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RECENT DEVELOPMENTS

The Qualitative Governmental Interest Analysis: New York's Conflict of Laws Rules in Transition—*George v. Douglas Aircraft Co.**

The traditional choice of law rule for torts is that the law of the place of wrong is determinative of all substantive issues.[1] This rule has been frequently criticized[2] and has been rejected by the *Restatement (Second), Conflict of Laws*,[3] and by a few courts,[4] particularly those of New York.[5] The successor to the traditional approach, however, has not been determined. Under the view of the *Restatement (Second)*, the applicable substantive law is that law of the state which has the most significant relationship with the occurrence and with the parties.[6] Although a qualitative approach would seem possible under this test,[7] a quantitative approach has generally been utilized,[8] adopting the law of the state with the greatest number of significant contacts.[9] A qualitative evaluation, however, contemplates a weighing of the governmental interests growing out of the contacts[10]

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* 332 F.2d 73 (2d Cir. 1964), *cert. denied*, 379 U.S. 904 (1964).

1. RESTATEMENT, CONFLICT OF LAWS § 384 (1934): "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state." See 2 BEALE, CONFLICT OF LAWS § 377.2 (1935); LEFLAR, CONFLICT OF LAWS § 110 (1959).

2. See, *e.g.*, Cook, *Tort Liability and the Conflict of Laws*, 35 COLUM. L. REV. 202 (1935); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1; Stumberg, *"The Place of the Wrong"—Torts and the Conflict of Laws*, 34 WASH. L. REV. 388 (1959).

3. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963): "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."

4. See Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). *Cf.* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

5. See, *e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *cf.* Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441 (1961); Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

6. In determining the state with the most significant relationship, the place of the injury, the place of conduct, the place of the domicile of the parties, and the place of the relationship, if any, between the parties are to be considered. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963).

7. See Leflar, *Comments on Babcock v. Jackson—a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1247, 1248 (1963).

8. See, *e.g.*, Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441 (1961); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

9. This indiscriminate accumulation of contacts has been criticized in Currie, *supra* note 2, at 43; Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 244 (1963); Comment, 51 CALIF. L. REV. 762 (1963).

10. See generally CURRIE, SELECTED ESSAYS IN THE CONFLICT OF LAWS (1963); Hill, *Governmental Interest and the Conflict of Laws—a Reply to Professor Currie*, 27 U. CHI.

and analyzing the relative significance of each contact in relation to the choice of law issue.[11]

The decisions in New York reflect the evolution from the traditional rule to a quantitative and then a qualitative evaluation of the contacts. In *Auten v. Auten*,[12] the New York Court of Appeals rejected the traditional jurisdiction-selecting choice of law rule for contracts in favor of a "grouping of contacts" approach.[13] The court in *Auten*, as it later did in *Haag v. Barnes*,[14] made its choice of law largely on the basis of the greater number of contacts with one of the interested states.[15] In *Babcock v. Jackson*,[16] the "grouping of contacts" rule was extended to tort actions, but the court, while still speaking in terms of the number of contacts,[17] seemed to make its choice of law by reference to the interests of the interested states.[18] Subsequently, in the recent case of *George v. Douglas Aircraft Co.*,[19] the Court of Appeals for the Second Circuit, bound by New York choice of law rules,[20] has apparently applied a qualitative analysis in determining the applicable law.

In *George*, plaintiffs, residents of Texas, were crewmen on an airplane which crashed in Florida in 1958. They brought a warranty action in 1963 against the California manufacturer of the airplane[21] in a federal court in New York. New York's borrowing statute bars

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L. REV. 463 (1960); M. Traynor, *Conflict of Laws—Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961).

11. Professor Currie has summarized his approach as follows: "(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 those 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." CHEATHAM, GRISWOLD, REESE & ROSENBERG, CONFLICT OF LAWS 477 (1964).

12. 308 N.Y. 155, 124 N.E.2d 99 (1954).

13. *Id.* at 160, 124 N.E.2d at 104.

14. 9 N.Y.2d 554, 175 N.E.2d 441 (1961).

15. See authorities cited *supra* note 9.

16. 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

17. *Id.* at 483, 191 N.E.2d at 285. See Comment, 62 MICH. L. REV. 1358, 1372 (1964).

18. See generally Leflar, *supra* note 7. It is possible to read the majority opinion in *Babcock* as taking the government interest approach. Currie, *Comments on Babcock v. Jackson—a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1234 (1963). In fact, it has been said that the opinion "contains items of comfort for almost every critic of the traditional system." *Ibid.* The court identified its approach with that of the *Restatement Second*. 12 N.Y.2d at 482, 191 N.E.2d at 283. It is even possible to read the opinion as adopting a jurisdiction-selecting rule, the place of the formation of the host-guest relationship. See 12 N.Y.2d at 482, 191 N.E.2d at 284.

19. 332 F.2d 73 (2d Cir. 1964), *cert. denied*, 379 U.S. 904 (1964).

20. See Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

21. The theory of the plaintiffs was that they were third-party beneficiaries to the contract of sale between their employer and the defendant manufacurer.

suit on a claim which arises outside the state if the period of limitations has expired in the state in which the cause of action arose.[22] The applicable California statute of limitations barred suit after one year,[23] while the Florida statute prescribed a longer period.[24] The district court granted defendant's motion for summary judgment on the ground that, because the cause of action arose in California and the California statute of limitations had run, the suit was barred in New York.[25] In finding that the cause of action arose in California for the purpose of determining the applicable substantive law, the district court found that California was the state with the greatest number of significant contacts to the warranty action. The contract under which plaintiffs sought recovery as third-party beneficiaries was made in California; the delivery of the airplanes took place in California; and the parties expressly stated in the contract of sale that California law would govern.[26] The only contact with Florida was that the accident fortuitously happened there. It would seem clear that under the quantitative approach of *Auten* and *Haag* the substantive law of California should govern this warranty action. The Court of Appeals for the Second Circuit, in an opinion by Judge Friendly, affirmed the district court decision, holding that the cause of action was procedurally barred by the California statute of limitations; however, in dictum it decided that the substantive law defining liability would be that of Florida.[27]

In determining that Florida substantive law would apply, the approach of the court in *George*, rather than relying on mere

22. "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon such cause of action, except where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply." N.Y. CIV. PRAC. LAW § 13.

23. CAL. CIV. PROC. CODE § 340(3). This section has been interpreted as applying to all personal injury and death actions regardless of whether they are based in tort or contract. See, *e.g.*, Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 26, 266 P.2d 163, 168 (Dist. Ct. App. 1954).

24. Florida provides a five-year period for "an action upon any contract, obligation or liability founded upon an instrument of writing not under seal." FLA. STAT. § 95.11(3) (1961). A three-year period is provided for "an action upon a contract, obligation or liability not founded upon an instrument of writing." FLA. STAT. § 95.11 (5) (1961). As an alternative the court of appeals stated that, if the Florida statute was to be applied to this case, the three-year period was appropriate. See George v. Douglas Aircraft Co., 332 F.2d 73, 80 (2d Cir. 1964).

25. George v. Douglas Aircraft Co., Civil No. 63-826, S.D.N.Y., July 23, 1963.

26. Both the appellant and the appellee agreed with the district court that California was the state with the most significant contacts, and that its law must apply. See Brief for Appellant, p. 5, George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir. 1964); Brief for Appellee, p. 5, *ibid.*

27. Chief Judge Lumbard joined in the opinion, and Circuit Judge Waterman concurred without opinion. See notes 22-24 *supra*, and text accompanying notes 39-55 *infra*.

numerical comparisons, was that of examining the policies behind the laws of the interested states in order to determine if one of the states would not be concerned should the law of the other state be applied. Although the court reached a conclusion from this examination contrary to that presently to be proposed, its approach was essentially in accord with the following analysis. The law of California imposes strict liability for injuries resulting from the defective manufacture of an airplane.[28] California's interest protected by the imposition of strict liability on a manufacturer would seem to be its interest in the general welfare of its residents.[29] Since its own citizens were not plaintiffs in this action, and since the accident did not take place within its territory, California is unconcerned with the application of the lower standard of care imposed on manufacturers by Florida law.[30] Ordinarily the place of injury will have an interest in the compensation of those who render medical aid to the injured party. But this interest of Florida would not be furthered by the application of a law making it more difficult for the plaintiff to recover damages.[31] Moreover, Florida would seem to have no interest in this case in the application of its fault-oriented law to protect defendants from absolute liability since this defendant was not a resident of that state.[32] The situation presented under

28. See Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959); Garon v. Lockheed Aircraft Corp., 7 Av. Cas. ¶ 17418 (1961). *Cf.* Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575 (1960); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963).

29. See POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 87 (1953 ed.)

30. The court said: "An accident caused by a defective product threatens the 'general security' of the state where the injury occurs rather than of the state of delivery, which is often determined by tax or other considerations wholly extraneous to the instant problem, or even of the state of manufacture." George v. Douglas Aircraft Co., 332 F.2d 73, 76 (2d Cir. 1964). However, this may be a parochial interpretation of the policy of California. It is possible that California would adhere to its policy of placing the social costs of the enterprise upon local industry regardless of where the injury took place and regardless of the residence of the victim. See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 180. *Cf.* Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957). If this is the correct interpretation of California's policy, rather than the interpretation given by the court, then it would seem clear that California law should be applied since California would have an interest in the application of its law while Florida has no such interest. See notes 31-32 *infra* and accompanying text.

31. The court in *George* recognized this interest of Florida in protecting its medical creditors, but failed to recognize that Florida would not be concerned as to this matter if the California law of strict liability were applied by the New York court. In fact, this interest of Florida is clearly better served by the California law than by application of the fault-oriented law of Florida because it would be certain to provide a fund for the medical creditors.

32. The court in *George* felt that "if a state has decided in general that persons injured within its borders by a particular kind of defective chattel should not be allowed to recover against the manufacturer except for negligence, there would be little reason to accord a greater degree of protection because the chattel causing the injury was made in another state which has shown a broader concern for the general welfare of its citizens by imposing strict liability." 332 F.2d at 77. This statement

the governmental-interest analysis is the problem of the disinterested third state in which reference to the policies of the interested states leaves the conflict unresolved,[33] although the court in *George* did not recognize it as such.[34] Professor Currie, dealing with a problem similar to the situation involving a true conflict between the policies of the interested states,[35] proposed that the forum either apply its own law, if it coincides with that of one of the interested states,[36] or make a choice on the basis of discretionary preference between the two conflicting policies.[37] In either event, it would seem that New York, as the disinterested forum, should apply the substantive law of California, because California law is most in accord with New York law and because it seems to reflect a more modern attitude.[38]

However, even though the court in *George* felt that the law of Florida would govern the substantive issues, it held that the statute of limitations of California was applicable and that the cause of action was precluded by that statute.[39] It is generally held that statutes of limitations are procedural,[40] and thus the limitations period is determined by the law of the forum.[41] Borrowing statutes,

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by the court fails to address itself adequately to the policies of protecting defendants from absolute liability. The more reasonable interpretation of Florida's policies is that it is primarily concerned about protecting its own manufacturers from undue liability, thereby subordinating its interest in seeing persons compensated who are injured in Florida. Florida should have no concern with the application of California law, which will advance the secondary policy of Florida and not encroach upon its primary policy.

33. See generally Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

34. The court in *George* considered that Florida had an interest in the application of its law. See notes 31 and 32 *supra*. It might be possible to infer from its treatment of the problem that when an interest analysis leaves the conflict unresolved the court should apply the traditional rule that the law of the place of injury governs.

35. Currie, *supra* note 33, at 772. It would seem to make no difference whether each of the interested states would prefer that its own law be applied, or whether neither would be concerned if the third state applied the law of the other.

36. *Id.* at 779. If the law of the forum does not coincide with the law of one of the interested states, application of the law of the forum may be unconstitutional. *Id.* at 780.

37. *Id.* at 778. This places the disinterested third state essentially in the position of Congress, and it is contemplated that the forum court would decide in accord with the best national interest. See M. Traynor, *Conflict of Laws*, 49 CALIF. L. REV. 845, 862-67 (1961).

38. See, *e.g.*, Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

39. 332 F.2d at 79.

40. Ailes, *Limitation of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474, 489 (1933).

41. There are certain exceptions to this rule. See, *e.g.*, Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955) (limitation so specifically directed at liability that it qualified the right). See generally 3 BEALE, *op. cit. supra* note 1, § 604.1.

however, enacted by a majority of the states,[42] often dictate application of the limitations period of a state other than the forum.[43] Although these statutes vary greatly,[44] most borrowing legislation adopts the time bar of the place where the claim arose or accrued.[45] To determine where the cause of action arose for the purpose of applying a borrowing statute,[46] courts have traditionally applied the mechanical rule that a tort arises in the state in which the last act necessary to establish liability occurred.[47] This has also been the rule when the action for injuries sustained is based on a warranty theory.[48] These decisions are difficult to justify on a policy basis, having little relation to the policy factors behind borrowing legislation—policies requiring plaintiffs to institute suit within a reasonable time and protecting defendants from an undue extension of their responsibility.[49] Nevertheless, as with the traditional choice of law in tort actions, the rule is simple and easy to apply and is consistent with the traditional notion that the law of a single state should govern all aspects of a claim.[50]

Babcock v. Jackson clearly contemplates a new approach in deciding where a cause of action arose for the purposes of the borrowing statute. *Babcock* rejected the notion that the law of a single state should govern each issue in a suit and followed instead an approach in which the choice of law relevant to each issue is decided in accordance with the law of the state which has the most significant relationship with that particular issue.[51] Under this approach, there is no anomaly in the determination in *George* that for substantive purposes the claim arose in Florida and for purposes of the borrowing statute the claim arose in California; indeed, the policy of the borrowing statute would seem to dictate the application of California law. The court found the legislative purpose behind the borrowing statute to be that of protecting the nonresident defend-

42. Vernon, *Statutes of Limitation in the Conflict of Laws—Borrowing Statutes*, 32 ROCKY MT. L. REV. 287, 294 (1960).

43. See, *e.g.*, ILL. REV. STAT. ch. 83, § 21 (1959); IOWA CODE § 614.7 (1958); WYO. STAT. ANN. §§ 1-25 (1959).

44. See, *e.g.*, DEL. CODE ANN. tit. 10, § 8120 (1953) (exception when period of forum is shorter); TENN. CODE ANN. § 28-114 (1955) (exception when one party not a resident of place of accrual). See generally Vernon, *supra* note 42, at 294-96.

45. *Id.* at 293-300.

46. This determination is often a difficult one. *Id.* at 300; Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 45 (1962); 51 HARV. L. REV. 1290 (1938).

47. Ester, *supra* note 46, at 47. See, *e.g.*, Sylvania Elec. Prods., Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955); Wilt v. Smack, 147 F. Supp. 700 (E.D. Pa. 1957).

48. Ester, *supra* note 46, at 47-48. See, *e.g.*, Moore v. Roschen, 93 F. Supp. 993 (S.D.N.Y. 1950).

49. Ester, *supra* note 46, at 74.

50. See generally authorities cited *supra* note 1.

51. 12 N.Y.2d 473, 482, 191 N.E.2d 279, 283 (1963). See Comment, 62 MICH. L. REV. 1358, 1369 (1964).

ant from an indefinite tolling of the limitations period in the forum state because of his absence from a state in which there was no reason to expect him to be present.[52] Because the place of injury was fortuitous, and because the tolling provision of the Florida statute might indefinitely prolong the limitations period in Florida because of defendant's normal absence from the state,[53] the *George* case presented the general situation which the New York statute was intended to govern. In such a case, it would seem clear that the court's decision to apply the statute of limitations of the place of manufacture, where the defendant manufacturer will almost certainly be amenable to suit, is the rule best designed to effectuate the policy of the New York borrowing statute.[54] Although uniform legislation has been considered by some to be the only solution to the problem of accomplishing the objectives of borrowing legislation,[55] it would appear that those policies can be effectively accomplished under the more modern and flexible conflict of laws rules and the approach of *Babcock* and *George*.

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52. 332 F.2d at 78.

53. FLA. STAT. ANN. § 95.07 (1961): "If when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state. . . ."

54. The court did not decide it was necessary to consider the possibility that New York might view the cause of action as arising in both Florida and California. 332 F.2d at 79, n.6. *Compare* Pattridge v. Palmer, 201 Minn. 387, 277 N.W. 18 (1937), *with* Osgood v. Artt, 10 Fed. 365 (N.D. Ill. 1882).

55. Ester, *supra* note 46, at 74; Vernon, *supra* note 42, at 323. See Uniform Statutes of Limitations on Foreign Claims Act, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 264 (1957).