Duquesne Law Review

Volume 9
Number 3 *Symposium on Cipolla v. Shaposka*

Article 3

1971

Cipolla and Conflicts Justice

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Among the cases that have departed from the traditional jurisdiction-selecting approach to choice of law, the majority opinion in *Cipolla v. Shaposka*[1] is noteworthy in its refusal either to transmute interest analysis into insurer's liability or to identify the better choice of law with the better rule of law, even though the better rule it rejected was its own. It has also recognized that the mere presence in a state of a visitor from another state should not be the occasion for application of the latter state's law to discriminate in the visitor's favor—or, I think one may infer, against him. In so doing, it has displayed a proper concern for territoriality in the choice-of-law process. It has advanced the search for "conflicts justice."[2]

I.

Neither the majority opinion in *Cipolla* nor Justice Roberts' dissent examines the specific circumstances of the relationship between the plaintiff guest and the defendant host. Since these facts were therefore treated as legally inconsequential, I consider myself at liberty at this point in my comment to substitute for the actual case a somewhat simpler hypothetical case consistent with the fact pattern on which the respective opinions were based. Let us assume that, when the accident happened, Pennsylvania plaintiff Cipolla was being driven by his Delaware friend, defendant Shaposka, to a hamburger stand in Wilmington, Delaware, a few blocks distant from their school. Let us

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1. 439 Pa. 563, 267 A.2d 854 (1970). The vigorous dissent, *id.* at 568, 267 A.2d at 857, was written by Roberts, J., the author of the court's ground-breaking opinion in Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), applying Pennsylvania's rule of damages for survival rather than the lower Colorado rule in an action brought by the estate of a Pennsylvania decedent killed in a Colorado crash on a flight beginning in Pennsylvania.

2. I owe the phrase quoted to Professor Gerhard Kegel of the University of Cologne who used it in *The Crisis of Conflict of Laws*, in 2 HAGUE ACADEMY OF PRIVATE INT'L LAW, RECUEIL DES COURS 91 (1964), where he also observes, at pp. 184-85: "What is considered the best law according to its content, that is, *substantively*, might be far from the best spatially . . . One must be ready, therefore, to accept the concept of a specific *justice of conflict of laws*, as distinguished from the justice of substantive law." (Author's italics.)

also assume that only the defendant's car was involved.[3] This hypothesis makes it clear that the only connecting circumstances on which the application of Pennsylvania's common-law rule rather than the Delaware guest-statute could be rested are the facts that the plaintiff is a Pennsylvanian and that his home state was the forum.[4]

I take it that, if the plaintiff had been a Delaware domiciliary (or even a Pennsylvania domiciliary who had moved there from Delaware after the accident for reasons independent of the law suit[5]), the dissenting justice would not have urged his brethren to undertake a piecemeal reform of the Delaware law by refusing to apply it in this case. Accordingly, his position seems starkly to assert that, while a Delaware citizen in Delaware is entitled to the equal protection of the laws of Delaware, a Pennsylvanian in Delaware is entitled to more than equal protection, at the expense of the Delawarean. The basis for the superiority of his claim in this case where, in the view of the dissenting justice, the contacts are equal is the superiority of the Pennsylvania law in the opinion of the Pennsylvania bench, if not of the Delaware legislature. One may grant that the Pennsylvania law is superior, but question the desirability of substituting this exercise in comparative law for a principled approach to choice-of-law problems.[6]

On the factual hypothesis I have adopted, this is not a case where careful inquiry into purposes of the Delaware statute is necessary to

3. This assumption, the implications of which I shall not pursue, eliminates a possible argument for the application of Delaware law. No such argument was considered in either majority opinion or dissent.

4. The dissent does not argue that Pennsylvania's law should be applied as the *lex fori*. However, if the forum is to prefer "the better rule of law," it can arrogate to itself the evaluation of the competing rules by domestic standards and so readily apply its own rule as the better one.

5. In Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877 (1968), a case still happily exceptional, the plaintiff who had moved to the forum from the accident state after the accident was allowed to disregard the latter state's ceiling on wrongful death damages. In Reich v. Purcell, 67 Cal. 2d 555, 432 P.2d 727 (1967), the court, *per* Traynor, C.J., refused to consider a change of domicile after the event leading to the claim, though no suspicion of forum-shopping was present. In Gore v. Northeast Airlines, 373 F.2d 717 (2d Cir. 1967), the plaintiff who had moved was accorded the benefit of her domiciliary law at the time of her husband's death.

6. I have developed elsewhere my objections to reliance on the better law save in exceptional situations. See Cavers, *The Value of Principled Preferences*, 49 TEXAS L. REV. 211, 215 (1971):

> In a choice-of-law case, if a State X court is willing to displace its own rule of law for State Y's rule, it is moved to do so by facts relating the parties or the controversy to State Y in the light of State Y's rule. Those facts are not germane to the relative merits of the X and Y rules in their respective domestic legal systems. Moreover, the X court is not charged with developing Y law and would not be doing so by rejecting the Y rule for the "better" X rule . . . I see the "better law" criterion as affording a false analogy [to the court's duty in a domestic case], an escape that is not responsive to the problem confronting the court [in a choice-of-law case].

determine whether the Delaware court would have had reason to apply its own rule. To be sure, the court may hold its rule in low esteem, as Mr. Justice Roberts suggests, but the occasion does not give rise to doubt as to the rule's applicability in Delaware. Whether Delaware's reason for adopting its guest-passenger law was the protection of Delaware insurers against collusion between hosts and guests or whether it was to protect hosts from the claims of ingrate guests, the object of its solicitude, insurer or host, is located in Delaware. Delaware plainly "has an interest in the application of its policy in the circumstances of the case."[7]

So, too, has Pennsylvania whose son is the victim of the defendant's negligence and has a claim which, if the accident had been wholly domestic, would have been sustained. However, it does not follow that, because the domiciliary contacts conflict, their significance is equal. Rather, the court has to evaluate the position of the two parties with reference to the two states' conflicting rules since the forum must prefer one state's rule to that of the other. A court in this position should recognize its responsibility for the reasonable allocation of the rule-making function between the states involved and, I suggest, should rest its preference on a broader base than an *ad hoc* weighing of contacts. A basis for preference that I submit would not only be rational as a principle of allocation but also be fair to visitors to the state would be a principle enabling a state to protect people within its bounds from exposure to greater financial hazards than those to which their own laws would subject them when that exposure was created by the claims of (unrelated) out-of-state visitors that are predicated on the claimants' own laws. The majority opinion in *Cipolla* is consistent with that principle.[8]

7. B. Currie, *Comment on Babcock v. Jackson: A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233, 1242 (1963).

8. Indeed, the court virtually espouses that principle in its quotation from the argument in D. CAVERS, THE CHOICE-OF-LAW PROCESS 146 (1965), in support of the second "principle of preference" advanced therein. *See* Cipolla v. Shaposka, 439 Pa. at 567, 267 A.2d, at 856. The majority opinion, however, rests chiefly on its finding that, when the auto owner's domicile in Delaware is added to the car's registration there, Delaware's contacts become "qualitatively greater than Pennsylvania's." *See id.* at 566, 267 A.2d at 856. Liability insurance rates are calculated on the basis of accidents charged to cars registered in a state; therefore, Delaware car owners should have the benefit of Delaware's guest-passenger law. This strikes me as a needlessly tortuous way to justify allowing Delaware law to delimit the financial hazards to be run by people in Delaware as they go about their day-to-day affairs. Incidentally, I see no need to reinforce this proposition by postulating the defendant's expectations before the event. For an acute commentary on the expectations rationale, *See* Shapira, *Protection of Private Interests in the Choice-of-Law Process: The Principle of Rational Connection between Parties and Laws*, 24 S.W.L.J. 574, 582, 584 (1970).

II.

The idea that a state has an interest in protecting the claims of its citizens to the benefits of their own law when they are itinerant plaintiffs but not to the protection of their own law when they are stay-at-home defendants has begun to manifest itself among courts venturing upon governmental interest analyses. I fear the two examples that follow are not the only ones that could be discovered in the advance sheets.

A New York citizen, driving in Missouri, was killed there by the negligence of a Missouri driver. Missouri, as readers of *Reich v. Purcell* will recall,[9] has a ceiling on wrongful death recoveries; New York has none. In *Tjepkema v. Kenney*,[10] a New York Appellate Division court ruled last year that the New Yorker's representative was free to recover more than Missouri law allowed. The court simply cited *Kilberg v. Northeast Airlines*[11] to sustain its ruling. It disregarded the fact that in *Kilberg*, though the defendant held to New York's higher measure of wrongful death damages was a Massachusetts corporation, its airline was operating out of New York State where the ill-fated trip to Massachusetts had begun and where the decedent New Yorker had purchased his airline ticket. In *Tjepkema*, there seems to have been nothing to link the defendant to New York State other than the citizenship of the accident victim.

It should be noted that New York secured jurisdiction over the defendant in that case by dint of the doctrine of *Seider v. Roth*[12] under which New York takes jurisdiction, up to the full amount of the defendant's insurance policy, by virtue of the attachment of the policy at the insurer's place of business in New York. Presumably, if the judgment does not satisfy the plaintiff's claim, he is free to continue the pursuit of the defendant (now bereft of insurance protection),[13] so

9. That case, 67 Cal. 2d 551, 432 P.2d 727 (1967), was the subject of a twelve-author symposium in 15 U.C.L.A. L. REV. 551 (1968). The California court applied Ohio's rule of wrongful death damages (which, like California's, had no prescribed ceiling) in an action arising from the wrongful death of an Ohio lady and her son caused in Missouri by a California motorist. Missouri law placed a $25,000 ceiling on wrongful death recoveries.

10. 31 A.D.2d 908, 298 N.Y.S.2d 175 (1st Dept. 1969) (memorandum opinion), leave to appeal denied because order not final, 24 N.Y.2d 942, 250 N.E.2d 68 (1969).

11. 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

12. 17 N.Y.2d 111, 216 N.E.2d 312 (1966).

13. In Tjepkema v. Kenney, *supra* note 10, the plaintiff sought a ruling that defendant had conferred *in personam* jurisdiction on the court by proceeding with the defense on the merits. The court declined so to rule, citing Simpson v. Loehmann, 21 N.Y.2d 305, 310, 234 N.Y.S.2d 669, 671 (1967), limiting recovery to the face value of the policy,

that the potential impact of this foreign invasion of Missouri is not restricted to its effect upon the Missourian's insurer. Moreover, the fact that the defendant had never left his home state affords him no sure protection from the application of another state's law by another state's court.

A still more recent case, *Foster v. Maldonado*,[14] involved a Pennsylvanian who was killed in an auto collision in New Jersey by the negligence of a New Jersey driver. Pennsylvania's survival statute allows for the recovery of economic loss; New Jersey's does not. A United States District Court in New Jersey applied Pennsylvania law, noting that state's strong interest in the protection of the families of accident victims and finding that the "State of New Jersey has no such strong countervailing policy with relation to out-of-state decedents."[15] But surely New Jersey has a clear policy operating to restrict recoveries in survival cases against a New Jersey motorist driving within the boundaries of his home state. The only surviving action for causing the death of a New Jersey citizen would limit the decedent's family's recovery to damages for "pain and suffering" between the time of his injury and death. Why should a Pennsylvania family be accorded better treatment? The court treated as indicative of New Jersey law the fact that New Jersey has followed *Babcock v. Jackson*[16] in applying its own common-law rule against a New Jersey host for an accident in a state with a guest-passenger law.[17] One would have thought that *Foster* was obviously distinguishable from *Babcock*, in which guest-passenger and host driver *both* came from the state with the higher liability rule, yet the Third Circuit has denied leave to appeal.[18]

These two cases strike me as deplorable. But for one circumstance, they would have seemed shocking. That circumstance is the probability that the defendants will not have to pay anything out of their own

despite the defendant's defense on the merits. The plaintiff's attempt to extract more than the insurance proceeds denotes a claim worth pursuing elsewhere. In so doing, the plaintiff might enjoy the benefit of collateral estoppel, extending perhaps to the damage issue. For a consideration of this and other complexities, *see* Seidelson, *Seider v. Roth, et seq.: The Urge Toward Reason and the Irrational Ratio Decidendi*, 39 GEO. WASH. L. REV. 42, 53 (1970). The author would solve these difficulties by according *in personam* jurisdiction to New York as the plaintiff's home state (except where inconvenient as a forum), thereby exposing the defendant to jurisdictional as well as choice-of-law hazards at the hands of the visitor to his state.

14. 315 F. Supp. 1179 (D.N.J. 1970).
15. *Id.* at 1183.
16. 12 N.Y.2d 473, 191 N.E.2d 279 (1963).
17. The New Jersey case accepting the *Babcock* rationale on facts closely resembling *Babcock's* was Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967).
18. Petition for leave to appeal denied, 433 F.2d 348 (3d Cir. 1970).

pockets—their respective insurance carriers will settle the accounts. Though I am aware of the prevalent notion that auto liability insurers are fair game for the manipulation of the interest analysis, I keep recurring to the view that a liability insurer should be liable only if the insured is liable. If therefore it would seem unjust to hold the defendant liable if he were not insured, I find it hard to justify holding his insurer. The fact that an insurer mulcted in the sum of, say, $50,000 in these circumstances may find that actuarial provision has been made for its loss does not persuade me that the particular exaction is deserved. A scheme of direct insurance might broaden the range of insurers' liability, but it would not operate in the hit-or-miss fashion that characterizes choice-of-law decisions of the sort noted above.

Personal injury, moreover, is not always the consequence of motor vehicle operation, even on highways. Suppose in cases like those we have been examining, the injury-inflicting defendant had been mounted in each instance on a bicycle or on a horse. Cyclists and equestrians do not carry liability insurance as often as do motorists. Is the probable possession of liability insurance the gravamen of the action so that a court in State X or State Y will not subject an X cyclist or horseback rider to higher damages based on State Y's law for having injured or killed a State Y visitor in X? If the choice-of-law rule is thus to be limited, some restrictive intimation to this effect should be included in any opinion holding an insured motorist in State X liable for injury to a State Y visitor under like circumstances. If it is not so to be limited, then I find the resulting choice-of-law rule not merely deplorable but shocking.

The three cases I have been canvassing would, incidentally, provide interesting tests of the reach of the new English approach to choice of law in torts. This emerged in 1968 in *Boys v. Chaplin*,[19] in which the (higher) English rule of damages was applied by the House of Lords to a personal injury claim by one English soldier against another as a result of a traffic accident in Malta. Suppose the three cases had been brought by English plaintiffs for injuries inflicted, as in the actual cases, by the respective American defendants in the states of Delaware, Missouri, and New Jersey. England has no guest-passenger statute; it places no ceiling on wrongful death damages, and (let us assume) permits economic damages to be recovered in a surviving personal injury action. Only a few years ago I believe most English commenta-

19. 3 W.L.R. 322 (H.L. (E) 1969).

tors would have predicted the application of England's two-barreled rule that a foreign tort must be actionable as a tort under English law and not justifiable under the *lex loci delicti*.[20] This would have permitted recovery in all three cases by English standards. Now, despite the uncertain light cast by the five speeches of the Law Lords in *Boys*, it seems fairly clear that a case like *Cipolla* would have been decided in England as it was in Pennsylvania, because now the plaintiff's cause must be *actionable* under the *lex loci* (Delaware) as well as under the *lex fori*.[21] Probably, however, both the other cases would have applied the restrictions on damages imposed by the *lex loci*, contrary to the decisions reached in *Tjepkema* and *Foster*. Three Law Lords are concerned lest the imposition of English damages be unfair to local defendants.[22]

III.

Might an inquiry into the particulars of the relationship between the parties have justifiably altered the result in *Cipolla*? Suppose, for example, the defendant by arrangement had called for the plaintiff at the latter's home in Pennsylvania, had driven him to their school in Delaware, and was returning him to his Pennsylvania home when the accident occurred. I believe the case could then have been viewed as a justifiable extension of *Babcock v. Jackson*.[23] To be sure, unlike *Babcock*, both car and driver would have hailed from the state of the accident, but the seat of the guest-passenger relationship could, I submit, have been found more readily to be in Pennsylvania. When the issue in a case goes to an incident of that relationship, the function of supplying a rule to regulate that incident would seem more rationally

20. This was the famous formula of Phillips v. Eyre, (1870) L.R. 6 Q.B. 1, which, though often criticized, had survived all challenges in England until *Boys*. Presumably the defendant's conduct in none of the three cases was justifiable.

21. The first of the two propositions in *Phillips* survives, but the precedent holding that a defendant's act might be "not justifiable" though not actionable where committed, Machado v. Fontes [1897] 2 Q.B. 231, has been overruled. Boys v. Chaplin, *supra* 19, *at* 323.

22. Two of the Law Lords (Guest and Donovan) considered the damage issue procedural and would apply English law as the *lex fori*. However, on the damage issue, Lord Hodson observed in a dictum that application of the *lex loci* "would be a just result if both parties were Maltese residents or even if the defendant were" such. *Id.* 332. Lord Wilberforce concurred where both parties were Maltese residents, adding that "if the defendant were a Maltese citizen the same result might follow." *Id.* at 343. Lord Pearson suggested that, if one Maltese citizen were to sue another in England for a tort commited in Malta, "the law of the natural forum" [i.e., Malta] might be applied to discourage "forum shopping." *Id.* at 356.

23. *Supra* note 16.

allocated to a state other than the accident state if the former state is more closely connected with the relationship and also imposes a higher standard of liability.[24]

If the relationship had had its inception in the host's proposal simply to drive his friend to the latter's Pennsylvania home, I think it would smack of manipulation to find the seat of the relationship in Pennsylvania, absent at least a regular practice of providing this service. However, even assuming the relationship to have had its seat in Delaware, Pennsylvania law should, in my opinion, have been applied if the accident had occurred there rather than in Delaware. For the state of the accident which has the higher standard of liability to give effect to a lower standard as an incident to an out-of-state relationship would be for it to derogate from its own responsibility to provide for "the general security" within its bounds.

The case for the application of the accident state's law is most obvious when, as in the hypothetical case under discussion, the plaintiff had his home in the accident state, but I do not think this circumstance should be essential. My view is supported by the controversial *Kell* case in New York[25] and the more recent *Conklin* case in Wisconsin.[26] The result is in accord with a Delaware case, *Friday v. Smoot*,[27] but that case was rested on First Restatement grounds.

IV.

The three cases I have been considering, *Cipolla, Tjepkema,* and *Foster,* all involve defendants who live in the accident state which has *lower* standards of liability or financial protection than the state from

24. This view, developed in D. CAVERS, THE CHOICE-OF-LAW PROCESS 300-304, commenting on Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965), lost judicial support with the overruling of *Dym* by Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394 (1969), followed in Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129 (1970). However, in the version I am hypothesizing, the plaintiff's domicile is at the seat of the guest-passenger relationship, a circumstance not present in *Dym* or *Tooker.*

25. Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d (Sup. Ct. 1965), *aff'd in memorandum,* 26 A.D.2d 595, 270 N.Y.S.2d 552 (3d Dept., 1966), discussed in Trautman, *Kell v. Henderson: A Comment,* 67 COLUM. L. REV. 465 (1967) and Rosenberg, *Kell v. Henderson: An Opinion for the New York Court of Appeals, id.* at 459. *Kell* has just been rejected at its source. Arbutchnot v. Allbright, 316 N.Y.S.2d 391 (3d Dept., 1970).

26. Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). The court also invoked the "better law" view. Both parties were domiciled in Illinois, not the accident state (Wisconsin).

27. Friday v. Smoot, 211 A.2d 594 (Del. 1965). The court assumed that *Babcock* would have dictated the application of Delaware law because of its more significant contacts, disregarding the fact that the place of the accident, New Jersey, had the common-law rule.

which the plaintiff comes. Suppose the same law-fact pattern except that it is the plaintiff who lives in the accident state with the lower standards and the defendant who comes from the other state with the higher standards. Would it be unjust to the out-of-state defendant to hold him to the higher standards of liability or financial protection existing in his own state, thereby benefiting the plaintiff who, of course, would have been restricted by his own state's rule to a lower recovery if the tortfeasor had been a fellow-citizen. Would a rational scheme of allocating the rule-making function permit this choice of law? Would that not be inconsistent with *Cipolla*?

The situation I have postulated might have emerged from the localized Michigan accident that led the New York Court of Appeals in *Tooker v. Lopez*[28] to apply New York's common law rather than the Michigan guest-passenger statute. That case involved an action by the personal representative of the accident victim, a New York student at Michigan State, against the father of the deceased tortfeasor, another New York student there. The court found no interest of Michigan's that could be invoked against New York's interest based on the New York domicile of the parties to the accident, reinforced, in the majority's view, by the fact that New York's compulsory liability insurance expressly extends to accidents occurring outside the state.[29] In the same accident, a Michigan passenger, Miss Silk, was injured. If she had joined in the suit, the problem addressed in this section would have been posed. She did not do so, but the court took note of her situation, intimating that, despite her Michigan domicile, she too might have recovered from the New York defendant.[30]

Recently an unreported case in the United States District Court for the Southern District of New York, *Hepp v. Ireland*,[31] posed the problem suggested by Miss Silk's case. The judge applied New York law to an accident claim brought by the plaintiff, an Illinois domiciliary, for an injury sustained by him in Colorado while a passenger in an auto, registered and insured in Kansas, which the New York defendant driver had borrowed from his Kansas roommate at Colorado College where all three were enrolled. Colorado, Illinois, and Kansas all had guest statutes, a circumstance that seems to me to render the case legally

28. See note 24, *supra*.
29. N.Y. VEHICLE & TRAFFIC LAW, § 388.
30. See Tooker v. Lopez, 24 N.Y.2d at 580, 249 N.E.2d at 400.
31. 66 Civ. 2138, S.D.N.Y., April 8, 1970, before Frankel, J. The case did not progress further; it was settled.

identical to one in which not only the accident but also the plaintiff's domicile and the auto's registration were in Colorado.[32] In other words, I think the decision may be treated as if the court had held that New York would, in a spirit of beneficence, hold a New Yorker liable to a Coloradan for a Colorado accident in a Colorado car for which the Coloradan could not have recovered if he had been hurt under the same circumstances through the negligence of a Colorado driver. In the actual case, moreover, the Kansas insurer of the car was not party to the New York suit; the insurer conducting the defense was doing so under a policy issued to the defendant's father in New York for the cars he owned there; an omnibus clause that New York required to be included in the policy extended its coverage to the insured's son for auto accidents outside the insured's own cars.

In another recent guest-passenger case, *Pfau v. Trenton Aluminum Co.*,[33] similar to *Tooker v. Lopez* except that the plaintiff guest came from a different common-law state than the driver, the New Jersey Supreme Court's opinion included a dictum suggesting that, if the plaintiff had come from a guest-passenger state, he should none the less have been able to enjoy the protection of the common law prevailing in the defendant's home state of New Jersey. "We are not certain," said the court, "that a defendant's domicile lacks an interest in seeing that its domiciliaries are held to the full measure of damages or the standard of care which that state's law provides for. A state should not only be concerned with the protection and self interest of its citizens."[34] To this statement it appended a citation to the *Tooker* dictum re Miss Silk.

I do not think this rather extreme exemplification of what Professor Brainerd Currie termed an "altruistic interest"[35] is unprincipled or a

32. I have long been arguing that, where parties come from different states having the same law on the point at issue, they should be treated as if they had come from a single state. I find support for this view in *Restatement of Conflict of Laws (Second)*, § 145, Comment *i* (Prop. Off. Draft, 1968). In Pfau v. Trent Aluminum Co., *supra* note 24, the court treated the plaintiff, who came from another state having the same law as the defendant's state, as if he were from the latter state. In England and the Continent, however, in proposals to depart from the *lex loci*, much stress is placed on the fact that both parties have a common "habitual residence," *see* Cavers, *Contemporary Conflicts Law in an American Perspective*, in HAGUE ACADEMY OF INT'L LAW, COLLECTION OF COURSES 1970, c. 4 (to be published). Perhaps, to be sure, in some cases, though the two laws at issue are the same, one or both are so conditioned substantively that they could not justly be treated as if they had emanated from a single state. For a discussion of the problem, *see id.* c. 3.

33. *Supra* note 24.

34. *Id.* at 524, 263A.2d at 136.

35. See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws:*

denial of "conflicts justice." A state may adopt a choice-of-law principle preferring its own standards of liability and financial protection when the duties these impose on its citizens are higher than those in the states to which they may resort, regardless of who may be the victims of their misconduct. Yet when such a principle is applied to hold a host liable for injuring his guest passenger in a relationship created and ending in the latter's own state, I find this application of the principle a bit quixotic.

There are, however, situations in which I believe a principled interpretation of the law of the defendant's state would reasonably lead to the conclusion that the burden it imposes on him should not be restricted to local injuries or to relationships having their seat in his own state. Two familiar examples are the application of a state's dram-shop law to impose liability for an injury caused across the border in a state having no dram-shop law[36] and also the denial of charitable immunity to a charity having its seat in a state that, unlike the state of the accident, has abolished the immunity.[37]

A recent case, *Johnson v. The Hertz Corporation*,[38] provides an actual and more debatable example of the problem. A driver in a rented car registered in New York injured Massachusetts citizens in New Jersey. The car's owner, Hertz, was sued in a federal court in New York where it does extensive business. The driver of the car could not be located. New Jersey imposes no liability on the owner of a car involved in an accident in these circumstances.[39] Massachusetts creates a rebuttable presumption that the owner was in control of the vehicle.[40] New York, however, provides by statute that the owner shall be liable for injuries resulting from negligence in the operation of the vehicle with the permission of the owner.[41] Moreover, the owner is required

Privileges and Immunities, in B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 445, 489 (1963).

36. See, *e.g.*, Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957). Another case of this type that is gaining recognition is Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968) (D.C. car owner who left keys in car liable under D.C. law to Md. citizen injured by car thief in Md.), discussed in Cavers, *supra* note 6, at 220.

37. See, *e.g.*, Blum v. American Youth Hotels, 40 Misc. 2d 1056, 244 N.Y.S.2d 35 (Sup. Ct. 1963), *aff'd on other grounds*, 21 A.D.2d 683, 250 N.Y.S.2d 522 (2d Dep't 1964). Perhaps better known is the imaginary case of Adams v. Knickerbocker Nature Study Society, Inc. in D. CAVERS, THE CHOICE-OF-LAW PROCESS 19-32 (1965).

38. 315 F. Supp. 302 (S.D.N.Y. 1970).

39. *See id.* at 305: Both parties agreed, on the basis of Schimek v. Gibb Truck Rental Agency, 69 N.J. Super. 590, 174 A.2d 641 (1961), that New Jersey follows the common-law rule.

40. *See* MASS. GEN. LAWS. c. 231, §§ 85A-85C.

41. *See* N.Y. VEHICLE & TRAFFIC LAW, c. 71, § 388 (1).

to carry insurance covering his liability, and this insurance must extend to claims arising "within the State of New York, or elsewhere in the United States."[42]

The court took note of New York's "express yoking" of its owner liability provision with its insurance provision which, the court stated, "makes it clear that imputed owner liability is part of the general scheme of the insurance laws and therefore must share its stated ends of protecting the innocent victims of tortfeasors."[43] It found no contrary interest in New Jersey or Massachusetts that "weighs against New York's policy of expanded liability expressed in" the New York statute.[44]

Did the court disregard the fact that the application of the New York liability insurance policy in another state should give rise to liability on the part of the insurer only if the insured was liable there? A disregard of this proposition was, in my view, the vice of the reliance by the New York Court of Appeals on the same statute in *Tooker v. Lopez* to sustain its conclusion that the New York guest statute applied to a Michigan accident.[45] I find it hard to accept the idea that New York has subjected New York car owners in other states and countries to New York's own tort law simply by making its compulsory liability insurance applicable extraterritorially.

In contrast, this does not seem to me to be the effect of New York's statutory imputation of liability for negligence to motor vehicle owners. Just as New York has, I believe, rendered its charities subject to extraterritorial liability for negligence, so I see New York as having made car owners answerable extraterritorially. The compulsory insurance requirement strengthens the case for the imputation to auto owners by making the burden less onerous. However, I should still suppose that liability in both charity and auto owner cases is restricted by the other limits on tortious liability prescribed by the laws prevailing in those places, absent some additional basis for the choice of New York law.[46]

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42. *See id.* § 311.
43. Johnson v. The Hertz Corporation, *supra* note 38, at 304.
44. *Id.* at 305.
45. Tooker v. Lopez, 24 N.Y.2d at 577, 249 N.E. at 400-01.
46. This was present in Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36 (1967), where New York's wrongful death law, as well as its owner liability law, was applied to deaths caused in North Carolina among a party of New Yorkers returning from a trip to Florida. Babcock v. Jackson, *supra* note 16, was cited, and the refusal to apply New York's wrongful death law extraterritorially in Kilberg v. Northeast Airlines, *supra* note 11, was overruled.

At the start of this section, I asked whether these cases were consistent with *Cipolla* in casting on a defendant a burden drawn from his home state's laws heavier than the burden that would be imposed by the laws of the state of accident where the plaintiff resided. In my view, whether correctly or incorrectly decided, these cases are not inconsistent. A defendant may complain of the harshness of his own state's rules when he is subjected to them in a case involving extraterritorial conduct or consequences. However, he can seldom complain that he has thereby been denied "conflicts justice."[47] This, I submit, would have been the effect of the application of Pennsylvania law in *Cipolla*.

47. A problem that I shall not attempt to examine here is whether another state may, as forum, justly make that projection in the absence of, or even contrary to, rulings in the defendant's own state. In my view, this may sometimes be done. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 102-07 (1965). For an example of such a projection where the other state's courts had spoken, *see* Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965) (Forum applied New York rule holding owner who failed to change license plates estopped to deny ownership when sued for injury caused in the forum).