

Conflicts of Law - Torts - Policy Considerations,  
Clark v. Clark, 22 A.2d 205 (N.H. 1966)

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## CURRENT DECISIONS

**Conflicts of Law—TORTS—POLICY CONSIDERATIONS.** In *Clark v. Clark*,<sup>1</sup> plaintiff, a passenger in an automobile which her husband was driving, sought damages for injuries allegedly caused by her husband's negligence. The evidence shows that both parties were domiciled in New Hampshire, and that the trip was begun in New Hampshire with the intention of going to another city in the same state; however, this trip took them into Vermont where the accident occurred. The plaintiff, in a pre-trial order to the Superior Court, moved that the substantive law of New Hampshire should govern the rights of the parties, thus raising the question of whether New Hampshire or Vermont law should govern the case. This question of law was then transferred to the Supreme Court of New Hampshire for its determination. The conflict between the laws of the two states was unmistakable as New Hampshire's law provides that a guest passenger may recover from the host if only lack of ordinary care is shown;<sup>2</sup> as distinguished from Vermont which has a guest statute under which a host is liable only if he was grossly or willfully negligent.<sup>3</sup>

The Supreme Court of New Hampshire ordered that the law of New Hampshire should govern the rights of the parties and in so holding it rejected the old mechanical rule that the "law of the place of wrong determines whether a person has sustained a legal wrong."<sup>4</sup> The court based its decision directly upon five "relevant choice-influencing considerations":<sup>5</sup> (1) Predictability of results; (2) Maintenance of reasonable orderliness and good relationships among the states; (3) Simplification of the judicial task; (4) Advancement of the forum's governmental interests; (5) The court's preference for what it regards as the better rule of law.<sup>6</sup> The court explained that the process of applying these

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1. 22 A. 2d 205 (N.H. 1966).

2. *Morin v. Letourneau*, 102 N. H. 309, 156 A. 2d 131 (1959).

3. 23 VERMONT STAT. ANN. § 1491 (1959). See generally, Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L. J. 595 (1960); Ford, *Interspousal Liability for Automobile Accidents in Conflict of Laws*, 15 PITT. L. REV. 397 (1954).

4. RESTATEMENT, CONFLICT OF LAWS § 378 (1934). See also, *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153, 98 N.W. 918 (1904); *Norfolk & W. Ry. Co. v. Barney*, 262 Ky. 228, 90 S.W. 2d 14 (1936); *Gray v. Gray*, 87 N.H. 82, 174 A. 508 (1934).

5. See, *Leflar, Choice-Influencing Considerations in Conflicts Law*, 41 N.Y. U.L. Rev. 267, and especially pp. 282-304 (1966) for excellent explanation and discussion of the contents of each consideration.

6. *Clark v. Clark*, 222 A. 2d 205, 208, 209 (N.H. 1966). The substance of each consideration as explained by the court is as follows:

(1) *Predictability of results*—The court emphasized the importance that parties

considerations in each case should be an objective one and further expressed the hope that "in course of time perhaps we will develop 'principles of preference' based upon the relevant considerations to guide us more exactly."<sup>7</sup> Thus the court, after analyzing the various considerations in relation to the facts of the case, determined that the law of New Hampshire was clearly applicable even though the accident had occurred in Vermont and under previous New Hampshire precedents the law of Vermont would have been controlling.

The traditional choice of law rule—that the law of the place of wrong will govern—has been subject to a great deal of criticism in recent years.<sup>8</sup> Several authorities, recognizing the inadequacy of the old rule in certain situations, have adopted new theories to determine choice of law problems.<sup>9</sup> The American Law Institute's Restatement (Second), has adopted the rule that torts are to be governed by the local law of the state which has the "most significant relationship" with the occurrence and with the

know in advance what law will govern a transaction so that they should be able to plan their transaction as one with predictable results, thus assuring uniformity of decision regardless of the forum.

- (2) *Maintenance of reasonable orderliness and good relationship among the states*—The court stated that this consideration required no more than that the court should apply the law of no state which does not have a "substantial connection" with the case before it.
- (3) *Simplification of the judicial task*—Court noted that the simplicity and ease of application of applying its own substantive law is a significant consideration but emphasized that simplification is not the only object of law and that opposing considerations may outweigh this one.
- (4) *Advancement of the forum's governmental interests*—Court observed that every court must be concerned with policy interests behind the laws of its own state, but that very often a state has no strong policy interest. The court stressed that in most private litigation, the only real governmental interest is in "the fair and efficient administration of justice."
- (5) *Court's preference for what it regards as the better rule of law*—Court stated that this consideration has too often been disguised and that a court should apply what it determines to be the better rule of law when a choice of rules presents itself to the court.

7. *Id.* at 210.

8. See e.g., Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1957); Weintraub, *A Method of Solving Conflict Problems—Torts*, 48 CORNELL L. Q. 215 (1963); Ehrenzweig, *Guest Statutes in Conflict of Laws*, 69 YALE L. J. 595 (1960); J.H.C. Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Childres *Toward the Proper Law of Tort*, 40 TEXAS L. REV. 336 (1962).

9. See, e.g., Currie, *The Disinterested Third State*, 28 LAW AND CONTEMP. PROB. 754 (1963); Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Cavers, *The Choice-of-Law Process* (1965); Yntema, *The Objectives of Private Internal Law*, 35 CAN. B. REV. 721 (1957); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

parties.<sup>10</sup> This "significant relationship" is to be determined by examining the important "contacts" that the forums involved in the case have with the parties and the issues.<sup>11</sup> The famous New York decision of *Babcock v. Jackson*<sup>12</sup> adopted this "grouping of contacts" doctrine and thus began the trend today towards rejecting the old rule. Following the lead of *Babcock*, several other courts have explicitly accepted the Restatement's tentative draft.<sup>13</sup> There is, however, a difference of opin-

10. RESTATEMENT (SECOND), CONFLICT OF LAWS, § 379 (Tent. Draft No. 9, 1964) provides as follows:

"§379 The General Principle

- (1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.
- (2) Important contacts that the forum will consider in determining the state of most significant relationship include:
  - (a) the place where the injury occurred,
  - (b) the place where the conduct occurred,
  - (c) the domicile, nationality, place of incorporation and place of business of the parties, and
  - (d) the place where the relationship, if any, between the parties is centered.
- (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

§ 379A Personal Injuries

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless some other state has a more significant relationship with the occurrence and the parties as to the particular issue involved, in which event the local law of the latter state will govern."

See generally, Note, "The Second Conflicts Restatement of Torts: A Caveat," 51 Calif. L. Rev. 762 (1963) (for critical view of Restatement (Second) view; Reese, "Conflict of Laws and the Restatement Second," 28 Law and Contemp. Prob. 679 (1963).

11. *Ibid.* The Supreme Court of the United States in *Richards v. United States*, 369 U.S. 1 (1962) appears to hold that the Restatement view is constitutional. The court in *Richards* states that "Where more than one state has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity."

12. 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279 (1963). The Court in *Babcock* states that the rule to be applied is one which would give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." 240 N.Y.S. 2d at 749 (1963). See Cavers, Cheatham, Currie, Ehrenzweig, Leflar, Reese, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212 (1963). But see Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L. J. 1 (1963).

13. See, e.g., *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964); *Fabricus v. Horgen*, 132 N.W. 2d 410 (Iowa 1965); *McSwain v. McSwain*, 420 Pa. 86, 215 A. 2d 677 (1965); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W. 2d 408 (1965); *Watts v. Pioneer Corn Co.* 342 F. 2d 617 (7th Cir. 1965); *Wartell v. Formusa*, 34 Ill. 2d

ion as to what factors should be stressed and the weight to be given to each factor or "contact." This confusion as to what standard to apply has led several courts to retain the old rule until a satisfactory technique for determining conflicts problems is arrived at under the new theory.<sup>14</sup>

The Supreme Court of New Hampshire in the instant case reflects this confusion in searching for a new standard among the various theories put forth recently. Its decision is significant in that it follows the trend of the Restatement (Second) and the *Babcock* decision in rejecting the old mechanical rule but even further since it does not merely adopt the "contact" or "most significant relationship" theories but sets up distinct policy considerations to determine choice of law problems in tort cases. The process now of applying these "choice-influencing considerations" will not be an easy one as admitted by the court.<sup>15</sup> It will depend upon the facts of the particular case and like many other legal questions, will involve a delicate weighing process. Nevertheless, this new emphasis on valid "choice-influencing considerations," as distinguished from the traditional rule, will at least permit a new flexibility to choice of law problems.

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57, 213 N.E. 2d 544 (1966). For recent cases rejecting *Babcock* see, e.g., *Friday v. Smoot*, 211 A. 2d 594 (Del. 1965); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E. 2d 533 (1965); *McDaniel v. Sim*, 194 Kan. 625, 400 P.2d 1018 (1965); *Goranson v. Capital Airlines*, 345 F. 2d 750 (6th Cir. 1965).

14. See, e.g., *Shaw v. Lee*, 258 N.C. 609, 129 S.E. 2d 288 (1963); *Landers v. Landers*, 153 Conn. 303, 216 A. 2d 183 (1966); See also Fuld's dissent in *Dym v. Gordon*, 16 N.Y. 2d 120, 262 N.Y. 5 2d 463, 209 N.E. 2d 792 (1965); see *supra* note 13 under cases rejecting *Babcock*.

15. Compare Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. Rev. 267 (1966) where Leflar commenting on the new standards states that "testing of rules or decisions under such a set of standards will be a qualitative process of evaluation, and there will be clear room for difference of opinion in it. That is inherent in the nature of conflicts problems; solutions to them should usually not be mechanical," *with* Ehrenzweig, *Conflict of Laws* § 122 at 394 (1964) where Ehrenzweig states that "these catalogues are virtually meaningless in view of their generality, comprehensiveness and inevitable inconsistency. In order to derive concrete solutions from them it would be necessary to limit their scope severely and to establish standards of relative effectiveness."