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**WEINTRAUB'S COMMENTARY ON THE CONFLICT OF LAWS:
THE CHAPTER ON TORTS**

Robert A. Sedler*

It is no easy task to compress a discussion of choice of law in conflicts-torts cases into some 60 pages, as Professor Weintraub has done, particularly when the author is both giving an overview of what has been happening in a area where "changes in judicial approaches to conflicts problems have come most swiftly and been most dramatic,"¹ and at the same time developing his own approach. Professor Weintraub has done a remarkable job in making the subject matter of the chapter very comprehensible to the non-experts in the field—lawyers, judges, law students; in fact everyone but another conflicts professor—and has also provided a very useful exposition and analysis for us "experts." I will briefly comment on the contents of the torts chapter itself, and will then give my views on Professor Weintraub's approach to choice of law in conflicts-torts cases, remembering that as Professor Brainerd Currie once observed, "I know of no sincere way to honor a scholar except to subject his scholarship to critical analysis."²

Professor Weintraub has performed a most valuable service by reminding us that the "place of the wrong" rule has not disappeared, as academic commentary would sometimes indicate. He points out that in recent years at least 10 jurisdictions have explicitly refused to abandon the place-of-the-wrong rule, and his analysis, in terms of policy and interest, of cases decided under that traditional rule³ is most enlightening. In his analysis, Professor Weintraub makes use of some older cases—in Conflicts that means cases that are more than 5 years old—which have not generally been considered leading ones, and demonstrates cogently the unsoundness of the results that were reached under the place-of-the-wrong rule in comparison with the results that would be reached under an "analysis of interests" approach. Because this kind of comparison was so effective. I am disappointed that he did not deal with the "state of the most significant relationship" approach of the Second Restatement⁴ more fully, and compare the results

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¹ R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 200 (1971) [hereinafter cited as COMMENTARY].

² Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the Rule of Validation*, 18 OKLA. L. REV. 243 n.2 (1965).

³ COMMENTARY 210-19.

⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

reached under this approach with those which would obtain under an interest analysis. His brief discussion seems to display some ambivalence over the policy content of the Restatement approach, and he fails to come down hard on the difference between its localizing, contact-oriented methodology and the methodology of interest analysis. *Dym v. Gordon*,⁵ which he discusses at length in another context,⁶ would be a good example of this difference.⁷ This is really my only criticism as to the content of the chapter.

Professor Weintraub has set forth his own approach most clearly and concisely. He has traced the development of interest analysis—and of the policy-centered approach in general—against the backdrop of the place-of-the-wrong rule, demonstrating the very real differences in result that may be produced. His analysis of the interests of the various contact states in applying their law on particular issues is most precise and provides many insights as to how interest analysis should properly operate. Somehow he manages to focus on most of the problems that arise and to pretty much “cover the field,” a task difficult to achieve in one chapter of a treatise. All in all, the chapter on torts represents a very valuable contribution to conflicts scholarship.

I turn now to a discussion of the substantive aspects of Professor Weintraub's approach to choice of law in conflicts-torts cases. It is not really possible, however, to discuss someone else's approach without first making clear—as briefly as possible—your own approach.⁸ Like Professor Weintraub, I believe that interest analysis is the soundest way to go about solving conflicts problems, particularly in the torts area. However, unlike Professor Weintraub, I adhere to Professor Currie's view that in the case of a true conflict—which I define a bit differently from Professor Currie by emphasizing real as opposed to hypothetical interests⁹—the forum should apply its own law. Secondly, I am very much concerned with judicial method and with the behavior of courts in dealing with the kinds of cases that actually do arise. It is my conclusion that conflicts cases, particularly in the torts area, fall into certain fact-law patterns, and that courts can resolve these cases based upon considerations of policy and fairness to

⁵ 16 N.Y.2d 120, 209 N.E.2d 792 (1965).

⁶ COMMENTARY 239-44.

⁷ See Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27, 75-78 (1967).

⁸ See generally Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 7; Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L. REV. 8 (1970); Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQUESNE L. REV. 394 (1971).

⁹ See Sedler, *Symposium—Conflict of Laws Round Table: The Value of Principled Preferences*, 49 TEXAS L. REV. 224, 225 (1971).

the parties. Court decisions in particular cases will serve as precedents for future ones, and in time a judicially established body of conflicts law may emerge. This orientation causes me to analyze "academic solutions" with reference to their impact on and relevancy for judicial behavior in conflicts cases.

Professor Weintraub's approach calls first for identifying and eliminating what he calls spurious conflicts, and then for providing a rational basis for resolving true ones. He says that a spurious conflict is present "when two or more jurisdictions, having some contact with the parties or the occurrence, have tort rules pointing to different results, but, upon analysis of the purposes underlying the putatively relevant and divergent rules, it becomes apparent that one rule and one rule only is rationally applicable to the case in issue."¹⁰ This will occur when one state would substantially and legitimately advance its own policies if its rule were applied, but the contacts of the other states are such that their policies, if given effect, "would officiously interfere with the policies of the first state."¹¹ He later uses as classic examples of spurious conflicts the situation of two spouses from a non-immunity state involved in an accident in a state that still recognizes spousal immunity,¹² and the situation of two parties from a state that does not have a guest statute involved in an accident in one that does.¹³

He then points out that there is not a sharp dividing line between spurious and true conflicts, but that, "there is a spectrum of torts conflicts situations," with spurious conflicts at one end and true conflicts at the other, and that "between these extremes are cases in which reasonable men may differ as to whether more than one state's policies are relevant."¹⁴ But he then drops the matter and moves on to the true conflict. I think there is an important gap in his approach here, and that explicit attention should be given to what Professor Currie has called the "unprovided for case," the case where neither state has an interest in applying its law on the issue as to which the laws differ.¹⁵ For example, a State A resident is killed in State A while operating a machine manufactured in State B by a State B corporation. State A has a limitation on the amount of damages recoverable for wrongful death; State B does not. The case is neither a spurious conflict nor a true one, because neither state has an interest in applying its law on the particular issue: State A has no interest in applying its limitation

¹⁰ COMMENTARY 201.

¹¹ *Id.*

¹² *Id.* at 228.

¹³ *Id.* at 212.

¹⁴ *Id.* at 202.

¹⁵ See B. CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 128, 152-53 (1963).

policy for the benefit of the State B defendant; State B has no interest in allowing unrestricted recovery to the beneficiaries of a State A decedent killed in State A.¹⁶

Professor Weintraub does not explicitly deal with this kind of case, nor does he indicate how he would decide it.¹⁷ It is necessary to take account of such cases since they do arise in practice, and to consider policies other than those reflected in the laws that differ. In the example I have given, it may be observed that all states have a common policy of imposing liability for wrongful death, and limitations on this liability are an exception to that common policy.¹⁸ This being so, where the only state interested in limiting the defendant's liability—his home state, where he will be required to bear the loss or carry insurance to cover it—does not do so, there is no reason to depart from the common policy of both states in allowing recovery for wrongful death, and unlimited recovery should be allowed. I would say as a general proposition that in the ordinary accident case, where the defendant's home state imposes tort liability, he should be held liable irrespective of where the plaintiff resides or where the accident occurs. Professor Weintraub's approach does not really deal with this kind of problem, and I think that is a significant omission.

When it comes to the true conflict, Professor Weintraub would not give up and apply the law of the forum.¹⁹ I am in full agreement with his view as to what constitutes a true conflict, namely, the situation that exists when each state has a legitimate and real interest in having its own rule applied. He distinguishes, as I do, between real and hypothetical interests, pointing out, as an illustration, that when two parties from an immunity state—a state that has a guest statute, for example—are involved in an accident in a non-immunity state, any interest of the state of injury in allowing compensation to the non-resident plaintiff is "officious and hypothetical."²⁰ But where the conflict cannot be avoided, he would look for a rational basis for resolving the conflict, and he suggests four criteria which will help the court arrive at that resolution. First is the general direction of substantive tort law toward distributing losses resulting from accidents,

¹⁶ See *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1969).

¹⁷ Drawing an analogy to the criteria employed by Professor Weintraub in resolving true conflicts, *see* text accompanying note 19 *infra*, I think that he would allow unlimited recovery.

¹⁸ Every American state has a wrongful death act. W. PROSSER, *LAW OF TORTS* 902 (4th ed. 1971). Despite variations in the way that different states compute damages, the policy is one of recovery and an express limitation on the amount recoverable must be viewed as an exception to that policy.

¹⁹ COMMENTARY 203.

²⁰ *Id.* at 246.

which argues in favor of allowing the plaintiff to recover.²¹ A second criterion is the general desirability of avoiding unfair surprise to the unwary defendant. Professor Weintraub does not see this factor as a significant element in tort cases, because (1) the individual defendant is not likely to have shaped his conduct to take account of rules of liability for negligence or the measure of damages, and (2) in any event, he is likely to have been insured.²² Unfair surprise would be relevant only in the context of a showing that the nominal defendant did not foresee any liability for his conduct and therefore failed to take out liability insurance, or that he would have taken out more liability insurance than he did if he could have foreseen that his liability would be measured by standards of compensation different from the standards obtaining in the place where he acted. As to the insurer, Professor Weintraub points out that insurance rates are not based upon individual cases, but upon great numbers of cases, and that in light of insurance rating and reserve practices, "to talk of 'surprising' the insurer is very likely to be talking nonsense."²³ The third factor is that of anachronism. Where the conflict is between "a rule that is in step with general modern trends in the area, and a rule that is clearly an anachronistic lag . . . resolution should be in favor of the rule that is more representative of current developments."²⁴ He carefully distinguishes the anachronism factor from the so-called "better rule" approach,²⁵ which he roundly and properly rejects.²⁶ It should be noted that any time a court has looked to the "better rule," that rule has, not coincidentally, been its own.²⁷ Anachronism, by contrast, is intended as an objective standard—it attempts to demonstrate by a scrutiny of legislative and case developments over past years that the rule in question is being displaced or modified in favor of the competing more modern rule. A rule is not anachronistic merely because the judges consider it to be undesirable. A guest statute, for example, can hardly be said to be anachronistic when twenty-six states have such statutes and two others require a showing of more than ordinary

²¹ See *id.* at 204.

²² *Id.* at 205.

²³ *Id.* at 206.

²⁴ *Id.*

²⁵ See generally Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966).

²⁶ COMMENTARY 207.

²⁷ See *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). For rejections of the "better rule" when it was not the rule of the forum, see, e.g., *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *DeFoor v. Lematta*, 249 Ore. 116, 437 P.2d 107 (1968).

negligence for a guest passenger to recover against his host driver.²⁸ Finally, a court should look to the state's choice-of-law decisions delineating the cases in which it would apply its substantive law. Such an analysis may serve as a guide to the purposes underlying that law, and to the state's interest in applying such law to the situation in question.²⁹ As a shorthand statement of "all that has been said" in regard to the above criteria, Professor Weintraub proposes the following formulation: "An actor is liable for his conduct if he is liable under the law of any state whose interests would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise the actor."³⁰

I tend to be somewhat skeptical about proposals for resolving true conflicts, at least in the tort area, largely because the case in which the forum would be expected to displace its law under these proposals is unlikely ever to arise in practice, and secondly because whenever a court has been faced with a true conflict, it has almost invariably—unless it continues to apply the place of the wrong rule—ended up by applying its own law.³¹ In terms of the torts cases that actually arise in which true conflicts are presented, then, the forum court has applied its own law, as Professor Currie advocates,³² and more significantly, *in these cases the commentators that have attempted to resolve true conflicts would usually agree that this is how the particular case should have been decided.*³³ I will try to illustrate these points with reference to the formulation that Professor Weintraub has proposed.

Suppose that a resident of a state that does not have a guest statute is injured there while a passenger in a vehicle that is operated by a driver from a guest-statute state. This is obviously a true conflict. The victim's home state is interested in applying its law to allow recovery to its resident who was injured there. The driver's home state, where the vehicle is insured and where insurance rates theoretically will be affected, is equally interested in protecting its resident, or more accurately, his insurer, no matter where the accident occurs. Professor Currie would say that courts in the plaintiff's home state should apply that state's own law in a true conflict. Professor Weintraub would

²⁸ COMMENTARY 207.

²⁹ See *id.* at 207-208.

³⁰ *Id.* at 209.

³¹ See authority cited notes 34, 36, 38, 41, *infra* and accompanying text.

³² B. CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 181-82 (1963).

³³ In addition to Professor Weintraub I am thinking particularly of Professor Cavers. See generally D. CAVERS, *THE CHOICE OF LAW PROCESS* 139-80 (1965). Since Professor Ehrenzweig rejects interest analysis entirely, he does not approach the problems in terms of "true" or "false" conflicts.

resolve the true conflict in favor of the application of the law of the plaintiff's state, since its interests would be advanced significantly by the application of its law and since the imposition of liability would not unfairly surprise the actor. They disagree only about what the defendant's home state should do: Professor Currie would say that it should apply its own law in a true conflict and Professor Weintraub would say that it should defer to the policy of the plaintiff's home state. *But this case will never arise.* The plaintiff will sue in his home state, obtaining jurisdiction under the non-resident motorist or non-resident tortfeasor's act and that state will apply its own law, as Professor Currie and Professor Weintraub would both advocate.³⁴ As Professor Weintraub points out in the chapter on jurisdiction, there is a strong relationship between jurisdiction and choice of law: whether the forum can or will apply its own law is a relevant factor to consider in determining whether it may take jurisdiction.³⁵ In terms of predictability of result, the relationship between jurisdiction and choice of law is even more clear. In the case of a true conflict the plaintiff will sue in his home state if he can obtain jurisdiction there, and that state is almost certain to apply its own law. Speculating on what the defendant's home state would or should do if suit were brought there may be an interesting academic exercise, but it is totally irrelevant to the realities of conflicts litigation. By the same token, in a true-conflict situation, if the plaintiff is unable to obtain jurisdiction in his home state, such as where he is injured in the defendant's home state and the defendant is not otherwise amenable to process in the plaintiff's state, the plaintiff may as well not waste his time by suing in the defendant's state, because if he does that state will apply its own law.³⁶

The matter of where suit is brought becomes all the more significant in the illustrative situation just described when the injury occurs in the defendant's home state and the defendant wants the plaintiff to recover. If the defendant desires such a result, he will allow himself to be served in the plaintiff's home state.³⁷ Guest-statute cases are a good example of this principle. In such cases, there will almost always have been a prior relationship between the parties—the fictitious ungrateful hitchhiker has not made his appearance in an actual conflicts case—and the nominal defendant wants the plaintiff to recover against the former's insurance company. Here again, Professor Weintraub, looking to the interest of the plaintiff's home state in allowing recovery and the clear absence of unfair surprise to either the nominal defendant or his insurer, would agree that the plaintiff's home state should

³⁴ See Sedler, *Characterization*, *supra* note 8, at 66-67.

³⁵ COMMENTARY 67-69.

³⁶ See *Satchwill v. Vollrath Co.*, 293 F. Supp. 533, 535 (E.D. Wis. 1968).

³⁷ See Sedler, *The Territorial Imperative*, *supra* note 8, at 399-401.

apply its own law. A problem may exist, however, because of what may be called the "territorial hang-up." Where some of the facts leading up to the accident, such as the origin of the trip, occurred in the plaintiff's home state, that state has had no difficulty in applying its own law.³⁸ But in *Cipolla v. Shaposka*,³⁹ where the accident occurred in Delaware—a guest-statute state—on a trip originating in Delaware and involving a Pennsylvania plaintiff and a Delaware defendant, the Pennsylvania Supreme Court applied Delaware law in denying recovery and thus became one of the few policy-centered courts in recent years to not apply its own law in a tort case presenting a true conflict. Professor Weintraub, interestingly enough, would disagree with the result in that case. While paying some obeisance to the "territorial hang-up" by saying that the plaintiff's home state should not apply its law unless either the defendant or his course of conduct that resulted in the injury had some nexus with it, he then proceeds to propose an exception that swallows up the rule by saying that the plaintiff should be able to recover under his home state's law if he boarded the vehicle there or if the trip was intended to or in fact did end there.⁴⁰ This exception covers the few guest-statute cases that have arisen in this vein, including *Cipolla*. Only the "territorial hang-up" could have caused the Pennsylvania Supreme Court to decide *Cipolla* as it did, and here again Professor Weintraub and Professor Currie would agree that Pennsylvania should have applied its own law.

*Miller v. Miller*⁴¹ was another case involving a true conflict where the defendant wanted the plaintiff to recover. At the time of the fatal accident the defendant was a resident of Maine, which then had a \$20,000 limitation on the amount of damages recoverable for wrongful death. The victim, a resident of New York prior to his death, was the defendant's brother, and the accident occurred while he was visiting the defendant in Maine. The defendant subsequently moved to New York, where suit, of course, was brought by his brother's survivors. Doubtless, if he had not moved to New York, he would have allowed himself to be served there. At the time of the suit Maine had also removed the limitation. The New York court applied its own law to allow unlimited recovery, and again Professor Weintraub seemingly agrees with the result, but here on the ground that post-accident changes in residence may properly be considered in determining interest analysis where this does not produce unfairness nor penalize a

³⁸ See *Bennett v. Macy*, 324 F. Supp. 409 (W.D. Ky. 1971); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968).

³⁹ 439 Pa. 563, 267 A.2d 854 (1970).

⁴⁰ COMMENTARY 248-49.

⁴¹ 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

party for the change of residence.⁴² The New York court, after emphasizing its interest in allowing unlimited recovery and pointing out how this produced no unfairness to the Maine insurer, did note that the defendant was now a New York resident and that the Maine limitation had since been removed.

I would submit that the result in *Miller* would have been no different if the nominal defendant had not changed his residence to New York. New York had a clear interest in allowing the beneficiaries of a New York decedent to obtain unlimited recovery, particularly against a nominal defendant who wanted them to recover. The insurance policy covered out of state accidents and, as the court observed, insurance policies do not distinguish between liability for personal injuries and liability for wrongful death. Thus, the insurance company could expect to be held to unlimited liability, and it was not prejudiced by being held to that standard merely because the accident occurred in New York. I would also add that the insurance company was doubtlessly doing business in New York and it is certainly reasonable for New York courts, under a "benefit theory," to hold the company to the New York standard whenever one of its residents is injured out of state by the company's insured.⁴³ Using the interest and fairness criteria then, the application of New York law would be proper whenever a New York resident was killed or injured by a person insured with a company doing business in New York. Only the "territorial hang-up" would produce a different result.⁴⁴

The point that I wish to emphasize is that in actual practice tort cases presenting true conflicts are almost invariably decided under the sub-

⁴² COMMENTARY 249-53.

⁴³ In *Pryor v. Swarner*, 445 F.2d 1272 (2d Cir. 1971), the court held that New York would not apply its law to allow recovery where the guest-passenger was a resident of New York, the defendant was a resident of Florida, a guest-statute state, and the accident occurred in Ohio, also a guest-statute state. Jurisdiction was obtained in New York *quasi in rem* by attachment of the insurance policy obligation of the defendant's insurer under *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). This case raises most cogently the question of whether the forum should hold an insurer doing business in the forum to the forum's standard whenever a forum resident is insured by one of its out-of-state insureds. The court never considered this question, making the completely erroneous observation that, "We think we can safely assume that the Swarners' insurance premiums were calculated with the Florida guest statute in mind." 445 F.2d at 1277. There was also no discussion of *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). The accident occurred on a return trip from New York to Ohio and the trip originated in Ohio. It may be queried whether the New York Court of Appeals would have reached the same result.

⁴⁴ See Sedler, *The Territorial Imperative*, *supra* note 8, at 406-07.

stantive law of the forum, as Professor Currie has advocated.⁴⁵ More importantly, the formulation for resolving true conflicts that Professor Weintraub has proposed would produce the same result in all of these cases. The cases in which he would argue that the forum should displace its own law in a true conflict simply do not arise. In terms of predicting the behavior of courts in actual cases, Professor Currie has carried the day: the forum will almost invariably apply its own law, assuming that it has abandoned the place of the wrong rule or unless it is caught in a "territorial hang-up" as in *Cipolla*. Solutions to true conflicts based on "a rational basis for resolving such conflicts" may be academically interesting, but may not have much relevance for the real world in which the non-experts must operate.

⁴⁵ See authority cited note 32 *supra*. In *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971), it was held that New Hampshire would not apply its tort law, apparently imposing a higher duty of care, in favor of a New Hampshire plaintiff injured while working on land located in Massachusetts, in a suit against a corporation having its principal place of business in Massachusetts. The "territorial imperative" seems even stronger when the injury occurs on the defendant's land located in another state. See generally 450 F.2d at 1152. Since the corporation was subject to suit in New Hampshire, it may be assumed that it was doing business there. However, the issue involved the duty of care owed to an invitee, and it could be argued that there may have been some reliance on the Massachusetts standard. *Barrett* is a hard case, but if the decision is correct, it is because that application of New Hampshire law would be unfair in light of the fact that the defendant may have conformed its behavior to the requirements of the Massachusetts standard.