and sale) that is bound to arise frequently in products liability. From the comments it appears that these are to be resolved by a governmental-interest approach: if the policy underlying the substantive law in question is primarily oriented towards compensation, the place of injury ought to be the most important factor; if, on the other hand, the prime objective of the substantive law is to impose sanctions for socially undesirable conduct, the law of the place of conduct ought to be applied. This solution is obviously exposed to all the general deficiencies inherent in the governmental-interest analysis. Moreover, the discouragement of antisocial conduct and the compensation of victims are complementary rather than contradictory policies, and it will nearly always be impossible to figure out a clearly predominant motive. This is especially true in an area like products liability where, given its case-by-case development, no coherent authoritative enunciation of policies is normally available. Besides this, the distinction between admonitory and compensatory tort law is inconclusive when the difference of substantive laws is not an expression of diverging policies but rather only the result of a difference in emphasis on the same pol-

114. Restatement (Second) of Conflict of Laws § 145, comments c and e.
115. Common illustrations for the latter principle are found in cases like Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957), and Zucker v. Vogt, 329 F.2d 426 (2d Cir. 1964), involving car accidents caused by violations of other states' "dram shop acts."
116. See text accompanying notes 88-105 supra.
icy. Thus, in products liability, all jurisdictions concerned may have judge-made strict liability of manufacturers for reasons of consumer protection (compensatory policy), but only the law of one of the jurisdictions may cover the exact commodity in question.

In sum, the Second Restatement does not provide a satisfactory solution to multistate and international products liability problems.

E. Cavers' Principles-of-Preference Approach

Professor Cavers has laid down five "principles of preference" for the solution of choice of law problems in torts. These are basically designed to cope with three classes of conflicts: a conflict between the laws of the state where the harmful conduct was performed and the laws of the state where the injury occurred (principles 1 and 3); a conflict between the laws of the state where the harmful conduct and injury occurred and the laws of the home state of the plaintiff (principle 2); and a conflict between the laws of the state where a relationship between the parties is seated and the laws of the state in which the injury occurred (principles 4 and 5).

Since in multistate and international products liability, no personal relationship exists between the parties, principles 4 and 5 are immaterial. As to the importance of domicile, residence, and nationality of the plaintiff (home state of the plaintiff), principle 2 says that where the liability laws of the state in which the defendant acted and caused injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case. Put in simpler terms, this means that the law of the plaintiff's home state can never prevail over the laws of the state in which the defendant acted and caused the injury. In downgrading the personal-law approach in torts choice of law, Professor Cavers aptly points out that, by entering a state that is not his home state, a defendant must assume the burdens and risks connected with his presence in this state. Merely that an injured person is an out-of-state resident, domiciliary, or national is, from the defendant's viewpoint, too extraneous a factor to make him accountable in terms of choosing the applicable law.

118. Id. at 139.
119. Id. at 159.
120. Id. at 146.
121. Id. at 166.
122. Id. at 177.
123. See note 75 supra.
124. D. Cavers, supra note 117, at 147.
As to the remaining conflict between the laws of the state of defendant's conduct and the laws of the state of injury, principles 1 and 3 are pertinent. According to principle 1, the laws of the state of injury should apply if those laws set a higher standard of care or of financial protection against injury than do the laws of the state where the defendant has acted. Principle 3 deals with the reverse situation:

Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind in which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to the defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions.1

Thus, when applied to products liability cases, Cavers' principles of preference appear to be pervaded with a rationale that may be stated as follows: The law most favorable to the plaintiff must be applied if the facts show, as in virtually all products liability cases, that no personal relationship exists between the parties (principles 4 and 5) and the defendant's conduct (in terms of manufacture or sale) occurs in the same state as the plaintiff's residence.2

Other writers have discerned a similar underlying rationale.3 By adopting such an approach, Cavers goes beyond both a leap-before-you-look type of jurisdiction-selecting rule and a substantive-law-oriented analysis that, like the gov-

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125. Id. at 159-60. Clearly falling within the ambit of principle 3, argues Cavers, is the case of Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957) (automobile accident in Wisconsin as a result of violation of Minnesota's dramshop act; Minnesota law held applicable). Id. at 160.

Professor Cavers finds it more difficult to subsume under principle 3 those cases in which the laws of the state of harmful conduct are not so much concerned with imposing standards of conduct (for example, dramshop acts) as with compensation for harmful consequences of certain kinds of activity (for example, blasting). Id. at 161-62. He explicitly mentions manufacturer's liability as being within the second category. Yet, in the end, he favors a similar treatment of both categories within principle 3, holding it invalid to attribute to the lawmaker a purpose to benefit only those persons who happen to be injured by the regulated activity within the state or in states having similar laws. Id. at 164.

126. This removes a case from the defendant-protecting principle 2. In the reverse situation of principle 2 (the state of harmful conduct and injury sets a higher standard of care and financial protection than the plaintiff's home state), Cavers argues in favor of the lex loci delicti as well. Cavers, Contemporary Conflicts Law in American Perspective, 131 RECUVEL DES COURS 75, 194-95 (1970). This demonstrates that, in fact, the solution of the conflict between the lex loci delicti and the plaintiff's residence does not hinge on substantive evaluation; there is no possible instance in which the residence can prevail over the lex loci delicti. Thus, the plaintiff's residence is an irrelevant factor.

ernmental-interest method, only looks to the interests of single jurisdictions. His approach, however, does presuppose the existence of an overriding substantive policy supporting the general balance of interests in favor of the plaintiff rather than of the defendant.

The significant factors in products liability choice of law are the places of manufacture, sale, and injury. Cavers' principles, according to their wording, rest upon the assumption that there is only a conflict between the laws of one place of conduct and one place of injury. Yet the places of manufacture and sale in products liability suggest that there may be more than one place of conduct involved. Cavers' explanations contain no indication that in such a case he would not extend his principles 1 and 3 by applying the law most favorable to the plaintiff. The basic weakness of Cavers' ideas, however, is that the principles of preference are built on the rather shaky distinction between "true" and "false" conflicts. These terms can mean everything and nothing, and pervade the principles of preference with the same uncertainty this is inherent in the governmental-interest approach. The only way to give a workable interpretation to the true-false conflicts test within Cavers' system would be to say that this test serves to eliminate all contacts that are not included in the principles of preference themselves. Thus, the distinction between false and true conflicts within Cavers' system would be a parallel to the distinction between "insignificant" (those not listed in section 145) and "significant" relationships under the Second Restatement's most-significant-relationship test—both distinctions are merely conclusory. But it is doubtful whether Cavers intends to reserve so limited an ambit to the true-false conflict test. After all, what deserves to be kept in mind as to Cavers' "principles of preference" is that they are obviously imbued with an overriding policy in favor of the plaintiff. The importance of this factor is more clearly and directly pointed out in the "better law doctrine" propounded by Professor Leflar in his "choice-influencing considerations."

F. Leflar's Better Law Approach

Leflar's "better law rule" is the last in his five "choice-influencing considerations." The others are: 1) predictability of results; 2) maintenance of interstate and international order; 3) simplification of the judicial task; and 4) advancement of the forum's governmental interests. It is not surprising that, out of the five considerations, the

128. See the variety of connotations associated with the term "false conflict" in Comment, False Conflicts, 55 CALIF. L. REV. 74 (1967).
“better law rule” has attracted the greatest attention in certain recent choice of law decisions. The first three principles do not really provide criteria for definite choice of law solutions. Their function is mainly negative: They establish outer limits for choice of law solutions that, in turn, must be based on positive criteria. In products liability cases, for example, where the places of defendant's conduct and of plaintiff's injury point to different jurisdictions, either choice can equally satisfy these first three principles. Leflar's fourth principle, the advancement of the forum's governmental interests, leads into the already well-known “desperanto”\textsuperscript{130} of governmental-interest analysis and serves as an invitation to judicial parochialism.

A number of recent decisions have partially relied on the fifth choice-influencing consideration”—the “better law rule.” It is still unclear, however, whether the rule ought to prevail over the forum's governmental interests, since in all cases that have followed this rule, the courts have considered their own law to be the “better law.” Thus, in Conklin v. Horner,\textsuperscript{131} an Illinois guest sued an Illinois host for injuries sustained in Wisconsin during a trip that began, and was to end, in Illinois. The defendant-host claimed protection of an Illinois guest statute, but the Wisconsin supreme court applied its own full recovery law, deeming it superior to the Illinois guest statute. Even assuming that this is a correct assessment of the “better law,” it is highly questionable whether the better-law rule should be given sufficient weight to defeat the interest of a state that is the seat of the parties' personal relationship. Indeed, where a personal relationship exists between the parties strong enough to support the imposition of the personal law standards of conduct and liability, this personal law ought to be applied regardless of its substantive quality.

In multistate and international products liability cases, where there is normally no personal relationship between the parties, the result to be obtained under the better-law rule is more predictable. Leflar's system has already been stigmatized as plaintiff-biased,\textsuperscript{132} a character-

\textsuperscript{130} Ehrenzweig, Foreign Guest Statutes and Forum Accidents: Against the Desperanto of State "Interests,” 68 Colum. L. Rev. 49 (1968). "Desperanto" is the opposite of "esperanto," the artificial language designed to further universal understanding. It is derived from the latin "sperare" (to hope) and "desperare" (to despair). Thus, “desperanto” could be translated as “confusion.”


\textsuperscript{132} Note, Post Transaction or Occurrence Events in Conflict of Laws, 69 Colum. L. Rev. 843, 850 (1969).
ization that is bolstered by the analysis of the cases.\textsuperscript{133} This bias in fact coincides with the trend in tort law towards greater consumer protection.\textsuperscript{134} The better-law rule is bound, by its very purpose, to reflect this tendency on the choice of law level. Given the national and international trend towards more rather than less liability upon the manufacturer and other members of the distribution chain, the better-law test, in most cases, will result in application of the law most favorable to the plaintiff after taking into account the laws of the place of manufacture, sale, and injury.

G. The Law Most Favorable to the Plaintiff

The preceding analysis shows that in choice of law involving products liability, neither the traditional jurisdiction-selecting approach nor the most widely recognized modern theories can provide a satisfactory solution. The Second Restatement test is conclusive only insofar as it indicates the rejection of a personal-law approach that is inapplicable to products liability cases. One must turn to Cavers' principles of preference and Leflar's better-law rule to find the key to a viable compromise between the two basic values of legal certainty and individual justice: the application of the law most favorable to the plaintiff, a rule that has been explicitly advocated in Germany for international products liability cases.\textsuperscript{135}

In openly adopting such an approach in multistate and international products liability cases, courts would not have to abandon present choice of law thinking. There are indications that many American courts in the past actually had in mind the idea of favoring the injured plaintiff by their choice of law solutions in products liability cases. The majority of the cases discussed above as standing for the implementation of traditional choice of law rules either granted plaintiff relief\textsuperscript{136} or applied a law under which the plaintiff had at least a cause of action.\textsuperscript{137} This fact recalls the observation made by Professor Ehren-

\textsuperscript{133} See cases cited note 131 supra, each allowing recovery under the "better law."

\textsuperscript{134} See text accompanying notes 3-23 supra.

\textsuperscript{135} S. Smitts, supra note 48, at 91-92.

\textsuperscript{136} Hunter v. Derby Foods, 110 F.2d 970 (2d Cir. 1940).

zweig\textsuperscript{138} concerning the plaintiff-biased true reasons underlying court opinions in products liability choice of law situations.

Once freed from the hard and fast First Restatement concepts, the courts exhibited an even clearer tendency towards the plaintiff's side. Again the majority of cases discussed above as applying modern theories have held in favor of the plaintiff, either by granting judgment\textsuperscript{139} or by recognizing a cause of action.\textsuperscript{140} Under a governmental-interest approach, this proplaintiff tendency will be conceptualized, as in \textit{McGrossin v. Hicks},\textsuperscript{141} by imputing a greater state interest to recovery laws than to those refusing recovery.\textsuperscript{142}

The idea of favoring the plaintiff looms large even behind those analyses that purport to adhere to choice of law philosophies not normally recognized as plaintiff-oriented. An example may be shown in a casenote published in the \textit{Harvard Law Review}\textsuperscript{143} in which the author attempted to apply governmental-interest analysis to the area of products liability. The author examined what interests the state of injury, the state of the place of sale, the state of plaintiff's residence, and the state of the place of manufacture might have in applying their law. Each state's interest was considered twice, first hypothesizing that in each case the laws would impose liability, then doing the same analysis under the opposite assumption. The author rightly concludes that the state of plaintiff's residence normally has no interest in applying its laws, irrespective of whether liability would thus be imposed.\textsuperscript{144} With regard to the states of purchase and of injury, the author points out\textsuperscript{145} that either state has an interest in the prevalence of its laws when these impose liability. Though hesitant as to a similar interest of the state of manufacture, he foresaw a trend to extrapolate that state's interest in imposing its law if it makes the manufacturer liable.\textsuperscript{146}

Professor Weintraub, although an advocate of governmental-in-

\textsuperscript{138} A. Ehrenzweig, \textit{supra} note 2, at 591.
\textsuperscript{141} 248 A.2d 917 (D.C. App. 1969).
\textsuperscript{142} Somewhat out of tune with this trend is Ryan \textit{v. Clark Equip. Co.}, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969), where the California court applied an Oregon statute limiting the recovery of damages in wrongful death actions; Michigan, the place of manufacture, had no such limitation. It may be that this deviation can be explained on the ground that the court attributed primary importance to the wrongful death recovery limitation rather than to the products liability aspect.
\textsuperscript{143} Note, \textit{supra} note 31, at 1452-70.
\textsuperscript{144} \textit{Id.} at 1466.
\textsuperscript{145} \textit{Id.} at 1462-65.
\textsuperscript{146} \textit{Id.} at 1469.
terest analysis as well, proceeds along similar lines.\textsuperscript{147} He also tends to favor the application of the strictest (plaintiff-oriented) law, admitting openly that common (shared) trends in the substantive law area involved "provide a useful focus for the resolution of true conflict problems."\textsuperscript{148} In sum, both articles convey the impression that, in products liability choice of law, the governmental-interest method has turned into a technical, complicated, and confused way of bringing to surface the fundamental idea of applying the law most favorable to the plaintiff.

Even Professor Ehrenzweig, despite his favor for the lex fori, does not appear to be totally immune to this idea:

Under this system [the lex fori], the plaintiff would usually be able to choose from among several courts that with the most favorable law. Whether the parties' unequal economic status in the typical products liability case will induce the courts to relieve the plaintiff of the burden of a foreign law suit by permitting him to claim a more favorable foreign law even at the place of his own residence remains to be seen.\textsuperscript{149}

One might even surmise that, in Professor Ehrenzweig's vernacular, this principle, like the "rule of validation," could be just another "true rule"\textsuperscript{150} permitting a forum's departure from its own law. Two arguments, one negative and one positive, militate in favor of the solution suggested in this article. The negative argument is to be seen in the interstate or international character of the fact pattern involved. Where the places of manufacture, sale, and injury are situated in different jurisdictions, there is no sufficient support in any of these factors (and their underlying rationales) for putting the entire fact situation under the umbrella of any one of the jurisdictions. In this area of "long distance" torts, even German conflicts law, which is principally based on a traditional jurisdiction-selecting system, has departed from such a concept and resorted to an alternative-reference rule.\textsuperscript{151}

Indeed, in this kind of situation, only substantive criteria can point the way to a positive solution. By their very nature, "long distance" torts would have to be dealt with through special substantive rules to be adopted either by a national (in interstate conflicts) or an

\textsuperscript{147} Weintraub, \textit{supra} note 26, at 1429-46.

\textsuperscript{148} \textit{Id.} at 1444.

\textsuperscript{149} Ehrenzweig, \textit{supra} note 2, at 803.

\textsuperscript{150} A. EHRENZWEIG, \textit{supra} note 2, at 352-53.

\textsuperscript{151} This term, in American choice of law discussions, has come to connote theories like those proposed by Cavers, in which, in a given instance, one of several relevant connecting factors is determinative depending on the result to be achieved substantively. \textit{Cf.} Juenger, \textit{supra} note 127, at 228-29.
international (in international conflicts) legislative body. For the time being such a superlegislature either has not yet seized upon these problems—as in the case of Congress for interstate conflicts—or does not even exist—as in the case of international conflicts. While courts lack power to create new substantive law for conflicts purposes like that which would have to be enacted by a superlegislature,\textsuperscript{152} they can, while choosing the applicable state or national law in given cases, take into account the substantive policy trend in the subject matter involved.

As far as policy trends in products liability are concerned, we note a marked tendency towards an extension of manufacturer's liability. The judge, when confronted with a choice of law problem, should effectuate this trend. This is the positive argument behind the solution advocated in this Article. It might be that in some instances even the strictest law is unreasonably harsh notwithstanding the national or international trend. The rule calling for the application of the law most favorable to the plaintiff must, on the other hand, be a general one, and this minor deficiency does not seem to be too high a price for the legal certainty and predictability thereby obtained.

It is this orientation towards substantive policies rather than the compassion with the plaintiff suggested by some authors\textsuperscript{153} that supports the German tort rule applying the law most favorable to the plaintiff in cases where the places of conduct and injury point to different jurisdictions. The German rule may sometimes be too broad; it could be that there are areas in torts where there is no discernible trend towards stricter liability or where there is even a tendency away from liability.\textsuperscript{154} Nevertheless, it is workable in the majority of situations.

One is tempted to think that this concept of the most favorable law is impermissible in view of the traditional idea that choice of law rules have to be neutral towards the substantive result achieved. This philosophy, however, has already faded in American conflicts thinking, and is also declining in continental conflicts ideology. In fact patterns like those involved here, "neutrality" is nothing but a euphemism for arbitrariness.

Several remaining problems must be considered. First, given

\textsuperscript{152} According to modern German choice of law doctrine, courts are permitted, in certain circumstances, to apply specially designed substantive law to fit particular situations, especially under the doctrine of "Anpassung" (adjustment). \textit{Cf.} G. Kegel, \textit{supra} note 47, at 125. In an article published in 1952, Hoff has advanced similar ideas in America, but apparently without any success. Hoff, \textit{Adjustment of Conflicting Rights: A Suggested Substitute for the Method of Choice-of-Laws, 38 Va. L. Rev. 745, 761-62} (1952).

\textsuperscript{153} See note 57 \textit{supra}.

\textsuperscript{154} Such may be the case in suits for invasion of privacy.
the multiplicity of relevant contacts in products liability choice of law, a plurality of contacts will frequently be situated in the same jurisdiction. For example, suppose that places of manufacture and sale are in state $X$ and place of injury is in state $Y$. It is arguable that in this type of case the jurisdiction with the majority of contacts ought to prevail even if the law of the jurisdiction where the remaining contact is located (state $Y$, the place of injury) is more favorable to the plaintiff. To preclude objections, this "contact counting" could encompass merely those factors relevant to the ascertainment of the most favorable laws—not, for example, the plaintiff's residence, since this would be irrelevant. Yet, even in this situation, the preponderance of contacts in state $X$ does not seem strong enough to outweigh the policy-oriented substantive argument underlying the most favorable law, by the same reasoning that leads to a plaintiff-oriented choice of law approach with respect to any one of them.

The second remaining problem involves those situations in which the applicable law would have been unforeseeable for the defendant. It may at first glance seem unjust in such cases to hold the defendant to the unforeseeable law under any choice of law rule, and several authors have argued for an unforeseeable-law exception. Under the rule proposed here, the unforeseeable law would be disregarded for the purpose of ascertaining the law most favorable to the plaintiff.

The practical importance of the exception must not be overemphasized under the most-favorable-law rule, however. The problem posed arises only in those instances where the unforeseeable law is more favorable to the plaintiff than any of the other laws to be considered. Second, in a period of rapidly growing interstate and international commerce, as well as increasing mobility of broad segments of population, almost every person engaged in the manufacture and distribution of goods has to be aware of the possibility that his products may cause harm in distant parts of the nation or world. Therefore, the limitation of choice of law according to foreseeability, though having a certain initial appeal, does not provide a workable criterion for reducing the manufacturer's liability risks. Differentia-

155. See Note, supra note 31, at 1466, where the author, although ruling out a "personal law approach," reserves some importance to the plaintiff's residence as reinforcing other factors, if they point to the same jurisdiction.


tions might rather be made along the lines separating certain classes of defendants, such as wholesalers and retailers, who normally serve the local market only. The liability of such dealers could arguably be restricted to the laws of either the place of manufacture or the place of sale, whichever is more favorable to the plaintiff.

The third problem involves the procedure used to ascertain which law is most favorable to the plaintiff. Conceivably, either the court or the plaintiff could make such a selection. The procedure to be chosen will largely depend on the individual forum's procedural treatment of questions involving foreign law. In most European countries the judge has to apply foreign law ex officio, whereas, in the Anglo-American tradition, foreign law is regarded as a fact to be asserted and proved by the parties. In terms of policy, it appears desirable to allow the court to select the most favorable law because it will generally be better equipped to deal with foreign law—an argument that obviously has a considerable share of responsibility for the steady decline of the “fact” doctrine in American procedure.

H. Search for a Proper Choice of Law: Conclusion

In a multistate or international products liability situation, therefore, the law most favorable to the plaintiff ought to be applied. Given the absence of personal relationships in this area, the choice of plaintiff's personal law is inappropriate. The relevant factors in ascertaining the most favorable law are the place of manufacture, the place of last sale prior to the occurrence, and the place of injury.

This Article does not purport to supply a final solution to all choice of law problems involving products liability. The connecting factors considered as relevant in this study do not take care of all products liability situations that may arise: for example, where harm arises out of defects in products where the chain of distribution does not end with a sale but with another contract (for example, a lease), special connecting factors may be warranted in determining the law most favorable to the plaintiff. One typical area in which the last link in the distribution chain does not consist of a sale is that of transportation (airplane crashes). In these situations courts will have to substitute for the regularly relevant contact its functional equivalent in the special situation.

158. Dealers can be supposed to know the origin of products they deal with.
159. G. Kegel, supra note 47, at 200 (recounting the German rule).
Other problems may come into play as well, such as the ubiquitous substance-procedure dichotomy. In many instances the peculiar aspects of products liability problems are wrapped in concepts of procedure, as, for example, the prima facie evidence rule and the doctrine of res ipsa loquitur. In the United States, these rules normally are characterized as procedural, so that the lex fori prevails. In Germany, however, burden of proof is characterized as substantive, and the lex fori is not necessarily controlling. Therefore, the particular location within the legal system of special rules for products liability will sometimes be decisive for the result in a given case. As a matter of effectuating the policies behind the most-favorable-law solution—consumer protection—it is desirable that the forum deviate from the traditional rule of applying its own procedural rules for products liability cases to the extent that such deviation furthers these policies and is not incompatible with the smooth functioning of the forum’s administration of justice.

Finally, doubts may exist as to what matters have to be taken into account in ascertaining the most favorable law. One could argue that, in accordance with the proplaintiff policy of products liability, the most favorable law has to be determined by taking into consideration only those parts of the relevant legal systems that specifically pertain to products liability situations. For example, assume that state A, in products liability cases, allows recovery for personal injuries and economic loss, whereas state B allows recovery for personal injuries only. On the other hand, state A bars recovery in case of plaintiff’s contributory negligence, while state B merely reduces recovery under a comparative negligence theory. Is the law of state A or of state B the most favorable? It seems that the most favorable final result should prevail in a given case, rather than the narrow conceptual boundaries of the often nebulous products liability law. In other words, the law of state B would be chosen as most favorable to the plaintiff, even though a mixture of the two laws—state A’s personal injury and economic loss recovery, state B’s comparative negligence approach—might benefit the plaintiff more. Such a lopsided approach ignores the interrelationship of the individual rules in any legal system.

163. R. Leelar, supra note 160, at 298.
164. G. Kegel, supra note 47, at 423.
165. See generally Kisch, La loi la plus favorable, in FESTSCHRIFT FÜR MAX GUTZWILLER (IUS ET LEX), 373-93 (1959).
The Hague Convention on Products Liability in Private International Law

One of the items appearing on the agenda of the 12th Hague Conference on Private International Law, to be held in the fall of 1972, is the unification of private international law relating to products liability. Unfortunately, codification of a law-most-favorable-to-the-plaintiff rule, or any other for that matter, faces special difficulties, because the law of conflicts traditionally has evolved as predominantly judge-made law, even in civil law countries. Certain authors have pointed to this characteristic in explaining the alleged nature of conflicts law as "hostile to codification" ("kodifikationsfeindlich"). If this is true, this character of conflicts law may account for the rather limited success achieved by previous Hague conventions on private international law.

Yet, by its very statutory purpose, the objective of the Hague Conference is to work for the progressive unification of rules concerning private international law. This objective can be approached in two ways: First, one can try to extrapolate and codify the common core of several legal systems with regard to a given field of law. Alternatively, one can try to work out a solution independent from the law of the individual countries involved, with the hope that this would provide a superior choice of law solution to which the member countries would gradually adhere. In products liability choice of law, the first alternative can be ruled out because no common pattern of solution can be discerned in the various countries; in many countries these problems have hardly been touched upon. Therefore, the only way to approach the problem of unification is through the second method.

Here, however, the Hague Conference must face serious obstacles, that bear less on the substantive solution involved than on problems of

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166. The following 26 countries are presently members of the Conference: Austria, Belgium, Brazil, Canada, Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic), Japan, Great Britain, Greece, Ireland, Italy, Israel, Luxembourg, Norway, the Netherlands, Portugal, United Arab Republic, Spain, United States, Sweden, Switzerland, Turkey, and Yugoslavia. The United States acquired full membership status in 1964. See Nadelmann & Reese, The Tenth Session of the Hague Conference on Private International Law, 13 AM. J. COMP. L. 612 (1964).


168. See the survey on the Hague conventions and their signatories in G. Kegel, supra note 47, at 85-92.

codification in general. First, since an international convention is particularly committed to the objective of uniformity, it would be indispensable that the draftsmen clearly delineate the scope of the convention.\textsuperscript{170} It is insufficient to leave it to the individual judge to determine what should be subsumed under the heading “products liability”\textsuperscript{171} diverging interpretations would be the consequence. Luckily, in the past, most conventions drafted by the Hague Conference have dealt with subject matters that, in the national legal systems, have generally accepted scope and meanings (effects of marriage, formal requirements of testamentary dispositions, etc.). Even in more recent codifications, such as the Hague Convention on the Law Applicable to Traffic Accidents,\textsuperscript{172} the narrow factual patterns covered leave little room for misinterpreting the intended scope. But unlike the traditional subject matters in international choice of law codifications and the area of traffic accidents, the field of products liability neither connotes a precise segment of the substantive legal system nor designates a homogeneous fact pattern. Instead, the common denominator is a negative one—the absence of privity between the parties. The boundaries of this area are fluid: for example, the performance of services does not give rise to products liability in Germany,\textsuperscript{173} whereas American law seems on the verge of including this within its scope of liability.\textsuperscript{174} This means, then, that in order to ensure the necessarily uniform application of a codified products liability rule in all adhering countries, a clear and unmistakable delineation of the rule’s scope is essential.

Second, the codification of choice of law in products liability raises another, even more fundamental problem: the attempt for codification comes at a period of time in which the traditional meth-

\textsuperscript{170} P. Vallindas, 2 Réflexions sur la conclusion des conventions de droit international privé uniforme, Scritti in onore di T. Perassi vol. II, at 355, 357, 358 (1957); A. v. Overbeck, Essai sur la délimitation du domaine des conventions de droit international privé, in Festchrift für Max Gutzwiller (Ius et Lex), supra note 165, at 325, 328-29.

\textsuperscript{171} For example, problems may arise as to the definition of “products” and the range of persons whose liabilities would fall under the convention.


\textsuperscript{173} BGB § 823, comment (D)(c)(bb) (Palant-Thomas, 29th ed. 1970).

ods of choice of law thinking are widely questioned and rejected. Originating in the United States, this process is beginning to exercise an impact in other parts of the world, especially in Europe.\textsuperscript{176} The basic foundations are more uncertain than ever, and no solution is yet to be foreseen that might win some kind of general acceptance. One might question whether this is the right moment for a codification, or whether, mutatis mutandis, there is truth in Brainerd Currie's statement relating to the efforts spent on drafting the \textit{Restatement (Second) of Conflict of Laws:} "[D]eep-freezing seems hardly the indicated treatment for a discipline just emerging from its Ice Age."\textsuperscript{176}

It is true, of course, that an area as broad as torts cannot be put under the umbrella of a few hard and fast rules, and differentiations among various tort subjects will be appropriate. It is equally true, however, that there has to be some kind of underlying general approach to the area as a whole; otherwise, inconsistencies among the narrower subjects are bound to arise.\textsuperscript{177} It is an illusion to believe that a consistent body of law can be developed solely by considering the particular aspects of a group of narrow problems. Every concrete rule of law ought to be the result of the application of general premises and their ramifications according to the particular aspects involved. Investigation into the general structure (Strukturforschung) and the particular interests (Interessenforschung) have to work together.\textsuperscript{178} The Hague Convention on the Law Applicable to Traffic Accidents has already been criticized for overlooking this postulate.\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{177} To mention one example, the Convention on the Law Applicable to Traffic Accidents does not cover liabilities based on a contract theory. \textit{See Convention on the Law Applicable to Traffic Accidents, supra} note 172, at 589. The scope of the convention will, therefore, partly depend upon the characterization of liabilities in the respective countries, a situation that has already provoked sharp criticism. Beitzke, \textit{supra} note 172, at 214-15. In products liability, contractual and delictual concepts overlap; if the upcoming Hague Conference produces a similar rule of application, it will have contributed nothing. Yet, if it adopts a different rule of application, it will create serious inconsistencies in the treatment of the areas covered by both conventions.
\item \textsuperscript{178} \textit{See} Kegel, \textit{Begriffs- und Interessenjurisprudenz im internationalen Privatrecht}, in \textsc{Festschrift für H. Lewald} 259, 287, 288 (1953).
\end{itemize}
A continuing piece-by-piece codification of narrow areas in private international law of torts will undoubtedly produce discrepancies. The present state of flux in international torts law, and in particular in products liability, cannot be overcome by specialized rules for isolated fact patterns without a minimum of consensus about the approach to be taken to the wider area of which the specific situation is a part. Even assuming that the trend towards codification of narrow fact patterns is to continue, large sections of torts choice of law will, for the foreseeable future, be left to the national choice of law systems. Therefore, inconsistencies in underlying value judgments are to be expected not only among different conventions, but, above all, between the areas covered by conventions and those left to the national conflicts systems. An increasing reluctance of member states to adhere to the conventions worked out by the Conference will undoubtedly result.

If the Hague Conference should prevail in its intention to adopt a convention on private international law in products liability at its 1972 session, the draftsmen would be well advised to depart from a system of jurisdiction-selecting rules and to take into account the substantive policy giving the area of products liability its distinctive feature: the protection of the consumer. This would have to be implemented through an alternative-reference rule securing the application of the law most favorable to the plaintiff, the choice to be made among the laws of the places of manufacture, of sale, and injury. Such a rule is the only way to avoid arbitrary results and, at the same time, to maintain a link between traditional and modern choice of law thinking.

CONCLUSION

The preceding comparative study of choice of law in products liability yields some interesting results. As in other areas of contracts and torts choice of law, traditional approaches have widely been superseded in the past decade by new methods and theories. However, while in some fact situations (for example, those involving guest statutes and interspousal immunity) modern thinking has forced its way rather rapidly, new choice of law theories pertaining to products liability reflect a comparatively slow development. Scrutiny of opinions reveals stereotyped formulas and modern catchwords rather than careful analysis. At least part of this seems to be attributable to a basic weakness inherent in the cherished modern theories: None of these

tests or analyses provides criteria sufficiently precise to develop a consistent pattern of concrete results. This does not mean that the formulation of hard and fast jurisdiction-selecting rules would be the indicated treatment; given the character of multistate and international products liability situations and almost equally relevant contacts with more than one jurisdiction, the selection of one contact as generally controlling necessarily produces arbitrary results.

Quite the contrary is appropriate: the policy underlying the substantive law of products liability—consumer protection—has to be given full weight in the choice of law process. This idea of broadening and, to a certain extent, generalizing the impact of substantive policies on choice of law takes support from Cavers' principles of preference and Leflar's better-law rule. Accordingly, an alternative reference rule calling for the application of the law most favorable to the plaintiff, chosen from the laws of the places of manufacture, of sale, and of injury, would be appropriate. This rule coincides with the rationale that often underlies judicial decisions in this area, and once this basis is generally accepted, further refinements will follow as in the development of other new principles.

As far as an international codification of this rule is concerned, the present upheaval in both products liability and choice of law thinking, as well as the general difficulties of codification in conflict of laws, strongly appeal for patience. If an international convention sponsored by the Hague Conference on Private International Law is eventually adopted, the principle of the law most favorable to the plaintiff ought to be given top priority.