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Conflict of Laws--Lex Fori in the Fields of Torts

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CASE COMMENT

CONFLICT OF LAWS — Lex Fori in the Field of Torts

LEX LOCI DELICTI

In the American law of conflicts, two rules deemed elementary are: (1) the law of the place of the wrong determines whether a person has sustained a legal injury,[1] and (2) that for a tort action to be maintainable, there must be a good cause of action existent under the laws of the place where the alleged tort occurred.[2]

In wrongful death actions, the traditional American view has been that the lex loci delicti determines the right to sue for such wrongful death,[3] who is entitled to the amount recoverable,[4] and the amount which may be beneficially recovered.[5]

This view has been predicated on the theory of "vested rights" as set forth by Mr. Justice Holmes in *Slater v. Mexican Nat'l R.R.*: "But as the only source of the 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."[6]

The rejection of the theory is said to have begun as early as 1923 in an opinion by Mr. Justice Learned Hand to the effect that:

> . . . no court can enforce any law, but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its

1. 11 AM. JUR. *Conflict of Laws* §182 (1937); RESTATEMENT, CONFLICT OF LAWS §378 (1934).

2. LEFLAR, CONFLICT OF LAWS §378 (1934); RESTATEMENT, *ibid.* at §379. For definition of the place of the wrong as being in the state where the last event necessary to make an actor liable for an alleged tort takes place see RESTATEMENT, *ibid.* at §377.

3. LEFLAR, *id.* at §114; RESTATEMENT, *op. cit. supra* note 1, §391.

4. Pennsylvania Ry. v. Levine, 263 Fed. 557 (2d Cir. 1920); Free v. Southern Ry., 78 S.C. 57, 58 S.E. 952 (1907); RESTATEMENT, *op. cit. supra* note 1, §393.

5. Northern Pacific Ry. v. Babcock, 154 U.S. 190, 38 L.Ed. 958 (1894); Lauria v. E. I. DuPont de Nemours & Co., 241 Fed. 687 (E.D.N.Y. 1917); LEFLAR, *op. cit. supra* note 2, §174; GOODRICH, CONFLICT OF LAWS §88 (1949); RESTATEMENT, *op. cit. supra* note 1, at §§391(d), 412.

6. Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126, 48 L.Ed. 900, 903 (1904); *accord*, Tennessee Coal, Iron & R.R. v. George, 223 U.S. 354, 58 L.Ed. 997 (1914); Davis v. Mills, 194 U.S. 451, 48 L.Ed. 1067 (1904).

own as nearly homologous as possible to that arising in the place where the tort occurred.[7]

While the doctrine of "vested rights" has been the object of criticism by both judges and scholars,[8] the role it has played, particularly in actions concerning measure of damages, has indeed been significant. This is well illustrated by a decision in the California Supreme Court arising from an automobile accident between two California citizens in Mexico. The court in upholding the limitation on damages as provided by Mexican law stated that: ". . . the measure of damages is inseparably connected to the cause of action, and cannot be severed therefrom."[9]

Other courts, finding this view to be to their dissatisfaction have, in attempts to avoid the rule of lex loci delicti, often resorted to various and sometimes rather specious reasoning to justify their decision in applying the law of the forum.[10] This has been accomplished by characterizing a transaction as a question of contract law;[11] by applying the law of the place of the alleged harmful conduct, rather than that of the actual harm as the real wrong;[12] and, more frequently, by applying lex fori as a matter of procedure rather than substance.[13]

7. Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 140 (2d Cir. 1962) (dissent). Judge Kauffman, in his dissenting opinion, cites from the case of Guinness v. Miller, 291 Fed. 769, 770 (S.D.N.Y.), *aff'd*, 299 Fed. 538 (2d Cir. 1924), *aff'd sub nom.* Hicks v. Guinness, 269 U.S. 71, 70 L.Ed. 168 (1925); *accord*, Siegmann v. Meyer, 100 F.2d 367 (2d Cir. 1938).

8. Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822, 823, n. 4 (1950) (for an explanation of the "vested rights" theory and the criticism by Judge Learned Hand and Professor Cook leading to their rejection of it); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); see EHRENZWEIG, CONFLICT OF LAWS §4 (1962).

9. Victor v. Sperry, 163 Cal. App.2d 518, 329 P.2d 728 (1958); *accord*, Stoltz v. Burlington Trans. Co., 178 F.2d 514 (10th Cir. 1949); Howard v. Pulver, 329 Mich. 415, 45 N.W.2d 530 (1951); *but cf.* Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162 (1953).

10. See Childress, *Toward the Proper Law of the Tort*, 40 TEXAS L. REV. 336, 348 (1962); Ehrenzweig, *The Lex Fori in Conflict of Laws, Exception or Rule?*, 32 ROCKY MT. L. REV. 13, 15 (1960).

11. Levy v. Daniels U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928); *cf.* Graham v. Wilkins, 145 Conn. 34, 138 A.2d. 705 (1958).

12. See Vrooman v. Beach Aircraft Corp., 183 F.2d 479, 480 (10th Cir. 1950) (*dictum*) (The court, in an action which arose from an airplane crash in Indiana, applied the law of Kansas, the place of the alleged negligent conduct); Gordon v. Parker, 83 F. Supp. 40 (D. Mass. 1949), *aff'd*, 178 F.2d 888 (1st Cir. 1949) (action involving alienation of affections); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957).

13. Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162 (1953).

CONSTITUTIONAL REQUIREMENTS

When the law of the forum is applied to an action based on a foreign statute, the question presented is whether such application is a violation of the Constitution of the United States, namely the due process clause of the fourteenth amendment,[14] and the full faith and credit clause.[15] Most of the controversy has centered around these two provisions.[16]

DUE PROCESS

No hard and fast rule can be laid down as to what is, or what is not, due process; rather the pattern of due process is to be shaped out of the facts and circumstances of each case.

Originally the due process clause was held to control a state's choice of law rules without regard to the contacts or interests, however significant, of the forum state with the transaction. In *New York Life Ins. Co. v. Dodge,*[17] the United States Supreme Court held that Missouri could not apply her own law to prevent the application of the paid-up value of a Missouri insurance policy toward the repayment of a loan agreement in accordance with a contract of lending. This, the Court reasoned, was a separate transaction entered into in New York and governed by her laws. Thus Missouri was forbidden to substitute her laws for those of the place of the making of the contract despite her interests in the transaction, in that both the insured and his wife, the plaintiff beneficiary, were residents of Missouri, and also, that at no time during the transaction did the insured leave Missouri.

While the *Dodge* case has never been expressly overruled, later decisions, difficult to reconcile with the view expressed in *Dodge,* indicate that the Supreme Court has relaxed its

14. ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

15. Article IV, §1: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

16. See also, Currie & Schreter, *Unconstitutional Discrimination in Conflict of Laws: Equal Protection,* 28 U. CHI. L. REV. 1, (1960); Currie & Schreter, *Unconstitutional Discrimination in Conflict of Laws: Privileges and Immunities,* 69 YALE L. J. 1323 (1960) (To the extent to which other constitutional prohibitions against discrimination limit the freedom of state courts in deciding conflict of laws questions).

17. 246 U.S. 357, 62 L.Ed. 772 (1918) (5-4 decision) *following* New York Life Ins. Co. v. Head, 234 U.S. 149, 58 L.Ed. 1259 (1914); *cf.* Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 66 L.Ed. 900 (1922).

standards in determining what constitutes such interest as will allow the application of local law.[18]

The deciding factor in *Home Ins. Co. v. Dick*[19] was the interest of the forum state in the transaction in controversy. The Court in its decision held that when a state, which has no interest in the matter, applies its law to defeat rights asserted under the law of a foreign country, there is a denial of due process. Thus it would appear that the converse of the rule as laid down in *Dick* would be that when a state does have substantial contacts and a legitimate interest in the transaction, it may apply its own law without violation of due process.[20]

Following this rationale, the prevailing rule has come to be that when the forum state has such a substantial contact with the action as to constitute a legitimate interest, it may apply its own law without violating the due process clause of the fourteenth amendment,[21] even assuming the other state may also have a similar interest.[22]

FULL FAITH AND CREDIT

While the forum state may meet the test of due process, it still must contend with the requirements of the full faith and credit clause.

It was perceived at an early age in the United States that conflict of laws, dealing with both interstate and international matters, as well as state interests, should not be left to the uncontrolled discretion of the several states, so even the loose

18. *E.g.*, Watson v. Employers Liab. Assur. Corp., 348 U.S. 66, 99 L.Ed. 74 (1954); State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 89 L.Ed. 812 (1945); Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 87 L.Ed. 777 (1943).

19. 281 U.S. 397, 74 L.Ed. 926 (1930); compare Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316-317, 87 L.Ed. 777, 782 (1943).

20. See Weintraub, *Due Process and Full Faith and Credit in a State's Choice of Law*, 44 IOWA L. REV. 449, 455-456 (1959).

21. Watson v. Employers Liab. Assur. Corp., 348 U.S. 66, 99 L.Ed. 74 (1954). The Court held that, as Louisiana had a legitimate interest in safeguarding the rights of her citizens, she could apply her own law without violation of due process. *Accord*, State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154, 89 L.Ed. 812 (1944); See generally Weintraub, *id.* at 450-468.

22. See Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 550, 79 L.Ed. 1044, 1053 (1935); *but cf.* Weintraub, *supra* note 20 at 456-458 (to the effect that a state may have a substantial contact with the occurrence, but that such contact was acquired so late that application of state law would inject an element of unfairness, constituting a violation of due process).

Articles of Confederation had a rudimentary full faith and credit clause.[23] Accordingly, the very purpose of our present full faith and credit clause was to alter the status of the several states as independent sovereignties, each free to ignore the obligations created by the laws and judicial proceedings of the other states, and to make them into integral parts of a single nation, throughout which certain rights and obligations would be recognized regardless of origin.[24]

The full faith and credit clause, however, does not compel a state to adopt any particular set of rules as conflict of laws. It merely sets certain requirements which each state must observe when asked to do so by a sister state,[25] leaving the states free to adopt rules of conflict of laws as they choose,[26] subject to the full faith and credit clause and other constitutional requirements.[27]

In the case of statutes, the extra-territorial effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests becomes imperative.[28] This conflict, originally expressed as that between the policies of two states,[29] is now described as that between the policy of one state and "the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states."[30]

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23. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 586 (1953), reprinted in ASS'N OF AM. LAW SCHOOLS, SELECTED READINGS ON CONFLICT OF LAWS 255 (1956); see generally Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. (1944).

24. Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-277, 80 L.Ed. 220, 228 (1935) (holding full faith and credit to judgments includes judgment for taxes).

25. Wells v. Simonds Abrasive Co., 345 U.S. 514, 516, 97 L.Ed. 1211, 1215 (1953).

26. Kryger v. Wilson, 242 U.S. 171, 61 L.Ed. 229 (1916).

27. Wells v. Simonds Abrasive Co., *supra* note 25.

28. State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154, 159-160, 89 L.Ed 312, 317 (1944), *citing* Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 547, 79 L.Ed. 1044, 1052 (1935); see generally Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958) (that the major uncertainty in the field of full faith and credit involves the extraterritorial effect that must be given to the statutes of sister states); Reese, *Full Faith and Credit to Statutes, the Defense of Public Policy*, 19 U. CHI. L. REV. 319 (1952).

29. Alaska Packers Ass'n v. Industrial Acc. Comm'n, *id.*

30. Hughes v. Fetter, 341 U.S. 609, 611, 95 L.Ed. 1212, 1216 (1951).

In resolving such conflicts, although with frequent disagreement among the members of the Court, permissive weighing and balancing of the conflicting claims and interests, both abroad and at the forum, has been approved in decisions by the Supreme Court.[31]

This aspect of weighing and balancing or analyzing interests has proven to be a popular topic, with many of the scholars in the field of conflict of laws advocating such.[32]

Such an approach has provided the basis for decisions in the field of workmen's compensation,[33] where however, it may be conceded that as compensation acts were enacted with special social and economic purposes in mind, greater freedom has been and should be permitted in the process of extending the scope of local laws to those who according to local theories come within its protective coverage.[34] It has also been used in such areas as insurance,[35] wrongful death actions,[36] and more recently in a case arising under the Federal Tort Claims Act, in which the Court stated:

> Where more than one state has sufficient contact with the activity in question, the forum state, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case, the law of one or another state having such an interest in the activity.[37]

31. Wells v. Simonds Abrasive Co., 345 U.S. 514, 97 L.Ed. 1211 (1953); Hughes v. Fetter, *id.*; Stumberg, *Torts and Conflict of Laws*, 34 WASH. L. REV. 388, 397 (1959).

32. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, DUKE L. J. 171 (1959); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI L. REV. 9 (1958); Kramer, *Interest and Policy Clashes in Conflict of Laws*, 13 RUTGERS L. REV. 523 (1959); Hill, *Governmental Interest and Policy Clashes in Conflict of Laws, A Reply to Professor Currie*, 27 U. CHI L. REV. 463, 474-479 (1960); *but see* Sumner, *Choice of Law Rules: Deceased or Revived?*, 7 U.C.L.A. L. REV. 1 (1960).

33. Carrol v. Lanza, 349 U.S. 408, 99 L.Ed. 1183 (1955); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493, 502, 83 L.Ed. 940, 945 (1939); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 79 L.Ed. 1044 (1935); compare Bradford Elec. Co. v. Clapper, 286 U.S. 145, 76 L.Ed. 1026 (1932).

34. Stumberg, *supra* note 31.

35. Watson v. Employers Liab. Assur. Co., 348 U.S. 66, 99 L.Ed. 74 (1954); State Farm Mut. Ins. Co. v. Duel, 324 U.S. 154, 89 L.Ed. 812 (1944).

36. Wells v. Simonds Abrasive Co., 345 U.S. 514, 97 L.Ed. 1211 (1953); First Nat'l Bank v. United Airlines, 342 U.S. 396, 96 L.Ed. 441 (1952); Hughes v. Fetter, 341 U.S. 609, 95 L.Ed. 1212 (1951).

37. Richards v. United States, 369 U.S. 1, 15, 7 L.Ed.2d 492, 501 (1962). This action arose out of an airplane crash in Missouri while en-

Only in the field of fraternal benefit associations,[38] has the Court adhered to its original position, seemingly ignoring any weighing and balancing or analysis of the states' interests.[39]

Thus it appears that the courts are increasingly moving from a strict application of the full faith and credit clause, to that of a more liberal nature, and in each instance delving into the merits of the particular case, as it should arise.

DEPARTURE FROM LEX LOCI DELICTI

In *Kilberg v. Northeast Airlines, Inc.*,[40] the highest court in New York in a dramatic departure from the rule of lex loci delicti, stated by way of dictum that the limitation on damages under the Massachusetts Wrongful Death Act might not be applied in the courts of that state in an action for wrongful death resulting from a plane crash in Massachusetts. The court justified its reasoning on the grounds that "[M]odern conditions make it unjust and anomalous to subject traveling citizens of this state to the laws of other states, over and through which they move."[41] The Massachusetts limitation was found to be violative of public policy and also to concern the "procedural" law of New York.

There seems to be little doubt that the real basis of the court's dictum was founded on the public policy of the state of New York, yet it is evident that the court, in throwing off

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route from Oklahoma to New York. The Court held that under the Federal Tort Claims Act the conflict of law rules of the state where the negligence occurred were applicable; thus Oklahoma's law, applying the Missouri Wrongful Death Statute governed, and the representatives were entitled to no further recovery. ($15,000 had already been recovered or at least tendered in Missouri.)

38. *E.g.*, Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 91 L.Ed. 1687 (1947); Sovereign Camp of the Woodmen of the World v. Bolin, 305 U.S. 66, 83 L.Ed. 45 (1938).

39. Another similar approach in the field of conflict of laws, which merits mention, has led to what has come to be called the "grouping of contacts" or "center of gravity" theory. Under this theory, the law of the state having the most significant contacts with the transaction should be applied. See Zogg. v. Pennsylvania Mut. Life Ins. Co., 276 F.2d 861 (2d Cir. 1960); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R.2d 264 (1954); *but see* Kramer, *supra* note 32 at 546, for a criticism of the approach as a mechanical weighing with little attempt to weed out the irrelevant factors; Currie, *supra* note 32, at 13 (describing the theory as being amorphous in relation to the contacts).

40. 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961). This case arose out of the same ill-fated flight as did Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962).

41. *Id.* at 135, 172 N.E.2d 526, 527 (1961).

the shackles of the rigid view of lex loci delicti, felt compelled to supplement their argument through the characterization of the problem as being one of "procedural" law.[42]

Regardless of the injection of the element of procedural law, *Kilberg*, in effect, laid the foundation for what may properly be defined as the final step toward the accomplishment of a new era in the field of torts in conflict of laws.

LEX FORI

In *Pearson v. Northeast Airlines, Inc.*,[43] plaintiff's decedent, a domicillary and citizen of New York perished in an airplane crash in Massachusetts. Plaintiff, as administratrix of her husband's estate, brought suit in the Southern District of New York under the Massachusetts Wrongful Death Act;[44] federal jurisdiction resting on diversity of citizenship, plaintiff being a citizen and domicillary of New York and the Airlines being a Massachusetts corporation. Plaintiff obtained a jury verdict of $160,204.65, the trial judge refusing to apply the $15,000.00 limitation under the Massachusetts statute. Judge McGohey, in so doing, ruled that he was obliged to apply a dictum of the New York Court of Appeals in *Kilberg v. Northeast Airlines, Inc.*,[45] to the effect that the Massachusetts limitation would not be enforced against a New York citizen suing in a New York court. The court later denied defendant's motion to strike pre-judgment interest.[46]

42. That *Kilberg* ". . . must be held merely to express New York's strong public policy against limitations in wrongful death actions," see Davenport v. Webb, 230 N.Y.S.2d 17, 183 N.E.2d 902, 904 (1962).

43. 199 F. Supp. 539 (S.D.N.Y. 1961).

44. MASS. GEN. LAWS ch. 229, §2 (1932): Damages for death by negligence of common carrier. If the proprietor of a common carrier of passengers . . . causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his servants or agents, and recovered and distributed as provided in section one, and to the use of the persons and in the proportions, therein specified. (The statute was amended to raise the upper limit of recovery to $20,000; MASS. ANN. LAWS ch. 229, §2 (Supp. 1961); and effective January 1, 1963, the minimum recovery was raised to $3,000.00 and the maximum to $30,000.00, MASS. ACTS, ch. 306 (1962).

45. 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

46. 201 F. Supp. 45 (S.D.N.Y. 1961). The present discussion will be limited to the controversial issue as to whether the New York Court is required to apply the $15,000.00 limitation of liability for wrongful death under the Massachusetts statute. In view of the decision in Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962), and that of Davenport v. Webb, 230 N.Y.S.2d 17, 183 N.E.2d 902 (1962), it appears well settled that the question of pre-judgment interest is to be determined by Massachusetts law.

In reversing and remanding, a panel of the court of appeals for the second circuit, one judge dissenting, held that the trial court's refusal to apply the $15,000.00 limitation under the Massachusetts statute was a violation of the full faith and credit clause of the United States Constitution.[47] The court also unanimously held that the lower court had erred in denying the motion to strike the pre-judgment interest.[48] The majority opinion in reaching their decision, relied heavily on *Hughes v. Fetter*,[49] and *First Nat'l Bank v. United Airlines*.[50] These cases, both of which involved wrongful death actions, were dismissed by the respective state's courts due to the forum's statutory policy against entertaining foreign wrongful death actions. After a finding that neither forum had any real antagonism toward wrongful death actions in general, for both entertained such actions arising in their own states, the Supreme Court of the United States reversed both decisions as violating the full faith and credit clause of the Constitution.

The panel court, in analogizing these cases with *Pearson*, stated that New York, likewise, had no antagonism to wrongful death actions in general, but only to the limitation of liability.[51] The majority seemingly found of little significance those cases illustrating the Supreme Court's attitude toward cases in which the law of the forum was applied in actions involving multistate activities. These, the court found, were distinguishable from the question before the court.[52]

On rehearing en banc, the court of appeals, affirming the decision of the district court, as modified by the panel's unanimous holding as to pre-judgment interest, held that the New York court was not required to apply the $15,000.00 limitation under the Massachusetts statute, and that the running of interest should be determined by Massachusetts law.[53]

47. Pearson v. Northeast Airlines, Inc., 307 F.2d 131 (2d Cir. 1962).
48. See *supra* note 46.
49. 341 U.S. 609, 95 L.Ed. 1212 (1951).
50. 342 U.S. 396, 96 L.Ed. 441 (1952).
51. See 307 F.2d 131, 134 (2d Cir. 1962). In Wells v. Simonds Abrasive Co., 345 U.S. 514, 97 L.Ed. 1211 (1953), the Court, however, said the crucial factor in Hughes and First National Bank was that the forum laid an uneven hand on causes of action arising within and without the forum state, resulting in discrimination against such foreign causes of action.
52. See Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 135-136 (2d Cir. 1962).
53. Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962) (6-3 decision), *cert. denied*, 31 U.S.L. WEEK 3259 (U.S. Feb. 19, 1963) (No. 694).

The court, citing a United States Supreme Court case,[54] and two state supreme court cases,[55] adopted as its view, that a state having substantial ties with the transaction in dispute has a legitimate constitutional interest in the application of its own rule of law,[56] and further that a court could examine each issue in the litigation weighing the contacts of the various states involved, and shape its rules controlling the litigation without interfering with the Constitution.[57]

Confronted with the contention of due process, the court stated that to constitute such a denial, there would have to be the assertion that Northeast Airlines had a vested property right in the application of the Massachusetts rule of liability for wrongful death. In answer to this, the court stated that no such right exists.[58] Not only must there be the deprivation of property, but also the arbitrary application of a state's jurisprudence to an out of state event.[59] With this the majority concludes, nothing could be less arbitrary than the decision it has made.[60]

CONCLUSION

The decision in *Pearson* is appealing to one's inherent sense of justice, but was such the proper one? The question is whether the theory of weighing and balancing of the states' interests should extend to the field of torts, or should it be confined to those fields of conflict of laws in which it has previously been applied.

It is submitted that among the various fields, there is little difference in the underlying principle. Certainly one basic task of conflict of laws is to provide methods of choice which will facilitate the fair and sensible accommodation of conflicting state policies.[61] It becomes apparent that a rigid rule

54. Richards v. United States, 369 U.S. 1, 7 L.Ed.2d 492 (1962).
55. Haumschild v. Continental Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162 (1953).
56. Pearson v. Northeast Airlines, 309 F.2d 553, 559 (2d Cir. 1962).
57. *Id.* at 561.
58. For the majority's explanation, see the dissenting opinion in Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 140-142 (2d Cir. 1962).
59. Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 563 (2d Cir. 1962).
60. *Ibid.* In regard to the Massachusetts statute being penal in nature, see Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198-200 (1918). Justice Cardozo writing the majority opinion states that the statute is not penal within the rules of private international law, its primary purpose being reparation to one aggrieved in tort.
61. Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822, 828 (1950).

mechanically applied to all torts must be inappropriate as according recognition to the true interests of the parties. Any such mechanical jurisprudence is particularly unsuited in this field.[62]

Accordingly, while much may be said in favor of greater elasticity in the rules of conflict of laws,[63] such can be accomplished only through the partial sacrifice of certain aspects of the present rule. To an extent, uniformity would be so affected.[64] But certainly the uniformity desired is not that of the strict standard thought appropriate in the field of property.[65] While the importance of the parties knowing where they stand is not to be taken lightly, yet in torts, certainty, transactions in reliance on previous decisions, predictability and the like are of less importance.[66] In the field of torts, such actions concerning legal rights among the parties are usually brought about through entirely fortuitous circumstances, normally not within the contemplation of the parties.

It has been contended that any change in the present view could possibly bring about the disturbing aspect of forum shopping.[67] This, it appears, is doubtful and at best, presents a rather unpersuasive argument. The plaintiff will seldom have the choice of more than two forums, and of these, the chances are that there will be slight dissimilarity.

In less modern times, lex loci delicti may have been an appropriate rule, yet with the passing of time and the changing of conditions, the need for a re-evaluation in the field of conflict of laws has become self-evident. The present theory, in light of these changed conditions presents fully its obsolesence if mechanically applied to a situation as in *Pearson.*

While it is true, that prior to *Pearson,* such deviation from lex loci delicti was in a relatively early stage, *Pearson* is the logical and final step toward the culmination of a changing pattern as evidenced by prior Supreme Court decisions. Rather than resorting to specious reasoning for the decision,

62. Shuman & Prevezer, *Torts, In English and American Conflict of Laws: The Role of the Forum,* 58 MICH. L. REV. 1067, 1071-1073 (1958).
63. See Childress, *Toward the Proper Law of the Tort,* 40 TEXAS L. REV. 336 (1962).
64. Sumner, *Choice of Law Rules: Deceased or Revived?,* 7 U.C.L.A. L. REV. 1 (1960).
65. See Childress, *supra* note 63, at 344.
66. *Id.* at 345.
67. See Sumner, *supra* note 66.

as other courts have felt compelled to do, or worse, to mechanically apply the rule of lex loci delicti, the court in *Pearson* was able to give frank recognition to the social, economic, and other governmental interests which were held to necessitate the application of New York law. Through such an analysis, there can be no contention that the all encompassing term of public policy has been used to conceal the true factors in the decision, or that such decision represents a blind intuitive grasping by a judge to reach what appears to him to be the just result.[68] To the contrary, the underlying reasons of public policy are brought forth to light, and as such compel the decision of the case.

Analysis of the interests among the states, while advocated by many of the scholars of today,[69] has been tempered to some degree by those who propose that such should not be within the province of the courts, but rather should be dealt with by Congress.[70] The argument is founded on the ground that the courts are limited in that their basic source of information will be supplied primarily from the opposing parties, while Congress, through a more thorough investigation could more accurately determine which of the conflicting interests is paramount. While this at first glance, may seem quite plausible, it is submitted that after further consideration, such proposal loses much of its luster. To begin with, this would certainly necessitate a long range undertaking by Congress, and even upon the final decision, the problem of a strict and rigid rule, unsuitable to conditions in later years might well be presented. Then, too, it would seem rather idealistic to say that such decision would be free of the various political pressures so often brought to bear upon members of Congress in questions of such importance. From the more practical viewpoint, the weighing and balancing or analysis of the interests should more appropriately be left in the hands of the courts.

Assuming then, that lex loci delicti is outmoded, and that the proper approach was used by the en banc session, the question remains as to whether the final decision as reached by

68. See Kramer, *supra* note 32, at 527.
69. *Supra* note 32.
70. See Currie, *supra* note 32; Kramer, *supra* note 32; *but see* Hill, *supra* note 32; Traynor, *Law and Social Change in a Democratic Society*, 1956 ILL. L. REV. 230, 234; Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961).

the court's analysis was correct. There can be little doubt that a true conflict of laws question was presented. On the one hand, there is New York's strong public policy against limitation on damages as expressed by its statute;[71] while on the other, there is Massachusetts' interest in protecting the corporations of her state against such unlimited liability.[72]

It is submitted that the interests of New York outweigh those of Massachusetts, and that the law of the forum should be applied. The Airlines, a corporation authorized to do business in the state of New York, maintains ticket offices throughout the state, and as such, a substantial portion of revenue is derived from the state. Decedent, a New York citizen and domicillary, purchased his flight tickets in one of the ticket offices in New York. The plaintiff, widow and administratrix of the estate of the deceased, likewise is a citizen and domicillary of the state of New York. From such a factual situation, the interests of New York are evident. As to whether New York's interest is paramount, certainly it may be said that New York has a legitimate interest in the welfare of her citizens. Assuming plaintiff's source of income destroyed, it may well become the responsibility of New York state in financially providing for her. It would appear ridiculous to even assume that the amount of damages as provided in the Massachusetts statute, even though considered sufficient by the standards of Massachusetts, could likewise be considered sufficient in another state, as New York, whose social and economic environment could well be quite different. Under these circumstances, Massachusetts' interests in the protection of her corporations should give way. It is unlikely that the decision will impair Massachusetts' position as the state of incorporation of Northeast Airlines in any way. The limitation of damages as provided by the Massachusetts statute would hardly seem to be the motivating factor, if any, in the Airlines' choice of the state of incorporation. Northeast Airlines, most assuredly contemplated doing business in other states which would not have such limited liability; and in such actions, as the present, the ultimate liability rests on the insurance carrier.

71. N.Y. CONST. art. I, §16 (1894).
72. *Supra* note 44.

To make the amount of damages depend on the fortuitous place of the wrong presents fully, that which is both absurd and unjust.

Pearson, in its departure from lex loci delicti has reached the proper and just decision, and hopefully such decision will provide a firm foundation for a more practical approach in the field of torts in conflict of laws.

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