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# LEX LOCI DELICTI AND BABCOCK v. JACKSON

R. HARVEY CHAPPELL\*

The commonly accepted choice of law rule, followed consistently until recently, is that the substantive rights and liabilities arising from a tort are determined by the law of the place of the tort, *lex loci delicti*.<sup>1</sup> This is embodied in the original Restatement of The Law of the Conflict of Laws, §384:

## RECOGNITION OF FOREIGN CAUSE OF ACTION

(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states.

(2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.<sup>2</sup>

*Lex loci delicti* is based upon the vested rights doctrine which postulates that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law. This doctrine has been subjected to criticism from time to time as being too inflexible and as not taking into account underlying policy considerations.<sup>3</sup> Professor Willis L. M. Reese, Reporter for Restatement Second, has observed:

... Work on the original *Restatement* was commenced in 1923. At this time the teachings of Professor Joseph H. Beale, the Reporter, were at their heyday. The vested rights theory, of which he was the principal exponent, was widely accepted, and it was generally believed that the entire field could be covered by a relatively small number of simple rules, as that the validity of a contract is governed by the law of the place of contracting and that rights and liabilities in tort

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1. 2 BEALE, THE CONFLICT OF LAWS 1928, § 384.1: Annotation, 77 A.L.R.2d 1266 (1961).

2. RESTATEMENT, CONFLICT OF LAWS § 384 ( ).

3. See Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Currie, *Notes on Methods and Objections in the Conflict of Laws*, 1959 DUKE L. J. 171; Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

are determined by the law of the place of injury. Little wonder as a consequence that the field was deemed ripe for restatement.<sup>4</sup>

And in commenting on the fact that the rules of the original Restatement are simple, relatively few in number and dogmatic, he continues:

... They are consistent with the vested rights theory and they give little indication of the fluidity and of the complexities and uncertainties of the subject.<sup>5</sup>

The lid was blown off this topic when in 1963 the New York Court of Appeals rendered its decision in *Babcock v. Jackson*.<sup>6</sup> There, damages for personal injuries sustained in an automobile accident which occurred in the Province of Ontario, Canada, were sought in a suit brought in the State of New York by a guest in the automobile against her host, the driver of the automobile. At the time of the accident there was in force in Ontario a statute providing that "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in... the motor vehicle"<sup>7</sup> §105, subd. [2]. No such bar is recognized under New York law and, accordingly, the defendant moved to dismiss the complaint on the traditional ground that the law of the place where the accident occurred governs and that Ontario's Guest Statute barred recovery. The Trial Court agreed with the defendant and granted the motion and this was affirmed by the Appellate Division over a strong dissent by Mr. Justice Halpern.<sup>8</sup>

On appeal the New York Court of Appeals saw the issue thusly:

The question presented is simply drawn. Shall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration

4. Reese, *Conflict of Laws and The Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963).

5. *Id.* at 680.

6. *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). An earlier case in the same vein, *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), did not receive such notoriety.

7. ONTARIO REV. STAT. (1960). c. 172, § 105(2).

8. *Babcock v. Jackson*, 17 A.D.2d 694, 230 N.Y.S.2d 114 (1962). Mr. Justice Halpern's dissent was applauded and the *per curiam* majority opinion roundly criticized in Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L. J. 1, 34-39.

of other factors which are relevant to the purposes served by the enforcement or denial of the remedy.<sup>9</sup>

The Court recognized *lex loci delicti* and acknowledged that this rule had been followed unquestionably in New York until recently. But the Court noted that in the field of contract law New York had applied the so-called "center of gravity" or "grouping of contacts" theory of the conflict of laws thereby, in the opinion of the Court, supplanting the "prior rigid and set contract rules".<sup>10</sup> And *Kilberg v. Northeast Airlines*<sup>11</sup> did not go unnoticed, the Court having observed that although the "center of gravity" theory was not expressly adopted in *Kilberg* there was a weighing of the contacts or interests of the respective jurisdictions in that case, as a result of which the Massachusetts Death Statute recovery limitation was not applied in a suit brought in New York for the death of a New York resident in Massachusetts.<sup>12</sup> The Court, speaking through Mr. Justice Fuld, then proceeded to reverse the lower courts, applying the "center of gravity" or "grouping of contacts" doctrine and concluding on the facts that the concern of New York was unquestionably the greater and that the interest of Ontario was at best minimal:

... The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a weekend journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.<sup>13</sup>

In a vigorous dissent Mr. Justice Van Voorhis, joined in by Mr. Justice Scilleppi, observed:

... The present case makes substantial changes in the law of torts. The expressions 'center of gravity', 'grouping of contacts', and 'significant contacts' are catchwords which were not employed to define

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9. *Babcock v. Jackson*, *supra*, note 6, 240 N.Y.S.2d 743, 746.

10. *Id.* at 747 citing *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954).

11. *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

12. For a similar result see *Pearson v. Northeast Airlines*, 309 F.2d 553 (2nd Cir. 1962), *cert. den.* 372 U.S. 912, (1963).

13. *Babcock v. Jackson*, 240 N.Y.S.2d 743, 750.

and inadequate to define a principle of law, and were neither applied to nor are they applicable in the realm of torts.

\* \* \*

... Importing the principles of extraterritoriality into the conflicts of laws between the States of the United States can only make confusion worse confounded. If extraterritoriality is to be the criterion, what would happen, for example, in the case of an automobile accident where some of the passengers came from or were picked up in States or countries where causes of action against the driver were prohibited, others where gross negligence needed to be shown, some, perhaps, from States where contributory negligence and others where comparative negligence prevail?

\* \* \*

In my view there is no overriding consideration of public policy which justifies or directs this change in the established rule or renders necessary or advisable the confusion which such a change will introduce.<sup>14</sup>

*Babcock* has prompted a considerable amount of scholarly comment.<sup>15</sup> One writer rejoiced at *Babcock's* breaking through "the stifling growth of *Restatement* doctrine".<sup>16</sup> Judge Fuld's opinion was observed to be "notable for the clarity with which it states and meets the issues" and for being "free from the compromises of court conference that so often blunt the directness of judicial statement"<sup>17</sup> and the decision was hailed as being "as heartening as it is historic".<sup>18</sup> One commentator has

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14. *Id.* at 753-754. Mr. Justice Van Voorhis' apprehension as to ensuing "confusion" appears to have been borne out. See Mr. Justice Fuld's dissent in *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965).

15. See, e.g., Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese, *Comments on Babcock v. Jackson, A Recent Development In Conflict of Laws*, 63 COL. L. REV. 1212 (1963); Reese, Ehrenzweig, Leflar, Cavers, Currie, Neuhaus, De Nova, Wengler and Nadelman, *New Trends In the Conflict of Laws*, 28 LAW AND CONTEMP. PROB. 673 (1963); Herzog, *Conflict of Laws, 1936 Survey of N. Y. Law*, 15 SYRACUSE L. REV. 169 (1963); Note, 32 FORDHAM L. REV. 158 (1963); Hyman and Newhouse, *Standards For Preferred Freedoms: Beyond the First*, 60 NW. U. L. REV. 1, 32-34 (1965); Note, 77 HARV. L. REV. 1463, 1464-65 (1964); Hancock, *In the Parish of St. Mary le Bow, in the Ward of Cheap*, 16 STAN. L. REV. 561, 627 (1964).

16. Cavers, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COL. L. REV. 1212, 1219-20 (1963).

17. *Id.* Cheatham, at 1229.

18. *Id.* Currie, at 1233. Professor Currie, it will be recalled, had embraced the dissent of Mr. Justice Halpern in *Babcock* (*supra*, note 6) and in treating *Babcock's* precursor, *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), he speculated that *Grant* had completely exposed the absurdity of the original *Restatement* position; see, Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 731 (1961).

characterized the automatic application of *lex loci delicti* as an attitude of yesteryear lingering on in some places but, referring to *Babcock*, he opined that "so many outstanding courts and judges have recently risen to meet the challenges of the day that some basic changes in choice-of-law techniques now seem to be inescapable, and their realization merely a question of time".<sup>19</sup>

Several authors, notably practicing attorneys, have viewed *Babcock* with alarm. One such author believes it will lead to forum shopping;<sup>20</sup> another is of the opinion that it substitutes uncertainty for certainty in the settlement and trial of multi-state transactions.<sup>21</sup> And it has been suggested that in *Babcock* the New York Court was primarily motivated by its solicitude for an injured New Yorker when it determined that New York law was applicable.<sup>22</sup> One practitioner goes so far as to acknowledge the death of *lex loci delicti* and predicts that the tide cannot be reversed.<sup>23</sup>

*What, then, is the true measure of Babcock?*

If a decisions' validity is established by endorsement alone, *Babcock* has some impressive credentials. In Pennsylvania, for example, where only a year previously *lex loci delicti* had been reaffirmed, the Supreme Court of that State cast its lot with *Babcock* with the language:

"We are of the opinion that the strict *lex loci delicti* rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the particular issue before the Court."<sup>24</sup>

And the Supreme Court of the United States seemingly has lent its

19. Foreword, *New Trends in the Conflict of Laws*, 28 LAW AND CONTEMP. PROB. 673 (1963).

20. Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections Upon The Opinion and Its Implications*, 31 INS. COUNSEL J. 428 (1964).

21. Kinney, *The Interstate Aviation Accident—What Law Governs*, 31 INS. COUNSEL J. 250 (1964). Mr. Kinney suggests that one practical way to cope with the confusion is to use a balance sheet with regard to the various issues and the states involved (i.e., residence, domicile, original of trip, where ticket purchased, intended destination, etc.) from which settlement and trial advice is given one's client.

22. Sparks, *supra*, note 18, at 435; "The opinion is window dressing." This criticism seems to have been dispelled in *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965), discussed hereinafter.

23. Lacey, *Choice of Law—An Unpredictable But Ineradicable Doctrine*, 32 INS. COUNSEL J. 293, 302 (1965).

24. *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796, 805 (1964).

support by countenancing the "grouping of contacts" approach in cases involving the Federal Tort Claims Act<sup>25</sup> and *forum non conveniens*.<sup>26</sup>

However, even in New York *Babcock* has not had completely smooth sailing. In *Dym v. Gordon*<sup>27</sup> a New York passenger brought suit against a New York host, both of whom were temporarily residing in Colorado, for injuries sustained during a trip that began and ended in Colorado. Colorado has a guest statute requiring the showing that the accident was intentional on the host's part or was caused by the host's intoxication. A divided New York Court of Appeals concluded that the Colorado Statute controlled. The majority applied what they conceived to be the *Babcock* rule but, ironically, Mr. Justice Fuld, the author of the *Babcock* opinion, dissented saying:

In the light of this court's decision in *Babcock v. Jackson* . . . , I cannot understand how an affirmance may here be justified. The view expressed by the majority is inconsistent not only with the rationale underlying *Babcock* but with the rule there explicitly stated, that the law to be applied to resolve a particular issue in a tort case with multi-jurisdictional contracts is 'the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern' with the matter in issue and 'the strongest interest' in its resolution. . . .<sup>28</sup>

The choosing of sides in this debate, supposedly centered on the adoption of the views expressed in *Babcock* or the continuation of the *lex loci delicti* rule, continues practically on a day to day basis.<sup>29</sup>

But does the issue resolve itself into the simple rejection or reaffirmation of *lex loci delicti*? It does not seem so.

It will be recalled that in *Babcock* the Court buttressed its adoption of the "center of gravity" or "grouping of contacts" theory with these words:

25. *Richards v. United States*, 369 U.S. 1 (1962).

26. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

27. *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965).

28. *Id.* 262 N.Y.S.2d at 470.

29. Recent cases rejecting *Babcock* are: *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *Goranson v. Capital Airlines*, 345 F.2d 750 (6th Cir. 1965); *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965); *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965); *See, Cherokee Laboratories, Inc. v. Rogers*, 398 P.2d 520 (Okla. 1965). Recent cases following *Babcock* are: *Fabricius v. Horgen*, 132 N.W.2d 410 (Iowa 1965); *Spector v. West Elizabeth Lumber Co.*, 37 F.R.D. 539 (W.D. Pa., 1965); *Watts v. Pioneer Corn Co.*, 342 F.2d 617 (7th Cir. 1965); *Wilcox v. Wilcox*, 26 Wisc. 2d 617, 133 N.W.2d 408 (1965).

Such, indeed, is the approach adopted in the most recent revision of the Conflict of Laws Restatement in the field of torts. According to the principles there set out, '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'... and the relative importance of the relationships or contacts of the respective jurisdictions is to be evaluated in the light of 'the issues, the character of the tort and the relevant purposes of the tort rules involved'...<sup>30</sup>

Remember also that those drafting Restatement (Second) have included the place of the wrong as one of the most significant contacts to be considered in determining which law shall apply.<sup>31</sup> This doctrine has been adopted by dictum in *Babcock*.<sup>32</sup>

Professor Albert A. Ehrenzweig, continuing his battle against the Restatement of the Law of Conflict of Laws<sup>33</sup> directs his fire specifically at Restatement (Second) and its proposed rule of "most significant relationship" (i.e., "center of gravity" or "grouping of contacts", these catchwords being used interchangeably):

Professor Reese (Willis L. M. Reese, Reporter for Restatement Second) admits that 'until recently the courts with rare unanimity applied the law of the place of the injury to determine rights and liabilities in tort', but discounts that practice because 'recently... several important courts have either expressed dissatisfaction with the rule or else have reached results that are inconsistent with it.' That fact might have justified a detailed analysis of results actually reached in individual fact situations. But it does not justify the American Law Institute under the pretext of 'restating' existing law to advance a general proposition which, prior to its tentative announcement, had never been adopted by any court. A 'restatement' cannot be properly used to 'aid in inducing the courts to depart from [a presumably accepted rule—here the place of injury rule]... in situations where this is desirable.'

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30. *Babcock v. Jackson*, 240 N.Y.S.2d 743.

31. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379(2) (Tentative Draft No. 9 [1964]).

32. *Babcock v. Jackson*, 240 N.Y.S.2d 743, 750-51, "... Where the defendant's exercise of due care... is in issue... it is [usually] appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place."; Note, 32 *FORDHAM L. REV.* 158, 161 (1963).

33. Ehrenzweig, *American Conflicts Law in its Historical Perspective: Should the Restatement be "Continued"*, 103 *U. PA. L. REV.* 133 (1954).

But the new 'rule' is not only admittedly contrary to prevailing authority. It is quite apt to be in the way of progress. This may be shown by the analysis of the first decision by an outstanding court, which is squarely based on the second *Restatement's* formula<sup>34</sup>

Professor Ehrenzweig then proceeds to review *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Insurance Company*,<sup>35</sup> decided by the United States Court of Appeals for the Fourth Circuit. There the plaintiff, a North Carolina corporation, in order to qualify for a business expansion loan sought insurance on the life of its president. Application was made to defendant, a Pennsylvania insurance company, for a \$200,000 policy. Approximately three weeks later defendant advised plaintiff that only \$50,000 could be issued and this was accepted with the request that defendant consider the matter further. Plaintiff's president died two days later and suit was brought for defendant's allegedly negligent delay in acting on the application. Replying upon the "most significant relationship" approach the Court concluded that Pennsylvania law was applicable since "the important events upon which liability, if any, would rest occurred in Pennsylvania",<sup>36</sup> the state in which "the alleged delay, the foundation of the cause of action, took place."<sup>37</sup> Professor Ehrenzweig concludes that the Court was misled by the American Law Institute's "new facile formula" and, in view of the Court's reasoning, he suggests that "... we are back to the first *Restatement*, to that very theory of 'analytical jurisprudence', of territorialism, and vested rights, which the 'most significant relationship' formula of the tentative draft of the *Restatement Second* purports but fails to displace."<sup>38</sup> Thus, even where the new formula was applied *lex loci delicti* was the end result.<sup>39</sup>

34. Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW AND CONTEMP. PROB. 700, 701-02 (1963).

35. *Lowe's North Wilkesboro Hardware, Inc., v. Fidelity Mutual Life Insurance Company*, 319 F.2d 409 (4th Cir. 1963).

36. *Id.* at 474.

37. *Ibid.*

38. Ehrenzweig, *supra* note 31, at 703-04.

39. See, also, Mr. Justice Fuld's dissent in *Dym v. Gordon*, *supra* note 25 262 N.Y.S.2d at 470: "... Although the majority in this case reaffirms Babcock's abandonment of the prior inflexible rule of *lex loci delicti*, its decision, nevertheless, in essence, reflects the adoption of an equally mechanical and arbitrary rule that, in litigation involving a specific relationship, controlling effect must be given to the law of the jurisdiction in which the relationship originated, notwithstanding that that jurisdiction may not have the slightest concern with the specific issue raised or that some other state's relationship or contract with the occurrence or the parties may be such as to give it the predominant interest in the resolution of that issue."

Indeed, a careful review of post-*Babcock* decisions reveals that pragmatically *Babcock* has not sounded the death knell of *lex loci delicti* or, at least, paraphrasing Mark Twain, the reports of its demise appear to be greatly exaggerated.<sup>40</sup> As shown above, the place of the wrong will be of prime importance even under the new doctrine. Further, from a philosophical standpoint the certainty, the stability of *lex loci delicti* will continue to attract many courts.<sup>41</sup> This being so, the American Law Institute's participation in "restating" unsettled law rather than synthesizing the existing law remains a highly questionable venture, particularly where, as here, the existing law gives every indication of remaining with us for quite some time to come.

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40. Mark Twain's cable from Europe to the Associated Press; Bartlett, *Familiar Quotations* (12th Ed. 1948) 616.

41. *Friday v. Smoot*, *supra* note 27 211 A.2d at 596-97. See also, *Atlantic Coast Line R. Co. v. Withers*, 192 Va. 493, 65 S.E.2d 654 (1951); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963).