

1-1-1973

Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents

Robert Allen Sedler
Wayne State University

Recommended Citation

Sedler, Robert Allen. Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents. 61 Ky. L.J. 378, 392 (1973)
Available at: <https://digitalcommons.wayne.edu/lawfrp/267>

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.

Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents

BY ROBERT ALLEN SEDLER*

In *Foster v. Leggett*,¹ the Kentucky Court of Appeals again had the occasion to consider what law should apply on the issue of guest-host immunity in the case of the interstate automobile accident. The problem is a recurring one in Kentucky and elsewhere and arises in a variety of factual contexts.² The previous cases before the Kentucky Court involved parties who were residents of the same state and the accident occurred while they were traveling in another state.³ In *Foster v. Leggett*, the parties were

* A.B., J.D., University of Pittsburgh, Professor of Law, University of Kentucky.

¹ 484 S.W.2d 827 (Ky. 1972).

² Some 26 states have guest statutes, which require a showing of a greater degree of negligence in a suit by a guest passenger against a host. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAW 207 n.20 (1971) [hereinafter cited as COMMENTARY]. Frequently a case will involve two residents of the same state who were traveling in another state when the accident occurred. But since many people live in functional socio-economic and mobility areas that cut across state lines, it is equally possible that the parties will be residents of different states. This being so, a case can present any of the following fact-law patterns: (1) two parties from a recovery state are involved in an accident in an immunity state; (2) two parties from an immunity state are involved in an accident in a recovery state; (3) the plaintiff is from a recovery state, the defendant is from an immunity state, and the accident occurs in the plaintiff's home state or another recovery state; (4) the plaintiff is from a recovery state, the defendant is from an immunity state, and the accident occurs in the defendant's home state or another immunity state; (5) the plaintiff is from an immunity state, the defendant is from a recovery state, and the accident occurs in the plaintiff's home state or another immunity state; and (6) the plaintiff is from an immunity state, the defendant is from a recovery state, and the accident occurs in the defendant's home state or another recovery state. Cases (3) and (6) have not yet appeared in reported opinions.

³ *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968). Prior to *Arnett* the conflicts torts cases coming before the Kentucky Court of Appeals since 1950—the last case before that arose in 1940—had involved the identical fact-law pattern of two Kentucky residents who were involved in an accident in a guest statute state. See the discussion in Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27, 65-70 (1967) [hereinafter cited as Sedler, *Babcock v. Jackson in Kentucky*].

residents of different states and the accident occurred in the driver's home state. The passenger was a Kentucky resident. The driver resided in Portsmouth, Ohio,⁴ but, like the passenger, was employed by the C. & O. Railroad in Russell, Kentucky. He often stayed at the Russell YMCA and had rented a room there by the week. He and the passenger had been dating for about a year at the time of the accident. The accident occurred on a planned trip from Russell to Columbus, Ohio, and the parties were to return to Russell that evening. Ohio has a guest statute, which would have barred recovery here.⁵ Kentucky allows the passenger to recover against the host on the basis of ordinary negligence.⁶ The lower court held that Ohio law applied on the issue of guest-host immunity and granted the defendant's motion for summary judgment. A divided Court of Appeals held that Kentucky law should apply and reversed. In so doing it gave further impetus to the process of what I have called judicial method and the policy-centered conflict of laws.⁷

The essential thesis of judicial method and the policy-centered conflict of laws is that courts should deal with conflicts problems on a case by case basis with reference to considerations of policy and fairness to the parties. This means that a court should approach a conflicts case as it would any other, that it should decide the case before it in light of the particular fact-law pattern⁸ presented, that the decision should be based upon considerations of policy and fairness to the parties, and that in time a body of decisional law will emerge providing guidelines for the resolution

⁴ The term "resided," as used here, means domiciled.

⁵ OHIO REV. CODE ANN. § 4515.02 (Page 1965). The statute required a showing of "wilfull or wanton misconduct," and the plaintiff had only alleged ordinary and gross negligence.

⁶ The legislature had enacted a guest statute, but it was held to be violative of the state constitution. *Ludwig v. Johnson*, 49 S.W.2d 347 (Ky. 1932).

⁷ See generally Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 3; 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) [hereinafter cited as Sedler, *Characterization*]; Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQUESNE L. REV. 394 (1971) [hereinafter cited as Sedler, *The Territorial Imperative*].

⁸ By "fact-law pattern" I mean the factual contacts that could give rise to an interest on the part of the involved states and the differing laws of these states. The "fact-law" pattern must be distinguished from the "facts of a case." In the ordinary accident case the factual contacts that could give rise to an interest are the residence of the plaintiff, the residence of the defendant, the place where the accident occurred, and the place where the wrongful act occurred if that differs from the place of the accident.

of future cases. In the area of the conflict of laws I fear that the courts have been all too willing to abandon the approach of judicial method for "academic solutions of universal application,"⁹ and I have elsewhere discussed what I believe to be the cause of this phenomenon.¹⁰ Until rather recently it was fair to say that the "law" of the conflict of laws was not the result of judicial decisions in particular cases and the development of principles for future application. Instead, from the "traditional rules approach" of the original Restatement,¹¹ to what I have called the "modern rules approach" of the *Restatement (Second)*,¹² the courts have been willing to accept "externally imposed solutions" to conflicts problems, and even where the courts are following an approach based on considerations of policy and fairness, as many now are, there is still the concern with developing "rules" to be applied to future cases that have not yet arisen.¹³ There is still the reluctance to deal with each case as it arises for fear of rendering "meaningless ad hoc decisions."¹⁴ It is my submission, however, that the proper use of judicial method in conflicts cases, as in any other area of law, will produce sound results in the particular case before the court and will provide guidelines for resolving future cases.¹⁵ I think that this is well-demonstrated by Kentucky's approach to choice of law in interstate automobile accident cases.

In *Wessling v. Paris*,¹⁶ decided in 1967, Kentucky abandoned the "traditional rules approach," which looked to the "law of the place of the wrong" in conflicts torts cases. The Court was there faced with the situation of two Kentucky residents who were involved in an automobile accident in Indiana, which had a guest statute. It recognized that only Kentucky had an interest in applying its law on this issue and proceeded to apply that law.

⁹ See the discussion of the "academic solution of universal application" in Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 3, at 30-41.

¹⁰ Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 3, at 53-57.

¹¹ This was followed in Kentucky until the decision in *Wessling*.

¹² See the discussion in Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 3, at 61-62; Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 284-86 (1972). Cf. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

¹³ See *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454 (1972).

¹⁴ See the discussion of "meaningless ad hoc decisions" in D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 121-22 (1965).

¹⁵ See the discussion in Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 3, at 129-30.

¹⁶ 417 S.W.2d 259 (Ky. 1967).

Whether the purpose of a guest statute is to protect a host from suit by an "ungrateful guest"—which is most questionable today¹⁷—or to protect the host's insurer from collusive suits or simply to exclude this class of cases from recovery (thereby possibly lowering insurance rates or more likely increasing insurance companies' profits),¹⁸ the only state interested in applying its law on that question is the defendant's home state, where the vehicle is insured¹⁹ and where the consequences of imposing liability will be felt.²⁰ Where that state has decided to prefer the injured passenger and the plaintiff is a resident of that state, it has a clear interest in applying its law to permit recovery.²¹ By the same token, the state where the injury occurred has no interest in applying its law to permit a non-resident defendant and his insurer to escape liability. In terms of interest analysis²² *Wessling*

¹⁷ Since there will almost always have been a pre-existing relationship between the parties, and since the host's liability is covered by insurance, the host would ordinarily want the guest to recover. While the concern with protecting the host may have been a purpose of a guest statute at the time of its enactment, it is difficult to see this as the purpose today. See the discussion of this point in Trautman, 67 COLUM. L. REV. 465, 468-72 (1967). However, in terms of interest analysis, the protection of the host would still be considered a *legitimate* legislative purpose. See the discussion of legitimate legislative purpose in B. CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 129, 143-44 (1963).

¹⁸ Whether the existence of a guest statute will reduce insurance rates is highly questionable. See the discussion in Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 574-77 (1961).

¹⁹ Insurance rates are based on loss experience in a territory of insureds. See the discussion in Morris, *supra* note 18, at 567-69. The accident will be charged to the loss experience of drivers in the defendant's home state irrespective of where it occurs, and recovery will affect the profits of the insurer's business in that state.

²⁰ The interest of the defendant's home state in protecting him from liability is more clear where the defendant is an entrepreneur, and the liability would have to be met or distributed by the enterprise, or if there is insurance, a judgment against him might significantly affect his future insurance rates. In such a case, particularly where the defendant may have conformed his conduct to the requirements of his home state's laws, there is a question of unfairness in holding the defendant to the higher standard imposed by the law of another state. See Barrett v. Foster Grant Co., 450 F.2d 1146 (1st Cir. 1971).

²¹ Interest analysis, however, does not mean that a state necessarily has an interest in protecting its own resident. A state's interest is in applying its law to implement the policy reflected in that law, and in a given case this may mean an interest in protecting a non-resident against its own resident. See, e.g., Gaither v. Meyers, 404 F.2d 216 (D.C. Cir. 1968) (D.C. law applied to allow Maryland plaintiff to recover against D.C. defendant, who left the keys in his automobile in D.C.); Williams v. Rawlings Truck Line, 357 F.2d 581 (D.C. Cir. 1965) (New York law imposing vicarious liability against the former owner of a vehicle who failed to transfer the registration applied in favor of a New Jersey plaintiff who was injured by the driver of the vehicle); Intercontinental Planning Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576 (1969) (New York Statute of Frauds applied to bar recovery by New York broker against New Jersey corporation).

²² My use of interest analysis, of course, is based on the approach of the late
(Continued on next page)

presented a false conflict, and Kentucky law should apply as the law of the only interested state.²³ Unless the forum remains committed to the "traditional rules approach,"²⁴ it will apply its own law to allow recovery, and in the unlikely event that the suit is brought in the state of injury, it too should apply the law of the parties' home state.²⁵

In *Arnett v. Thompson*,²⁶ the Court was faced with the reverse side of the coin: Ohio spouses traveling in the same vehicle were involved in an accident in Kentucky. Ohio has a guest statute and recognizes spousal immunity; neither defense is available under Kentucky law. This is not necessarily the same case as *Wessling*. The parties' home state is, of course, interested in applying its law to allow the defense.²⁷ However, here, unlike the situation in *Wessling*, the state of injury may have an interest in applying its law to allow recovery to a non-resident plaintiff. It has been contended that such an interest is present because the plaintiff might become a public charge on that state if he does not recover or he may have incurred debts to resident medical creditors, which can only be satisfied from the proceeds of tort recovery.²⁸ It has also been contended that the general compensatory policy of the state of injury should be applied in favor of all persons injured within

(Footnote continued from preceding page)

Professor Brainerd Currie. See generally B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). This should not be confused with Professor Robert Leflar's choice-influencing consideration of "advancement of the forum's governmental interests," which looks to the "total governmental interest" and is not related to the forum's interest in applying its own law. See Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587 (1966). However, when the courts purport to apply Professor Leflar's choice-influencing consideration, they tend to employ the concept of interest analysis that was developed by Professor Currie. See, e.g., *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968).

²³ This would be true whenever two parties from a recovery state are involved in an accident in an immunity state irrespective of the nature of the immunity. See the discussion in Sedler, *Characterization*, *supra* note 7, at 49-61.

²⁴ See, e.g., *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *Holder v. Holder*, 384 P.2d 663 (Okla. 1962); *Oshiek v. Oshiek*, 136 S.E.2d 303 (S.C. 1964).

²⁵ See *Schwartz v. Schwartz*, 447 P.2d 254 (Ariz. 1968). But see *Schlitz v. Meyer*, 280 N.E.2d 925 (Ohio 1972), where in a suit between two Kentucky residents who were involved in an accident in Ohio, the Ohio court held that it was required to apply the legislative policy represented by the Ohio guest statute to any accident that occurred in that state.

²⁶ 433 S.W.2d 109 (Ky. 1968).

²⁷ And will do so if the suit is brought there. See, e.g., *Wartell v. Formusa*, 213 N.E.2d 544 (Ill. 1966); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *McSwain v. McSwain*, 215 A.2d 677 (Pa. 1966). See also *DeFoor v. Lematta*, 437 P.2d 107 (Ore. 1968).

²⁸ See B. CURRIE, *supra* note 17, at 366-72.

its borders.²⁹ But obviously this interest, even if it is found to exist, is not nearly as strong as the forum's interest in allowing recovery to a resident plaintiff, and the commentators and the courts are clearly divided on how this case should be resolved.³⁰ My own view is that the state of injury has no real interest in applying its law here and that it should defer to the policy of the parties' home state.³¹ In this day and age the accident victim will get back home,³² and the social and economic consequences of the accident will be felt in his home state. He will not become a public charge in the state of injury. The purpose of tort recovery is not to provide reimbursement for medical creditors, since medical loss forms such a small part of the total recovery. The only real interest I see here is with the parties' home state, and in my view its law, denying recovery, should be applied.

In *Arnett*, the Kentucky Court of Appeals came down on the side of the injured plaintiff and held that Kentucky law should apply.³³ I have always felt that the primary reason for the Court's decision in *Arnett* was the realization that the parties, although Ohio residents, were "Kentuckians at heart." This was indicated to me by the first sentence in the opinion, which says, "Carl A. Arnett and Edna, his wife, residents of Ohio, while visiting relatives in Kentucky were involved in an automobile accident. . . ."³⁴ The accident happened in the eastern part of the state, and to anyone familiar with the social and economic conditions pre-

²⁹ See D. CAVERS, *supra* note 14, at 143-45.

³⁰ See the discussion of the views of various commentators in Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 3, at 121-23. See also Rosenberg, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 459 (1967). Compare the majority and dissenting views in *Conklin v. Horner*, 157 N.W.2d 579 (Wis. 1968), and the decision of the New Hampshire Supreme Court in *Johnson v. Johnson*, 216 A.2d 781 (N.H. 1966), with its decision in *Gagne v. Berry*, 290 A.2d 624 (N.H. 1972).

³¹ See the discussion in Sedler, *Characterization*, *supra* note 7, at 64-65. My view as to real interests differs somewhat from Professor Currie's use of interest analysis in that I think Professor Currie tended to look to hypothetical interests. See the discussion of this point in Sedler, *Symposium-Conflict of Laws Roundtable: The Value of Principled Preferences*, 49 TEX. L. REV. 224, 225 (1971). Generally in the case of an interstate automobile accident where the parties are from the same state, I favor the application of the state's law either way.

³² Unlike the situation that perhaps existed at an earlier period with respect to injured workmen who were temporarily present in the forum as reflected in *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939), and *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935).

³³ And in so doing rejected my view that Kentucky should displace its own law here. 433 S.W.2d at 113. While such rejection is "personally painful," it accords with my position that courts should not give undue weight to the opinions of academic commentators.

³⁴ 433 S.W.2d at 112.

vailing there, no more need be said. Large numbers of eastern Kentuckians have emigrated to the cities of Ohio, Michigan, Indiana and elsewhere to find employment, which is not available in the heart of Appalachia's poverty belt. But they retain their ties to eastern Kentucky and consider themselves "Kentuckians at heart."³⁵ On week-ends and holidays many of them return home, as demonstrated by the traffic on Interstate-75 south from Cincinnati on any Friday evening. On Sunday evening the jam-up is on Interstate-75 north. The Arnetts were no exception, as my further research for the preparation of this article disclosed. Carl Arnett was a native Kentuckian, who went to Ohio to get a job. The Arnetts returned to Kentucky almost every weekend, and what is even more interesting, they did not go back to Ohio after the accident.³⁶ The fact that the parties stayed in Kentucky might have justified the application of Kentucky law on the ground that a court may properly consider post-accident changes in residence.³⁷ However, I think that the Court was equally concerned with protecting other "Kentuckians at heart," who would return to Ohio, Michigan, Indiana, and other states after the accident. And it may have been that the Court also believed that all non-residents injured in Kentucky should recover under its law. In any event, in *Arnett* the Court decided the question before it and held that whenever two non-residents were involved in an accident in Kentucky, Kentucky law, allowing recovery against a host and against a spouse, would apply.

In *Arnett* the Court also set forth guidelines for future cases presenting conflicts torts problems.³⁸ Rejecting any weighing of the conflicting interests of the concerned states,³⁹ and also rejecting the state of the most significant relationship test of the

³⁵ I also understand that many of these persons return to Kentucky in the event they lose their jobs.

³⁶ I obtained this information from the attorney for Edna Arnett.

³⁷ See the discussion in COMMENTARY, *supra* note 2, at 249-53. The courts are ambivalent about the propriety of taking post-accident changes of residence into account. Compare *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967) and *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727 (1967), with *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968).

³⁸ It may be queried whether this approach will be employed fully in other areas of choice of law. As to the use of judicial method and the policy-centered conflict of laws in other areas, see the discussion in Sedler, *Babcock v. Jackson in Kentucky*, *supra* note 3, at 130.

³⁹ Which Professor Currie says cannot be done in the case of a true conflict. B. CURRIE, *Notes on Methods and Objections in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 181-82 (1963).

Restatement (Second),⁴⁰ the Court said that Kentucky law should apply whenever "Kentucky has *enough* contacts to justify applying Kentucky law."⁴¹ It found that such contacts were present in *Wessling* since the parties were Kentucky residents and the only contact with another state was that the accident happened there. However, in *Arnett* it found that the fact that the accident happened in Kentucky was also sufficient, even though the parties were non-residents.⁴² Thus, at the time of *Arnett*, the Kentucky Court of Appeals had dealt with two fact-law patterns, the one where two Kentuckians were involved in an accident in an immunity state and the one where two residents of an immunity state were involved in an accident in Kentucky. In both cases it held that Kentucky law allowing recovery would apply, and in so holding it developed the sufficient contacts test for application in future cases.

Foster v. Leggett involved still a different fact-law pattern, and the Court's approach in that case demonstrates very clearly how a court, proceeding in the common law tradition of deciding only the case before it while at the same time developing principles susceptible of future application, handles a new case. *Foster* was like *Wessling* in that the plaintiff was a Kentucky resident and the accident occurred in another state, but differed from *Wessling* in that here the defendant resided in an immunity state, in which the accident occurred. It was like *Arnett* in that the defendant was from an immunity state, but differed from *Arnett* in that the plaintiff was from a recovery state and the accident occurred in the defendant's home state. In terms of interest analysis it differed from both cases in that here a true conflict was clearly presented, since the plaintiff was from a recovery state and the defendant was from an immunity state.⁴³

⁴⁰ The rejection of the RESTATEMENT (SECOND) test was made clear in *Foster v. Leggett*.

⁴¹ 433 S.W.2d at 113.

⁴² The Court stated: "The fact that we will apply Kentucky law where Kentucky people have an accident in Ohio or Indiana does not require that we apply Ohio or Indiana law where people of one of those states have an accident here, because the basis of the application is not a *weighing* of contacts but simply the existence of *enough* contacts with Kentucky to warrant applying our law." 433 S.W.2d at 113.

⁴³ The fact that the injury occurred in a guest statute state does not give that state an interest in having its law applied to deny recovery. The interest is present only where the defendant is also a resident of the state. See the discussion of this point in *Cipolla v. Shaposka*, 267 A.2d 854, 856 n.2 (Pa. 1970).

Although the fact-law pattern and the analysis of interests in *Foster* differed from those in *Wessling* and *Arnett*, the principle of sufficient contacts that the Court had developed in those cases was applicable to provide a basis for decision. The Court stated:

When the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law. The basic law is the law of the forum, which should not be displaced without valid reasons.⁴⁴ We have not, therefore, tried to adopt a rule, or rules, for all cases of this kind which may come before us.

In the case at bar, contacts with Kentucky were numerous and significant. Decedent was a lifelong resident of Kentucky. While appellee was a resident of Ohio, he kept a rented room near his work in Kentucky, stayed in it on the average of two nights per week and all his employment and most of his social relationships were in Kentucky. The fatal journey began in Kentucky and was to have been concluded in Kentucky.

So we conclude that the reasons appellee here advances, that the accident occurred in the state of Ohio and that appellee was domiciled and had a residence in that state, are not sufficient in view of the contacts the state of Kentucky had with the parties to justify the displacement of the law of this forum with the law of the state of Ohio. We are now reaffirming our position taken in *Wessling v. Paris*, supra, that if there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied.⁴⁵

Three judges dissented, two on the ground that Kentucky should follow the *Restatement (Second)* state of the most significant relationship test,⁴⁶ which they believed would clearly lead to the application of Ohio law on the issue of guest-host immunity,⁴⁷ and one on the ground that Kentucky should never have abandoned the “place of the wrong” rule.⁴⁸

⁴⁴ See the discussion of this point in Sedler, *Babcock v. Jackson in Kentucky*, supra note 3, at 87-88.

⁴⁵ 484 S.W.2d at 829.

⁴⁶ RESTATEMENT (SECOND), CONFLICT OF LAWS § 175 (1969). 484 S.W.2d at 831.

⁴⁷ Professor Reese, the Reporter for the RESTATEMENT (SECOND), is not as certain. See the discussion in Reese, *The Kentucky Approach to Choice of Law: A Critique*, 61 Ky. L.J. 368 (1972).

⁴⁸ 484 S.W.2d at 829. This was the basis of Judge Osborne's dissent in *Wessling*.

Wessling, Arnett and Foster, taken together, establish the following: (1) in conflicts torts cases Kentucky will apply its own law so long as there are sufficient contacts with Kentucky to justify application of that law; and (2) on the basis of this approach Kentucky law applies, at least with respect to issues of guest-host and spousal immunity,⁴⁹ whenever: (a) both parties are Kentucky residents, although the accident occurred in another state; (b) the accident occurred in Kentucky, although the parties are both non-residents; and (c) the plaintiff is a Kentucky resident and the defendant and/or the trip resulting in the accident had factual connections with Kentucky.

It is now important, I think, to analyze further the sufficient contacts test that has been developed in these cases. Left unanswered under that formulation is whether Kentucky law would also apply in a case involving the same fact-law pattern and the same conflicting interests, as in *Foster*, but where the same kind of factual contacts were not present.⁵⁰ Let me posit such a case. Suppose that Mrs. Foster met Mr. Leggett at a party in Portsmouth, Ohio, and they went out to dinner together afterwards. Mr. Leggett was driving her back to the home of friends in Portsmouth with whom she was staying when the accident occurred. Let us also assume that Mr. Leggett worked in Portsmouth instead of Russell and that he only rarely came into Kentucky. The fact-law pattern here is the same as that in *Foster v. Leggett*: the plaintiff is from a recovery state, the defendant is from an immunity state, the accident occurred in the defendant's

⁴⁹ In my view this applies not only to all claims of immunity, but to all questions of tort liability.

⁵⁰ Almost identical factual contacts were present in *Bennett v. Macy*, 324 F. Supp. 409 (W.D. Ky. 1971), involving a Kentucky plaintiff and an Indiana defendant, and Judge Bratcher correctly forecast *Foster* in holding that Kentucky would apply its own law. Likewise, on very similar facts, in *Schneider v. Nichols*, 158 N.W.2d 254 (Minn. 1968), Minnesota applied its law to allow a Minnesota plaintiff to recover against a North Dakota defendant.

However, where such contacts with the plaintiff's home state were absent, the courts have refused to apply that state's law and have sustained the defense. See *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970); *Pryor v. Swarner*, 445 F.2d 1272 (2d Cir. 1971). Cf. *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968), where the accident occurred in the defendant's home state, which had a wrongful death limitation, but the defendant subsequently moved to the decedent's home state. The suit was brought in the decedent's home state, and the court there refused to recognize the limitation. It emphasized the defendant's subsequent change of residence, and the decision has been explained on this ground. See COMMENTARY, *supra* note 2, at 252-53. My own view of *Miller* is somewhat different, and as will be seen, I disagree with the results in *Cipolla* and *Pryor*. See Sedler, *The Territorial Imperative*, *supra* note 7, at 397-403.

home state. But here any factual connection with Kentucky other than the residence of the plaintiff is absent.

In speaking of such a case Professor Weintraub states:

Suppose that the Kentucky plaintiff was a pedestrian crossing an Ohio street when she was struck by an automobile driven by an Ohio resident. Assume that on one or more issues the Kentucky rules of liability and compensation are more favorable to the injured pedestrian than the Ohio rules. Even if the Ohio driver can be subjected to the jurisdiction of the Kentucky courts, by, for example, being served with process while temporarily present in Kentucky, Kentucky law should not be applied. Assertion of the Kentucky compensation interest based solely on the residence of the plaintiff and without any other connection between Kentucky and the defendant or the occurrence would be chauvinistic.⁵¹

In the guest statute situation Professor Weintraub would allow the plaintiff's home state to apply its law when the accident occurred in the defendant's home state only if the trip had begun in the plaintiff's state or was to end there,⁵² and thus he would hold that Kentucky law should not apply in the example I have given. Many other commentators would agree.⁵³ If the sufficient contacts test means factual contacts with Kentucky, then it would seem that the Kentucky Court would likewise deny recovery here.

It is my submission that Kentucky law should apply both in the example that I have given and the example of Professor Weintraub, and it is for this reason that I want to analyze the sufficient contacts test more carefully. I too had once paid obeisance to the need for factual contacts with the forum,⁵⁴ but am now convinced that this is merely a "territorial hang-up" and that conflicts torts problems should be resolved without reference to the "territorial imperative."⁵⁵ I will now try to develop this point more

⁵¹ Weintraub, *Finding a Substitute for the Place-of-Wrong Rule: The Kentucky Experience*, 61 KY. L.J. 419 (1972).

⁵² COMMENTARY, *supra* note 2, at 248-49.

⁵³ See generally the various discussions in *Symposium on Cipolla v. Shaposka—An Application of "Interest Analysis,"* 9 DUQUESNE L. REV. 347 *et seq.* (1971).

⁵⁴ "This much of the territorial principle seemingly remains, that a state may not apply its law solely on the ground that the plaintiff is a resident of that state. If defendant did nothing in the forum, the causing of an injury to the forum's resident in another state would not be a sufficient constitutional contact to justify the forum's applying its own law." Sedler, *Characterization, supra* note 7, at 68. See also Sedler, *Babcock v. Jackson in Kentucky, supra* note 3, at 127-28.

⁵⁵ Sedler, *The Territorial Imperative, supra* note 7, at 397-98.

fully and in the process will suggest a different explanation of the sufficient contacts test.

It may first be well to ask how *Foster v. Leggett* got before the Kentucky courts. If it is true, as I have maintained, that courts which are committed to a policy-centered approach are likely to apply their own law in the case of a true conflict,⁵⁶ the plaintiff will want to bring the suit in his home state. In *Foster*, since the accident occurred in Ohio, jurisdiction in Kentucky could not be sustained on the basis of a "long-arm" act. We are informed in the opinion that the defendant was before the Kentucky courts on the basis of personal service. Since he worked in Kentucky, he probably could not have avoided such service even if he wanted to do so. But, of course, he did not want to avoid service. Because of the prior relationship between the parties in *Foster* and in all the conflicts guest statute cases which have arisen—the fictitious "ungrateful hitchhiker" has yet to make his appearance in an actual case⁵⁷—the host very likely wants the injured passenger to recover and will allow himself to be served in the passenger's home state.⁵⁸ Indeed it is this prior relationship which is the justification most commonly advanced for guest statutes today—a higher standard of liability is necessary to prevent collusion between the guest and the host against the host's insurer. We may assume in our example, therefore, that the host will allow himself to be served in Kentucky.⁵⁹

What this points out is that a guest-host suit, as most personal injury actions, is in reality not a suit between the victim and the nominal defendant, but, as everyone knows, between the victim and the defendant's insurer. If this were frankly acknowledged, there would be no problem as to jurisdiction. Since most automobile liability insurance companies are national concerns, the insurance company will very likely be doing business in the plain-

⁵⁶ See the discussion in Sedler, *Conflict of Laws Roundtable: A Symposium*, 57 IOWA L. REV. 1229, 1234-38 (1972).

⁵⁷ Although I have not checked this out, I would imagine that this is equally true in the non-conflict guest-host cases as well.

⁵⁸ In *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970), the nominal defendant was served in the plaintiff's home state when they were playing golf together. It takes no feat of imagination to assume that this was prearranged. See the discussion of this point in Sedler, *The Territorial Imperative*, *supra* note 7, at 400-01.

⁵⁹ The example given by Professor Weintraub assumes the absence of a prior relationship between the parties, which is not likely in the guest-host situation. See also the examples given in Weintraub, *Conflict of Laws Roundtable: A Symposium*, *supra* note 56, at 1261-64.

tiff's home state. If the state had a direct action statute,⁶⁰ or the insurer were otherwise subject to suit in the forum because of the insurance relationship,⁶¹ there would be no problem as to jurisdiction and it would not be necessary to resort to pre-arranged service. In any event, it is the insurance company's lawyer who will assert the guest statute defense. If the purpose of a guest statute were really to protect the host from suits by ungrateful guests,⁶² the host should be able to decide whether to assert the defense and he should be able to refuse to assert it without jeopardizing his claim of liability protection against the insurer. Of course, this is not the way it is.

However, once it is recognized that the controversy is between the plaintiff and the nominal defendant's insurer, it is clear that there is no unfairness in holding the insurer to the higher standard of the plaintiff's home state. The existence of a guest statute in the insured's home state will affect insurance rates only peripherally if at all.⁶³ Since the insurance must cover all accidents irrespective of where they occur, there would be liability if the accident occurred in the plaintiff's home state and the insurer would not be "unfairly surprised" if it is held liable when the accident occurred on the other side of the state line.⁶⁴ If further

⁶⁰ See, e.g., WIS. STAT. ANN. § 204.30(4) (Supp. 1972).

⁶¹ New York allows suit to be brought against the insured defendant by the attachment of the insurance policy obligation of the insurer to defend the action. *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). On this basis suit can be brought in New York without personal service where the accident occurred in another state. See *Pryor v. Swarner*, 445 F.2d 1272 (2d Cir. 1971).

⁶² See note 17, *supra*.

⁶³ See note 18, *supra*.

⁶⁴ As Professor Weintraub has pointed out:

If the defendant is insured, the one who will pay is the liability insurer. It would be more in accord with the facts to speak in terms of surprise to the insurance company. If this is done, then the surprise argument may all but disappear. Insurance actuaries do not base rates upon individual cases, but upon great numbers of cases. That a bizarre event will occur in a given case is unlikely, but that it will not occur in a hundred thousand cases is equally unlikely. Moreover, in setting insurance rates, the 'incurred losses' that are used in computation include not only paid losses but also 'loss reserves'. The amount of the loss reserve for a particular accident is the amount of probable eventual payment as estimated by the insurer's claim department during the 'accident year' in which the injury occurs and before payment. The loss reserve is then reviewed and adjusted from time to time in the light of subsequent events until final payment of the claim. The premium set is designed to produce a five percent underwriting profit in addition to investment income, taking into account all costs, including loss reserves and a 'trend factor' that anticipates continuing inflation in settlement costs. In short, to talk of 'surprising' the insurer is very likely to be talking nonsense. COMMENTARY, *supra* note 2, at 205-06.

justification is needed, it can be found in the fact that the insurance company does business in the plaintiff's home state and on a "benefit theory," that state can hold the company to its standard of liability whenever one of its residents is injured elsewhere by the company's insured.⁶⁵

The point that I am making is that the forum is justified in applying its law whenever it has an interest in doing so and when the application of its law will not produce fundamental unfairness or defeat the legitimate expectations of the other party. In the ordinary automobile accident case the "interest and fairness" test that I am proposing justifies the plaintiff's home state's application of its law to allow recovery. The fact of the plaintiff's residency gives it an interest in applying its law, since the social and economic consequences of the accident will be felt there, and the application of its law is not unfair to the nominal defendant (who in the guest-host situation at least will want the plaintiff to recover) nor to his insurer.⁶⁶ There is nothing "chauvinistic" about the forum's applying its own law in the case of a true conflict,⁶⁷ and it should do so when no unfairness to the other party results. It is time to abandon the "territorial imperative" in interstate automobile accidents and to approach the conflicts problems resulting from such accidents in terms of interest and fairness. In the ordinary automobile accident case this justifies the application of the forum's law allowing recovery.

I come back then to the sufficient contacts test that the Kentucky Court of Appeals has developed and ask whether the Court is really setting forth a requirement of factual contacts. The sufficient contacts test could be interpreted as a shorthand way of saying that Kentucky will apply its own law whenever it has an interest in doing so and the application of its law is not unfair to either party or his insurer. The results in *Wessling, Arnett* and

⁶⁵ See the discussion of this point in Sedler, *The Territorial Imperative*, *supra* note 7, at 406-07.

⁶⁶ Cf. *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971), where it could be argued that it would be unfair to hold the landowner to a different standard of care to persons coming on the land than was required by the law of the state where the land was situated. On the other hand, in *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968), the New York court in denying the Maine insurer the benefit of the Maine limitation on wrongful death recovery, emphasized that automobile liability policies did not distinguish between liability for personal injuries and liability for wrongful death, so that there could have been no "reliance" on the Maine limitation. 237 N.E.2d at 881-82.

⁶⁷ Its interest is the same irrespective of the factual contacts with the forum.

Foster are fully consistent with this explanation. In all of these cases, Kentucky saw an interest in applying its law to allow the plaintiff to recover,⁶⁸ and in all of these cases the application of Kentucky law produced no unfairness toward the nominal defendant (who wanted the plaintiff to recover) or toward the insurer. Kentucky should also apply its law to implement the policy of compensation reflected in that law whenever a Kentucky plaintiff has been injured in another state by a resident of that state who is insured by an insurance company doing business in Kentucky.⁶⁹

In *Foster* the Court observed that: "When the court has jurisdiction of the parties its primary responsibility is to follow its own substantive law. The basic law is the law of the forum, which should not be displaced without valid reasons."⁷⁰ Obeisance to the "territorial imperative," it is submitted, is not a valid reason to displace Kentucky laws when Kentucky has a real interest in the application of its law and no unfairness results from such application. When faced with the question, it is hoped that the Kentucky Court will define "sufficient contacts" as "interest and fairness" and will abandon territorialism once and for all. The thrust of its decisions thus far would appear to lead in that direction.

What stands out most clearly in *Foster* and in the cases that have preceded it is that in deciding conflicts torts cases the Kentucky Court of Appeals has been proceeding in accordance with the best principles of judicial method. It has decided each case with reference to the fact-law pattern presented and has based its decision upon considerations of policy and fairness to the parties. It has avoided unnecessary generalizations and has resisted the temptation to formulate "rules" for cases that have not yet arisen.⁷¹ And yet from its decision guidelines for the resolution of future cases have emerged. It has demonstrated very effectively that the common law tradition of judicial method is "alive and well" in the conflict of laws.

⁶⁸ In *Arnett* the interest was seen as applying to non-resident plaintiffs injured in Kentucky.

⁶⁹ In the unlikely event that the insurance company was not doing business in Kentucky, I would still allow suit in Kentucky and the application of Kentucky law if the parties resided in a functional socio-economic and mobility area that included Kentucky. See the discussion in Sedler, *The Territorial Imperative*, *supra* note 7, at 407-10.

⁷⁰ 484 S.W.2d at 829.

⁷¹ As the New York court did not do in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454 (1972).