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# The Value of Principled Preferences Symposium: Conflict of Laws Roundtable

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*Professor Sedler urges resolution of choice-of-law problems arising from multistate incidents on the basis of "real" rather than "hypothetical" interests of the states involved. He would thus make a detailed analysis of each case to determine which present "real" as opposed to "false" conflicts. On discovering a "real" conflict, Professor Sedler would apply the forum state's law unless it would work an injustice to the parties.*

My approach to the solution of conflicts problems,<sup>1</sup> while to a large extent based upon interest analysis as propounded by Professor Brainerd Currie, also relates to judicial method and the case-by-case development of a body of conflicts law by the courts. It is my position that courts should make decisions on the displacement of the forum's law with reference to the fact-law pattern of particular cases, and that the forum's law should be displaced only when its application would defeat the legitimate expectations of the parties or would be violative of the interests of other states, which, under the circumstances, the forum should recognize. You will note the similarity between this approach and what Professor Cavers was proposing in his classic article, *A Critique of the Choice-of-Law Problem*.<sup>2</sup> You may also note the similarity between my approach and Professor Albert Ehrenzweig's "true rule."

My application of interest analysis has taken a somewhat different direction from that of Professor Brainerd Currie, and this difference becomes very significant in determining what is a "true conflict." The conflicts field changes so rapidly that it may be appropriate to refer to "traditional interest analysis" as developed by Professor Currie. It seems to me that when Professor Currie applied interest analysis he did so in terms of possible, or what I call hypothetical, interest; that is, considering the purpose or policy behind the differing laws, could one or more states have any legitimate interest in the application of its law to the issue in question. The matter of what constituted a true conflict likewise was approached with reference to this possible or hypothetical interest. While Professor Currie recognized that some-

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<sup>1</sup> See Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27 (1967); Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L.J. 8 (1970).

<sup>2</sup> Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

times an apparent conflict could be avoided by a more moderate and restrained interpretation of the policy or interest of one state, he also stoutly insisted that in the case of a true conflict, as he defined it, a court could not weigh conflicting interests and, therefore, in such a case the forum had to apply its own law.

It is this analysis in terms of hypothetical interest that marks my point of departure from Professor Currie. I believe it is possible by a careful analysis of the practical realities of a given situation to assess the real interests of the states involved. Thus I see a true conflict only when more than one state has a real interest in the application of its law to a particular issue. When one state has a real interest and the interest of the other state is only hypothetical, the conflict, in my view, is "readily avoidable," and I would apply the law of the state with the real interest. I do not think this is a weighing of interests—I prefer to call it a qualitative analysis of those interests—and perhaps it is an extension of Professor Currie's concept of a more moderate and restrained interpretation. In any event, I would find a true conflict when more than one state has a real interest, and in such a case I do follow Professor Currie's view that the forum should apply its own law. Of course under my definition of interest, true conflicts will occur with less frequency than under Professor Currie's.

It is Case I of Professor Cavers' three hypotheticals<sup>3</sup> that, in my opinion, best illustrates the difference between hypothetical and real interests. The policy of State X is to limit the liability of tortfeasors, particularly in death actions, as evidenced by the ceiling on recovery and the restrictive application of *res ipsa loquitur* to airplane accidents. It clearly has an interest in applying that policy to protect an X corporation being sued by the survivors of an X decedent. The interest of State Z in applying its law to allow recovery to Mrs. P is purely hypothetical and does not accord with the realities of modern life. Professor Currie's "medical creditors" and "public charge" argument would, of course, be inapplicable in this death case, but I would say the same thing if P had lived and the issue was whether X or Z law should apply on the question of *res ipsa*. Today the injured plaintiff will get back home—unlike the situation perhaps prevailing at the time of *Pacific Employers*<sup>4</sup> and *Alaska Packers*<sup>5</sup>—and the social and economic consequences of the accident will be borne by his home state. Also, the purpose of allowing tort recovery is not to benefit

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<sup>3</sup> For a full statement of Case I see Appendix.

<sup>4</sup> *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939).

<sup>5</sup> *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

medical creditors; this is a very attenuated basis for finding any interest.

Now I come to the premise on which Professor Cavers' first principle of preference<sup>6</sup> is based, that the state where an injury occurs has an interest in extending the protection of its law allowing recovery to a nonresident injured there. This interest is necessarily a theoretical one except when liability is imposed for admonitory purposes and the wrongful act as well as the injury occurred in that state. But in the ordinary accident case, the realistic purpose in allowing recovery is to provide compensation for the victim or his dependents. Since the social and economic consequences of the accident will be borne in the victim's home state, the only real interest in allowing compensation lies there.

The justification given for application of the law of the state of injury proceeds on the assumption that there is an interest precisely because the person was injured there and that to deny recovery would impair the "system of physical and financial protection" established by that state. But as a practical matter, to deny recovery to a nonresident will not have any effect on that system. Since the victim and his dependents are not living there and the social and economic consequences of the accident will not be felt there, I simply do not see any real interest on the part of the state of injury in applying its law to allow recovery.

Thus, under my interpretation of interest analysis, the only interested state in Case I is State X; I, therefore, do not believe this case presents a true conflict. State X should apply its law on both the question of *res ipsa* and the question of the wrongful death ceiling, and if the suit could be brought in State Z under its long-arm statute, I would say that Z should also apply X law. In other words, I agree with the result in a case such as *Johnson v. Johnson*<sup>7</sup> and would disagree with the results in *Kell v. Henderson*<sup>8</sup> and the Wisconsin case of *Conklin v. Horner*.<sup>9</sup> Extending this principle, I would say that whenever two parties from an immunity, no liability, or limited liability state are involved in an accident in a "recovery" state—assuming no interest of the recovery state in implementing any admonitory policy—there is, in reality, a false conflict and the law of the parties' home state should be applied.

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<sup>6</sup> D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 139 (1965).

<sup>7</sup> 107 N.H. 30, 216 A.2d 781 (1966).

<sup>8</sup> 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966).

<sup>9</sup> 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

It may seem that I am advocating a "personal law" of torts even to the point when this results in a denial of recovery. This is not strictly true, but the charge does not bother me because, in this day of the jet airplane and the interstate highway, I cannot attach much significance to the place where an accident occurs.

If you look at the cases that actually arise—and obviously this is the focal point of my concern—they usually involve two residents of the same state traveling in the same vehicle in another state (all the guest-statute and family-immunity cases fall into this category) or they involve two residents of the same state who collide in a neighboring state in which there is a frequent pattern of interstate travel. Cases such as *Grant v. McAuliffe*<sup>10</sup> and *Mitchell v. Craft*,<sup>11</sup> and for these purposes, *Schmidt v. Driscoll Hotel*,<sup>12</sup> come readily to mind.

I would emphasize again that, in my view, the approach to the solution of choice-of-law problems should be based on these kinds of cases—the kind that actually arise—rather than on the possibility of two New York residents colliding in Timbuctu or somewhere else.

Case II,<sup>13</sup> as Professor Cavers points out, is a false conflict. State Y has a real interest in applying its admonitory policy against a Y defendant who leaves his keys in a parked automobile in Y. No interest of State X is invaded if Y allows recovery against the Y defendant in favor of an X plaintiff injured in X. The more interesting case is the one in which the defendant is a resident of X, which is not an improbable situation. Here Y's interest in implementing its admonitory policy conflicts with X's interest in protecting its resident and his insurer from what it considers an unwarranted extension of liability. Both states have a real interest, and I should have to say that here each state should apply its own law. This troubles me a bit when it results in X's applying its law. There seems to be considerable validity to Professor Cavers' third principle of preference,<sup>14</sup> and I can see the argument to the effect that X should respect the admonitory policy of Y when the unlawful act occurred in Y. I cannot, however, worry about this too much because the case is not likely to arise in that posture. P will sue in State Y, obtaining jurisdiction under Y's long-arm act, which would doubtless be interpreted to authorize suit against a nonresident who left his keys in a parked vehicle in Y. Y, applying its own law in this case of a true conflict, will allow recovery.

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<sup>10</sup> 41 Cal. 2d 859, 264 P.2d 944 (1953).

<sup>11</sup> 211 So. 2d 509 (Miss. 1968).

<sup>12</sup> 249 Minn. 376, 82 N.W.2d 365 (1957).

<sup>13</sup> For a full statement of Case II see Appendix.

<sup>14</sup> See Cavers, *supra* note 6, at 159.

Since Case III<sup>15</sup> involves the validity of a contract, I want to say briefly something about interest analysis in that context. All states share a common policy of protecting the legitimate expectations of the parties to consensual arrangements and of promoting the stability of commercial transactions. The interest in implementing this common policy may be more important than the interest of a state in applying its specific rules of contract law. This is particularly so when the rule in question does not reflect any strong policy. Many rules of substantive contract law, such as a rule that a contract by mail is accepted upon posting, are designed primarily to implement the broader policy of protecting expectations and insuring commercial stability. This would indicate that interest analysis may be less significant here, or at least that it must be approached from a different perspective.

Of course, in the hypothetical case we are dealing with a rule that does represent a strong contractual policy and, in my view, Professor Cavers' solution is based primarily on the interest of State *X* in applying its Statute of Frauds to a transaction centered in that state; I agree with the result. The stability of commercial transactions in *Z* and *Y* is not weakened by *X*'s holding an *X* broker to *X* standards when so many of the significant events took place in *X*. It should be noted that here interest analysis results in the protection of a nonresident against a resident of the forum, and because the transaction was centered in *X*, *X* has a real interest in extending this protection to him.

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<sup>15</sup> For a full statement of Case III see Appendix.