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Conflict of Laws--State Interest Not Sole Criterion in Choice of Appropriate Law--More General Considerations Held Cognizable (Miller v. Miller, N.Y. 1968)

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RECENT DECISIONS

CONFLICT OF LAWS — STATE INTEREST NOT SOLE CRITERION IN CHOICE OF APPROPRIATE LAW — MORE GENERAL CONSIDERATIONS HELD COGNIZABLE — Decedent, a New York resident, while on a short business trip in Maine, was fatally injured in an automobile accident. Subsequent to the accident and prior to the commencement of a wrongful death action by the deceased's wife, the defendants, owner and operator of the vehicle, changed their residence from Maine to New York. In denying defendants' partial defense which asserted the application of Maine law, the New York Court of Appeals, in affirming the appellate division, *held* that since New York has the predominant interest in the litigation, its law shall apply. *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

The earliest choice of law rule in New York was that the substantive rights and liabilities of the parties were governed by the law where the tort occurred.[1] This rule, known as *lex loci delictus*, was predicated upon the doctrine of vested rights[2] and was not without its shortcomings. Indeed, the fact was widely recognized that, at times, the situs of the tort did not have a sufficient nexus to warrant the interjection of its law.[3]

Realizing this factor, as well as the trend of the state courts to depart from the general conflicts rule in an effort to develop more rational solutions to choice of law questions,[4] the New

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[1] Kaufman v. American Youth Hostels, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943). *See* Babcock v. Jackson, 12 N.Y.2d 473, 477, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746-47 (1963). The American Law Institute adopted this rule in 1934, although it has since changed position. RESTATEMENT, CONFLICT OF LAWS 1967-69 (1935).

[2] For a brief analysis of the vested rights doctrine see 3 BEALE, CONFLICT OF LAWS 1967-1969 (1935).

[3] *See also* Gordon v. Parker, 83 F. Supp. 40 (D. Mass.), *aff'd*, 178 F.2d 888 (1st Cir. 1949); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957). It has been subsequently observed by Mr. Chief Justice Traynor of the California Supreme Court:

> As the forum we must consider all of the foreign and domestic elements involved in this case to determine the rule applicable. Reich v. Purcell, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967).

[4] Richards v. United States, 369 U.S. 1, 12-13 (1962). *See, e.g.*, Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-85 (1945); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflicts of Laws*, 58 MICH. L. REV. 637 (1960); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

York Court of Appeals, in *Kilberg v. Northeast Airlines, Inc.*,[5] instituted the first major departure in New York State tort law from the *lex loci delictus* approach.[6]

In *Kilberg*, a New York domiciliary while on route from New York was fatally injured when the plane in which he was a passenger crashed in Massachusetts. The Court, although proceeding under Massachusetts law as to right of recovery, refused to apply the Massachusetts monetary limitation for wrongful death actions. Instead, the Court reasoned that the dominant interest of New York in the litigation, together with the fortuitousness of the accident site, demanded application of New York's policy of prohibiting arbitrary monetary limitations. Thus, right was distinguished from remedy and an exception to the *lex loci delictus* doctrine was formulated.

The *Kilberg* approach, however, was soon recognized as unsatisfactory.[7] Therefore, two years later, in *Babcock v. Jackson*,[8] the New York Court of Appeals reevaluated this doctrine and decided to abandon it completely.

In *Babcock*, plaintiff-passenger, while travelling in Ontario, was injured in an automobile accident caused by the negligence of his host. Both parties were New York residents; the excursion had originated and was terminated in New York; and, the automobile was registered and insured in New York.

Recognizing, however, that the law of one of the interested jurisdictions should not be applied exclusively to all the issues in dispute, the Court stressed the independent determination of each issue by the law of the jurisdiction having the greatest interest in the particular matter.[9] As such, the policies which were effected by the laws in conflict were isolated and the Court sought to determine the relative interests of the jurisdictions in light of their contacts with the case. Applying this contact-interest approach, the Court concluded that New York law had the most direct and compelling interests in the litigation and should, therefore, control. The policies and interests behind the

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[5] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[6] This approach had already been abandoned in the area of contract. *See* Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[7] *See* Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962) which severely limited *Kilberg* to the expressions of New York's strong public policy with respect to arbitrary limitations in wrongful death actions.

[8] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[9] *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752. For an extensive discussion of this aspect of *Babcock*, see Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Groping for Contacts*, 16 BUFF. L. REV. 537, 549-54 (1967). *See also, Comments on Babcock v. Jackson, A Recent Development In Conflict of Laws*, 63 COLUM. L. REV. 1212, 1249 (1963).

conflicting laws, in its opinion, were clear. The Ontario guest statute had as its object the prevention of collusive suits arising out of the host-guest relationship against Ontario insurance carriers.[10] In contrast, New York had developed a strong policy of protecting *all* passengers injured as a result of a driver's negligence despite the risk of collusive suits when the driver-passenger relationship was also one of host-guest.[11]

While *Babcock* effectively repudiated the out-moded rule of *lex loci delictus*,[12] it was a rather ambiguous step in the development of the conflict of laws in New York State. *Babcock*, in reality, had involved only a "false" or "spurious" conflict since the contacts and policies were so readily conducive to the application of New York law that no real conflict existed.[13] Consequently, in 1965, in *Dym v. Gordon*,[14] the Court of Appeals engendered difficulty in interpreting this contacts-interest approach.[15]

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[10] *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

[11] As the Court stated, not only did New York have the most compelling interest but, in addition, there appeared to be no legitimate interest at all by Ontario which a denial of recovery could advance. Thus, *Babcock* provided an excellent situation for the refutation of the *lex loci delictus* doctrine.

[12] *See also, e.g.*, Bernkrant v. Fowler, 55 Cal. 2d 558, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), wherein the abandonment of *lex loci delictus* in other jurisdictions is exemplified.

[13] Since *Babcock*, New York courts have on numerous occasions referred to the decision by name or approach. In the majority of these cases, however, there has been no more than passing reference, implying that the conflict rules are in a process of re-examination. Baer, *supra*, note 9, at 554-55. Basically, there are three reasons for this outlook. Firstly, since the fact pattern in *Babcock* was so conducive to the application of New York law, the decision has been deprived of a great deal of its viability. Secondly, in an effort to buttress the reasoning of the majority, the Court relied upon the approach taken by RESTATEMENT (SECOND) CONFLICTS OF LAW, which has been criticized for its seemingly "quantitative approach." *Comments on Babcock v. Jackson, A Recent Development In Conflict of Laws*, 63 COLUM. L. REV. 1212, 1245 (1963) (Ehrenzweig's view). *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 379 (1) (Tent. Draft No. 9, 1964). Thirdly, the Court's confusing use of "interests" and "contacts," often seemingly defining one in terms of the other, has been a mainspring of inconsistency in its application.

[14] 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

[15] The difficulty in deciding *Dym* could have been forecast from an earlier New York Court of Appeals decision. Several months before *Dym*, in Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S. 2d 557 (1965), the Court was presented with a conceptual fact situation which closely paralleled *Babcock*. In holding that the law of the jurisdiction which had the most significant relationship and contacts with the matter in dispute should govern, the Court utilized what appears to have been a qualitative rather than a quantitative approach. That is, rather than applying the law of the jurisdiction having the most numerous contacts, the Court applied the law of the jurisdiction wherein the most significant contacts were located. However, in summarizing the support for its conclusion, the Court

In *Dym*, plaintiff-guest and defendant-host, both domiciliaries of New York, were involved in an automobile accident in Colorado. Both parties were living in Colorado for the summer, and the host-guest relationship had originated and was to terminate in that state.

In an opinion purporting to be an application of *Babcock*, the Court held that the Colorado guest statute, rather than the New York law, should control. The *Babcock* approach was restated as requiring isolation of the issues, identification of the policies underlying the laws in controversy and, finally, evaluation of the contacts involved.[16]

After finding the issue to be whether a guest should recover from a negligent driver, the Court concentrated upon the contacts, apparently disregarding the relative importance of the policies to be effectuated. In the analysis of contacts, the facts were strongly distinguished from those in *Babcock*. First, unlike *Babcock*, the parties were not in transit but were temporarily residing in Colorado; secondly, the physical situs of the host-guest relationship was in Colorado and not in New York.

While attempting to dispel any possible implication that either the situs of the relationship or the time of its creation was alone controlling,[17] these factors, together with "the general intent of the parties as inferred from their actions," [18] led the Court to conclude that in no sense could the situs of the accident be considered fortuitous.

Dissenting, Chief Judge Fuld found the position taken by the majority to be inconsistent with *Babcock* which gave controlling effect to the law of the jurisdiction with the predominant interest in the resolution of a particular issue. Although agreeing with the majority's affirmation of *Babcock's* rejection of the inflexible rule of *lex loci delictus*, he contended that the majority opinion was adhering to an equally mechanical and arbitrary doctrine of giving controlling effect to the jurisdiction in which a relationship originated irrespective of the policy sought to be implemented. On what Chief Judge Fuld considered the essential issue of policy considerations, he found no factual basis for distinguishing *Dym* from *Babcock*.

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seemed to have stressed the quantitative by a listing of the relevant contacts. Thus, it was confusing what approach the Court did take and it was equally unclear whether contacts or interests or a combination of both was the rule to be applied for a proper application of *Babcock*. *See* Note, *Impact of Babcock v. Jackson on Conflict of Laws*, 52 VA. L. REV. 302, 307-09 (1966).

[16] 16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

[17] *Id.* at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

[18] *Id.* at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

The confusing question of whether *Babcock* mandated a contacts approach or an analysis of policy again arose in *Macey v. Rosbicki*.[19] In *Macey*, plaintiff and defendant, New York domiciliaries, met in Ontario where defendant maintained a summer residence. While on a short trip in Ontario, plaintiff-passenger was injured when the automobile driven by the defendant collided with another vehicle.[20] In applying the law of New York, the Court concluded that the action was properly within the purview of *Babcock* and therefore controlled by New York law. The Court relied upon the factual affinity between this case and *Babcock*, distinguishing *Dym* primarily on the duration of the stay and situs of the relationship. Therefore, as in *Dym*, the decision evolved not on the basis of policy, but instead, upon the nature of the contacts with the respective jurisdictions.

In a lengthy concurrence, Judge Keating viewed the factual situation of the present case as "indistinguishable" from that presented in *Dym* and the result reached in the latter as "irreconcilable" with that of *Babcock*.[21] The concurring judge argued that neither the origin of the relationship, the duration of the trip, nor its locale were of more than minor significance, since they bore no relation to the interests or policies sought to be affected by the laws in conflict.[22] Further recognizing the great emphasis which *Dym* placed upon the intent of the parties in determining which law would govern their rights, Judge Keating took issue with the Court's engaging in fictions for "no apparent reason."[23] It was his opinion that neither in *Babcock*, *Dym* nor this case had the parties any intent as to what law would govern their rights. As *Dym* had been an apparent source of confusion and dissent, in that it failed to give controlling significance to those contacts relating "to the policies sought to be vindicated by the *ostensibly* conflicting laws,"[24] the concurrence called for a limitation of *Dym* before it became "encrusted" in the law of New York.[25]

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[19] 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

[20] Prior to the commencement of the action the driver of the other vehicle settled with the defendant. Therefore, the fact that a third party was involved in the accident did not affect the outcome of the litigation.

[21] 18 N.Y.2d at 298, 221 N.E.2d at 385, 274 N.Y.S.2d at 598 (concurring opinion).

[22] As stated by Judge Keating, "the interest a particular jurisdiction has in the application of its law should and can only be determined by an examination of the facts of the case in light of the relevant policy considerations." 18 N.Y.2d at 296, 221 N.E.2d at 384, 274 N.Y.S.2d at 597 (concurring opinion).

[23] *Id.* at 297, 221 N.E.2d at 384, 274 N.Y.S.2d at 597 (concurring opinion).

[24] *Id.* at 295, 221 N.E.2d at 383, 274 N.Y.S.2d at 595 (concurring opinion).

[25] *Id.* at 299, 221 N.E.2d at 385, 274 N.Y.S.2d at 598 (concurring opinion).

While the validity of Judge Keating's criticism of *Dym* was not immediately approved, his reasoning in *Macey* gradually gained support. Thus, in *Gore v. Northeast Airlines, Inc.*,[26] a wrongful death action, the Circuit Court of Appeals held applicable the law of New York despite a post-accident change in domicile by the widow. Adopting the "interest analysis" approach developed by his concurring opinion, the court found that New York's policy proscribing statutory limitations upon damages recoverable in wrongful death actions was based upon the state's dual interest in preserving a citizen's life and in providing for the survivors.[27]

Paralleling these refinements in tort, in the area of the right of election in the disposition of a decedent's property the movement away from *Dym* and *Macey* was clearly demonstrated. In *In re Crichton*,[28] the New York Court of Appeals was unanimous in its decision to apply New York law to the estate of a decedent who left his stocks, bonds and savings accounts in Louisiana to his children and made no provision for his wife. Louisiana's interest in the property stemmed from its presence there and from the fact that the securities were purchased out of proceeds of decedent's business ventures in that state. New York's contact was as marital domicile of the decedent and his widow. It was the contention of the Court that this choice of law problem required, as noted in *Babcock*, isolation of the issue, identification of the underlying policy considerations embodied in the laws in conflict and an examination of the contacts of the respective jurisdictions. In relation to the final step in this three-stage process, the Court noted: "Contacts obtain significance only to the extent that they relate to the policies and purposes sought to be vindicated by the conflicting laws." [29] Following this rationale to its logical conclusion, the Court decided that as the facts or contacts were presented, New York, being the marital domicile, had "not only the dominant interest in the application of its law and policy but the only interest." [30]

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[26] 373 F.2d 717 (2d Cir. 1967). *See also* Long v. Pan American World Airways, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965), where a unanimous court specifically held that the *Babcock* approach was applicable to wrongful death actions as well as to actions not resulting in death. Undoubtedly, courts had previously been restrained to make this extension because wrongful death actions, unknown at common law, are created by statute.

[27] 373 F.2d 717, 723 (2d Cir. 1967).

[28] 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967).

[29] *Id.* at 135 n.8, 228 N.E.2d at 806 n.8, 281 N.Y.S.2d at 820-21 n.8.

[30] *Id.* at 134, 228 N.E.2d at 806, 281 N.Y.S.2d at 820. *See also In re* Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288, N.Y.S.2d 993 (1968); Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 281 N.Y.S.2d 248 (1967) where, in an analogous situation, the Court supported the *Babcock* approach.

With the benefit of this background, the establishing of a contacts-interest approach in *Babcock*, its confused interpretation in *Dym* and *Macey* and, in turn, the modification of *Dym's* reasoning in *Gore* and *Crichton* — the New York Court of Appeals was confronted with a similar conflict of laws question in *Miller v. Miller*.[31]

In *Miller*, a New York resident, while on a short business trip in Maine, died as a result of injuries sustained in an automobile accident. Shortly thereafter, defendants, residents of Maine, relocated to New York. As a partial defense to a wrongful death action commenced by the decedent's wife, defendants pleaded the Maine limitation on recoveries in effect at the time of the accident but since repealed.

The Court, in applying New York law, concluded that in the interests of justice "controlling effect should be given . . . to the law of the jurisdiction which because of its relationship . . . has the greatest concern with the specific issue raised in the litigation."[32] Admitting the inconsistencies with which past decisions had interpreted the contact-interest approach of *Babcock*, the Court stated its method for determining the applicable law: "[T]he facts or contacts which obtain significance in defining state interests are those which relate to the purpose of the particular law in conflict." [33] Moreover, relying on *Crichton*, the Court noted that "contacts obtain significance *only* to the extent that they relate to the policies sought to be vindicated by the conflicting laws." [34]

Recognizing New York's ardent public policy which has chosen, via constitutional provision,[35] not only to permit full recovery but to prohibit any legislative enactment which would attempt to do otherwise, the Court contrasted this interest with countervailing claims alleging the reliance on and, therefore, necessity for application of Maine law. Paramount among these considerations was the fairness of applying New York law where a nonresident or resident had acted in consonance with the law of the particular jurisdiction in which the transaction had occurred as well as the possible interest of a sister state in providing remedies for conduct within its borders.

After careful analysis, the Court concluded that it perceived no general considerations which would warrant the application of Maine law. Specifically, the Maine statute was not of the nature

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[31] 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

[32] *Id.* at 15, 237 N.E.2d at 879, 290 N.Y.S.2d at 736, *quoting Babcock*, 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

[33] *Id.* at 16, 237 N.E.2d at 879, 290 N.Y.S.2d at 737.

[34] *Id.* at 17, 237 N.E.2d at 880, 290 N.Y.S.2d at 738, *quoting Crichton*, *supra*, note 28.

[35] N.Y. CONST. art. 1 § 18.

upon which a person would pattern his conduct. The only possible reliance would have been the purchase of liability insurance pursuant to the remedies available to an injured party. However, since the standard automobile liability policies issued in Maine did not differentiate between protection for wrongful death or personal injuries, and, since there was no monetary limitation for personal injury actions, no proper claim that the defendants relied upon this limitation in purchasing insurance could have or, in fact, was made.

In answer to the argument that the choice of law applied should be determined in accordance with reasonable expectations of the litigants as evidenced by their intercourse with the state where the tort occurred, the Court noted that although the country consists of separate jurisdictions, people invariably act as if they were governed by the laws of a single jurisdiction. Considering the real party in interest, it was maintained that even if the insurer may have reasonably expected the enforcement of the Maine limitation, this could not be the sole determinative factor since the insurance policy was not and could not have been limited to affording protection to only those accidents occurring in Maine. Again, therefore, the possibility of liability in excess of $20,000 was not unexpected and there appeared to be no reason to deny the application of New York law.

Finally, in examining whether the application of New York law would unduly impinge upon a legitimate interest of a sister state in regulating the rights of its citizens, the Court observed that to the extent the limitation evinced a desire to protect Maine residents in wrongful death actions, its purpose would not be defeated because the defendants were no longer residents of that state. Although aware that the danger of forum shopping would, at times, require a court to ignore a post-accident change in domicile, this subsequent change, the court stated, had been proven to be unrelated to a desire to achieve a more favorable legal climate.

Judge Breitel, in dissent, premised his argument for the application of Maine law on the existence of a "true conflict" [36] in that both Maine and New York had an interest in applying their rules regarding damage limitations. Emphasizing the reasonable expectations of the parties as the prevailing consideration, the dissent noted that the parties had established a settled and persistent local relationship in Maine which, insofar as it most strongly evidenced the litigants' reliance on Maine law, should be of vital importance in determining the most interested jurisdiction.

While Judge Breitel recognized that under a choice of law technique based upon interest analysis the law of New York could be applied, it was his contention that such an approach would

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[36] 22 N.Y.2d at 25, 237 N.E.2d at 885, 290 N.Y.S.2d at—.

invariably result in a person carrying the law of his domicile wherever he travelled. Furthermore, as states have an interest in applying their law to protect the "legitimate objects of their legislative concern" and, since this includes persons other than domiciliaries, individuals would, in addition, carry with them a number of varying personal laws invocable at will. The effect of this application, he contended, would result in the substitution of a rigid personal law reminiscent of *lex loci delictus.*

With reference to the majority's consideration of the post-accident events, the dissent reasoned that the repeal of the Maine statute was significant only to the extent it suggested that the former policy was waning and should, therefore, yield to the New York constitutional policy of providing unlimited recovery. The inadvisability for considering post-accident changes in domicile was based upon the dangers of forum shopping and collusive suits which, as Judge Breitel stated, are legitimate objects of a state's legislative concern.

Finally, in summarizing, Judge Breitel expressed concern that his opinion might be interpreted as a rejection of the contacts-interest approach. Rather than excluding or relying on any one particular theory, "the objective," Judge Breitel stated, "is to achieve justice in a particular case and cases of like kind, avoiding ideology, on the one hand, and particularistic result-oriented determinations, on the other." [37] Thus, it was his contention that "in this very difficult and still inchoate field of law a case-by-case development of rules is necessary" [38] in order to establish sound judicial principles.

Underlying all choice of law decisions from *Babcock* to *Miller,* the basic premise has been that courts should apply the law of the most appropriate jurisdiction in the disposition of specific issues.[39] This is the major consideration which brought about the rise and subsequent demise of the traditional *lex loci* approach and which warrants a developmental approach in an effort to find a suitable successor. While the opinions of *Babcock* and its successors have provided little specific direction to courts presented with an actual conflict of interests, the "Babcock process" does provide a conceptual framework for the proper resolution of the large number of choice of law problems which present no actual conflict between state interests. Failing, therefore, to provide any definite criteria for the resolution of future controversies, *Babcock* did, however, recognize that rules predicated upon con-

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[37] *Id.* at 33, 237 N.E.2d at 890, 290 N.Y.S.2d at—.

[38] *Id.*

[39] *Comments on Babcock v. Jackson, A Recent Development In Conflict of Laws,* 63 COLUM. L. REV. 1212, 1251 (1963) (Reese's view).

ceptualistic reasoning rather than actual experience are bound to fail.

The approach adopted by the Court of Appeals in *Miller* represents both a return to and refinement of this rationale. Premised upon *Babcock,* "grouping of contacts" or "center of gravity" requires a "qualitative" evaluation of the most compelling relationship. This "qualitative" analysis of relevant contacts is cast, necessarily, in terms of jurisdictional policies and interests. Thus, contacts obtain significance only as they relate to the vindication of the underlying policy considerations present in the ostensibly conflicting laws.

Failing to appreciate this fact, however, the appellate division, in *Tooker v. Lopez,*[40] has reverted to the quantitative approach of *Dym* in holding that a wrongful death action arising out of an out of state accident was precluded by a Michigan guest statute. While *Dym,* however, served a useful purpose in the development of a modern conflicts approach by demonstrating that no single criterion is to be formulated, *Tooker,* although benefited by *Miller,* refused to consider this instant case as relevant. Ignoring the fact that, at the least, *Dym* was limited by *Miller* to its precise facts, *Tooker,* therefore, represents a backward step in the choice of law problem.

Indeed, *Miller,* if recognized, goes far in resolving much of the confusion engendered by *Babcock* and its more immediate progeny. Contrary to such decisions as *Macey* in which there was no extended discussion of policy or interest considerations, the Court, in *Miller,* scrutinizing the law-fact pattern before it, was forced to explicitly adopt a strict "interest analysis" approach. Illustrative of this is the Court's determination of liability partly on the basis of post-accident events. Relying in part upon *Gore,* the Court recognized that post-accident transactions could have a significant effect upon a jurisdiction's interest in the application of its law.

Further cognizant of Maine's proper concern in protecting local insurers, the Court proceeded to investigate the effect of the imposition of greater liability upon the real party in interest. Examination of the policies sought to be effected by the conflicting laws leads inevitably to the Court's result that, as the facts were presented, the application of New York law in no way impinged upon a proper legislative concern of Maine.

Such an approach amplifies the utility of the "Babcock process" in discerning between the real and spurious conflicts and is further demonstrative of the intense analysis often required to differentiate between the two. By express adherence to such methodology *Miller* provides a *useful* standard by which the significance of contacts are

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[40] 30 App. Div. 2d 115, 290 N.Y.S.2d 762 (3rd Dep't 1968).

to be determined and thus, introduces a degree of consistency and predictability of result into this area of law.

The essence of *Miller,* however, is not to be overlooked. The Court is not merely formulating an exact rule or standard to be procedurely applied but, instead, views interest analysis as merely representing a consideration to be employed in the establishment of a modern rule of law. Illustrative of this attitude is the Court's recognition of the significance of countervailing considerations which in its collective judgment should concern the disposition of justice in a modern court. *Miller,* therefore, does not, as contended by the dissent, adopt domicile per se as the controlling consideration. Rather, the Court establishes a flexible approach which seems to reduce the danger of such parochialism by qualitatively examining all relevant factors before a determination is reached.

TAXATION — CORPORATE SPIN-OFFS — REORGANIZATION PLAN MUST DISTRIBUTE EIGHTY PERCENT CONTROL TO QUALIFY FOR SECTION 355 NONRECOGNITION PROVISION.

In 1961, Pacific Telephone and Telegraph Company (Pacific) established the Pacific Northwest Bell Telephone Company (Northwest) and transferred all of its non-California assets and $100,000 to Northwest in exchange for all the Northwest stock and a $2,000,000 demand note. In the same year Pacific distributed to its shareholders transferable rights to purchase fifty-seven percent of the Northwest stock at a price substantially less than its fair market value. The remaining forty-three percent was disposed of twenty-one months later through a similar offering. Taxpayers exercised almost all of their rights to acquire the Northwest stock, but failed to report the difference between the fair market value of the stock and the option price paid as income from stock dividends on their federal income tax returns. The Courts of Appeals for the Second and Ninth Circuits disagreed on the qualification of the Pacific spin-off for the nonrecognition of gain treatment that Section 355 of the Internal Revenue Code, under certain circumstances, affords to stockholders of a controlling corporation who receive shares of the controlled subsidiary. On certiorari, the United States Supreme Court *held* that the fifty-seven percent distribution in 1961 was not protected by the corporate spin-off exemption since section 355(a)(1)(D) requires that the distribution divest the controlling corporation of at least eghty percent control of the controlled corporation. This prerequisite could not be satisfied by the Pacific step-transaction plan which was too indefinite to unite