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Commentary--Guest Statutes in Conflict of Laws: Two Opinions on Arbuthnot v. Allbright

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COMMENTARY

GUEST STATUTES IN CONFLICT OF LAWS: TWO OPINIONS ON ARBUTHNOT v. ALLBRIGHT†

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I have cast this comment on *Arbuthnot v. Allbright* in the form of two additional opinions for the Appellate Division. This format has certain dialectical advantages and is enjoying a vogue in conflict of laws circles. It is also exhilarating to don judicial robes, however unilaterally, hypothetically and temporarily. In this case, there is the additional justification of the abbreviated character of the actual Appellate Division opinion, which appears immediately below.

HERLIHY, Presiding Justice.

The action is to recover for injuries sustained by an Ontario guest as the result of the negligence of an Ontario host in the operation of an automobile garaged, licensed and insured in Ontario during a trip which began and was to end in Ontario. The only New York relationship to the accident was that it happened in this State.

The issue is whether the law of New York or the law of Ontario applies to the action now pending in this State, the defendants having interposed affirmative defenses setting forth the Ontario guest statute and the common law of Ontario as it applies to the guest-host relationship. Special Term denied a motion to dismiss these defenses.

This court in Kell v. Henderson, 26 A.D.2d 595, 270 N.Y.S.2d 552 had the identical issue before it by way of a procedural question as to whether or not a defendant belatedly, and in view of pre-trial procedures, should be allowed to amend the answer by asserting the affirmative defense of the Ontario guest statute and while there was some reference to the prevailing law of the State, the majority of the court decided the issue on the procedural question. We have no such question in the present case as the affirmative defense was interposed at the time of the serving of the answer.

In Tooker v. Lopez, 24 N.Y.2d 569, 585, 301 N.Y.S.2d 519, 532 Chief Judge Fuld in a concurring opinion suggested certain principles for actions such as this. He stated:

† 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (3d Dep't 1970).

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> "When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest. * * *
>
> Guidelines of the sort suggested will not always be easy of application, nor will they furnish guidance to litigants and lower courts in all cases. They are proffered as a beginning, not as an end, to the problems of sound and fair adjudication in the troubled world of the automobile guest statute."
>
> Aside from the pleadings there is a bill of particulars which shows that the items of special damages were incurred for services in the Province of Ontario and based upon the present record, the plaintiff, aside from the fact that the accident happened in New York State, has failed to establish that he is entitled to the benefits of New York law.
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> The order should be affirmed.

TRUEBLUE, Justice (concurring).

While I join in the judgment and opinion of the Court, I add a few words. In this case we are presented with the reverse of the Babcock v. Jackson facts of a New York driver and passenger involved in an Ontario accident. 12 N.Y.2d 437, 240 N.Y.S.2d 743. Since both parties here are Ontario residents and the defendant's automobile is registered and presumably insured in Ontario, the anti-collusion purpose of the Ontario guest statute is fully pertinent to this case. The fortuity of the place of the accident does not diminish the strength of that interest in any degree. With the wisdom and utility of that policy we have nothing to do. Ontario has the sovereign prerogative of regulating persons and transactions within the legitimate scope of her concern as she pleases. Our task is to delineate the scope of that concern in light of the facts and in relation to relevant New York law and policy. The question for decision, therefore, is whether the single fact that New York was the place of injury during the transient presence of these Ontario residents in the State so implicates New York's governmental interest in applying its common-law rule of recovery as to justify disregarding the relevant Ontario statute. I conclude that it does not.

Since the pertinence of the letter and spirit of the Ontario guest statute is, as has been stated earlier, beyond dispute, it is in order to examine the nature and quality of this State's interest in applying the compensatory policy embodied in the common-law rule of recovery for negligently inflicted personal injury. While a policy of deterrence might theoretically have relevance, it may be disregarded as a serious

factor here. As the Supreme Court of New Hampshire justly observed in relation to the related issue of the interspousal immunity of a Massachusetts couple injured in New Hampshire: "Recognition of the Massachusetts immunity will not render Massachusetts drivers less careful on our highways since their own and their wives' safety will still be jeopardized by carelessness on their part." Johnson v. Johnson, 107 N.H. 30, 32, 216 A.2d 781, 783.

The existence and amount of compensation relate to the standard of living the disabled victim is going to enjoy during his convalescence or permanently, as the case may be. This factor, together with the possibilty of public assistance, is primarily the concern of the victim's home State and only secondarily that of the State of injury. This does not mean that the State of injury has no concern for applying its compensatory law to the victim; it means only that this concern is secondary and subordinate to that expressed by the victim's home State. See R. Weintraub, Conflict of Laws 246.

In response to my dissenting brother's suggestion that we are discriminating against a plaintiff because of alienage, in violation of the spirit if not the letter of the interstate privileges and immunities clause (U.S. Const. Art. IV), it may be said that it is perfectly rational and humane to deny a nonresident the full measure of local compensatory law when to do so would infringe the legal policy of the nonresident's own State. If that State has the primary compensatory interest in his welfare we need not be more Roman than the Romans. The insurer of the defendant is within the scope of Ontario's antifraud policy and to give effect to New York's secondary compensatory interest would infringe on the legitimate interest of the very State which has the primary compensatory concern for the plaintiff. This we need not and should not do. Accord, Restatement (Second), Conflict of Laws § 169 (Preliminary Official Draft).

If the defendant had been a New York resident, the case would be different. It would be no infringement on Ontario's concerns to grant its resident a recovery greater than that available at home. New York's residual compensatory interest in the Ontario resident injured here could then be implemented without embarrassment. Since a New York defendant and his insurer would be liable in such a case, I reject the implication that we are engaging in a jingoistic exercise for the sole benefit of New York residents. Our task is simply that of accommodating the differing policies of two concerned jurisdictions. Residence of the parties is material only insofar as it relates to the scope of the respective governments' concerns and no more.

Although this particular trip began and was to have ended in

Ontario, the Court does not hold that factor indispensible to the result reached. I note that in the converse situation of a New York host and guest involved in an accident in a guest statute State, the Court of Appeals has held irrelevant the termini of the particular trip and the place where the guest-host relation was created. Tooker v. Lopez, 24 N.Y.2d 569, 301 N.Y.S.2d 519. Although noting this analogy we need not decide this issue nor the further question whether a different result would be called for if the plantiff had incurred substantial medical or other liabilities in this State.

PUREHEART, Justice (dissenting).

The majority today holds that the victim of negligent injury on the highways of this State must be denied redress under our law because the parties are Ontario residents, the trip began and was to have ended in Ontario and the plaintiff's medical and other liabilities were not incurred in favor of New York creditors. From this conclusion I must dissent.

First, there is the controlling authority of Kell v. Henderson, 26 A.D.2d 595, 270 N.Y.S.2d 552, decided by this Court four years ago, which on indistinguishable facts held the Ontario guest statute inapplicable. Surely this holding, which has been the subject of academic critical approval (see Rosenberg and Trautman, Two Views on Kell v. Henderson, 67 Colum. L. Rev. 459), deserves greater deference than summary dismissal on a technicality of procedure not mentioned by the majority when the case was decided. In analogous cases, some States have given effect to the relational immunity of the parties' common domicile (Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781) while others have insisted on applying the compensatory lex loci (Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579).

If we must reexamine this matter, it is unfortunate that the Court mentions that the plaintiff's medical expenses and other special damages were incurred in Ontario. Although the significance of this fact is not discussed, I assume it reflects the view held in some academic quarters, but never sanctioned by the Courts of this State, that a State of injury has no more than a marginal "interest" in applying its compensatory law to a nonresident victim other than as a fund for local creditors. In a society having pretensions to civilization such tribalism is appalling. I categorically reject on humanitarian grounds the suggestion that the protection of our tort law is somehow the peculiar privilege of New Yorkers. The common-law rule that the victim of a negligent injury is entitled to be made whole by the tortfeasor antedates the risk-spreading policy of compulsory insurance and

expresses a basic view of moral duty and social responsibility. And so long as society continues to give effect to such views through territorially organized government, the law of the place of conduct and injury must be recognized as having a primary concern, or governmental interest, in vindicating its conduct-regulating and compensatory policies.

A single auto accident in this State may injure two passengers, one a New Yorker and the other an Ontario resident. To suggest that the compensatory value set by our law on human suffering is one iota less applicable to the Ontarioan than the New Yorker is to take a long step backward into a dark past. Although not technically a violation of the privileges and immunities clause of Article IV of the United States Constitution, it violates an even older injunction: "One law shall be to him that is homeborn, and unto the stranger that sojourneth among you." Exodus 12:49. I therefore conclude that if we would allow a New York passenger to recover under the identical circumstances of this case then we can do no less for Mr. Arbuthnot. I only note in passing that nothing said here implies disagreement with cases such as Tooker v. Lopez, 24 N.Y.2d 569, 301 N.Y.S.2d 519, or Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, which recognize a domicile's continuing concern for its residents traveling outside the State. A community's concern for the welfare of its members traveling abroad is not inconsistent with a like concern for all guests within the community.

Since I approach an examination of this conflict of laws with an appreciation of the force of this State's compensatory law, I would pose the question on appeal differently from the majority. Is the Ontario policy of insulating insurance companies in passenger-host lawsuits of such overmastering weight as to displace the presumptively applicable local rule of compensation — as applied to New Yorkers and others injured here?

The first observation to be made on the strength of Ontario's policy as applied to these facts is that no more than Ontario does New York sanction collusive claims against insurers. In that basic respect, the policies of the two jurisdictions do not really conflict. In implementing them, however, this State proceeds on a case-by-case basis, relying on the trier of the fact to prevent abuses without throwing the baby of legitimate claims out with the bathwater of sham claims. Ontario, on the other hand, prefers total prophylaxis. To apply New York law, therefore, would only partially impair Ontario policy. To apply Ontario law completely frustrates New York's regulatory and compensatory goals.

Disregard of Ontario's guest statute would also give effect to what might be called Ontario's "latent" policy of compensating negligently injured accident victims. Although subordinated in its domestic law to the anti-fraud purpose of the guest statute, no one can deny the existence in Ontario of an underlying, all inclusive rule of compensation, to which the guest statute makes a narrow exception for reasons collateral to the primary obligations expressed in the law of negligence. It is in this light that I respectfully disagree with Chief Judge Fuld's dictum in Tooker v. Lopez that: "When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine *the standard of care* which the host owes to his guest." 24 N.Y.2d at 585, 301 N.Y.S.2d at 532 (italics added). The host's immunity from suit most emphatically does not express a judgment that care is not due to the safety of the guest. It is not, in other words, a conduct-regulating rule. It derives from exclusively remedial considerations—a judgment that the cure would be worse than the disease. Disregarding the guest statute, therefore, while confessedly impairing Ontario's anti-fraud policy to a degree has a consolation from Ontario's point of view in salvaging that "latent" compensatory goal which had been sacrificed domestically to the purposes of a guest statute.

Lastly, I note that the defendant and his insurer can claim no unfair surprise in the application of New York law. When he entered this State the defendant's expectations could hardly have been shaped by the possibility of injuring only fellow Canadians.

In summary, I would apply this State's compensatory rule for the benefit of persons injured here despite the guest statute of the parties' common domicile. Although not directly raised by the facts of this case, I add that the same result should follow for all relational immunities that rest on the anti-collusion rationale.

Although I am convinced that justice in this particular case requires that we strike the guest statute defense, it is not amiss to add that institutional values of certainty and predictability would be promoted by the rule stated above. If recovery is to turn on factors mentioned by the majority, such as where the trip was to begin and end and the amount of special damages incurred in this state — none of which, I repeat, has real relevance to either the anti-fraud policy of Ontario or the compensatory policy of New York — then this area of law will return to where it was before Kell v. Henderson, a Dickensian fog of litigation and uncertainty.