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A JUDGE'S VIEW

JOHN J. TODD*

In January 1972 I was appointed to the Supreme Court of Minnesota. I had hardly found the other judges' offices and had barely occupied my office when the supreme court administrator advised me that I must immediately fill out forms so that arrangements could be made for me to attend the appellate judges' seminar to be held the coming summer at New York University. I subsequently discovered that I had not been singled out, but that all members of our court, before my time and since I was appointed, have attended the N.Y.U. seminar.¹

During the seminar I became acquainted with Bob Leflar and had the opportunity to participate with great enthusiasm in the entire two-week session. I was fascinated by Bob's presentation of issues and methods of treating problems in the conflict-of-laws area because I had dealt with some of these problems in my practice. As fate would have it, when I returned for the fall session of court, the second case assigned to me was *Milkovich v. Saari*.² The *Milkovich* case is classic material for one of Bob Leflar's seminars. It involved two residents of Ontario, Canada, who were involved in an automobile accident while traveling in Minnesota. The injured passenger was hospitalized in Minnesota and, upon recovery, returned to Canada. Ontario had a guest statute which seemed to preclude recovery on the facts of the case. Therefore, she commenced an action in Minnesota,

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1. Professor Leflar has written a number of articles about his involvement in these seminars and about the subject of continuing education generally. See R. LEFLAR, *APPELLATE JUDICIAL OPINIONS* (1974); Leflar, *Appellate Judicial Innovation*, 27 OKLA. L. REV. 321 (1974); Leflar, *Seminars for Appellate Judges*, 52 JUDICATURE 12 (1968); Leflar, *The Appellate Judges Seminars*, 21 ARK. L. REV. 190 (1967); Leflar, *Continuing Education for Appellate Judges*, 15 BUFFALO L. REV. 370 (1965); Leflar, *Seminar for Appellate Judges*, 4 J. SOC'Y PUB. TCHRS. L. 150 (1958); Leflar, *The Appellate Judges Seminar at New York University*, 9 J. LEGAL EDUC. 359 (1956); Leflar, *Minimum Standards of Judicial Administration—Arkansas*, 5 ARK. L. REV. 1 (1950-51).

Several delightful essays appear in an issue of the *Arkansas Law Review* especially devoted to Bob Leflar entitled *Twenty-Fifth Anniversary Dedication to Robert A. Leflar, Distinguished Professor of Law*, 25 ARK. L. REV. 1 (1971). Several tell of his work in the field of judicial education; see, e.g., Kenison, *The Continuing Contribution of Robert A. Leflar to the Judicial Education of Appellate Judges*, *id.* at 95; Klein, *Robert A. Leflar—Institute of Judicial Administration Stalwart*, *id.* at 112.

2. 295 Minn. 155, 203 N.W.2d 408 (1973).

seeking to recover under Minnesota law, which has never had a guest statute.

In the *Milkovich* decision, we discussed the history of Minnesota law in this field, indicating that as late as 1958 Minnesota had approved the *lex loci* rule.³ We had begun moving away from that rule, however, and by 1966, in two cases, *Balts v. Balts*⁴ and *Kopp v. Rechtzigel*,⁵ we indicated our abandonment of the *lex loci* rule on the grounds that it emphasized certainty and predictability at the expense of other, frequently more relevant, considerations. In these cases we were influenced by and cited with approval the landmark New York case of *Babcock v. Jackson*.⁶ Although we had not yet adopted Leflar's choice-influencing considerations, the results in both cases are consistent with his methodology and both decisions apply what Leflar has identified as the "better rule of law."

In *Kopp*, which is a *Babcock*-type case, we applied the Minnesota common-law rule of negligence, despite the existence of a guest statute in South Dakota, where the accident occurred, and allowed recovery by a Minnesota plaintiff against a Minnesota defendant injured in the course of a trip that was to begin and end in Minnesota. Such a "better law" result is more obvious in *Balts*, in which we chose Minnesota law and at the same time adopted a substantive rule of law permitting intra-family suits in negligence.⁷

In 1972, in *Bolgrean v. Stich*,⁸ we attempted to collect our prior decisions under the umbrella term "center of gravity." Thus, our court was faced with the opportunity to reassess our position and I was freshly and thoroughly inculcated with Bob Leflar's choice-influencing considerations. *Milkovich* provided us the necessary vehicle for adoption of Leflar's concept and methodology of dealing with choice-of-law problems. The fact that Min-

3. See *Phelps v. Benson*, 252 Minn. 457, 90 N.W.2d 533 (1958) (reiterating adherence to the doctrine of *lex loci*).

4. 273 Minn. 419, 142 N.W.2d 66 (1966).

5. 273 Minn. 441, 141 N.W.2d 526 (1966).

6. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

7. Attention to the "better rule of law" is sanctioned not only by Leflar, but also by others. See Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 VA. L. REV. 847 (1967). For particular attention to *Balts* and the relation between choice-of-law methodology and the favored substantive rule of law, see Felix, *Interspousal Immunity in the Conflict of Laws: Automobile Accident Claims*, 53 CORNELL L. REV. 406, 429 n.113 (1968). See generally Felix, *The Choice-of-Law Process at a Crossroads*, 9 DUQ. L. REV. 413 (1971).

8. 293 Minn. 8, 196 N.W.2d 442 (1972).

nesota moved in this direction should not have come as a great surprise, particularly in the light of our 1968 decision in *Schneider v. Nichols*.⁹ That opinion was written by then Associate Justice Robert Sheran, who also had attended the seminar for appellate judges at N.Y.U. and who presently serves as our chief justice. In the *Schneider* case, Justice Sheran referred extensively to Bob Leflar's writings in the field,¹⁰ and although he did not specifically adopt Leflar's methodology, he did embrace its concept. In *Milkovich*, we went ahead and adopted the Leflar approach as our choice-of-law method.

Thereafter—and as I have subsequently learned—almost predictably a law review case comment appeared in the *Minnesota Law Review*.¹¹ The comment writer was less than enthusiastic about the *Milkovich* decision, indicating that the court had returned to the rigid characteristics of the vested-rights theory of the *lex loci* rule. (I add, since Professor Rosenberg is a fellow participant in this discussion, that the law review writer cites *Neumeier v. Kuehner*¹² as an express rejection by the New York Court of Appeals of the “better law doctrine.”¹³) Subsequent decisions showed that it is not necessarily wise to write law review comments so soon after a decision is handed down because the court may have in mind some further expansion of the doctrine originally enunciated.

The next reference to *Milkovich* appeared in a footnote in *Alside, Inc. v. Larson*.¹⁴ I will come back to this in my discussion of another case. Also appearing with *Alside* in the same volume of the *Minnesota Reports* was the case of *Schwartz v. Consolidated Freightways Corp. of Delaware*.¹⁵ This case involved an action by a Minnesota resident against a Minnesota trucking firm for an accident that occurred in Indiana. The plaintiff, an over-road hauler, was hospitalized for some time in Indiana and then returned to Minnesota for treatment. Indiana allowed contribu-

9. 280 Minn. 139, 158 N.W.2d 254 (1968).

10. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

11. 58 MINN. L. REV. 199 (1973).

12. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

13. 58 MINN. L. REV. 199, 207 (1973). Cf. Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459 (1967).

14. 300 Minn. 285, 293 n.2, 220 N.W.2d 274, 279 n.2 (1974).

15. 300 Minn. 487, 221 N.W.2d 665 (1974), cert. denied sub nom. Spector & Freight Sys., Inc. of Illinois v. Schwartz, 425 U.S. 959 (1976).

tory negligence as a complete defense, while Minnesota had adopted comparative negligence. The case was tried before a jury, which submitted comparative negligence findings that concluded defendants were ninety percent negligent and plaintiff ten percent negligent. The trial court, however, entered a verdict for defendants on the ground that Indiana law applied. We reversed and ordered an entry of judgment for the plaintiff using the *Milkovich* doctrine and Professor Leflar's methodology. Our court stated in that case: "Adoption of this methodology by this court in *Milkovich* has in effect replaced the traditional choice-of-law rules with a flexible approach which takes into account policy as well as factual considerations in arriving at a choice of law in a given situation."¹⁶

This statement seems to summarize what impressed me about Bob Leflar's methodology. It appeared to be a common-sense approach to complement Minnesota's goal of providing access to our courts if the nature of the controversy or the residence of the plaintiffs entitled them to use our courts. This approach is consistent with our constitutional mandate, which is part of the Minnesota Bill of Rights, and which provides that "[e]very person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive to his person, property, or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws."¹⁷

The court is philosophically committed to this goal, and I believe the members of our present court feel that the adoption of Leflar's methodology in the field of conflict of laws has been an invaluable tool in achieving our justice-seeking purpose.

We subsequently had an opportunity to consider and apply these principles in the case of *Myers v. Government Employees Insurance Co.*¹⁸ In that case, a Minnesota resident was involved in an accident in Louisiana with a Louisiana resident. Louisiana has a one-year statute of limitations and a direct-action statute. Negotiations were undertaken but no settlement was reached within the year. The insurance company advised that no claim could be made. The Minnesota resident then brought an action in the Minnesota courts, asserting jurisdiction over the insurance

16. 300 Minn. at 491, 221 N.W.2d at 668.

17. MINN. CONST. art. I, § 8.

18. 302 Minn. 359, 225 N.W.2d 238 (1974).

company, which did business in Minnesota, and limiting her claim to the amount of the insurance coverage. We allowed the action and based our procedure on the Leflar methodology. In that case we also had occasion to discuss "false" conflicts of law in limited detail. This matter has been better handled by Bob Leflar in his article on the subject,¹⁹ and elsewhere, than by myself.

The *Alside*²⁰ case, previously referred to, fits into the category of false conflicts. There a Minnesota resident signed a noncompetition contract with his employer, an Ohio corporation. He was employed in Minnesota, but the contract was signed in Ohio. Minnesota law permitted such provisions but the employee contended that Ohio law did not. Our court indicated that Ohio law was the same as Minnesota law and, that therefore, there was no conflict, citing Leflar's *American Conflicts Law*,²¹ and the *Milkovich* case. Our court then said that even if Ohio law were different, that difference would be of no consequence since the parties intended the clause to be enforceable and the law giving effect to this intent should apply. There was no need to discuss governmental interests or contacts with the respective states to compare their respective interests.

I believe the result in *Alside* is correct as it relates to private contracts. However, we presently have before our court a petition for reargument in an insurance case in which we originally held that insurance contracts would not be considered in the same light as private contracts.²² In that case we originally held that we would permit a representative to recover against an insurance company under the "stacking" provision of Minnesota law. The accident happened in Wisconsin and all parties involved were Wisconsin residents. The decedent husband owned three vehicles. He was employed in Minnesota and lived immediately across the border in Wisconsin. His widow moved to Minnesota shortly after the accident and remarried, this time to a Minnesota resident. We originally held that the fact of employment in Minnesota and proximity of residence to the state border created sufficient foreseeable and actual contacts with Minnesota to sat-

19. Leflar, *True "False Conflicts," et Alia*, 48 B.U.L. REV. 164 (1968).

20. 300 Minn. 285, 220 N.W.2d 274 (1974).

21. *Id.* at 293 n.2, 220 N.W.2d at 279 n.2, citing R. LEFLAR, *AMERICAN CONFLICTS LAW* § 103 at 239 (2d ed. 1968).

22. *Hague v. Allstate Ins. Inc.*, No. ____ (Minn. Sup. Ct., filed Apr. 7, 1978) (unreported to date), *aff'd on rehearing* (Minn. Sup. Ct., filed Aug. 31, 1979) (application for certiorari pending).

isfy due process requirements for application of Minnesota law.

In the fall of 1975, Professor Davies, better known to me as Senator Davies, co-authored an article on choice of law.²³ In this article he urged adoption of the "seat-of-the-relationship" doctrine as a method to more fairly explain the rulings in conflict-of-laws cases, and advocated that this was a more predictable rule. Senator Davies filed an amicus brief with our court thereafter, hoping that we could adopt his views. Unfortunately, I do not see that occurring in light of our recent decision in *Blamey v. Brown*.²⁴ It is an interesting case because of the manner in which jurisdiction is achieved over a nonresident seller of intoxicating liquors whose conduct contributed to foreseeable injury in Minnesota. Although the court rejects the statutory dram-shop provisions of Minnesota as being inapplicable to the Wisconsin purveyor, the court does apply common-law rights of recovery which we had established in previous decisions in our state. In this case we quoted with approval the Leflar methodology, but rejected his suggestion²⁵ that we apply the same methodology to construe statutory provisions. We did, of course, have available the same result through the application of our common-law rule. The case was an easy one except for the fact that defendant had not procured liability insurance that would cover the facts sued upon. This clearly affected the choice-influencing consideration of predictability of results, but the foreseeability of such an accident, the stronger pull of the forum's governmental interests, and the better rule of law, carried the day.

I would like to comment a bit on the attitude of our court toward taking jurisdiction in these conflicts cases. As my colleague, Justice Rogosheske, pointed out recently in *Follese v. Eastern Airlines*,²⁶ our approach to the problem is not whether we have jurisdiction to the exclusion of some other state or whether our state's interests or contacts are greater or more significant than those of another state having an interest measured by conventional choice-of-law tests employed in such cases as *Milkovich v. Saari*.²⁷ Rather, we have attempted to articulate what we call a legitimate-interest test emphasizing the interest of Minnesota

23. Davies & Rathke, *Choice of Law Based on the Seat of the Relationship*, 10 VAL. L. REV. 1 (1975).

24. 270 N.W.2d 884 (Minn. 1978).

25. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 189-92 (3d ed. 1977).

26. 271 N.W.2d 824 (Minn. 1978).

27. *Id.* at 829.

in providing a forum, particularly in cases involving Minnesota residents. Overall, the facts we consider are: (1) the quantity of the contacts with the forum; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with the contacts; (4) the interest of the forum state in providing a forum; and (5) the convenience to the parties.²⁸

Regarding a more controversial matter, the *Seider* procedure—we had our say before *Shaffer v. Heitner*²⁹ and continue to have our say. Here I refer to our decision in *Savchuk v. Rush*.³⁰ In *Savchuk* we allowed the garnishment of a nonresident's insurance coverage because his carrier did business in Minnesota. In a 4-to-3 decision, we upheld our pre-*Shaffer* decision that due process was satisfied. My dissenting colleagues were of the opinion that the reason our earlier decision had been vacated and remanded by the United States Supreme Court was that the Court was directing us to read *Shaffer* as inviting us to abandon the *Seider* procedure.³¹ Those of us on the majority, however, felt that our decision was consistent with the due process standards of *Shaffer* because of Minnesota's interest in providing a forum to Minnesota residents. Our statute, as interpreted in our earlier opinion, protects against exceeding the limits of due process first set out in *International Shoe Co. v. Washington*³² because the nonresident defendant is guaranteed notice, his liability is limited to the face amount of the policy, and the procedure may be utilized only by residents of the forum state.³³ In this analysis we agree with New York's post-*Shaffer* upholding of the *Seider* procedure, especially in *O'Connor v. Lee-Hy Paving Corp.*,³⁴ a case in which the Second Circuit followed its own pre-*Shaffer* justification of *Seider* in *Minichiello v. Rosenberg*.³⁵

I think the important thing to remember for jurisdiction as

28. *Sausser v. Republic Mortgage Investors*, 269 N.W.2d 758 (Minn. 1978), relying on *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965) and *Mid-Continent Freight Lines v. Highway Trailers Indus.*, 291 Minn. 251, 255, 190 N.W.2d 670, 673 (1971).

29. 433 U.S. 186 (1977).

30. 311 Minn. 480, 245 N.W.2d 624 (1976), vacated in light of *Shaffer*, 433 U.S. 902 (1977), *aff'd on rehearing*, 272 N.W.2d 888 (Minn. 1978), *prob. juris. noted*, 99 S.Ct. 1211 (1979), *oral argument heard*, *Rush v. Savchuk*, 48 U.S.L.W. 3238 (Oct. 9, 1979).

31. 272 N.W.2d at 893 (Otis, J., dissenting).

32. 326 U.S. 310 (1945).

33. See 272 N.W.2d at 891.

34. 579 F.2d 194 (2d Cir.), *cert. denied*, 99 S. Ct. 639 (1978).

35. 410 F.2d 106 (2d Cir. 1968).

well as for choice of law is that we are dealing, for the most part, with multistate carriers who contract to provide coverage for persons engaged in an obviously mobile activity that will probably cross state lines at almost any time. Automobile insurance policies, when examined from the viewpoint of the forum's governmental interests, either to provide a forum or a substantive rule, are not the same type of thing as contracts between private parties. We almost take the view that any company writing insurance today has to contemplate that the insured is going to operate in fifty states and is going to be subject to fifty rules of law. Thus, it does not seem unfair for us to provide a forum for one of our residents in such cases or to apply our own rules of law within due process limits.

More generally, I look at jurisdiction with a stricter sense of due process than I do in applying the Leflar methodology in making a choice of law. At least in my view, the requirements of due process appear less restrictive in choice of law than in jurisdiction. After we take jurisdiction, the consideration of our governmental interests tends to blend into considerations of the best result we can reach on the facts of the case. I think that is where Bob Leflar's work comes in. Not only is the use of choice-influencing considerations a practical guide to the justice-dispensing functions of our courts, but it is a very good way of keeping before us what we are actually doing.