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Bernard E. Gegan

WHERE DOES A PERSONAL INJURY ACTION ACCRUE UNDER THE NEW YORK BORROWING STATUTE

BERNARD E. GEGAN*

On the day after Christmas, 1963, Marvin Myers was injured when a tire he was mounting in the course of his employment exploded. The accident occurred in Kentucky where Myers resided and where his employer was located. The tire had been manufactured in New York by the Dunlop Tire and Rubber Corp., a New York corporation, and sold to Myers' employer F.O.B. Buffalo in March of 1962.

Myers commenced an action against Dunlop in the New York Supreme Court on August 20, 1965 to recover for personal injuries, alleging two causes of action: one in negligence and one for breach of implied warranty. Although the causes of action were both timely under the applicable New York statutes of limitations,[1] they would be barred under the Kentucky statute.[2]

Defendant's answer raised the defense of the borrowing statute, CPLR 202, which provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

The court struck the defense as to both causes of action, holding that they accrued within New York thereby rendering the borrowing statute inapplicable.[3] In the belief that this holding is erroneous in both respects, this comment will criticize the court's reasoning and discuss alternative solutions.

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* Professor of Law, St. John's University School of Law; B.S., St. John's University, 1959; LL.B., St. John's University, 1961; LL.M., Harvard University, 1962.

1 N.Y. CIV. PRAC. § 214 (McKinney 1972) (negligence); N.Y. CIV. PRAC. § 213(2) (McKinney 1972) (warranty). The facts occurred prior to the effective date of Uniform Commercial Code section 2-725 fixing a four year warranty period. N.Y. U.C.C. § 2-725 (McKinney 1964).

2 KY. REV. STAT. § 413.140(1) (1971); Howard v. Middlesborough Hosp., 242 Ky. 602, 47 S.W.2d 77 (1932); Columbus Mining Co. v. Walker, 271 S.W.2d 276 (Ky. 1954); Finck v. Albers Super Markets, Inc., 136 F.2d 191 (6th Cir. 1943).

3 Myers v. Dunlop Tire & Rubber Corp., 69 Misc.2d 729, 330 N.Y.S.2d 461 (Sup. Ct. N.Y. County, 1972).

The Negligence Cause of Action

The *Myers* court concluded that the plaintiff's cause of action for personal injuries based on negligence accrued in New York rather than Kentucky because the defendant's "tortious act" was performed in New York where the tires were manufactured and not in Kentucky where the allegedly negligent conduct produced the injury. The court reached this conclusion through an analogy to CPLR 302 whose jurisdictional basis of a "tortious act" occurring in New York was held inapplicable in a case where the defendant's acts were performed outside the state causing injury within the state.[4] The court gratuitously equated the place of the "tortious act" under CPLR 302 with the place of accrual of the cause of action under CPLR 202. Why the tortious act should be separated from the other components of the case, such as the injury, was not explained. Nor, is it submitted, could such an explanation convincingly be made. One wonders if the court would measure the running of the period from the time of the commission of the "tortious act" in New York.

The cases decided under the long arm statute were based on definite statutory language predicating jurisdiction on the performance of an act in the State, a different concept from the accrual of a complete cause of action. Moreover the holding flies in the face of numerous cases dating the accrual of a cause of action in negligence from the occurrence of the injury rather than the performance of the negligent act.[5] Such cases include decisions under section 202 borrowing the statute of limitations of the state of injury where the products causing the injury were manufactured in New York.[6]

The Breach of Implied Warranty Cause of Action

The *Myers* court concluded that the cause of action for breach of implied warranty of fitness accrued in New York since the warranty is breached at the time of sale rather than when it causes injury and because the sale of the tires to plaintiff's employer was made in New York. Unlike the reasoning in the negligence cause of action the court's conclusion respecting warranty is at least supported by the logic that

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4 Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965); Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

5 Durant v. Grange Silo Co., 12 App. Div. 2d 694, 207 N.Y.S.2d 691 (3d Dep't 1960); Great A.I. Co. v. Lapp Insulator Co., 282 App. Div. 545, 125 N.Y.S.2d 147 (4th Dep't 1953); Gile v. Sears Roebuck & Co., 281 App. Div. 95, 120 N.Y.S.2d 258 (3d Dep't 1952).

6 Simons v. Inecto, 242 App. Div. 275, 275 N.Y.S. 501 (3d Dep't 1934); McGrath v. Helena Rubenstein, Inc., 29 F. Supp. 822 (S.D.N.Y. 1939).

the time of the accrual of the action determines the place of its accrual.

The Mendel Case

An understanding of *Myers'* problem with the borrowing statute requires that we go back to *Mendel v. Pittsburgh Glass Co.*[7] A woman was injured when struck by a plate glass door installed by the defendant in a bank building seven years before the accident. Among the causes of action brought by plaintiff were two based on breach of implied warranty of fitness for use. The Court of Appeals affirmed an order dismissing the causes of action as untimely, holding them to sound in contract, to have accrued at the time the glass door was sold to the bank, and hence barred after six years. The dissent argued that a cause of action for personal injury caused by a defectively manufactured product was a tort action in strict liability and governed by the three year statute which runs only from the date of injury.

Few commentators have had a good word to say about the *Mendel* case.[8] At the theoretical level it was generally accepted that the warranty rationale of strict liability for injury caused by defectively, though non-negligently, manufactured products was merely temporary scaffolding, useful in constructing the new tort, but to be dismantled once the structure was complete.[9] Indeed, in the leading New York case allowing recovery without negligence by one not in privity with the defendant both the majority and the dissent recognized the result as inconsistent with the traditional contract rationale.[10] "Strict tort liability (surely a more accurate phrase)" wrote Chief Judge Desmond for the court, meant that "a breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer."[11] The tort rationale has continued to extend the cause of action to rescuers of injured users of the defective product[12] and to nonuser bystanders.[13]

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7 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

8 *E.g., Symposium on Mendel v. Pittsburgh Plate Glass Co.*, 45 ST. JOHN'S L. REV. 62 (1970).

9 *E.g.*, Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); James, *Products Liability*, 34 TEX. L. REV. 192 (1955).

10 Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

11 *Id.* at 436-37, 191 N.E.2d at 82-3, 240 N.Y.S.2d at 594-95.

12 Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E. 173, 306 N.Y.S.2d 942 (1969).

13 Codling v. Paglia, 38 App. Div. 2d 154, 327 N.Y.S.2d 978 (3d Dep't 1972).

At the practical level the criticism of *Mendel* is even more telling. A cause of action has always been held to accrue when the plaintiff first acquired the right to sue.[14] Any deviation from this rule has been in the direction of postponing the accrual to some later date to allow an opportunity to discover the wrong.[15] In *Mendel* the plaintiff of course was not wronged and had no remedy even for nominal damages until she was injured by the door. Yet while acknowledging that she had the substantive right to recover in warranty, the court held it procedurally extinguished a year before it ever became enforceable.[16]

The Effect of Mendel on the Borrowing Statute

The court in *Myers* simply took the time of the accrual of the cause of action as laid down in *Mendel* and held that the time of accrual also determines the place of accrual — upon the sale of the tires in New York.

Unless CPLR 202 is to remain an antiquated island in a sea of post-*Babcock*[17] conflicts law, the selection of a jurisdiction where a cause of action accrues must be made with an awareness of what law otherwise governs the cause of action. The logic in *Myers* has some justification if plaintiff's warranty cause of action is based on New York law. It is then arguable though not inevitable that the action accrued upon the sale of the tires in New York. But the premise is faulty. While the Court of Appeals has yet to pass on the question, all indications are that when a product is manufactured in one state and sold to a user in another state where it causes injury the action in strict products liability is governed by the law of the buyer's state,[18] the state whose "general

[14] Schmidt v. Merchants Dispatch Trans. Co., 270 N.Y. 287, 200 N.E. 824 (1936); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963), *remittitur amended*, 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied*, 374 U.S. 808 (1963).

[15] Flanagan v. Mt. Eden General Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969) (medical malpractice); N.Y. CIV. PRAC. § 213(9) (actual fraud).

[16] Logically antecedent to the accrual issue was the court's choice not simply to apply the three year personal injury period to all actions to recover for personal injuries whatever the theory. When unencumbered by precedent the court has shown a disposition to select a statute of limitations on the basis of the nature of the harm rather than the theory of liability. In Morrison v. National Broadcasting Co., 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967), a case arising from rigged television quiz shows, an honest contestant sued for injury to his reputation from having been linked in the public mind with rigged shows. Although plaintiff argued prima facie tort and the court conceded that conventional theories of defamation did not apply, it was held that the one year defamation period governed because of the similarity of the harm to that caused by defamation.

[17] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (definitively adopting the significant relationship criteria over the traditional lex loci theory); *See Symposium on Babcock*, 63 COLUM. L. REV. 1212 (1963).

[18] Patch v. Stanley Works, 448 F.2d 483 (2d Cir. 1971); George v. Douglas Aircraft Co.,

security" has been disrupted and which has the responsibility for compensating the victim and satisfying his creditors. This is most obviously true when, as in *Myers*, the state of use and injury is also the victim's domicile.

Kentucky, where Myers was injured, follows the Restatement Second of Torts in allowing recovery on a tort theory of strict products liability; the contract rationale is discarded.[19] When Myers comes to New York to sue on his Kentucky-created strict tort cause of action is it sensible to say that it accrued on the sale of the tire in New York before the tire ever entered Kentucky, much less injured anyone there? The result would be antithetical to every tenet of interest-oriented conflicts law. What would justify New York, *qua forum*, in extending a nonresident's right to sue beyond the period allowed under the law of his domicile which creates his cause of action?[20] Clearly the purpose of section 202 is frustrated by allowing the nonresident to shop the New York forum after his local statute of limitations has expired.

Refusal to take into account these considerations which are directly pertinent to a proper interpretation of the borrowing statute can

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332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964); Aetna Freight Lines, Inc. v. R.C. T'way Co., 298 S.W.2d 293 (Ky. 1956). While there is general agreement that the law of the state of injury is applicable in a products liability case when it allows a recovery, some scholars have urged a contrary result when it does not. In such a case, it is argued, the law of the state of manufacture should be applied if it creates strict liability. R. WEINTRAUB, CONFLICT OF LAWS 258-59 (1971). Since, however, strict products liability is compensatory rather than admonitory in rationale (*see* Burke, J., dissenting in Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 440, 191 N.E.2d 81, 85, 240 N.Y.S.2d 592, 597 (1963); Note, *Products Liability and the Choice of Law*, 78 HARV. L. REV. 1452, 1467 (1965)), it is difficult to perceive any governmental interest why the state of manufacture should apply its strict liability rule to a plaintiff over whom it has no proprietary concern and whose own state does not assert a similar interest in its tort law. To do so would add a burden to its domestic industry without advancing the policy expressed in the laws of either state. An indication of New York's inclination towards this view may be found in Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 78 (1972). There, an Ontario passenger in a New York automobile was injured during a trip in Ontario. The plaintiff tried to avoid the effect of the Ontario guest statute by arguing that the compulsory liability insurance held by the car owner covered injuries to guests in Canada. In holding the Ontario plaintiff subject to the Ontario guest statute the court reasoned that insurance covers liability and does not create it. The court expressly reaffirmed the principle that the lex loci applies unless its displacement would significantly advance the substantive law purposes of another concerned jurisdiction.

One is entitled to wonder, however, whether the poison of *Mendel* has spread so far through the bloodstream of the law as to cause the courts to characterize a breach of warranty-personal injury action as contactual for choice of law purposes hence making applicable the law of the state of original sale.

19 Post v. American Cleaning Equip. Co., 437 S.W.2d 516 (Ky. 1969); Allen v. Coca Cola Bottling Co., 403 S.W.2d 20 (Ky. 1966); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965).

20 And provides long arm jurisdiction: KY. REV. STAT. § 271.610(2) (1946) *as amended*, KY. REV. STAT. § 454.210 (1968); Irby v. All State Indus., 305 F. Supp. 772 (W.D. Ky. 1969); Post v. American Equip. Cleaning Co., 437 S.W.2d 516 (Ky. 1969).

only be attributed to the malign influence of the *Mendel* case. Its eccentric determination of when a warranty cause of action accrues has now spread to the issue where it accrues. Is this extension necessary?

The question when a cause of action accrues to start the running of the New York statute of limitations is different from the question where it accrues for the purpose of borrowing the statute of limitations of another state. The court in the *Myers* case ignored this difference in assuming that the time when title passes from the seller to the buyer also determines the place where the warranty-injury action accrues. A single basic concept such as the accrual of a cause of action may have different applications in different contexts. As the late Walter Wheeler Cook remarked, "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."[21] In connection with CPLR 203(a) the determination when a cause accrues involves issues of logic and policy that moved the majority in *Mendel* to the almost unthinkable conclusion that a cause accrued and expired before the plaintiff could ever have sued. The fear of unfounded claims against a manufacturer asserted upon injury many years after the product was sold "ad infinitum" made the court "willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period . . ."[22]

Ordinarily a court first determines when a cause of action is complete and "accrued" and dates the running of the statute from that moment.[23] I think it fair to say that *Mendel* reversed this process and first decided when public policy required the limitation to commence running and only as an afterthought identified that as the accrual of the cause of action. Only such result-oriented reasoning could have led to the paradox that a cause of action accrued before it could ever have been made the subject of an action by the plaintiff. If *Mendel* is to stand it would be more straightforward to say, that for reasons of policy, the statute of limitations on actions for personal injury caused through breach of warranty of fitness commences to run at the time the product is sold notwithstanding that the noncontracting victim's cause of action accrues only upon subsequent injury. This may do violence to the maxim that the time begins to run on a cause of action only upon its

21 Cook, *Substance and Procedure in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933).

22 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

23 Schmidt v. Merchants Dispatch Transp. Co., 270 N.Y. 287, 200 N.E. 284 (1936); Cary v. Koerner, 200 N.Y. 253, 93 N.E. 979 (1910); *see* 1 WEINSTEIN, KORN AND MILLER, New York Civil Practice ¶ 203.01 [hereinafter WK&M].

accrual; but it is submitted that the violence to that concept has already been done by *Mendel* and the only remaining question is whether that holding is to be confined to the situation covered by the public policy which called it forth or is it to be extended to the separate issue of choice of law reference to another jurisdiction's statute of limitations.

The *Myers* case presents the problem of where the cause of action accrued in relatively simple form. Where Kentucky was the state of use and injury, where Kentucky law creates the substantive right to recover, and where the defendant was always suable in Kentucky, a purposive construction of the borrowing statute points to Kentucky as the place where the causes of action accrued. I, for one, find this answer quite clear. Less clear, however, are more complicated cases involving several states or cases in which the state of injury does not furnish the governing substantive law.

Beyond Myers

Reference to another state's statute of limitations must be recognized as a choice of law problem and like other such problems influenced by the tremendous changes in rationale that have occurred in the last several years. The time-honored phrase "where the cause of action accrued" dates back to the days before the First Restatement when all choice of law analysis was territorially oriented. In tort cases particularly, the occurrence of the last act necessary for liability fixed both the place where the cause accrued and the substantively applicable law. Whether the statutory language freezes this question in territorial terms or whether the courts will be sufficiently flexible to interpret it creatively according to the gospel of *Babcock* remains to be seen.

The Second Circuit faced such a challenge in *George v. Douglas Aircraft Co.*[24] in which a breach of warranty recovery was asserted against a California aircraft manufacturer by members of the crew injured in Florida where the plane crashed as a result of engine failure shortly after taking off from Miami on a flight to South America. While the action would be timely in the New York forum the question was in which state did the cause of action "arise"[25] for the purpose of borrowing its statute of limitations. The court first reasoned that the substantive right of recovery in warranty would be governed by the law of Florida, the state of departure and injury rather than California,

[24] 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

[25] The former New York borrowing statute, N.Y. Civ. Prac. Act § 13 (McKinney 1921), used the term "arose" rather than "accrued" as now appears in N.Y. Civ. Prac. § 202 (McKinney 1972). No change of substance was intended by the change in wording. *See* 1 WK&M ¶ 202.01.

the state of the plane's manufacture, because it was Florida's "general security" that was disrupted by the accident and Florida which bore the primary responsibility for compensating the accident victims and those who care for them. Having gone this far, however, the court refused to take the final step of holding that the action arose in Florida. Pursuing a purposive interpretation of former Civil Practice Act section 13, the court read it as having an "underlying policy against prolonging the period of limitations because of the defendant's absence from a jurisdiction where there was no reason to expect him to be present." Reasoning that the manufacturer would always be present and suable in California where it did business the court held the purpose of the borrowing statute would be best served by holding the cause of action to have arisen in California. The court went on, however, to hold the action also barred under Florida law.

One fault in the court's reasoning was its overly narrow assumption concerning the purpose of the borrowing statute. True, one main purpose is to ameliorate the hardship to a nonresident defendant when sued in New York. If he was not previously present within the state the tolling provisions of CPLR 207 would indefinitely prolong his suability. Hence the alternative reference to a "substantively" applicable statute of limitations. But this purpose would appear to be satisfied once reference is made to some other state's "substantively" applicable statute of limitations. Which state that should be is another question, in which the defendant's amenability to suit is an important but not the exclusive factor. Given the prevalence of long arm statutes,[26] a factor insufficiently considered by *George*, the likely residence of plaintiff, and availability of witnesses, the state of injury would be a preferable referent for the borrowing statute's policy of "refusing to enforce a cause of action which was not, but could have been, seasonably enforced in some other jurisdiction . . . where defendant was amenable to process."[27] In recognition of the interests of the state of injury it has been argued that in a case like *George*, the plaintiff should be pinned down with a triple reference, *i.e.*, he may not sue if his action is barred either by the New York forum or by the laws of either the state of manufacture or the state of injury.[28] Such a defendant-oriented interpretation of the borrowing statute disregards, however, legitimate interests of the plaintiff. In a case like *George* it would in effect hold

[26] *See, e.g.*, annotations in 19 A.L.R. 3d 13; 20 A.L.R. 3d 957, 1201; 23 A.L.R. 551; 24 A.L.R. 3d 532; 27 A.L.R. 3d 397.

[27] Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 50 (1962).

[28] Siegel, *Conflict of Laws*, 19 SYR. L. REV. 235, 255-56 (1968).

the plaintiff to the time bar of a distant forum whose law governs no other aspect of the case. Of course, this is precisely what the borrowing statute does when it applies the New York period of limitations to a New York lawsuit to the extent that it is shorter; but at least in such a case there is the justification that the plaintiff has deliberately chosen to seek redress in New York's courts and must abide by New York's standards concerning stale claims.[29] Why he should also have to comply with California's time limitations at peril of losing his right to enforce his Florida-created right in New York is not clear. It might as well be argued that the plaintiff must lose if the laws of any of the states which have significant contacts with the case preclude recovery on the merits. If, as seems likely, the rationale behind such a suggestion is to exclude unwanted litigation from New York courts that office is performed by the doctrine of *forum non conveniens* — a doctrine undergoing a healthy expansion in New York.[30] To require, in addition, that plaintiff's claim be timely under the laws of all the significantly related jurisdictions could only result in giving an arbitrary benefit to the defendant in a case that passes muster under *forum non conveniens.*

Indeed, a better case can be made for the opposite proposition: if the action is timely under the laws of any of the jurisdictions significantly related to the transaction then it is timely in New York, subject of course to the New York statute of limitations. If the action is "alive" in some other concerned state then obviously the plaintiff's choice of the New York forum is not motivated solely by the lengthy New York statute of limitations — an important consideration in construing the borrowing statute. It is, moreover, arguable that since the effect of the statute of limitations is to render unenforceable a possibly meritorious claim, and since all states have basically the same policy expressed in their statutes of limitations, differing only in detail of time, then by analogy to the principle of validation in usury cases,[31] the plaintiff's claim should remain enforceable if it is so regarded by the laws of any of the concerned states.

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[29] The traditional characterization of the statute of limitations as procedural rests on the judgment that a forum is entitled to decide for itself the "period within which it is believed substantial justice between the parties can be administered." RESTATEMENT OF CONFLICT OF LAWS § 603 (1934). Insofar as forum law sets the maximum period within which to sue the borrowing statute does not disturb this procedural governmental interest. It merely superimposes on it the possibility of a further shortening of the period because of substantive choice of law considerations.

[30] Silver v. Great Amer. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); *see The Quarterly Survey of New York Practice,* 46 ST. JOHN'S L. REV. 561, 588 (1972).

[31] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1969) validating a contract

However tenable such policy arguments may be in principle, I doubt if a court could legitimately implement them under the borrowing statute as it now reads. There is a line between construing the statute in light of modern conflicts law and repealing its clear reference to the place of accrual in favor of a wholly new approach. At this point the responsibility passes from the judiciary to the legislature. Even if such a new approach were thought basically just, practical difficulties remain unresolved. The problem of tolling would have to be met, otherwise a defendant previously absent from both the New York forum and one of the concerned jurisdictions might remain indefinitely suable. Further, one of the concerned states might well be that of the plaintiff's residence, which prefers its residents, as does New York, by giving them the benefit of the local period though the action is untimely elsewhere. While a defendant sued in New York must abide New York's preference for its own residents under the borrowing statute there would be needless injustice to the defendant in New York's adopting the similar prejudices of other states by giving the nonresident plaintiff the benefits of his home state's favored treatment.

Another suggestion to bring Section 202 in line with modern conflicts principles has been to deem the cause of action to accrue in that state whose substantive law creates the cause of action sued on.[32] A variation on this theme has been urged by my colleague Prof. Siegel who would combine the *lex causae*-place of accrual equation with the *George* holding. The result is that if New York law creates the cause of action, then it accrues in New York. Not so as to foreign causes of action however: there if several states have significant relationships with the transaction the state having the shortest statute of limitations should be the place of accrual even though another state's substantive law might otherwise govern.[33] In discussing the *George* case I have already explained my disagreement with the last part of this proposal as being unduly harsh to the plaintiff. As to the first part, it seems inconsistent with Prof. Siegel's own approval of the *George* case. If in

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if its rate of interest is permitted by the law of any state to which the contract is substantially related if not grossly different from the otherwise applicable laws.

32 E. RABEL, CONFLICT OF LAWS 490-91 (2d ed. 1950); Vernon, *Report on First Tentative Draft of the Uniform Statute of Limitation of Foreign Claims Act*, 3 WAYNE L. REV. 187 (1957); Note, *Choice of Law and the New York Borrowing Statute: A Conflict of Rationales*, 35 ALBANY L. REV. 754 (1971).

33 Siegel, *Conflict of Laws*, 19 SYR. L. REV. 235, 255-56 (1968). If New York law is substantively applicable then to apply another state's statute of limitations, according to Prof. Siegel, "invites this: that which New York has 'substantively' (by grouping of contacts) given, a foreign state has 'procedurally' (by application of its shorter period of limitations) taken away. Such a result is inconsistent with the policy underlying CPLR section 202. . . ." *Id.* at 254.

George California may "procedurally" take away what Florida law has "substantively" given then why should it be thought awkward in a case like *Farber v. Smolack*,[34] for example, for the New York auto owner's liability and wrongful death statutes to apply to an accident outside the state and yet be subject to the shorter statute of limitations of the state of injury? An absolute commitment to the *lex causae*-place of accrual equivalency rests on the view that: "where, by the contact-interest approach established by *Babcock* and subsequent decisions, New York substantive law is found to apply, it is absurd to say that the foreign statute of limitations should bar the substantive right created by New York law."[35] The unstated premise of such views is the unitary or jurisdiction-selecting theory of conflicts in which one and only one total body of substantive law applies to all issues in the case. Not only is such a theory not self-evident; it has been expressly rejected in New York. "[T]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented."[36]

If, indeed, one were determined to locate the accrual of a cause of action in the state whose law created it there would often be difficulty in isolating one jurisdiction for that purpose. In *Babcock v. Jackson*, where a New York driver injured a New York passenger in Ontario, does the guest's right to sue the host rest on New York or Ontario law? True, New York law rather than the Ontario guest statute governs the host-guest relationship but Ontario rules of the road and standards of due care also apply. In *Farber* both the New York wrongful death statute and the automobile owners liability statute were held applicable to a fatal accident occurring in North Carolina involving a New York car during a round trip from New York to Florida.[37]

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[34] 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967). In citing Farber as an illustration, I would alter the fact that the plaintiff was a New Yorker, which would, of course, make the borrowing statute inapplicable. I do not believe such a difference would affect the choice of law analysis. *Cf.* Thomas v. United Air Lines, 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973 (1969).

[35] Note, 35 ALBANY L. REV. 754, *supra* note 32 at 762.

[36] Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d at 484, 191 N.E. at 285, 240 N.Y.S.2d at 752 (1963).

[37] 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967). Although in *Babcock*, *Farber*, and *Kilberg* the plaintiffs were New Yorkers, thus making the borrowing statute inapplicable, the same choice of law issues could arise in the case of a nonresident plaintiff. *See* note 34 *supra*; D. CAVERS, THE CHOICE OF LAW PROCESS 153, 170-72 (1965).

Elements of North Carolina law also entered the case, primarily a North Carolina statute making a defective steering mechanism negligence per se if it proximately caused an accident. I submit that untangling the threads of New York and North Carolina law to specify which was *the* law creating the cause of action would be wholly arbitrary.

Even when the applicable rules are determined by the court there may be ambiguity in attributing them to one or another state. In *Kilberg v. North East Airlines*[38] an unlimited recovery was given to persons killed on landing in Massachusetts on a flight from New York despite the Massachusetts statutory ceiling on wrongful death damages. Would a Court follow the reasoning of *Kilberg* and apply the Massachusetts wrongful death statute with a New York measure of damages? Or, as now seems likely,[39] hold New York law applicable in its entirety? In many cases, therefore, difficulty of application must be added to the objections made to a *lex causae*-place of accrual formula.

CONCLUSION

While one purpose of the borrowing statute is to prevent indefinite suability of a nonresident in New York through tolling, it is certainly not the only one. The borrowing statute also operates in favor of resident defendants and nonresidents who are at all times subject to the jurisdiction of the New York courts. In such cases the operative purpose of CPLR 202 is to prevent a nonresident plaintiff from shopping for a lengthy New York statute of limitations when he failed seasonably to avail himself of another forum to redress injuries suffered outside New York.

It is submitted that in cases of multistate torts the probable residence of the plaintiff and his counsel's consequent familiarity with local time limits, the availability of long arm jurisdiction, and other elements of *forum non conveniens* all point to the state of injury as the most frequently appropriate place of accrual for purposes of the borrowing statute. It may not always be the state whose law governs all other substantive issues in the case; but on the single issue of to which foreign time bar a nonresident plaintiff should be held, the state of injury best qualifies in most cases. While the residence of the plaintiff and other factors justifying this suggestion may not all be present in all cases I nevertheless prefer to state it in the form of a

38 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.E.2d 133 (1961).

39 Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967); *cf.* Long v. Pan American World Airways, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

rule rather than leaving the application of basic policy considerations to an ad hoc evaluation in each case. Some sacrifices in flexibility are owed to predictability and evenhandedness.[40] Yet one general exception appears to me legitimate. Airplane crashes in states other than those of origin or destination present the claim of the state of injury in its most attenuated form. At this point a better case can be made for regarding the action as accruing in the state whose substantive law is primarily applicable on the basis of most significant relationship.[41]

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40 Under the impetus of Chief Judge Fuld the New York Court of Appeals appears to be emerging from the first stage of the conflicts revolution into something resembling a regularized system of rules and principles transcending the equities of the particular case. *See* Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 78 (1972); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (concurring opinion). It is worth noting incidentally that a place of injury-place of accrual rule might have procedural advantages over a *lex causae*-place of accrual rule. If the place of injury determines the accrual, the statute of limitations issue is easily disposed of by motion before trial. If it depends on the law which is applicable to the other merits of the action it must await resolution of the choice of law issues which may be difficult to resolve before trial or may be vulnerable to reversal on appeal. The parties may be required to go through a trial only to find at the end that the action is time barred.

41 *Cf.* Paris v. General Elec. Co., 54 Misc. 2d 310, 282 N.Y.S.2d 348 (Sup. Ct. N.Y. County 1967), *aff'd*, 29 App. Div. 2d 939, 290 N.Y.S.2d 1015 (1st Dep't 1968) (mem.); *Contra*, Neilson v. Avco Corp., 54 F.R.D. 76 (S.D.N.Y. 1972).

ED. NOTE: After this article was in print, the Appellate Division, First Department reversed the lower court's order as to the timeliness of the negligence cause of action and severed it from the warranty cause of action. 335 N.Y.S.2d 961 (per curiam) (1972).