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Conflict, Crisis and Confusion in Pennsylvania

Albert A. Ehrenzweig*

The three pejoratives in the title of this paper were the battle cry which Brainerd Currie, one of the outstanding scholars of American conflicts law, raised in 1963 with regard to a series of New York decisions in this area.¹ Shortly thereafter, Gerhard Kegel, one of the leading conflicts authors on the international scene, found all of American conflicts law to be immersed in a severe crisis.² As for myself—even then I shared Currie's unhappiness about a misguided theory which, having arisen from the fluid and largely academic playgrounds of torts and contracts, had been permitted by the New York court to create such very human tragedies as that of the "bastard" denied his right to a father under a foreign law.³ And today I would unhappily conclude that ever since, New York has continued along this dangerous path.⁴ But for other states I have always maintained that, if a crisis exists, it has remained limited to the conflicts law of enterprise liability where it is due to the critical posture of the substantive law in this area.⁵ Here we are faced with the incongruity between the search for an equitable distribution of unavoidable losses and its disingenuous tool of a tort liability designed to achieve avoidance of such losses by the potential wrongdoer's admonition.⁶ So long as this irrational law of admonition

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1. Currie, 1963 DUKE L.J. 1, reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 690 (1963).

2. Kegel, *The Crisis of Conflict of Laws*, Academy of International Law, *RECUEIL DES COURS* 112 (1954) 93.

3. Ehrenzweig, *The Bastard in the Conflict of Laws—A National Disgrace*, 29 U. CHI. L. REV. 498 (1962).

4. We now have similar New York inroads even into the law of property. For documentation see Ehrenzweig and Westen, *Fraudulent Conveyances in the Conflict of Laws: Easy Cases May Make Bad Law*, 66 MICH. L. REV. 1679 (1968); also EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 21, 63, 70, 142, 151 (1967). That the New York free-for-all in tort law has continued, has been generally noted, in this country as well as abroad. See, e.g., Jayme, *Rabels* 34 (1970) 141, 142, with regard to *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394 (1969).

5. Older contract cases such as the fateful New York decision in *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954) which ushered in the "new era," are but harmless reflections of the general and age-old "proper-law" anarchy in what unhappily is still treated as a homogeneous "subject." See now also e.g. such "landmark" cases in other jurisdictions as *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964); and generally Ehrenzweig, *The Not so "Proper" Law of a Tort: "Pandora's Box,"* 17 I.C.L.Q. 17 (1968).

6. See, e.g., Ehrenzweig, *Specific Principles of Private Transnational Law*, Academy of International Law, *RECUEIL DES COURS* 125 (1968) ch. VII (hereafter cited *RECUEIL*).

for "fault" is not replaced by a rational scheme of compensation without fault, any conflicts rule must choose between two irrational laws and will, therefore, continue to remain irrational.⁷ Indeed, the alleged crisis, except for what I have characterized as the general Desperanto of the Second Conflicts Restatement⁸ and for the unfortunate experiments of New York, has with an almost exasperating regularity, been virtually limited to such very specific problems of an obsolescent enterprise liability as guest statutes, limitations of damages, and family and charitable immunities. But the present case, though it does, of course, as nearly all cases of this kind, reach a wholly defensible decision on the merits, may regrettably signify a dramatic spread of Currie's "Conflict, Crisis and Confusion" from New York into the important jurisdiction of Pennsylvania.

In their kindness to both me and my readers, the editors have permitted me to state this presumptuous view by mere conclusions and to rely for documentation primarily upon my earlier all-too voluminous writings in this area. These include, in addition to four general treatises,⁹ and some one hundred articles on related topics, three papers discussing the specific problem here involved.¹⁰ This problem is the applicability of a foreign guest statute to the claim of a forum domiciliary whose law would have permitted common law recovery.

When first surveying the conflicts law bearing on this problem in 1960, I found that, presumably under the continuing influence of the (First) Restatement, twelve jurisdictions had on occasion applied guest statutes of foreign places of accident in preference to their own common law rule.¹¹ Of those states, the large majority have since abandoned this practice. We should have expected Pennsylvania to join the grow-

7. See e.g., EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951), reprinted 54 CALIF. L. REV. 1419 (1966).

8. Ehrenzweig, DAS DESPERANTO DES ZWEITEN "RESTATEMENT OF CONFLICT OF LAWS," IUS PRIVATUM GENTIUM, FESTSCHRIFT FÜR MAX RHEINSTEIN (1969) 343; Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason versus the Restatement Second*, 28 LAW & CONTEMP. PROB. 700 (1963); Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965). See also, *infra* note 10.

9. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS § 220 (1962) (hereafter cited TREATISE); EHRENZWEIG, PRIVATE INTERNATIONAL LAW § 40 (1967) (hereafter cited PIL); RECUEIL § 117; EHRENZWEIG, CONFLICTS IN A NUTSHELL § 89 (2d ed. 1970) (hereafter cited NUTSHELL).

10. Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595 (1960); Ehrenzweig, *Foreign Guest Statutes and Forum Accidents: Against the Desperanto of State "Interests,"* 68 COLUM. L. REV. 49 (1968). See also Ehrenzweig, Comment, 63 COLUM. L. REV. 1243 (1963).

11. 69 Yale L.J., *supra* note 10 at 602.

ing consensus after her earlier forays against the regime of the *lex loci*.¹² But the present case seems to betray this expectation. For the reasoning of the majority, though rejecting Justice Bell's renewed advocacy of the *lex loci*,¹³ in effect returns to it by a tortuous detour: A Pennsylvania citizen is denied recovery under the guest statute of the state of the accident—(1) because of a prevailing "interest" of that state; (2) because of the court's "highly territorial approach;" (3) because the defendant deserved protection; (4) because the car was garaged and insured in the state of the accident; and (5) because there was no room for the application of the "better rule."

1. We are to understand that the court reached its conclusion for the defendant under the *lex loci* of Delaware because that state had "the greater *interest* in having its law applied" than Pennsylvania.¹⁴

(a) By thus weighing state interests the court purports to adhere to the technique it adopted in the *Griffith* case.¹⁵ Like Chief Justice Traynor¹⁶ and other distinguished judges before and after him, Justice Roberts, in that case, transposed into his state's non-governmental tort conflicts law that language which the United States Supreme Court had introduced in cases which were fundamentally distinguishable as involving truly governmental interests.¹⁷ This transposition remained harmless and, indeed, may have often assisted courts in reaching desired and desirable results by applying their *own* law.¹⁸ The Pennsylvania Supreme Court itself used this technique in those three cases on which it now relies.¹⁹ But in contrast to these cases, the majority of the

12. See above all, Justice Roberts' scholarly opinion in *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796, 800-807 (1964). Having in mind Justice Bell's prophetic warning of "confusion or chaos" (*id.* 807, 809), we must regret that the courts did not replace the *lex loci* by another "clear and definite and well settled rule" (*id.* at 807). Such a rule would have to be based on the interpretation of the forum's substantive law, e.g. to the effect that the policy of the Pennsylvania common law rule on damages did or did not require any limitation based on the law of the place of accident or domicile.

13. *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854, 857 (1970), dissent.

14. *Id.* at 857.

15. *Griffith v. United Air Lines*, *supra* note 12.

16. See *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727 (1967). In this case the court purported to apply the Ohio common law rule of unlimited wrongful death damages as against the limitation rule of Missouri, the state of the accident, in litigation between California citizens. A prevailing "interest" of Ohio as the state of the decedent's domicile was assumed, although Ohio herself would have applied Missouri law. Interpretation of the forum rule as applicable to this case would have led to the same result without misdirecting California courts in future cases. See Ehrenzweig, Comment, 15 U.C.L.A. L. REV. 570 (1968).

17. See, NUTSHELL § 8-5.

18. The only "interest" case in which a foreign guest statute was applied in New York, has been duly overruled. See the history in *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394 (1969), relied on by the *Cipolla* majority, at 856.

19. These are *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966); *McSwain v.*

court now further distorts the United States Supreme Court's original "interest" doctrine by using it in explaining the application of *foreign* law.

(b) As I have tried to show many times, application of a foreign law on grounds of another state's prevailing "interest" could, in the absence of a rule of choice of law to this effect, be justified only on the basis of a super-law such as a constitutional command or an international rule. But such super-laws, while once assumed as "vesting" rights or conferring "legislative jurisdiction," have long been recognized as illusory assumptions of an utopian private "international" law.²⁰

(c) Without such a super-law, then, the court had no reason, and indeed no excuse for considering a priori any "interest" of Delaware. Yet, that state was said to be "concerned"²¹ because defendant was "a Delaware resident."²² Asking ourselves why such residence was "a contact relevant to the issue," we learn of Delaware's "policy that its hosts should not be required to compensate their guests for their (the hosts's) negligence."²³ In other words: Delaware is "concerned" because her "contact" is "relevant," and this contact is relevant because Delaware is concerned. Let us assume that the car had been garaged and insured in New York. Would this "contact" have been "relevant to the issue" so as to activate New York's policy as that of a concerned state? Most probably the answer would have been in the negative. But this answer would have had to be derived from a rule of choice of law declaring "relevant" only Delaware's rather than New York's interest, by virtue of that very choice of law rule which we had set out to ascertain from these states' "interests."

(d) The same circular reasoning underlies the court's concept of a "true conflict" which was said to permit the weighing of Delaware's interest despite the "competing" interest of Pennsylvania as the state of the plaintiff's residence, with each state's policy being "furthered" by the applicability of its laws. The court apparently considered this finding necessary in order to distinguish the case from those precedents which, faced with mere "false conflicts", reached the application of the

McSwain, 420 Pa. 86, 215 A.2d 677 (1966); Griffith v. United Air Lines, *supra* note 12. See the *present case*, at 855.

20. See, TREATISE §§ 121-123; PIL ch. III; RECUEIL ch. IV; NUTSHELL §§ 1-14.

21. For the identity of the "concern" language, borrowed from Von Mehren and Trautman, and "interest" terminology, see Kay, *Book Review*, 18 J. LEGAL ED. 341 (1966).

22. Cipolla v. Shaposka, *supra* note 13, at 856.

23. *Id.*

lex fori.²⁴ But the concepts of both false and true conflicts as used by the court are analytically untenable, being as circular as the concepts of "concern," "relevance," and, for that matter, "interest."²⁵

2. In effect, the majority admits the futility of its interest reasoning by its simultaneous reverter to that very, long obsolete, "*territorial approach*" which the "interest" theory had been designed to dislodge.²⁶ Judge Wyzansky's saying on which the court purports to rely,²⁷ merely suggested that "departure from the territorial *view of torts* ought not to be lightly undertaken" to justify application of a law other than that of the forum state in which the defendant had committed a tort.²⁸ There was no reference to a *foreign* territorial law. And, indeed, the court, somewhat inconsistently to be sure, rejected Justice Bell's *lex loci* as applicable only to "rules of the road."²⁹ No wonder that Justice Roberts, dissenting, considered the majority's "territorial" language "misplaced."³⁰

3. Elsewhere I have tried to show how Chief Justice Traynor in a now leading case,³¹ though purporting to apply a wholly unrealistic "state interest" approach, in effect builds a common-sense argument on the interests of the litigating *parties*.³² Significantly, the majority in the present case found itself impelled to make a similar about face. At the climax of the court's argument we learn that "it seems only fair to permit a defendant to rely on his home state law when he is acting within that state."³³ For this strange conclusion, the court relies on Cavers' statement that "by entering the state or nation, the visitor has exposed himself to the risk of the territory and should not subject persons living there to a financial hazard that their law had not created."³⁴ This argument *can* have validity where forum policy can thus be interpreted or, in our case, if the Pennsylvania common law

24. *Id.* at 855.

25. See Ehrenzweig, "*False Conflicts*" and the "*Better Rule*": *Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847 (1947); Peter Westen, Comment, 55 CALIF. L. REV. 74 (1967).

26. *Cipolla v. Shaposka*, *supra* note 13, at 857.

27. *Id.* at 857; *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949), *aff'd* 178 F.2d 888 (1st Cir. 1949).

28. See, TREATISE 558.

29. See *Cipolla v. Shaposka*, note 13, *supra* at 856 n.2.

30. *Id.* at 859.

31. *Supra* note 16.

32. Justice Roberts, in *Griffith v. United Air Lines*, *supra* note 12, at 802, credits me kindly with emphasis on this approach.

33. *Cipolla v. Shaposka*, *supra* note 13, at 856.

34. CAVERS, *THE CHOICE-OF-LAW PROCESS* 147 (1965). See Ehrenzweig, *A Counter-Revolution in Conflicts Law: From Beale to Cavers*, 80 HARV. L. REV. 377 (1966).

rule is held not to have been intended to protect Pennsylvania citizens who expose themselves to the possible impact of foreign laws. But this is the only issue and, as I have tried to show earlier, wholly unconcerned with Delaware's policy. Could we, in the present case, seriously assume that Pennsylvania policy would abandon her citizen to the law of a state which has accepted him as a daily commuter? The court's attempt to distinguish what it concedes to be the only reported case "presenting a factual situation similar" to the present one and arriving at the contrary result, is an obvious failure.³⁵

4. But, we learn, Delaware's "qualitatively greater" interest "in having its law applied" is also based on another party interest. "The automobile involved in the accident is registered and housed in Delaware [and] it appears that *insurance rates* will depend on the state in which the automobile is housed."³⁶ Contrary to the court's contention,³⁷ such a "zone-risk analysis" was expressly denied, rather than asserted, by Professor Morris with regard to the incidence of guest statutes,³⁸ in contradiction to what he erroneously considered my suggestion which, internationally, has half-jokingly come to be known as my advocacy of a "lex loci stabuli."³⁹ I had in fact suggested a test of "reasonable insurability" (rather than "actual insurance" as Professor Morris surmises) to help in establishing a firm insurance practice and thus to facilitate a fixed and foreseeable choice of law. I must take the blame, therefore, for having encouraged the search for an admittedly arbitrary, fixed choice of law by the consideration, apparently attributed to Morris,⁴⁰ that "it seems unreasonable to compel the host [whose car is garaged in a guest statute state], as we do now, to buy insurance against a liability that he might incur under the law of a [guest statute state] possibly to be reached on a yet *unplanned* out-of-state trip."⁴¹

35. *Schneider v. Nichols*, 280 Minn. 551, 158 N.W.2d 255 (1968). Here the common law of the forum was applied in the forum resident's favor against the guest statute of the place of accident on the ground that all the defendant's residence, and the car's garage and insurance in the guest statute state all "add[ed] nothing to the case for guest statute application either as to predictability of result. . ." *Id.* at 158 N.W.2d 258. This is in direct conflict with the *Cipolla* court's reasoning.

36. *Cipolla v. Shaposka*, *supra* note 13, at 856.

37. *Id.*

38. The court cites Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 574 (1961). See *id.* at 574-576.

39. See DICEY-MORRIS, A DIGEST OF THE LAWS OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (8th ed. 1967) (Kahn-Freund), ch. 30 n.67. Cf. PIL 136.

40. *Supra* note 13, at 856.

41. Ehrenzweig, *Products Liability in the Conflict of Laws*, 69 YALE L.J. 794, 801 (1960), emphasis added. Shortly before the *Cipolla* case, the Supreme Court of New Jersey had approved my reasoning. *Pfau v. Trust Aluminum Co.*, 263 A.2d 129, 134 (N.J. 1970).

But, contrary to the majority, and in accord with Morris,⁴² I would, in the present case of a *planned* commuting trip, have found the guest's claim under Pennsylvania law justified as "foreseeable and insurable."

5. Only Justice Roberts' dissenting views would have reached this decision. But he, too, was forced to phrase his argument in that fateful "interest" language which he, though for other purposes, had introduced in his state.⁴³ Being compelled to travel this route, he had to resort to another novel tool in order to escape the result of the majority's weighing of "interests." He declared this result to be one of "*even balance*," thus requiring an additional test.⁴⁴ But can we follow Justice Roberts in his proposal that in such cases the court is simply to apply the "*better rule of law*?"⁴⁵ With due respect, we must point out that the cases relied on by the Justice⁴⁶ all treated this evaluation as merely one of "the choice influencing considerations in conflicts law" so ably propounded by Robert Leflar.⁴⁷ I know of no court that has so far treated this consideration as a *rule* of choice, and I submit that such a rule would not only make us return to Magister Aldricus' 12th century preconflicts law,⁴⁸ but would be entirely unworkable. Would Justice Roberts, sitting in Delaware, have applied Pennsylvania law to our facts as offering the better rule? Could he have done so without ignoring the policy of his own state which alone can determine the choice of law in the absence of established statutory or judicial rules to the contrary?

We must sadly conclude that Brainerd Currie's finding of "conflict, crisis, and confusion" in New York has now reached Pennsylvania. It is our only hope that they will remain limited to those tort conflicts rules which, as suggested earlier, are bound to remain unsatisfactory so long as our tort laws remain those of the nineteenth century. And let us hope that Pennsylvania will not follow New York in its gratuitous excursions into other yet untouched areas of the law of conflict of laws.

42. "From the actuary's standpoint, therefore, these trips are foreseeable. . . . As far as [the defendant's] neighborhood is concerned those claims are foreseeable and insurable" [my phrase]. *Id.* at 576.

43. *Supra* note 12.

44. *Cipolla v. Shaposka*, *supra* note 13, at 859.

45. *Id.*

46. *Id.*

47. Leflar, *Choice Influencing-Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 295-304 (1966). Cf. PIL § 28; NUTSHELL § 8-7; RECUEIL §§ 26-28; Ehrenzweig, *supra* note 25.

48. According to him the judge's oath to decide "justly" imposed on him the obligation always to apply "the stronger and more useful" custom. See TREATISE 318.