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A COMMENT ON *Neumeier*

MAURICE ROSENBERG*

This talk will be a comment on the *Neumeier*¹ case in light of choice-influencing considerations and in light of what Professor Leflar said about *Neumeier* in the *Law and Contemporary Problems* article which he calls, as you remember, *Choice of Law: A Well-Watered Plateau*.² What I am going to say actually could be subtitled "Are the Courts Going to Carve a Butte out of the Plateau?" I want to explain the pedigree of that subtitle, but before doing so I would like to say a few things about Robert Leflar.

He is a very rare type. He is one of the few people for whom it is genuinely impossible to list all achievements. It is even difficult just to inventory the areas his work has touched. He has the habit of periodically announcing his retirement from this or that. Younger people (which includes quite a lot of people) do not know whether to be glad of that or not. They are glad to be rid of the competition but they look at the gap he leaves when he retires from something and they wonder how they are ever going to take up the slack.

Of all the qualities of mind and heart Professor Leflar has, I suppose that close to number one is the talent he has for clarity and for organizing and presenting ideas, whether his own or someone else's, in a coherent way. If you ever want to know how to find a path through the befuddlement that other academicians and courts will lead you into in choice of law or jurisdiction, the way to do it is to pick up an exposition by Leflar. He has an unerring sense of getting to the bottom of things and getting there in a straightforward and clear fashion. In addition to the enormous substantive contributions he has made by advancing powerful ideas in this field and by favoring us with the third edition of his fine treatise on conflicts,³ he has put us all in his debt for a lesson he always teaches without making a special point of it: the lesson

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1. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

2. Leflar, *Choice of Law: A Well-Watered Plateau*, *LAW & CONTEMP. PROB.* 10 (Spring 1977).

3. R. LEFLAR, *AMERICAN CONFLICTS LAW* (3d ed. 1977).

is to be clear and straightforward in whatever you say.

Now, let us get to his "Well-Watered Plateau" article and to my subtitle about the plateau's possible erosion into a butte as a result of action by the courts. The reason for the subtitle is to register doubt about what he says in the article—namely, that things have pretty well settled down in the choice-of-law area these days; and the courts, instead of beating around the Bealian bushes down in the lowlands and in the swamps, are now on the great sunlit uplands of a plateau that Leflar characterized as well-watered, especially by Dave Cavers, who has taught us about principles of preference.⁴ To that last I say "Amen." It is my view that in this generation those two people, Leflar and Cavers, have made the most enduring contributions of anybody to the conflicts area. This statement does not exclude Professor Currie and the redoubtable work he has done.

Leflar said in his article that although academic writers keep stirring the ashes, the courts have found a certain measure of peace in choice of law.⁵ He declared that judges do not ordinarily employ today a single modern theory of choice of law but a blend—like a good coffee, I suppose—of a number of modern theories. These are nonmechanical and they include such theories as the second conflicts Restatement's most-significant-relationship approach,⁶ Cavers' principles of preference,⁷ the governmental-interest approach,⁸ and preference for the forum's law.⁹ Modestly, he tucks in, without attribution, choice-influencing considerations. We know that many courts, led by Minnesota, are applying those considerations.¹⁰ Finally, his article says, even the dominant contacts theory is used.¹¹ The courts then mix and match these approaches as they go along, using several of them in the same decision without much discrimination among them and without any effort to reach analytically pure streams of reasoning on their way to a decision.

Then onto this serene and civilized well-watered plateau

4. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 114-224 (1965).

5. Leflar, *supra* note 2, at 10.

6. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

7. D. CAVERS, *supra* note 4, at 139, 181.

8. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183-84 (1963).

9. A. EHRENZWEIG, *CONFLICT OF LAWS* 309-16 (1962).

10. *See, e.g.*, *Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238 (1974); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

11. Leflar, *supra* note 2, at 15-16.

there comes the sad state of New York, the fly in the ointment. Whereas, writes Leflar, any and all of the collection of modern theories that are used by the courts which are no longer benighted will lead you pretty much to the same decision¹²—that is, to the same conclusion in the end as to who should win—New York, even though its views are modern, does not reach the right outcome. He asserts that “only states like New York would be so bedeviled by opposing academic theories that, attempting analytical integrity, they would let results be much affected by shifting from one modern approach to another.”¹³ As an aside, let me say that we New Yorkers do not spurn any accusation of “integrity,” even though modified by “analytical.” Hence, I gratefully accept the accusation on behalf of New York.

Be that as it may, Leflar views New York’s approach to choice of law as more unsatisfactory than that of any other state¹⁴ that has thrown off the yoke of the first Restatement’s Bealian mechanics. As exemplifying New York’s disreputable efforts he points us to *Neumeier*¹⁵ and *Rosenthal v. Warren*.¹⁶ *Neumeier* is, of course, Judge Stanley Fuld’s elaboration of the line of thinking in choice of law that he began in 1954 in *Auten*,¹⁷ and carried to a high point in *Babcock*¹⁸ in 1963. Professor Leflar regards *Neumeier* as one of the pieces of skull-duggery that New Yorkers perpetrated, and the Second Circuit’s 1973 decision in *Rosenthal v. Warren* as the other. He says these two cases show the self-centered nature of the New York position.¹⁹ That means, he explains, that New York’s governmental interests are made to coincide with the interests of the New York resident in these cases.²⁰ Thus, it is a very parochial, a very home-town favoring, type of approach. The assertion is that when nonresidents are involved in the case, the New York resident wins.

Now, as a New York resident—although I am out of residence this year—I could almost wish that were so, but that is not the way I read the *Neumeier* case. Specifically, under Fuld’s second

12. *Id.* at 11.

13. *Id.* at 11-12.

14. *Id.* at 21.

15. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

16. 475 F.2d 438 (2d Cir. 1973).

17. *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

18. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

19. Leflar, *supra* note 2, at 20.

20. *Id.* at 20-21.

guideline in the *Neumeier* case, it is made explicitly clear that if a New Yorker is a guest in a car driven by a non-New York resident and the injury occurs in the driver's state, the New York guest will have to satisfy the driver-state's standard of negligence to prevail in a New York court.²¹ That is, a person residing in a guest-statute state driving a car there wins against the New York resident. It is clear that the *Neumeier* case is not so parochial that it decrees a New Yorker will always prevail whatever the combination of law and fact.

On the other hand, there is basis for ascribing the home-favoring philosophy to *Rosenthal v. Warren*, but I am convinced that *Rosenthal* misreads and misapplies *Neumeier*. Those, I might say, are the kindest words I can think of to say about *Rosenthal*. The rest is unprintable, in my opinion.

Now let me turn to *Neumeier*, which, I hope, is the handsome shape of things to come in choice of law in the not too distant future. I am always bemused by the fact that courts have so much difficulty following *Neumeier*, that is, in reading and understanding it easily. It seems plain enough that the decision is a clear response to an obvious need in choice of law—the need to find a proper line between unreasonable rules on one side and unruly reasonableness on the other side. You have to have rules in the end, it seems to me; the question is whether we can arrive at some reasonable rules as we go along.

At this point, we have to take a short ride on the way to *Neumeier* through well-known New York guest-statute cases in order for you to see what Judge Fuld was doing when that case came to him. I should say that I clerked for Judge Fuld for a couple of years and I think I know a bit about the workings of his mind. Additionally, I have had many conversations with him about these cases. Starting in 1963 with *Babcock* and continuing to 1969, New York had a machine-gun-like staccatto succession of guest-statute cases in a way that really was quite disgraceful. In *Babcock*,²² in 1963, Fuld used the interest analysis to arrive at a three-ply approach to choice-of-law cases involving guest-host liability in multistate situations. He said, first of all, the interest of the place of wrong in regulating the rules of conduct and standards of due care made it almost unthinkable that any state

21. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

22. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

other than the state of the place of wrong would govern those matters involving the driver's due care.²³ Thus, the law of the state of wrong has priority in matters involving the driver's due care and standard of conduct. The interest approach is the route for selecting that state's rule: the state of the wrong has the greatest interest in governing those matters.

Secondly, said Judge Fuld, the place where the guest-host relationship arose is appropriate to govern legal issues that arise out of the relationship.²⁴ That view is arrived at by application of the interest analysis. From that approach we know that when a car starts out with a guest and host in it, the state they start in is the seat of the relationship. It seems from *Babcock* that it will be the law of that place that will govern issues arising out of that relationship from then on.

The third principle that emerges from *Babcock* is that remaining issues will be determined according to the law of the state that has the most interest in the particular issue presented.²⁵ There you have the three-ply approach of *Babcock*. All three propositions in the end rest less on the dominant-contact idea than on the question of which state has the greater interest in the matter.

Two years later, in 1965, came the Colorado guest-host statute case, *Dym v. Gordon*;²⁶ here the court split four to three. This time, it is fair to say, the seat-of-the-relationship idea was in the saddle. The majority of the court said that since Colorado was the seat of the relationship its guest statute would apply, even as between the guest and host New Yorkers involved in the accident.

The next year brought *Macy v. Rozbicki*,²⁷ another case involving the seat of the relationship, with the "seat" riding very high. Through the pen of Chief Judge Desmond, the court said that although the relationship was formed in New York and not in Ontario, the relationship of importance was that the two parties were sisters.²⁸ By playing that pun upon the "relationship" of the parties as sisters in New York and disregarding their relationship as host and guest in an automobile, Judge Desmond was

23. 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

24. *Id.* at 483-84, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 751.

25. *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

26. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

27. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

28. *Id.* at 291-92, 221 N.E.2d at 381-82, 274 N.Y.S.2d at 592-93.

able to refer the case to New York and to apply the New York common-law rule instead of the rule of Ontario, where the plaintiff acutally got into the car with her sister, the driver.²⁹

In 1969 the fourth of the guest-host cases came along, *Tooker v. Lopez*,³⁰ and the "seat" of the relationship dropped away completely. Since *Tooker*, no one has been interested in locating the seat of the relationship, either with respect to the parties' guest-host relationship or their kinship relationship; interest analysis has become the basis on which the cases are decided. At the time of the *Tooker* decision, Judge Fuld had reached the conclusion that it was unduly monotonous to have been required to decide four guest-statute cases in six years at the highest level of the state's judicial system. He tried, in a concurring opinion in *Tooker*, to reason his way to a few principles that would apply in future cases, making it unnecessary to litigate other guest-statute cases all the way to the highest court. His views attracted no colleagues at that time. It was several years before the next case, *Neumeier*, came along and he was able to get a court for his view. In sum, in his 1969 concurrence in the *Tooker* case (involving the two New York girls who went to Michigan State University and were in a fatal highway accident in Michigan), Judge Fuld set the stage for his guideline approach; you could say he gave the idea of guidelines a tryout in Michigan and then "put it on the road" in Ontario in the *Neumeier* case, there attracting four other judges to his position.

The three guidelines that emerged are well known. First, if the guest and host are from the same state and the car is registered there, the law of that state will apply whether it is the common-law rule or the guest-statute rule.³¹ Second, if the guest is hurt in a state that has a guest statute and the driver is from that state and driving in that state, the guest statute will apply even though the guest comes from a common-law state; that is, a guest does not carry the common-law rule with him when he goes into a guest-statute state and the driver does not carry his guest law with him when he goes into a common-law state and injury results in that other state.³² The third principle is that when the fact pattern is different from those enumerated we have

29. *Id.*

30. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

31. 31 N.Y.2d at 128, 286 N.E.2d at 457, 335 N.Y.S.2d at 70.

32. *Id.*

to be less categorical; a presumption is created for the applicability of the liability rule of the state where the accident happened, but that presumption can be displaced if good reason is shown why it should be displaced.³³ An example of a good reason is showing that displacing the presumption in favor of the *lex loci* is consonant with underlying substantive law purposes that are involved and will not create needless uncertainty. This third guideline is obviously plastic; it will have to be given firmer shape and meaning as we get more cases of this kind.³⁴

There are several things that are important to notice about *Neumeier*, by way of appreciating what Judge Fuld was trying to do. First, he wanted to end the absurdity of making ad hoc decisions case by case in the guest-host situations.³⁵ He thought that too much was enough, as he had said in *Tooker*, and that it was time to blow the whistle and try to develop a systematic approach. The systematic approach he arrived at was based upon analysis of the underlying purposes and objectives in the guest statutes and comparison of them with the purposes of the common-law rule. He believed the guidelines he developed did take account in proper fashion of what might be called governmental interests, that is, purposes and objectives underlying substantive rules of law.³⁶ But he thought that it was time to call a halt to the parade of guest-statute cases. It was perhaps analogous to the situation of the Englishman who was sailing on the Titanic. The waiter handed him his drink and he said, "I know I ordered ice, but this is absurd." New York was in something like that situation.

Notice also how Judge Fuld proposed to put a cap on the guest-statute cases. *Babcock* and its progeny, he said, helped us to see the underlying values—the underlying policies, purposes, and objectives—that were operative in this field of law. Now that they are revealed, his argument proceeds, it is time for us to use them in order to fashion guidelines that will help in future cases

33. *Id.*

34. *Neumeier v. Kuehner* was the subject of extensive comment in the periodical literature, including a symposium entitled *Neumeier v. Kuehner: A Conflicts Conflict*, 1 HOFSTRA L. REV. 93 (1973). See also Hancock, *Some Choice of Law Problems Posed by Anti-Guest Statutes: Realism in Wisconsin and Rule Fetishism in New York*, 27 STAN. L. REV. 775 (1975); Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1 (1976).

35. 31 N.Y.2d at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

36. *Id.* at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.

so that the litigants can know what the outcome is likely to be without having to litigate all the way to the highest court in the state each time.³⁷

The third point about Judge Fuld's approach is one that is missed most often by the courts and commentators. The Fuld opinion explicitly limited these guidelines to guest-host cases.³⁸ True, it may be disagreeable to be unable to extrapolate and generalize these guidelines as if they covered wrongful-death damage cases or comparative contributory negligence cases or sundry other torts cases. It is sort of vexing to be told we shall have to learn pin-point rules instead of global principles, and that the rules will not hold as we move from one problem to another and from one area to another. But that, I am bound to say, is the very nature and essence of the governmental interest or purpose-behind-the-rule analysis. It is essential to learn what the competing purposes are and to fashion a choice-of-law standard sensitive to those competing purposes. Obviously, as we move from one problem to another the underlying purposes change and compel us to formulate different rules in resolving the clashes of values that result. That is why Judge Fuld was careful to say that these guidelines are limited to "situations involving guest statutes in conflicts settings."³⁹ They therefore may not be used in an all-purpose way.

What has happened since *Neumeier*? Three things. First, the flood of automobile guest-host cases in the New York Court of Appeals has subsided to a drip—it is no longer even a trickle. As a matter of fact, there has only been one guest-statute case of the kind we are discussing. The change in quantity has been dramatic: there were four in six years, a fifth just three years later, and then six years with no similar case.

In 1976 came *Toweley v. King Arthur Rings*,⁴⁰ involving a Colorado accident, but there was no difficulty at all so far as concerns the applicability of the *Neumeier* principles. The court was sidetracked on the question whether plaintiff should have had a chance to show that the driver had been negligent within the meaning of the Colorado "wanton and willful" guest statute. That is the only guest-host case in the more than six years since

37. *Id.* at 128, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

38. *Id.*

39. *Id.*

40. 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976).

Neumeier; it represents quite a change from the drumfire that preceded. Of course, it may only be the phenomenon of the "Smokey the Bear" subway posters in New York: there has not been a single forest fire in New York City since those posters went up. *Neumeier* may likewise have had little to do with the near absence of guest cases since it was announced; on the other hand, it may be responsible.

A second thing to observe is the impact of *Neumeier* in the lower courts. It has been mentioned in seventeen cases in those courts. The mentions have been honorable for the most part; sometimes they have even been relevant, itself an accomplishment. None of the decisions presented serious difficulties or required attention of the court of appeals in-order to be put to rest.

Third, research by computer reveals that in the federal courts there have been fifteen "level one documents"—which turn out to be cited cases, of all things. Of the fifteen citations to *Neumeier* in the federal courts, some are misapplications. For example, there is *Rosenthal v. Warren*,⁴¹ where the court cited and treated *Neumeier* as if it had left untouched the plaintiff favoritism that was revealed by the predecessor cases, notably *Tooker*.⁴² *Rosenthal* was wrong to speak as if *Neumeier* had left intact the attitude of the court of appeals of the state that New York residents deserve to win almost ipso facto. *Rosenthal* misreads *Neumeier* to think it leaves, in full force, *Miller*,⁴³ *Tooker*,⁴⁴ *Kilberg*⁴⁵ and some of the other famous decisions that favored New York residents.

Outside New York, the federal courts have not done anything with or to *Neumeier* that would boggle a conflicts teacher's mind. The case has had a mixed reception. The year after it was decided, Colorado approved two of its principles⁴⁶ while Rhode Island disapproved all three.⁴⁷ I do not think you can draw any conclusions about its overall impact in the provinces outside New York from the evidence so far at hand.

41. 475 F.2d 438 (2d Cir. 1973).

42. *See id.* at 442.

43. *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

44. *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

45. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

46. *First Nat'l Bank v. Rostek*, 182 Colo. 437, 514 P.2d 314 (1973).

47. *Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973).

David Cavers, in his *Choice-of-Law Process*,⁴⁸ put up some hypotheticals, as you remember, and asked various people to decide them as if they were judges. One of the hypothetical problems that he outlined seems to me to be the cutting edge of all our thinking here. It was his "Case of the Nantucket Banker." You know that Nantucket is a Massachusetts island, a summer resort. Cavers postulates that to Nantucket one summer comes a New York tourist. A local banker, a Massachusettsan, in the days when Massachusetts had a limit of \$15,000 on wrongful-death damages, bicycling to work one day, runs into the New York tourist and kills him. In some fashion, the estate or the representative gets jurisdiction over the Nantucket banker in New York, say, by serving him while he is flying over New York on his way to Pittsburgh or Fayetteville. The question is: Can the Nantucket banker be saddled with New York's sky-is-the-limit damages, considering that the banker acted at home? He was not involved in interstate commerce when he ran over the New Yorker, and he had no reason to suspect that he was running over an expensive New Yorker. Can he be mulcted in damages under the New York rule?

That case arose in a slightly altered fashion in New York. A New York court, the appellate division, decided the case and overruled *Home Insurance Co. v. Dick*,⁴⁹ at least in its hypothetical version. The case is one that is little known or remembered except as a note in our casebook. It is called *Tjepkema v. Kenney*.⁵⁰ The Tjepkema family was traveling across the country and got as far as Missouri. In Missouri, their car broke down. Mr. Tjepkema sought aid by crossing a well-traveled highway to make a phone call. On his way back he was struck and killed by a Missouri car. Jurisdiction was obtained by attaching the insurance company of the Missouri driver in New York by a *Seider*-type attachment.⁵¹ An attachment of the insurance company, Insurance Company of North America, was made in New York on a claim for \$100,000 in damages. Missouri at that time had a \$25,000 damage limit. Question: In those circumstances may New York apply its sky-is-the-limit rule to attach a \$100,000 policy on

48. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965).

49. 281 U.S. 397 (1930).

50. 31 A.D.2d 908, 298 N.Y.S.2d 175 (1969).

51. See Rosenberg, *One Procedural Genie Too Many or Putting Seider Back into its Bottle*, 71 COLUM. L. REV. 660 (1971).

account of a \$25,000-limit accident in Missouri? Answer: Yes. The appellate division did it. It was not reviewed on appeal. I have always thought that case would provide an acid test of how far choice of law is today constitutionally restricted under *Home Insurance Co. v. Dick*. The only contact with New York in the case was that a New York resident was killed and New York representatives were suing. That Missourian, so far as we know, never heard of New York. Probably Illinois, but not New York. That is the case.

Would the New York Court of Appeals have decided *O'Connor v. Lee-Hy Paving Corp.*⁵² in the way the Second Circuit did? The decedent was killed in Virginia, the circumstances being that he was working in Virginia and was run over by a road grader that belonged to defendant. The defendant was an all-Virginia outfit. We can take it that, under the Virginia law that was applicable, there would have been no common-law liability; that is, no damage liability because the decedent was killed by someone who would be regarded in Virginia as being in the same employ as the tortfeasor.

In New York, the rule is the opposite. This looks like the Nantucket banker case again; that is to say, we have here a Virginia road-grading business operating at home. The only basis for jurisdiction over it is that its insurance company was attached in New York. That was the entire basis for jurisdiction in *O'Connor*, as it was in *Tjepkema* and other cases. Thus, you have again a case in which the sole material contact is the domicile of the plaintiff. I think the New York Court of Appeals would have said that it would be unfair and close to a due process violation to apply the New York substantive law to a transaction in which the defendant had so little to do with New York—just killing a New Yorker. That is all. If that is enough, if killing a New Yorker is enough to subject any defendant to New York law, wherever the defendant acts, and particularly if the defendant acts at home, then *Home Insurance Co. v. Dick* is a rather dead letter.

In *O'Connor* there was no question of assignment or anything else. That case suggests this problem: If New York can apply its substantive law when a New Yorker is killed or injured in another state by someone acting at home under a protective local rule, suppose a non-New Yorker is killed in the same circumstances as

52. 579 F.2d 194 (2d Cir.), cert. denied, 99 S. Ct. 639 (1978).

Mr. Tjepkema. Suppose further that his family moves to New York afterward and starts suit obtaining jurisdiction by attaching the defendant's insurance policy. The dilemma would be as follows: if *Tjepkema* is good law, will the New Yorker who moves into the state after an out-of-state accident be treated differently from a New Yorker who was already a resident in the state when the out-of-state accident occurred? Will a non-New Yorker be treated differently from a New Yorker in respect to whether New York will apply its substantive law? You see the problem.

If you are of the view that *Tjepkema* and *O'Connor* are constitutional on the reasoning that contact with a New York resident is enough to satisfy the legislative jurisdiction requirements of *Home Insurance Co. v. Dick*, you open the door to very grave questions in cases where a non-New York resident is the plaintiff. The first question is whether there is judicial jurisdiction in the forum court to allow suit to go forward in the absence of personal jurisdiction over the tortfeasor. Under the offspring of the *Seider* decision, a negative answer has been given to that inquiry. But presumably, that difficulty could be overcome by New York's enacting a statute providing for a direct action against the insurer of the injurer. If the insurance company does business in New York, a direct action would probably be jurisdictionally permissible. However, the question would then arise whether the *Home Insurance Co. v. Dick* limitation on the applicability of a forum's decisional rules in a case having only wispy connections with the forum prevents a *Tjepkema* or *O'Connor* outcome when the plaintiff is a nonresident.

The dilemma thus posed is whether to apply different substantive rules to identically situated victims of injury arising from out-of-state torts merely because one is a New York (or forum) resident and the other is not. That would amount to outright discrimination. On the other hand, to apply the same rule to the nonresident might run into the constitutional difficulty exemplified in *Home Insurance Co. v. Dick*. Seemingly, the choice must be between grave discrimination on the one hand and due process insufficiency on the other hand. I take the view that the New Yorker should not be treated differently. New York should not apply its law in a case like *Tjepkema* on behalf of the New Yorker.

Returning to my main thesis, I would say that *Neumeier* apart, recent court decisions do not bespeak an era of tranquility and clarity in conflicts. The choice-of-law field may be well-

watered, but it is still full of ruts and furrows. These are created by modernist courts such as California, which in September 1978, decided *Offshore Rental Co. v. Continental Oil Co.*,⁵³ a decision weighing "comparative impairments." Similarly, the *Pancotto*⁵⁴ case was decided by our erstwhile colleague Prentice Marshall, now a judge here in the northern district of Illinois. He had terrible troubles with modern theories in that case. Mrs. Pancotto and her family went on safari to Mozambique. Mrs. Pancotto got out of her vehicle to take pictures of the assembled hunters and was run over by a swamp-buggy belonging to the Mozambique Safari Company. She sued in the northern district of Illinois for her grievous personal injury. She was able to get jurisdiction over the Mozambique Safari Company because it solicited trade in the northern district, in addition to other places in the country. The case came up on motion by the Safari Company to require that Mozambique law be applied to determine liability and damages. The judge, Prentice Marshall, divided the question into two parts. On liability he wrote a lengthy and learned opinion in which he pointed out that, under the law of Mozambique, the standard of care enjoined upon the defendant was that owed by a male head of a family. This, you notice, was a very sexist, "male chauvinist pig," kind of Portuguese rule. He then decided that the liability rule that would apply to that Mozambique swamp-buggy accident under the Illinois choice-of-law rule was the Mozambique standard, since that was the *lex loci*.

After deciding, under the interest analysis, that the Mozambique rule would apply, Judge Marshall said, in effect, I do not know what the Mozambique standard is, so I will have to send it back to get further evidence on that.⁵⁵ Doesn't that approach stand the interest analysis on its head? You are supposed to know what interests underlie the respective rules before you decide that one jurisdiction, here Mozambique, has a better claim to applicability than Illinois does. Since the judge did use a blend of the interest analysis, *lex loci*, and the most-significant-relationship approach, I do not see how he could first decide that the law of that state applies and then start looking to find out what the law is in that state—not if he wants to use the interest analysis.

53. 22 Cal. 3d 181, 583 P.2d 737, 148 Cal. Rptr. 867 (1978).

54. *Pancotto v. Sociedade de Safario de Mozambique, S.A.R.L.*, 422 F. Supp. 405 (N.D. Ill. 1976).

55. *Id.* at 409.

Regarding the other question, damages, it turns out that Mozambique's statutory law limits damages to sixty-six hundred contos or some number of contos which works out to \$6600. Also, the Portuguese Code there does not allow for pain and suffering or disfigurement, or other damages which would be allowable under Illinois law. The judge held that, under an interest analysis, Illinois law governed those matters. The reason I have discussed *Pancotto* is this: the defendant, confronted with the possibility that it would have Illinois law applied on the damage question, submitted an affidavit declaring, in effect, we don't have any insurance, so don't think that somebody with a deep pocket is going to pay for this, it's just us. Judge Marshall said the evidence that there was no insurance came from a lawyer's affidavit; but, since the lawyer had no personal knowledge of the matter, he would disregard it.⁵⁶

I do not know many other cases in which there has been an effort by defendants to prove that there was no insurance. I think it will be an ugly day if the parties start arguing about how much insurance the defendant has as a predicate for determining choice of law. We cannot assume that insurance is going to pay for everything and say, as my friend just did, the reason it is okay to impose forum-state liability away from home is that an insurance company will pay. We would then have to open the door to proof of insurance. That is not a very entrancing prospect as far as I am concerned. If we judge from this decision and some others, we must conclude that Professor Leflar's well-watered plateau of a few years ago is going downhill.

Concluding, I must add that what Robert Leflar said about *Neumeier* and *Rosenthal* has helped me think about those cases in dimensions that otherwise would not have been revealed to me. On that account, too, I am grateful to him.

56. *Id.* at 411.