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The Aftermath of Babcock

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THE AFTERMATH OF *BABCOCK*

Dissatisfaction with the traditional "place of wrong" rule[1] for its failure to consider the interests which jurisdictions other than that where the tort occurred have in the resolution of a particular issue erupted in the New York Court of Appeals decision in *Babcock v. Jackson*.[2] After reviewing cases from other jurisdictions in which the courts had circumvented the place of wrong rule by various devices,[3] enabling them to apply the law of a jurisdiction having a more compelling interest in the resolution of the legal issue involved, the court concluded that a new and more flexible approach should be adopted. The rule to be applied was one which would give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[4]

The approach used was essentially a "governmental interest" analysis.[5] However, the facts would have required the same result under all theories advocating change, and the language used was sufficiently ambiguous to enable each theorist to claim the decision a product of his approach.[6] The decision met with nearly universal approval,[7] and commentators sat

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[1] "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, . . . but equally determines its extent." Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904); accord, Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914); RESTATEMENT, CONFLICT OF LAWS §§ 377-90 (1934). Cases applying the common law or guest statute of the place of accident despite a different forum law are collected in Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws": I*, 69 YALE L.J. 595, 601 nn. 39-40 (1960).

[2] 12 N.Y.2d 473, 477-82, 191 N.E.2d 279, 281-84, 240 N.Y.S.2d 743, 746-50 (1963).

[3] *Id.* at 479-82, 191 N.E.2d at 282-83, 240 N.Y.S.2d at 747-49 (1963). See generally, EHRENZWEIG, CONFLICT OF LAWS §§ 104, 109-20 (1962); Lambert, *Reviews of Leading Current Cases*, 30 NACCA L.J. 35, 43-46 (1964); 49 VA. L. REV. 1362, 1363-65 (1963).

[4] 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749 (1963).

[5] See text accompanying notes 39-43 *infra*.

[6] *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (Cavers at 1219, Cheatham at 1229, Currie at 1233, Ehrenzweig at 1243, Leflar at 1247, Reese at 1251) (1963).

[7] See, *e.g.*, *ibid.*; Webb, *Conflict in Conflicts—Vested Rights Versus Proper Law: An English Don Reads Babcock*, 9 VILL. L. REV. 193 (1964); 49 IOWA L. REV. 934 (1964); 62 MICH. L. REV. 1358 (1964); 66 W. VA. L. REV. 126 (1964); 1964 WIS. L. REV. 316; 28 ALBANY L. REV. 128 (1964); 18 ARK. L. REV. 96 (1964); 38 CONN. B.J. 155 (1964); 32 FORDHAM L. REV. 158 (1963); 77 HARV. L. REV. 355 (1963); 79 LAW. Q. 484 (1963); 47 MARQ. L. REV. 255 (1963); 15 SYRACUSE L. REV. 78 (1963); 38 TUL. L. REV. 398 (1964); 33 U. CINC. L. REV. 119 (1964); 49 VA. L. REV. 1362 (1963).

back to await further elucidation as the rule was applied to different fact situations. The disappointing clarification came in *Dym v. Gordon*.[8]

This Comment will analyze *Dym v. Gordon* and contrast that decision and other New York cases with the decisions which would have been reached had a proper application of the "governmental interest" approach been used.

I

NEW YORK INTERMEDIATE LOWER COURT DECISIONS: RESISTANCE TO CHANGE

Although the reasoning and results of the lower court decisions can, with few exceptions,[9] be described only as confused, two generalizations can be made: First, those courts which have regarded *Babcock* as establishing a new rule for choice of law questions generally have engaged in no analysis of governmental policy in deciding which law to apply. Instead, effect has been given to the law of the jurisdiction which has the greatest quantitative "contacts" with the issue, such "contacts" being selected without regard to their relevance to the particular issue.[10]

Second, some courts have interpreted *Babcock*, not as adopting a new rule for choice of law decisions, but simply as establishing another exception to the place of wrong rule.[11] Unless the issue and precise facts before the court have been the subject of a specific prior holding, the place of wrong rule will be applied. Some courts openly adhere to the

[8] 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

[9] Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965) (application of direct action statute of place of tort); Ardieta v. Young, 22 App. Div. 2d 349, 256 N.Y.S.2d 199 (1965) (effect of settlement and release in foreign jurisdiction); Steinberg v. Fischman, 24 App. Div. 2d 457, 260 N.Y.S.2d 403 (1965) (same facts as *Babcock*); Blum v. American Youth Hostels, Inc., 21 App. Div. 2d 683, 250 N.Y.S.2d 522 (1964) (overruling Kaufman v. American Youth Hostels, Inc., 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (1958), on issue of charitable immunity); Downs v. American Mut. Liab. Ins. Co., 19 App. Div. 2d 376, 243 N.Y.S.2d 640 (1963) (limitation on wage assignment); Zucker v. Baker, 47 Misc. 2d 840, 263 N.Y.S.2d 422 (Sup. Ct. 1965) (effect of settlement on action based on dram shop act); Freund v. Spencer, 46 Misc. 2d 472, 260 N.Y.S.2d 149 (Sup. Ct. 1965) (same facts as *Dym*, except that accident occurred in yet a third jurisdiction); Brewi v. Handrich, 45 Misc. 2d 121, 256 N.Y.S.2d 171 (Sup. Ct. 1965) (same facts as *Babcock*).

[10] See Macey v. Rozbicki, 23 App. Div. 2d 532, 256 N.Y.S.2d 202 (1965); Ardieta v. Young, *supra* note 9; Fornaro v. Jill Bros., Inc., 22 App. Div. 2d 695, 253 N.Y.S.2d 771 (1964); Long v. Pan Am. World Airways, Inc., 23 App. Div. 2d 386, 390, 260 N.Y.S.2d 750, 754-55 (1965) (dissenting opinion).

[11] Long v. Pan Am. World Airways, Inc., *supra* note 10, at 388, 260 N.Y.S.2d at 752-53; Leonard v. O'Mara, 22 App. Div. 2d 835, 253 N.Y.S.2d 826 (1964); Estate of O'Connor, 21 App. Div. 2d 333, 335, 250 N.Y.S.2d 696, 698 (1964); Murphy v. Barron, 45 Misc. 2d 905, 908, 258 N.Y.S.2d 139, 143 (Sup. Ct. 1965); Manning v. Hyland, 42 Misc. 2d 915, 916-17, 249 N.Y.S.2d 381, 382 (Sup. Ct. 1964); Riley v. Capital Airlines, 42 Misc. 2d 194, 208, 247 N.Y.S.2d 427, 442 (Sup. Ct. 1963); Keller v. Greyhound Corp., 41 Misc. 2d 255, 257, 244 N.Y.S.2d 882, 884 (Sup. Ct. 1963).

place of wrong rule,[12] while others arrive at the same result by a more circuitous route, such as finding that the place of wrong is the jurisdiction having the "most significant contacts."[13] In addition, prior specific holdings are being construed as narrowly as possible;[14] the courts are not extending the prior holdings by applying the rationale underlying the precedent to the issue presently before them.

The first group of cases can be illustrated by *Fornaro v. Jill Bros.*,[15] a suit by New York parents against a New York corporation for the wrongful death of their five-year-old son. The corporation owned the automobile in which the child was riding when he received his fatal injuries. The child was a guest of the driver of the automobile, who was operating it with the corporation's permission on a purely personal shopping trip. The accident occurred in New Jersey. New York law made the owner of a vehicle liable when someone was injured as a result of the driver's negligence, provided the driver was operating the automobile with the owner's permission.[16] Under New Jersey law, on the other hand, the owner was not liable for the negligent acts of a driver simply because that driver was operating the automobile with his permission. In order for the owner to incur liability for the acts of the driver, New Jersey law required that, at the time of the accident, the automobile be in use on the owner's business. Since Miss Jill was not engaged in corporate business when the accident occurred, the corporation was not liable unless New York law was applicable.

While the court recognized that the traditional rule had given way to the rule that " 'controlling effect' is to be given 'to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation,' "[17] it held New Jersey law applicable because "the dominant contacts and the 'center or gravity' of this occurrence were in the state of New Jersey."[18] No reason was given to explain why New Jersey had the greater interest in having its law decide whether this New

[12] Long v. Pan Am. World Airways, Inc., *supra* note 10, at 388, 260 N.Y.S.2d at 753; Leonard v. O'Mara, *supra* note 11, at 835, 253 N.Y.S.2d at 827; Estate of O'Connor, *supra* note 11, at 335, 250 N.Y.S.2d at 698; Murphy v. Barron, *supra* note 11, at 907, 258 N.Y.S.2d at 142; Riley v. Capital Airlines, *supra* note 11, at 208, 247 N.Y.S.2d at 442.

[13] See Macey v. Rozbicki, 23 App. Div. 2d 532, 256 N.Y.S.2d 202 (1965); Fornaro v. Jill Bros., Inc., 22 App. Div. 2d 695, 253 N.Y.S.2d 771 (1964); Murphy v. Barron, 45 Misc. 2d 905, 258 N.Y.S.2d 139 (Sup. Ct. 1965).

[14] See Long v. Pan Am. World Airways, Inc., 23 App. Div. 2d 386, 387-88, 260 N.Y.S.2d 750, 752 (1965); Murphy v. Barron, 45 Misc. 2d 905, 908, 258 N.Y.S.2d 139, 143 (Sup. Ct. 1965).

[15] 22 App. Div. 2d 695, 253 N.Y.S.2d 771 (1964).

[16] N.Y. VEHICLE & TRAFFIC LAW § 388(1).

[17] Fornaro v. Jill Bros., Inc., 22 App. Div. 2d 695, 253 N.Y.S.2d 771, 773 (1964).

[18] *Ibid.*

York corporation was to be held liable for injuries inflicted by one driving the corporation's automobile with its permission. Instead of analyzing the rationale underlying each state's rule to see if that rationale was applicable to the case, the court simply recited the number of New Jersey and New York "contacts" and concluded that New Jersey had more.[19]

New York courts had repeatedly held that the statute invoked in *Fornaro* applied only to a vehicle used or operated in New York.[20] Under a proper governmental interest approach the *Fornaro* court should have examined the reason for imposition of liability and its limitation to automobiles used in New York. If the reason was to provide a financially responsible defendant for New York victims of automobile accidents, New York law might well be applied in order to effectuate this policy. If the intended beneficiaries (the intended benefit being to furnish the plaintiff with the means to pay[21]) of the statute were those who furnished emergency medical aid and other assistance to the victims, this case would fall outside the scope of that policy. Since the accident happened in New Jersey, no New York residents would have furnished any such aid. If, on the other hand, the intended beneficiary was the general tax-paying public of New York who would otherwise have to support those victims denied private tort recovery, the injured victim's New York residence would be highly significant, and New York's policy could be effected by applying its law.

Riley v. Capital Airlines[22] illustrates the second group of cases. The plaintiff's decedent had been killed when the defendant's airplane crashed in West Virginia on the return trip to New York from Atlanta, Georgia. The court followed specific precedent departing from the place of wrong rule on those issues where precedent existed. For the remaining issues, it relied on the place of wrong rule and one of its established exceptions, the substance-procedure characterization. Thus, under *Kilberg v. Northeast Airlines*[23] and *Davenport v. Webb*,[24] the court held that the issues

[19] *Ibid.*

[20] See, *e.g.*, Selles v. Smith, 4 N.Y.2d 412, 414, 151 N.E.2d 838, 840, 176 N.Y.S.2d 267, 269-70 (1958); Cherwien v. Geiter, 272 N.Y. 165, 169, 5 N.E.2d 185, 187 (1936); Miranda v. Lo Curto, 249 N.Y. 191, 192, 163 N.E. 557, 558 (1928).

[21] See Watson v. Employers' Liab. Assur. Corp., 348 U.S. 66, 72 (1954).

[22] 42 Misc. 2d 194, 247 N.Y.S.2d 427 (Sup. Ct. 1963).

[23] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). The *Kilberg* case involved a suit by the New York beneficiaries of a New York decedent killed in an airplane crash in Massachusetts. Suit was brought under the Massachusetts wrongful death act, which had a limitation on damages in the amount of $10,000. The court of appeals held that the Massachusetts limitation on damages would not apply, and that, instead, this issue would be decided in accordance with New York law.

[24] 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962). *Davenport* held that the issue of prejudgment interest was substantive, and must therefore be decided in accordance with the law applicable to the issue of damages.

of the nature and amount of damages and of prejudgment interest were to be governed by New York and West Virginia law, respectively.[25] In regard to the application of res ipsa loquitur, the court fell back on the old substance-procedure characterization and decided that, since the issue was a procedural one, New York law would govern.[26]

The significance of the decision lay in the selection of the law governing distribution of damages. The New York and West Virginia statutes were not in conflict as to the identity of the beneficiaries; under both they were the surviving wife and children. However, there was a difference in the manner provided for ascertaining what percentage each distributee should receive. New York distributed the damages to each beneficiary in accord with the damages actually suffered, and provided for a hearing to determine the issue in each particular case.[27] West Virginia, on the other hand, provided for set percentages (one-third for the wife and two-thirds for the children).[28] The court determined that distribution should be made in accordance with the laws of West Virginia.

Had the court analogized the reasoning underlying *Kilberg* and *Davenport* to the present case and used the rationale presented in *Babcock*, it would have concluded that New York should have the right to determine this issue as well. The court should have applied New York law because the case related to parties with whom New York was concerned. West Virginia had nothing to do with these beneficiaries. Its law regarding distribution of damages was not enacted with these parties in mind any more than was its law regarding the nature and amount of damages. Its legislature is not charged with providing protection for New York residents, and is indifferent whether the widow receives ninety percent or twenty-five percent of the recovery.

The analogy which could have been drawn between this case and the *Kilberg* case and the reasoning underlying the *Babcock* case so clearly called for application of New York law to this issue that the only possible explanation for the decision was the court's unwillingness to depart from the place of wrong rule unless it could find a specific holding on the precise issue.

Equally illuminating is *Long v. Pan Am. World Airways*.[29] The court held that the law of the place of injury determined who were to be the proper beneficiaries of a wrongful death action, and hence the proper parties to bring suit. In this case, the airplane carrying the decedent dis-

[25] Riley v. Capital Airlines, 42 Misc. 2d 194, 205-06, 247 N.Y.S.2d 427, 439-40 (Sup. Ct. 1963).

[26] *Id.* at 203, 247 N.Y.S.2d at 437.

[27] N.Y. DECED. EST. LAW §§ 132-33.

[28] W. VA. CODE ANN. §§ 4080, 4089(1)(b), 5475 (1955).

[29] 23 App. Div. 2d 386, 260 N.Y.S.2d 750 (1965).

integrated in flight and fell in Maryland.[30] The plaintiffs were the personal representatives of the deceased, and were entitled to bring the action under Pennsylvania law, the state of residence of the deceased. They urged application of Pennsylvania law to this issue. Since the deceased was not survived by any of the relatives specified in the Maryland statute, the defendant urged application of Maryland law.

While the court recognized that the place of wrong rule was no longer "a complete statement of the situation today,"[31] it limited application of *Babcock* to situations involving the application of a restrictive[32] statute to New York residents where the situs of the accident was "incidental to the enterprise in which the parties were engaged."[33] *Kilberg* was distinguished because under the wrongful death statute of the place of wrong the proper parties had been suing in that case, and the court stated that the *Kilberg* decision reflected merely New York's refusal to apply a foreign law which conflicted with its strong public policy on limitation of damages.[34] Further, the court continued, New York had been able to characterize the issue of damages as procedural or remedial and thus apply its own law.[35]

The court apparently saw no analogy between *Babcock*, *Kilberg*, and the instant case, as it stated:

> The state of residence of the deceased has the greatest interest in the determination of the persons who can maintain an action for his death. So that if a choice is by any means permissible, the law of that state could be argued to govern. But a choice is not permissible. No interest in the state where the deceased resided can operate to give a cause of action to anyone when the statutes of that same state give him none and he is entirely dependent on the laws of another state which likewise give him none.[36]

Had the court examined the reasoning underlying *Kilberg* and *Babcock*, it would have concluded that the only state which should determine

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[30] Actually, the court was uncertain whether the airplane fell into Maryland or Delaware. However, since neither party claimed Delaware law applied, the court assumed the airplane had fallen in Maryland. *Id.* at 387, 260 N.Y.S.2d at 752.

[31] *Id.* at 388, 260 N.Y.S.2d at 752.

[32] The statute in question, set out *infra* note 39, provides that, unless the defendant was engaged in the business of carrying passengers for hire, the plaintiff is absolutely barred from recovery. Apparently, the court felt that this absolute bar was sufficient to distinguish the case.

[33] 23 App. Div. 2d at 388, 260 N.Y.S.2d at 752.

[34] By adopting this interpretation, the court is asserting that *Kilberg* was merely another example of the old exception that the place of wrong law will be ignored when it offends the public policy of the forum. See Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); EHRENZWEIG, CONFLICT OF LAWS § 120 (1962).

[35] 23 App. Div. 2d at 389, 260 N.Y.S.2d at 753.

[36] *Id.* at 388, 260 N.Y.S.2d at 753.

the beneficiaries is the state of the decedent's domicile. No more violence is done to the statute by deciding this issue according to Pennsylvania law than was done to the Massachusetts statute in *Kilberg* by deciding the issue of amount of damages according to New York law. Both New York and Pennsylvania have established a cause of action for wrongful death. The scope of that cause of action is equally limited by the damages allowable under it as it is by the identity of those recognized as having been damaged, and therefore entitled to sue. Furthermore, it is impossible to imagine a situation in which a jurisdiction could have a more "incidental" connection with the enterprise in which the parties were engaged.[37]

II

Dym v. Gordon: TWO STEPS BACKWARD

Uncrystalline as was the reasoning in these cases, the waters were permanently muddied by *Dym v. Gordon*.[38] The facts of this case were quite similar to those in *Babcock*. The plaintiff and the defendant were both New York residents, and the accident occurred in Colorado, another jurisdiction having a guest statute. In both cases the defendant conceded his negligence. Both parties returned to New York, their permanent residence, where suit was commenced and prosecuted.

However, whereas in *Babcock* the trip commenced and was to end in New York, and was simply a weekend trip to Canada, in *Dym* the situation was slightly different. The parties had each gone for a six-week period to attend summer school at the University of Colorado, and apparently met while taking the same golf class. There had been no arrangement made while they were in New York for the defendant to furnish the plaintiff with any transportation; the trip in question was entirely Colorado-based. Also, whereas in *Babcock* no other car was involved, in *Dym* the plaintiff's injuries were incurred when the defendant collided with another car.

The only issue in both cases was whether the guest statute of the jurisdiction where the injury occurred should be applied,[39] thus precluding

[37] See the circumstances described in note 30 *supra*.

[38] 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

[39] The statute in *Babcock* provided: "[T]he owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or death of any person being carried in . . . the motor vehicle. . . ." ONT. REV. STAT. ch. 172, § 105(2) (1960).

The Colorado guest statute in *Dym* provided: "No person transported by the owner or operator of a motor vehicle as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss in case of accident, unless such accident shall have been intentional on the part of such owner or operator or caused by his intoxication, or by negligence consisting of a willful and wanton disregard of the rights of others." COLO. REV. STAT. ANN. § 13-9-1 (1963).

the plaintiff from recovery. In *Babcock*, the court held it should not; in *Dym*, it held it should.

The reasoning underlying the two cases is quite different. Although Judge Burke claimed he was merely applying the reasoning in *Babcock* to reach his result, it will be shown that a new rule has evolved. The court in *Babcock* approached the problem by determining what policies the Ontario guest statute attempted to effectuate.[40] Having decided that the purpose of the statute was to guard insurers of Ontario drivers from the risks of assertions of collusive claims by guests and hosts, and also to guard Ontario drivers from having their insurance rates raised because of recoveries in potentially collusive suits,[41] the court held that, since no Ontario driver was involved, the policy which Ontario was attempting to effect by its statute simply was not relevant to the issues before it.[42] On the other hand, New York had a policy, exemplified by its legislature's refusal on three separate occasions to enact a guest statute, of affording its injured plaintiffs compensation for injuries which their negligent hosts had inflicted upon them.[43] This policy was reflected in the New York rule that a guest can recover from his host upon the showing of mere negligence. The problem of potential collusiveness was left to the courts to ferret out in each case. In other words, Ontario's guest statute was not applied simply because the rationale underlying its enactment had no relation to the facts of the case.

On the other hand, what the court did in *Dym* was essentially to make an initial determination that, although this was a tort action, the disputed issue—the rights, liabilities, and incidents of the guest relationship—was contractual in nature. It then applied the test formulated in *Auten v. Auten*[44] for choice of law on contract matters, and came to the conclusion that the jurisdiction whose law should govern this relationship was Colorado, where the (contractual) relationship had its nexus. After having done this, it proceeded to the "tort" question (was defendant liable?).

This reasoning is not apparent from the language of the decision. The language is couched in terms of analysis of governmental interests. But, when one looks beyond the language used, and considers those factors

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[40] Babcock v. Jackson, 12 N.Y.2d 473, 482-83, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

[41] *Id.* at 483-84, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750-51.

[42] *Ibid.*

[43] *Id.* at 483-84, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750.

[44] 308 N.Y. 155, 124 N.E.2d 99 (1954). The test formulated in *Auten* was "instead of regarding as conclusive the parties' intention or the place of making or performance, . . . [applies] the law of the place 'which has the most significant contacts with the matter in dispute.'" *Id.* at 160, 124 N.E.2d at 102-03, quoting from Rubin v. Irving Trust Co., 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953).

deemed pivotal as well as those which were rejected or not considered at all, this reasoning, no matter how phrased, becomes clear.

Consider, first, Judge Burke's analysis of the policies behind Colorado's enactment of its guest statute. Three are enumerated. The first two, prevention of suits by ungrateful guests and prevention of the assertion of collusive claims by guest and host against the insurer of a Colorado driver with its resulting increase in insurance rates of other Colorado drivers, prima facie have no application to the facts of the case. Since a Colorado defendant was not involved, neither insurers of Colorado drivers nor other Colorado drivers' insurance rates would be in the least affected by the recovery of this plaintiff against this defendant. This defendant's car was registered, garaged, and insured in New York, and his rates were based on recoveries obtainable in New York, including cases in which guests recovered from hosts for negligence. The beneficiary of this decision is the New York defendant's insurer, who has collected for this risk and will not have to pay for it.

The third policy Judge Burke advances—protecting this defendant's assets from being depleted by this guest-plaintiff's recovery in order to preserve them intact for the driver or passengers of the other car—likewise has no application to the facts and reasoning of this case. First of all, Judge Burke cites no authority for this proposition, either from the legislative history of Colorado's guest statute or from decisions of the Colorado court interpreting its guest statute and the evils it was designed to meet.[45] This is understandable since, while the idea is intriguingly novel, there simply is no authority for it.

Laying to one side the question whether it is proper for a New York court to interpret the Colorado statute in such a novel manner and assuming, *arguendo*, that such a practice would meet with approval,[46] this policy did not weigh at all, let alone heavily, in making the decision. The driver of the other car was not from Colorado, but from Kansas. While it might be said Colorado would still be interested in seeing that anyone injured within its borders could pay the Colorado residents who rendered medical aid to such party, and was therefore justifiably interested in affording him recovery,[47] this argument is (1) equally, if not more, ap-

[45] The Colorado Supreme Court has ascribed the following two purposes to the enactment of the guest statute: (1) The prevention of suits by ungrateful guests (Dobbs v. Sugioka, 117 Colo. 218, 220, 185 P.2d 784, 785 (1947)); and (2) the prevention of fraud and collusion between guest and host, resulting in unjustly charging the host's insurance carrier for injury or death to the guests (Vogts v. Guerrette, 142 Colo. 527, 534, 351 P.2d 851, 855 (1960)).

[46] Comment, *Conflict of Laws—Two Case Studies in Governmental-Interest Analysis*, 65 COLUM. L. REV. 1448, 1459 (1965) (criticizing this aspect of the case).

[47] See Watson v. Employers' Liab. Assur. Corp., 348 U.S. 66, 72 (1954); Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

plicable to the plaintiff in this case, and (2) this policy could not be effected unless the third party was able to maintain a suit. Judge Burke did not send the case back for a determination whether the driver of the other car was injured and, if so, whether he was himself free from fault so as to be in a position to sue the defendant. If the other driver could not maintain a suit against the defendant, Colorado's alleged policy of protecting defendant's assets for the other driver would manifestly not be relevant. Since it seemed immaterial to Judge Burke's argument whether either of these conditions prevailed, it will be assumed they were not considered important.

Since none of the three policy rationales underlying Colorado's enactment of her guest statute could be effected by applying that statute to this case, it becomes clear that the decision is not really grounded on any "governmental interest" analysis. Upon consideration of the facts which Judge Burke did deem pivotal, and of the rule of law he laid down and the authorities cited to sustain his proposition, the decision in *Dym v. Gordon* represents two steps backward. What emerges is no more than the old "characterization"[48] ploy, ironically originally used to circumvent the place of wrong rule, made doubly dangerous because couched in misleading[49] terms of "governmental interest."

The pivotal factors upon which the case actually turned were that the parties had placed themselves "under the protective arm of Colorado law" by residing there temporarily,[50] and that the relationship arose out of Colorado-based activity. It was because Colorado had such "significant contacts with the *relationship itself* and the *basis of its formation* [that] the application of its law . . . [is] clearly warranted."[51] The pivotal, or

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[48] See EHRENZWEIG, CONFLICT OF LAWS §§ 109-14 (1962).

[49] That this dichotomy between apparent and actual reasoning is both misleading and confusing is reflected in Comment, *Conflict of Laws—Two Case Studies in Governmental-Interest Analysis*, 65 COLUM. L. REV. 1448, 1458 (1965) (*Dym* represents a misapplication of governmental interest, implying there has been no departure from the basic approach); Comment, *New York and the Conflict of Laws: A Retreat*, 18 STAN. L. REV. 699 (1966) (*Dym* represents use of quantitative, as opposed to qualitative, contacts, implying there has been no departure from the basic approach); Note, 30 ALBANY L. REV. 148 (1966) (*Dym* represents further illustration of governmental interest approach).

[50] Dym v. Gordon, 16 N.Y.2d 120, 125, 209 N.E.2d 792, 795, 262 N.Y.S.2d 463, 467 (1965). This statement begs the question. The very issue was whether this particular aspect of Colorado's law was one to which the parties had become subject. While one can infer that a person has "chosen" to live under the "protective arm" of the law of a particular jurisdiction simply by placing his person in the territory of that jurisdiction, this inference can be sustained more easily with regard to laws regulating the area of permissible conduct (such as speed laws or criminal laws). The inference is not so patent with regard to a law regulating the effects of transgression of that area of permissible conduct by residents of another state. In addition, the statement can equally be said to be true of the parties in *Babcock*.

[51] *Id.* at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

decisional, factor was the "seat" or "nexus" of the relationship. This "seat" or "nexus" was not to be determined *solely* from the physical situs where the relationship was created nor from the time of its creation, but rather from these two factors together with the *intent*[52] of the parties as inferred from their actions.[53]

Having determined in which jurisdiction the relationship is "seated," one *for the first time* looks at the content of that law, the incidents which the jurisdiction attaches to the relationship. In other words, the law which is to have controlling effect is chosen with total disregard of its content. Consequently, the attempt to effectuate any policy that law represents is not only not pivotal, it is immaterial. In short, analysis of the "governmental interest" or attempted effectuation of policy by jurisdictions which will be affected by the outcome of the case plays no part in the choice of law.

Once the authorities Judge Burke cites for his proposition that the law where the relationship was "seated" is to have controlling effect are examined, confusion mounts. These cases simply do not stand for the propositions for which they are cited.

First, he cites *Mertz v. Mertz*[54] for the proposition that since the relationship itself is the reason for the special treatment, the jurisdiction where the relationship is seated has the primary interest in having its policy in regard to that relationship effected by having its law applied.[55] The *Mertz* case involved a suit in New York by a New York wife against a New York husband for injuries resulting from an automobile accident which occurred in Connecticut. Connecticut permitted interspousal suits, but New York at that time did not. The court of appeals upheld the dismissal of the complaint, not on the ground that since the relationship was a New York-based relationship, New York law should control its incidents, but on the basis that New York, as the forum, would not entertain such suits.[56] It was therefore immaterial where the relationship was "based." It would not have mattered if this marriage relationship had been Connecticut-based; New York simply did not entertain such suits.

Second, Judge Burke cites workmen's compensation cases, and specifically *Alaska Packers Ass'n v. Industrial Acc. Comm'n.*[57] In this case,

[52] See discussion in text accompanying notes 66-68 *infra.*

[53] It is submitted that the reason that Judge Burke had so much difficulty formulating his test for the "seat" or "nexus" of the relationship is that he was trying to fit it into the formula stated in Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[54] 271 N.Y. 466, 3 N.E.2d 597 (1936).

[55] Dym v. Gordon, 16 N.Y.2d 120, 125, 209 N.E.2d 792, 795, 262 N.Y.S.2d 463, 467 (1965).

[56] 271 N.Y. 466, 473, 3 N.E.2d 597, 599 (1936); *see also* Gordon v. Parker, 83 F. Supp. 40 (D.C. Mass.), *aff'd*, 178 F.2d 888 (1st Cir. 1949).

[57] 294 U.S. 532 (1935).

a non-resident alien entered into a contract with Alaska Packers in California to work in Alaska during the fishing season. The contract recited that the worker elected to be bound by the provisions of the Alaska workmen's compensation law.[58] The Alaska workmen's compensation law provided that it was to be the exclusive remedy.[59] California, at the time the contract was made, had a statute providing that California workmen's compensation laws should govern in cases where the employment contract was entered into in the state, even though the work was to be performed elsewhere.[60] The worker was injured in Alaska and returned to California, as required by the contract as a condition precedent to obtaining his wages, where he applied for workmen's compensation. The California Commission made an award under California law. Alaska Packers argued that the award violated the full faith and credit clause and the due process clause of the United States Constitution. The Supreme Court held that California could validly apply its statute. The Court's answer to the due process argument was that the formation of the employment contract within the state, although it was to be performed elsewhere, gave the state a legitimate basis for desiring to control the terms, obligations, and sanctions of the employment relationship. Having such a basis for the exercise of its police power, the only issue was whether the manner in which the power was exercised—the retention of the right to control the incidents of the employment relationship—was arbitrary or unreasonable.[61] The Court held that because there was a practice of employing workers under such conditions as to make it improbable that those injured in Alaska would be able to apply for compensation there (since they were required to return to California to receive their wages), and, in addition, because there was such a slight possibility they would be able to return to Alaska in order to prosecute their claim there, California had a reasonable and legitimate interest in ensuring an injured worker would have some remedy.[62]

In answer to the full faith and credit argument,[63] the Court said "every state is entitled prima facie to enforce in its own courts its own statutes,"[64] and, since California had a legitimate interest in providing the

[58] For the treatment accorded by the courts to a choice of law clause in an adhesion contract, see EHRENZWEIG, CONFLICT OF LAWS § 172 (1962).

[59] ALASKA STAT. ANN. § 23.30.050 (1962).

[60] CAL. LAB. CODE § 5300.

[61] Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 539-43 (1935). See the discussion of *Alaska Packers* in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 22-27 (1958).

[62] Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935).

[63] This argument was presented because of the Court's holding in Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932). See discussion in Currie, *supra* note 61, at 23.

[64] Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 547 (1935).

remedy for this injured worker, the full faith and credit clause did not require recognition of the substance of the Alaska workmen's compensation statute over its own.[65] In other words, since California would be the jurisdiction which would have to cope with the problems the injured worker would present, it had the right to determine the amount of compensation and the circumstances under which it would be awarded.

It is quite different to say that the state where the employment relationship was entered into can constitutionally apply its law than it is to say that the law where the relationship is "seated" should be given controlling effect. The Court said nothing about which law should be given controlling effect. Furthermore, the reasoning underlying the Court's holding could better be cited for the proposition that New York's law should be applied in *Dym*, since New York is the jurisdiction which would have to cope with the problems of the injured plaintiff.[66] The relationship arising from an employment situation can more readily be analyzed in contractual terms, and more readily be governed by the parties' "intent," since the parties could rationally be said to have entertained some "intent" with regard to the incidents of the relationship when they entered into it; but the Court in *Alaska Packers* did not consider this contractual nature of the relationship controlling, and chose instead to recognize the interest of the jurisdiction primarily concerned with providing the particular workman with an adequate recovery, since it would bear the burden in the event an adequate private recovery was not provided. Only the most tortured legal thinking can construe a contractual relation out of the realities of a guest-host situation.[67] If the parties in *Dym* had made some agreement about what legal effect their relationship should have upon possible tort liability, the contractual analysis might be appropriate; but to say that the parties entered into this relationship with the intent that its incidents should be governed by Colorado law because they were then acting under its protective arm, having chosen to live there for a period of six weeks,[68] is to ignore reality. In any event, the relationship in *Alaska Packers* was "seated," under Judge Burke's test,[69] not in California, but Alaska.

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[65] *Ibid.*

[66] For a discussion of the problems facing the states in regard to residents injured by automobile accidents, and suggested solutions, see Jacobs, *The Financially Irresponsible Motorist: a Survey of State Legislation*, 10 VILL. L. REV. 545 (1965); Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964); Comment, *Private Insurance as a Solution to the Driver-Guest Dilemma*, 62 MICH. L. REV. 506 (1964).

[67] See, *e.g.*, the dissenting opinion in the lower court decision in Babcock v. Jackson, 17 App. Div. 2d 694, 700-01, 230 N.Y.S.2d 114, 123-24 (1962).

[68] See note 50 *supra*.

[69] See text accompanying notes 51-53 *supra*.

The third proposition Judge Burke advances is that the rationale of the decision in *Kilberg v. Northeast Airlines, Inc.*[70] was the creation of the relationship between the decedent and the defendant airline in New York. He emphasized that not only was plaintiff's decedent a New York resident, but also the contract for the trip was made in New York by the purchase of the airline ticket, and the contract was partly performed in New York.[71] This statement flies in the very face of the holding in *Kilberg*. The case specifically held that an action in contract would not lie.[72] Even had there been no contractually-created relationship between the decedent and the airline, the same result would have been reached if the airline had negligently caused the decedent's death. Furthermore, *Gore v. Northeast Airlines, Inc.*[73] demonstrated that the decision in *Kilberg* was grounded on the reasoning that New York, as the jurisdiction which would have to cope with the problems of the surviving beneficiaries —since it was their domicile—claimed the right to implement its value judgment as to the amount of damages those beneficiaries were to receive.[74] Since the pivotal factor in the determination of which jurisdiction would have to cope with these problems was the beneficiaries' domicile, the place where the relationship between the decedent and the airlines was "centered," "seated," "formed," or "partly performed" was entirely irrelevant, and therefore not discussed. *Gore* held that, since the beneficiaries, who together with the decedent had been residents of New York at the time the ticket was purchased and at the time the accident happened, had since moved to another jurisdiction which would recognize the limitation of damages imposed by the Massachusetts wrongful death statute, the holding in *Kilberg* was not available to them. This was because New York's right to determine the adequacy of damages in a wrongful death action was founded on New York being the present domicile of the surviving beneficiaries. Since these beneficiaries had moved from New York, they were no longer proper objects of its concern, and the law which should be applied was that of their present domicile. If the basis of *Kilberg* had been what Judge Burke alleged it was, the court in *Gore* would have been required to hold that New York law was applicable to the amount of damages in that case as well, since the decedent in *Gore* also purchased his ticket in New York, thereby creating the contract between

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[70] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[71] Dym v. Gordon, 16 N.Y.2d 120, 126, 209 N.E.2d 792, 795, 262 N.Y.S.2d 463, 468 (1965).

[72] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 38, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133, 135 (1961).

[73] 222 F. Supp. 50 (S.D.N.Y. 1963).

[74] *Id.* at 53.

the *Gore* decedent and the airlines, and since that contract was also partly performed in New York.

Judge Burke ignored the line of cases that he might have cited in support of his proposition that predominant effect is to be given to the law of the jurisdiction where the relationship is "seated."[75] These are the interfamily immunity cases.[76] By analogy, these cases are the closest to the gnest-host cases. Both involve special rights or disabilities which grow out of the existence of a relationship, not depending upon contract, and are imposed upon the parties because the legislature or courts of the jurisdiction have made a value judgment as to who should bear the loss in a tort situation solely because of the existence of the particular relationship. The issue is, again, which jurisdiction, in a case having multistate contacts, has the greatest claim to have its policy with regard to the relationship effectuated by having its law applied.

Although many jurisdictions still adhere to the old rule that all rights and liabilities in a tort suit are to be governed by the law of the place where the injury occurred,[77] the more progressive jurisdictions have isolated this issue and decided that the applicable law is that of the family domicile.[78] This conclusion was reached by analyzing the policies underlying the rules of the various jurisdictions. If the reason underlying the imposition of immunity from interfamily suits is the desire to preserve domestic harmony or the avoidance of collusive suits against insurance companies by husband and wife, their family domicile should be the one to determine whether it fears the evil enough to prevent the possibility of its occurring by forbidding suits between the parties altogether.[79] If, however, the reason underlying the bar to such suits is that they are beneath the dignity of the court or that collusion in such instances would be too difficult to detect,[80] then, unless the forum is a jurisdiction having the immunity rule, there is no reason to apply it. Again, the reason the particular jurisdiction is selected as having the greatest right to govern the issue is that it is the one which must cope with the problem the rule was formulated to decide.

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[75] This line of cases is also analogous because the "seat" of the relationship will frequently be a jurisdiction other than that in which the relationship was "created."

[76] See generally Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); see also Ford, *Interspousal Immunity for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397 (1954).

[77] Cases applying this rule are collected in EHRENZWEIG, CONFLICT OF LAWS § 220 nn. 10-13 (1962).

[78] See cases cited note 76 *supra*.

[79] See EHRENZWEIG, CONFLICT OF LAWS § 221 (1962).

[80] See, *e.g.*, Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

In summary: The particular result in each case cited by Judge Burke is that controlling effect is given to the law of a jurisdiction which happens to be the place where the relation was centered or created; but the results were reached not because these were the jurisdictions where the relationship was centered or created, but by virtue of reasons wholly antithetical to the reasoning in *Dym*. Had Judge Burke followed the reasoning of these cases, he would have been lead to the inevitable conclusion that New York law should govern the issue of guest-host immunity in *Dym*.

III

THE GOVERNMENTAL INTEREST APPROACH

A. Introduction

Dym v. Gordon will now be analyzed in accordance with a proper "governmental interest" approach. This approach is utilized for several reasons: First, the application of theory to facts, in *Dym* and many of the other decisions, shows that many misconstrue the approach.[81] If specific examples of the approach are given, it would help clarify the theory. Second, while the analysis is restricted to guest statutes, the methodology used can be adapted to almost any issue that might arise. While the pivotal or decisional factors will differ according to each issue and each type of case, the methodology remains the same.

B. Definition of "Governmental Interest"

When a jurisdiction is said to have an "interest"[82] in the resolution of an issue, it means that the policy underlying the value judgment its legislature or courts have crystallized into a rule of law would be effectuated by applying that rule of law to the particular parties and the particular set of facts in the case presented for decision. A jurisdiction does not have an "interest" in the resolution of the issue simply because it has a policy with regard to this issue. For the jurisdiction to have an "interest," the parties or operational facts must be, in the context of the particular case, subjects which are proper objects of its regulatory concern. Regulatory functions will have different goals, depending on the different types of problems presented; which operational facts form the proper subject of a jurisdiction's regulatory function in a tort situation will vary from those in a contract situation, and these general examples can be further

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[81] See note 11 *supra*.

[82] Beyond the scope of this Comment are choice of law problems involving the "act of state doctrine," or those where a foreign government actually has a proprietary interest in relation to one of the parties. See generally EHRENZWEIG, CONFLICT OF LAWS § 48(1)(b)(1) ("act of state doctrine").

divided and subdivided ad infinitum.[83] Generally, however, a party or operational fact will be the subject of a jurisdiction's proper regulatory function when the jurisdiction will directly bear the consequences of the particular resolution of the particular issue in the particular case presented for decision.

Whether a jurisdiction has an "interest" in the resolution of the issue will always be initially determined by the forum.

C. Basic Method

The method suggested is essentially[84] that advocated by Currie:

> 1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of these policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.
>
> 2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

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[83] Illustrative of pertinent policy considerations involved in different types of cases is the discussion in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

[84] The method differs from Currie's approach only in the following respect: Currie feels that courts should not "weigh" competing interests. If what he means by "weighing" is that a court should not, once it has found the forum has an interest in resolution of the issue, decide that the foreign state's policy is "better" and therefore that law should be applied, his statement is correct. In that instance, the court would be performing a legislative, as opposed to a judicial, function. No court can properly substitute its value judgment for that of the duly elected representatives in the legislature. If the conflicting domestic law was judicially formulated, as opposed to legislatively formulated, the court is, of course, free to reconsider the prior decision if it feels it was wrongly decided. In such event, if the court decides the foreign state's conflicting law represents the "better" decision, it may overrule its own prior decision and adopt a new rule of law consistent with that of the foreign state. However, it is still applying its own law.

A court must necessarily make value judgments in determining what policy a rule of law is attempting to effect, and whether such policy applies to the facts in the case before it.

In addition, the process of "minimization" of conflict between two rules (discussed *infra* in the text accompanying notes 110-11) requires a court to "weigh" between specific rules and the general policy these rules were designed to implement. A court must, in undergoing this process, conclude that its own or the foreign jurisdiction has a specific rule which, if applicable to the facts in the case before it, would bring about a result which is contrary to a general policy which the two jurisdictions share in common. If the forum can find that both jurisdictions have the same general policy, although the specific rules each has adopted to implement that policy may differ, it can "minimize" the conflict by recognizing the general policy and applying whichever of the two seemingly conflicting rules effectuates the mutual general policy. For an illustration of the "minimizing" process, see Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). *Contrast* Lilienthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964), where the court failed to "minimize." See generally Kay, Book Review, 18 J. LEGAL ED. 341, 341-48 (1966).

3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.[85]

1. Isolation of Issues

Both the First[86] and Second[87] Restatements are essentially jurisdiction-selecting rules. They describe the pivotal factors to be utilized in

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[85] CHEATHAM, GRISWOLD, REESE, & ROSENBERG, CASES ON CONFLICT OF LAWS 477-78 (5th ed. 1964).

[86] RESTATEMENT, CONFLICT OF LAWS §§ 377-428 (1934), provides generally that the nature, defenses, and scope of tort or criminal liability is to be determined by the law of the place of wrong. The place of wrong is defined as "the state where the last event necessary to make an actor liable for an alleged tort takes place." *Id.* at § 377.

[87] RESTATEMENT (SECOND), CONFLICT OF LAWS (Tent. Draft No. 9, 1964) provides:

"§ 379. The General Principle.

(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

(2) Important contacts that the forum will consider in determining the state of most significant relationship include:

(a) the place where the injury occurred,

(b) the place where the conduct occurred,

(c) the domicil, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states."

"379a. Personal Injuries.

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless some other state has a more significant relationship with the occurrence and the parties as to the particular issue involved, in which event the local law of the latter state will govern."

deciding which jurisdiction's law should govern the case. Once that jurisdiction has been found, its laws govern all substantive issues. In contrast, the governmental interest approach commences by isolating the particular issue to be decided. For example, in both *Babcock* and *Dym*, the issue was the effect of plaintiff being defendant's guest upon plaintiff's right to recover from defendant. In *Kilberg*, the issue was whether the jurisdiction under whose wrongful death statute the plaintiff was suing should have the right to determine the quantum of damages recoverable under that statute, or whether a different jurisdiction—that of the beneficiaries' domicile—should have that right.

In many cases, this process of isolating issues leads to the conclusion that different jurisdictions should furnish the rule of decision on different issues.[88] The danger of result distortion, discussed below,[89] is equally applicable to this process.[90]

(*a*) *Foreign or Domestic Law as Datum as Opposed to Furnishing the Rule of Decision.*[91]—There are issues in a case which will require the forum to look to the law of a foreign jurisdiction for the purpose of furnishing an operative fact. If the plaintiff claimed the defendant was negligent (the legal effect) because he was speeding (the operative fact), the law that would be relied upon to resolve this issue would be that of the jurisdiction where the defendant's act occurred. If the speed limit in Colorado was fifty miles per hour, and that of New York was sixty-five miles per hour, plaintiff could not claim defendant was "speeding" if the accident occurred in New York and defendant had been driving at sixty miles per hour. Conversely, defendant could not claim he was within the proper speed limit if the accident occurred in Colorado, even though suit was brought in New York. In this instance, the law of the foreign jurisdiction is used for the purpose of deciding whether a disputed fact was true or not.

Consider the following statement in *Babcock*:[92]

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[88] See generally, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[89] See text accompanying note 97 *infra*.

[90] For an example of the grotesque hybrid that can result from this distortion, see Victor v. Sperry, 163 Cal. App. 2d 518, 329 P.2d 728 (1958) (imposing limitation of damages fixed by foreign jurisdiction's law, but refusing to recognize balancing aspect of absolute liability of that law on grounds it violated California's public policy).

[91] See generally, Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CALIF. L. REV. 47 (1965); EHRENZWEIG, CONFLICT OF LAWS § 212(b) (1962); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

[92] This statement was seized upon in order to justify utilization of the law of the place of wrong in regard to the issue of standing to sue in Long v. Pan Am. World Airways, Inc., 23 App. Div. 2d 386, 387-88, 260 N.Y.S.2d 750, 752 (1965).

> [T]he jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive concern [with the issue of defendant's exercise of due care] . . . . In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.[93]

This means that if the issue is whether defendant's transgression of the area of permissible conduct imposes liability, the law that determines the area of permissible conduct will be that of the jurisdiction where the conduct occurred. The legal effect (imposition of liability) resulting from transgression of that area of conduct is an entirely separate issue, which may be determined by the law of a separate jurisdiction because of some additional factor.[94]

White v. Motor Vehicle Acc. Indem. Corp.[95] illustrates the selection of foreign law for the purpose of affording the court a fact, upon which the rule of decision from another jurisdiction will operate, clothing that fact with its legal effect in the case. In that case, the issue was whether the state of plaintiff's domicile would afford a resident of New York a remedy similar to that which plaintiff, an Ontario resident, was asserting. The applicable New York statute, which furnished the rule of decision, was a reciprocal one, affording relief to those residents of foreign jurisdictions granting a similar remedy to New York residents. The court looked to Ontario only for the purpose of determining this fact; upon concluding the requisite element of reciprocity was lacking, it applied the New York statute's provision to decide the issue, and concluded the plaintiff was barred from relief.

Many other instances can be found. Some might entail, as did the *White* case, a construction of the foreign law. However, the purpose of construction remains that of determining whether a disputed fact occurred. For example, if in *Dym* the plaintiff had furnished compensation[96] to the defendant for the ride, she would not have been a "gnest" under Colorado law. After deciding whether plaintiff was defendant's

[93] Babcock v. Jackson, 12 N.Y.2d 482, 483, 191 N.E.2d 279, 284, 240 N.Y.S.2d 742, 750-51 (1963).

[94] See Estate of O'Connor, 21 App. Div. 2d 333, 250 N.Y.S.2d 696 (1964); Zucker v. Baker, 47 Misc. 2d 840, 263 N.Y.S.2d 422 (Sup. Ct. 1965); White v. Motor Vehicle Acc. Indem. Corp., 39 Misc. 2d 678, 241 N.Y.S.2d 566 (Sup. Ct. 1963).

[95] 39 Misc. 2d 678, 241 N.Y.S.2d 566 (Sup. Ct. 1963).

[96] As to what will constitute "compensation," see Sullivan v. Davis, 263 Ala. 685, 83 So. 2d 434 (1955); Sadberry v. Griffiths, 191 Cal. App. 2d 610, 12 Cal. Rptr. 773 (1961); Pletchas v. Von Poppenheim, 148 Colo. 127, 365 P.2d 261 (1961); Elliott v. Camper, 38 Del. 504, 194 Atl. 130 (1937); Bodaken v. Logan, 254 Iowa 230, 117 N.W.2d 470 (1962); Sparks v. Getz, 170 Kan. 287, 225 P.2d 106 (1950); Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N.W.2d 451 (1943).

"guest" under Colorado law, the issue as to the legal effect which should be accorded the existence of this relationship could well be determined by New York law.

In choice of law, the search is for the "rule of decision," or the rule which will furnish the legal effect which the operative facts will have.

(*b*) *The Danger of Distortion.*—In making the decision whether to apply the rule of decision of one jurisdiction to a fact determined according to the law of another jurisdiction, however, one must not, when splitting the issues, distort the actual rule existing in either jurisdiction. For example, New York might define "guest" as one who was not transported for hire, but impose no disability upon such status. Colorado, on the other hand, might define a "guest" very strictly, as one from whose presence the host derived no benefit—construing "benefit" to include social companionship—but impose very severe disabilities upon this status.[97] It would be a distortion of either jurisdiction's law to separate that datum from its legal consequence. In such event, after determining which jurisdiction's policy should be effected by utilizing its rule of decision, both interdependent facets of the rule should be applied.

2. *The Determination of Policy*

To determine what policy was sought to be effectuated by any rule claimed to be applicable, the underlying reasons for its existence must be determined. In addition, its intended scope must be assessed.[98] The methodology used will be illustrated mainly by an examination of the possible policies underlying the enactment or failure to enact a guest statute. This process should also reveal the intended scope.

Whether or not one is aided by legislative or judicial pronouncement of purpose, to analyze the policy, content, or meaning of a statute out of the context in which it exists distorts its meaning and effect. To narrow the line of inquiry, only the states having a connection with *Dym*, New York and Colorado, will be considered.

The context in which guest statutes operate is that of imposition of tort liability upon the drivers of automobiles for negligent infliction of injuries. The initial question is whether the imposition of liability for this activity is admonitory or compensatory in nature.[99] If the imposition

[97] The conduct required of the host before the guest is entitled to maintain an action will vary from gross negligence (KAN. STAT. ANN. § 8-122b (1964), MICH. STAT. ANN. § 9.2101 (1960)) to wilful misconduct (CAL. VEHICLE CODE § 17158 (1961), COLO. REV. STAT. § 13-9-1 (1963)), or intoxication (CAL. VEHICLE CODE § 17158 (1961), COLO. REV. STAT. § 13-9-1 (1963)).

[98] The scope of the policy becomes important primarily in connection with the "minimization" process, discussed in text accompanying notes 110-11 *infra*.

[99] "[I]t is essential to distinguish between two types of tort liabilities, namely those

of liability is admonitory, the policy underlying it is the deterrence of the defendant from engaging in this activity by punishing him for it. If, on the other hand, the imposition of liability is compensatory, the policy sought to be effected is the compensation of the plaintiff for injuries received, and placing the burden of the loss elsewhere than on the injured plaintiff.

Useful in this determination is the nature of damages which the plaintiff may recover. The damages recoverable in an action of this kind are purely compensatory in nature. If the plaintiff has suffered no damage, he cannot recover, and his damages are geared entirely to the degree of harm which he has suffered. In addition, the defendant is allowed to shift the burden of payment of damages to another by contracting for insurance. If the reason underlying imposition of liability is to deter the defendant by punishing him, the means of "punishment" selected is the forced payment of money. But if the negligent defendant is not forced to pay himself, but can contract to have another pay for him, then the purpose behind the rule cannot be to punish him. Where liability is imposed as an admonition or punishment to the defendant for engaging in wrongful conduct, the damages are geared to the degree of defendant's misconduct, and not the extent of plaintiff's injury. In addition, it is insisted defendant be the one to pay, since he would otherwise escape the punishment exacted, and defeat the deterrent effect.

The law goes further. It actively searches out someone who had some connection with the subject matter or the parties, even though this third person is personally without fault, and imposes liability directly upon him. All jurisdictions employ the family car doctrine, or impose liability upon an owner of a car for injuries inflicted by one operating the car with the owner's permission; all jurisdictions utilize the doctrine of respondeat superior. The purpose in selecting these particular people (parents, car owners, employers) is a desire to find, not a defendant who is guilty of misconduct, but a defendant who is financially responsible.

The growing concern of all states with the rising financial toll exacted by automobile injuries is shown by the enactment in all fifty states of

for moral fault which continue primarily to serve as a wrongdoer's admonition, and the much more important liabilities for what I have called 'negligence without fault,' *i.e.*, liabilities which, although still phrased in terms of fault, have come primarily to serve to distribute the losses inevitably caused by modern enterprise.

"It was for the first type, the classic liabilities for moral fault, that the law of conflict of laws, for the defendant's protection, developed the reference to the law of the place of the wrong. That this reference has become inappropriate, and indeed meaningless, in those cases in which liability had ceased to presuppose a 'wrong' . . . . [Such a] formula could produce intolerable results . . . ." Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws": I*, 69 YALE L.J. 595, 598 (1960).

financial responsibility laws.[100] These laws, which provide for suspension of drivers' licenses and all automobile registrations for failure to pay a judgment arising out of an automobile injury, provide a powerful and almost unprecedented[101] sanction for this select group of judgment creditors. Each state, therefore, has a strong interest in affording compensation to those injured by automobile accidents within its borders, as well as its residents. This policy is directed against those who operate, maintain, or own automobiles,[102] because they are more likely to have resources with which to meet this liability. It also encourages the purchase of insurance by those upon whom liability is imposed,[103] thus shifting the loss from the particular injured plaintiff to the whole of the driving, owning, and maintaining public. The rationale underlying each state's concern is the cost to its public in terms of support and medical care, and loss to the community of the productive and creative abilities which these injured people would otherwise have contributed.[104]

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[100] *E.g.*, COLO. REV. STAT. ANN. §§ 13-7-1 to 13-7-39 (1963); N.Y. VEHICLE & TRAFFIC LAW §§ 310-68.

[101] The great interest of the states in providing compensation for those injured in automobile accidents was recognized by the Supreme Court when it upheld the sanctions imposed by the Utah Safety Responsibility Law, despite the claim that the provision that the sanctions would not be discharged by bankruptcy (*e.g.*, COLO. REV. STAT. ANN. § 13-7-5(2) (1963); N.Y. VEHICLE & TRAFFIC LAW § 337(c) (1960)) violated the supremacy clause, in Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962).

[102] COLO. REV. STAT. ANN. § 13-7-4(3) (1963) provides: "The judgment referred to shall mean any final judgment . . . for or on account of bodily injury to or death of any person resulting from the operation of any motor vehicle upon a highway." N.Y. VEHICLE & TRAFFIC LAW § 332(b) provides: "The judgment . . . shall mean any judgment . . . for damages . . . because of bodily injury to or death of any person arising out of the ownership, maintenance, use or operation of any motor vehicle."

[103] Purchase of insurance is encouraged by exempting those who have a minimum insurance coverage from posting the security required. *E.g.*, COLO. REV. STAT. ANN. § 13-7-18 (1963); N.Y. VEHICLE & TRAFFIC LAW § 342.

[104] The legislative policy behind the adoption of both the Colorado and New York statutes is codified as follows:

"(3) The general assembly is acutely aware of the toll in human suffering and loss of life, limb, and property caused by negligence in the operation of motor vehicles in our state. Although it recognizes that this basic problem can and is being dealt with by direct measures designed to protect our people from the ravages of irresponsible drivers, the general assembly is also very much concerned with the financial loss visited upon innocent traffic victims by negligent motorists who are financially irresponsible. In prescribing the sanctions set forth in this article, it is the policy of this state to induce and encourage all motorists to provide for their financial responsibility for the protection of others." COLO. REV. STAT. ANN. § 13-7-2(3) (1963).

"The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss thereby inflicted. The legislature determines that it is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them." N.Y. VEHICLE & TRAFFIC LAW § 310(2). See also articles cited in note 66 *supra*.

Once the context—general compensatory tort liability for injuries inflicted in automobile accidents—has been established, it becomes apparent that the special immunity granted to the host and the special disability imposed upon the guest are the exception. The guest's ability to recover is conditioned upon proof of a greater degree of deviation by the host from the conduct normally required.

The requirement that plaintiff guest prove this greater deviation from normal conduct does not mean that the standard of care has become less. The standard for determining whether defendant's conduct was negligent remains the same. The existence of the guest-host relationship, in those states having guest statutes, creates a special immunity, or right, in the host, to engage in conduct which would normally create liability on his part, without in fact incurring such liability. The guest, on the other hand, suffers a special disability in that he can be injured by less than the normal standard of care without being able to receive compensation for his injuries.[105] The pivotal factor is the existence of this relationship; from it flow these special rights and disabilities.

A jurisdiction which has a guest statute has thus made a policy decision to burden one group, injured guests, in order to benefit another. Since both guest statute and non-guest statute jurisdictions have general policies of affording innocent injured plaintiffs compensatory recovery in all cases not falling within this narrow exception, it can be assumed denial of recovery would not be desired unless the group intended to be benefited thereby would, in fact, receive the benefit. In other words, there would be no desire to limit the guest's recovery, and thus negate the general policy, unless the countervailing policy giving rise to such limitation of recovery could be effected.

There are several groups that might have been intended as beneficiaries: hosts or those who stand in their place insofar as ultimate liability is concerned; the courts; other drivers; or third parties injured in the same accident who were not guests of the defendant. The last of these potential beneficiaries is the most easily dismissed. Nothing in the legislative history of the statute or in its judicial interpretation by the Colorado courts suggests that a motivation underlying enactment of the statute was the protection of these third parties. Nor is such construction plausible from the terms of the statute. The benefit to this group is supposed to flow from the preservation of defendant's assets by not allowing the guest to sue. The preservation of defendant's assets would easily be accomplished by enactment of a priority statute, or by conditioning the guest's recovery upon a showing that any such third

[105] See note 97 *supra*.

party (1) had no legally cognizable claim against this host or (2) such a claim existed but had been satisfied.[106] The condition upon which recovery hinges under a guest statute (proof of a higher degree of fault on the part of the host) in no way preserves the defendant's assets for such third party in the event the plaintiff is able to establish that degree of misconduct. Nor does the statute grant the guest recovery if there is no valid third party claim which would be adversely affected.

Two reasons for enactment of the statute are suggested by the nature of the conduct required for imposition of liability and the parties upon whom the statute operates. The first is the desire to exclude suits in which there is a high probability that the host, because he lacks any meaningful adverse interest to that of his guest, will collude with the guest in establishing the operative facts requisite for imposition of tort liability. Since negligence involves no idea of moral fault, and since the defendant's insurer rather than the defendant personally will suffer the consequences if liability is found to exist, the legislature has required that, once this relationship is found to exist, facts constituting an adverse interest in the host condition the guest's ability to recover. The guest is required to establish that the host engaged in conduct entailing moral fault and possible criminal sanctions[107] (gross negligence, or intoxication, or wanton and wilful disregard for plaintiff's safety). Since this higher degree of fault involves moral fault, it might call for imposition of a penalty upon defendant personally by requiring him to pay instead of allowing him to shift the burden to his insurance carrier. Therefore, these two factors coalesce to provide the host with sufficient adverse interest to refuse to collude with his guest and ensure that the suit will be between true adversaries.

If the rationale underlying the enactment of the guest statute was the legislature's desire to provide the defendant host with an adverse interest, the intended beneficiary could not be the host. The legislature felt the need to provide this adverse interest because it initially determined that the host would prefer to have his guest recover at the expense of the host's insurance company than to resist any showing of negligence. By raising the degree of fault required of the host, the host has not been benefited.

The potential beneficiaries are those upon whom liability is imposed

[106] That the legislature is capable of tailoring a statute to the exact needs of the policy giving rise to its enactment is illustrated by the provisions of the safety responsibility laws; *e.g.*, COLO. REV. STAT. ANN. § 13-7-7(5)(f) (1963) (exempting from operation of the statute those factual situations in which there would be no liability on the part of the owner or operator).

[107] See, *e.g.*, CAL. VEHICLE CODE §§ 23101-04 (Supp. 1965); COLO. REV. STAT. ANN. §§ 13-5-30 to 13-5-32 (1963).

for the host's negligence: other drivers in the same jurisdiction, and the jurisdiction's courts. Those who incur liability because of the host's acts are benefited because the party who causes their liability now has just as much interest as they do in preventing the guest from establishing the facts requisite for liability.

The intended beneficiaries of the rule could also be other resident drivers of the jurisdiction. Insurance premiums are calculated on the basis of a number of variables existing in the area where the automobile in question is garaged (usually the domicile of the owner).[108] One variable is the recovery on automobile accidents. If the jurisdiction in question denies recovery to the whole group of guest claimants for ordinary negligence, and allows recovery only in those cases where the guest can show a greater degree of fault, it is able to keep down the amount of recoveries against its residents. The legislature might decide to exclude this class of claimants either because it feels there is a high degree of potential collusion possible in guest-host situations and does not want the price paid by other drivers through increased premiums, or because it generally wants to reduce its residents' insurance rates by excluding this class of recipients.

If the evil feared by the legislature is the fear of collusion, another intended beneficiary of its decision to require a showing of a higher degree of fault might be its courts. The legislature might feel that the difficulty in ferreting out collusive from noncollusive suits is too much of a burden for its courts to bear, and therefore simply prefers to remove the temptation from potential defendant hosts.

3. Legitimate Application of Policy

(*a*) *False Conflicts.*—A state's policy can have legitimate application only when it is relevant to the issues and parties before the court. Where the application of a state's law will result in the solution of a particular issue in the manner the state has decreed, for the benefit of the parties contemplated by that law and with the burden being borne by the parties contemplated, that policy can be effected by applying that law to the case, and the state has an interest in its application. If, upon analysis, it is revealed that the law in question was meant to apply to a different problem, or intended to benefit different people, or intended to burden different people, than the ones presently before the court, the policy intended to be effected by applying that law is not relevant. Therefore, that jurisdiction would have no "interest" in having its law applied. The "conflict" alleged to exist between that jurisdiction and another on this issue is false.

[108] Ehrenzweig, *supra* note 99, at 603.

Suppose, for example, that the *Dym* case had been brought in a disinterested third jurisdiction, whose only contact with the parties or the case was that it was the forum. The plaintiff pleaded New York law was applicable, and the defendant urged Colorado law. After evaluating the policies in the manner outlined above, the forum would conclude that, as applied to the facts of this case, there was a false conflict between the laws. Since there was no policy which the Colorado guest statute reflected that could be effected if that law were applied to the instant case, there would be no reason to apply it. Since no Colorado resident is involved, and since the premiums on the automobile involved were calculated on the basis of New York recoveries, no other Colorado drivers will be benefited; their rates will remain unchanged even if this plaintiff is allowed to recover. The New York defendant and all other New York drivers have already had the possibility of this plaintiff's recovery included in the computation of their rates. The only beneficiary of the decision to apply Colorado law would be the New York defendant's insurer, who has already collected his premium for the risk that this plaintiff would be injured due to defendant's negligence and that it would be required to compensate for that injury. If the driver of the other car was the intended beneficiary, there is nothing in the record to show he was injured or that, if he were, he was without fault and therefore entitled to recovery. Since the defendant is the party urging application of the foreign law, the burden of establishing that the foreigu law is properly applicable to the case must fall upon him. Since he failed to do so, his case must fall.

On the other hand, New York's law was intended to effect its policy in regard to this exact situation and these exact people. Therefore, its law could legitimately be applied, displacing the forum's own, which would have been applicable if no other law had been found legitimately applicable.

In addition, the only jurisdiction which will be directly affected by the outcome of this case is New York. Its resident is the party who will have to bear the loss in either event. Therefore, it has a right to implement its value judgment as to which of these two parties should be the one to bear the loss.

Similarly, if the plaintiff had been a Colorado resident in the instant case, New York law should still be applied. Colorado's policy is not to deprive its plaintiff residents of their normal recovery right unless the proper party is benefited thereby. Unless its courts, the insurers of its defendants, or its other drivers will receive the benefit of having its law applied, no policy of Colorado's will be furthered by depriving its plaintiff of recovery.[109] New York, on the other hand, has no policy of

[109] See Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); this also seems to

benefiting its courts, other drivers, or insurers of its defendants, but prefers to grant compensatory relief to injured plaintiffs. Therefore, both Colorado and New York policy, in regard to the instant case, are the same, and both can be effected by applying New York law.

Similarly, if the intended beneficiary of Colorado's guest statute was its courts, that policy would not be relevant unless Colorado was the forum. Therefore, even if both the plaintiff and the defendant were residents of Colorado, if the legislature enacted the guest statute only because it did not want its courts to have to grapple with collusion, Colorado would have no desire to penalize its plaintiff and subvert its other policy of compensating negligently inflicted injuries unless Colorado courts were required to work with the collusion problem. Therefore, both New York and Colorado policy could be given effect by applying New York law.

(*b*) *The Minimization of Conflicts*—Assume that upon superficial analysis, the forum finds both policies are relevant to the facts of the case. For example, the plaintiff might be a New York resident and the defendant might be a Colorado resident. The forum might still be able to solve the conflict by minimizing the differences in policy underlying the law of the two jurisdictions.[110] Thus, even if the suit were brought in Colorado, a Colorado court could minimize and apply New York law. This is accomplished by narrowly construing the conflicting portion of the law. Here, both jurisdictions have general policies of affording injured plaintiffs compensatory relief. Colorado might conclude that, unless the burden was to be borne by one of its residents, the other resident should not receive the benefit. Therefore, since here the burden of applying Colorado law would not be borne by a Colorado resident, but would fall upon the New York public, a Colorado court might conclude that its legislature meant the statute to apply only when it would result in benefiting a given class of Colorado residents (other drivers) at the expense of a larger class of Colorado residents (its general tax-paying public, who would have to bear the burden of an incapacitated plaintiff denied private recovery). It might conclude that if the burden was to be shifted to a group not envisaged by the legislature (the general tax-paying public of New York), this would be fatal. Therefore, it could again give effect to both its own and New York's general policy of compensating negligently injured plaintiffs unless the narrow group was to bear the burden of nonrecovery.[111]

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be the reasoning underlying Watson v. Employers' Liab. Assur. Corp., 348 U.S. 66 (1954); and Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

[110] This hypothetical is used only for purposes of illustrating the "minimizing" methodology. It is not suggested a court could not properly reach a different result.

[111] Illustrative of the "minimization" process is Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

(c) *True Conflict.*—If the forum is not able to minimize the conflict out of existence, but is faced with two jurisdictions whose policies have legitimate relevance to the matter before it, and one of those jurisdictions is its own, it simply applies its own law. Its courts are not free to substitute the value judgment made by the courts or legislature of another jurisdiction for its own.[112] Therefore, if the policy underlying Colorado's guest statute was to keep its courts from having to consider this type of potentially collusive suit, and Colorado was the forum, Colorado should apply its own law and dismiss the suit. If New York were the forum, and it found that Colorado intended to keep its drivers' insurance rates down by precluding negligence recovery for guests altogether, whether that burden was to be borne by Coloradans or New Yorkers, and the defendant was from Colorado, but New York's law reflected its policy of allowing its plaintiffs to recover for negligence, New York should apply its own law.

Similarly, if the facts were the reverse of those in *Babcock*,[113] it would not necessarily lead to the conclusion that Colorado law was applicable. New York's law might still be directed at affording compensation to all who were injured within its borders, in order that those of its residents who extended aid or comfort to such victims might not go unrecompensed for their efforts on that victim's behalf.[114] Therefore, even if the policy reflected in Colorado's law was fully applicable to the situation, even if both parties were Colorado residents, if the accident occurred in New York, New York's policy would still be applicable. Since the two were in actual conflict, New York, as the forum, should apply its own law. If Colorado were the forum, it would apply its law.

(d) *The Problem of the Disinterested Forum.*—If the forum has no policy of its own which is applicable a problem is created only in the event of a true conflict between the laws of two or more other states. In other cases, it merely does what any interested forum would do, including the application of its own law unless a foreigu law is shown to be applicable. However, in a true conflict case, the disinterested forum has no guide.[115] One solution might be to see which of the applicable conflicting laws was most like its own, and apply that. Whichever of the conflicting laws the disinterested forum does decide to apply, however, it will at least have a rational basis for its choice of law.

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[112] If the rule was judicially made, and the court decides that its own rule is erroneous and that of the foreign jurisdiction represents the better rule and decides to adopt the substance of that rule, it thereby overrules its own rule. It is still applying its own law, not that of the foreign jurisdiction.

[113] Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965).

[114] See, *e.g.*, Watson v. Employers' Liab. Assur. Corp., 348 U.S. 66 (1954).

[115] One possible solution would be to dismiss the suit. See EHRENZWEIG, CONFLICT OF LAWS § 218 (1962).

IV

CONCLUSION

The governmental interest approach is suggested for several reasons. First, it should be easy to apply. It is essentially the same methodology used by any good court in resolving conflicts in internal law. If a court finds that two conflicting rules of law are urged as applicable in a domestic case, it first analyzes the policies underlying each. If it finds the rationale behind one of the laws is not relevant to the case before it—that there is a false conflict—it simply applies the other law which it finds applicable. If, after superficial analysis, it seems both rules are equally applicable, it reexamines both, and construes the conflicting portions narrowly, emphasizing the common grounds—it minimizes the conflicts. If it is not able to avoid the conflict by construction, it simply makes a choice. In a conflict of laws case, the solution is just that much easier, since the forum is not required to undergo this last step without guidelines unless it is disinterested. It simply applies its own law.

Second, the burden of this process rests on counsel—where it belongs. Just as in domestic cases, counsel bears the burden of persuasion that the law he favors, as opposed to that of his opponent, is properly applicable to the facts before the court. Therefore, the court will not be required to spend a great deal of time delving into unfamiliar foreign law. Unless the relevance of the foreign law is raised by its advocate, no question of its applicability can arise, and the forum will simply apply its own law.

Third, and most important, this approach will produce the most rational results. It best ensures that the answers will deal meaningfully with the problem before the court. This is the reason the very same approach has been used by good courts in solving domestic problems. No solution is good merely because it is arrived at easily; it must also satisfactorily resolve the problem.[116] It is precisely because the place of wrong rule, while simple to apply and certain in result, reached results which bore so little relation to the problem presented that it has been rejected. To adopt a rule like that enunciated in *Dym* which is complex, uncertain in its application,[117] and still bears no relation to the problem is the height of judicial folly. The often repeated judicial statement that dissatisfaction with the substance of the law is to be solved by resort to the legislature instead of the courts has no meaning if a law is applied from a jurisdiction whose legislature could not conceivably have been reached by the interested party.

Sandra Terzian

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[116] See, *e.g.*, Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

[117] See note 49 *supra*.