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CONFLICT OF LAWS IN TORT ACTIONS—THE DEVELOPMENT OF
Babcock v. Jackson

The main responsibility for the rational development of conflict of laws is bound to remain with the state courts. The responsible court will have to be on its mettle. It must be prepared to reject unrealistic rules, yet cautious enough not to make formulations that reach too zealously into the future or give too zealous a scope to local policy. It must distinguish between real and spurious conflicts at the outset. It must temper its freedom to declare local policy and its scope with a sense for harmonious interstate relations as well as for the justifiable expectations of the parties.¹

So spoke Justice Roger J. Traynor of the California Supreme Court in commenting upon the task of the judiciary in seeking to develop and articulate the fast-changing principles in the conflict of laws field. His comments would seem to be an appropriate point of departure for an examination of the developments initiated in this area by the New York Court of Appeals, particularly with reference to its much-discussed decision in *Babcock v. Jackson*.² To provide a context within which to examine these developments, this note will view the state of the New York law prior to *Babcock* and then trace *Babcock* through its application in *Dym v. Gordon*³ and in the most recent case in this area, *Macey v. Rozbicki*.⁴

Until the early 1950's, the prevailing and virtually unquestioned choice of law rule in the United States in cases wherein the cause of action sounded in tort was that of *lex loci delictus*.⁵ According to this principle, the rights and obligations of the parties to the action were to be determined according to the law of the place wherein the injury occurred and the rights and obligations thus established would usually be enforced by the forum despite inconsistencies with forum law.⁶ Thus, in *Coster v. Coster*,⁷ plaintiff-wife's negligence action against her husband was dismissed by the New York Court of Appeals because such an action was barred by the law of Massachusetts, the place of the wife's injury, even though New York would have permitted such an action had the injury occurred within its borders.⁸ So, too, in *Kaufman v.*

¹ Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 675 (1959).

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

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

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

⁵ See EHRENZWEIG, CONFLICT OF LAWS § 220, at 578-79 (1962).

⁶ RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

⁷ 289 N.Y. 438, 46 N.E.2d 509 (1943).

⁸ *Id.* at 442, 46 N.E.2d at 511.

American Youth Hostels, Inc.,⁹ the defendant charitable corporation's immunity from liability under Oregon law, the law of the place of the injury giving rise to plaintiff's cause of action, was upheld against a public policy challenge in an action in New York.

The *lex loci* approach had the advantages of extreme ease in determining the law to be applied and of predictability of the legal results which would follow from a given set of operative facts.¹⁰ The principal weakness of the approach, however, lay in the very inflexibility which gave rise to its virtues, *i.e.*, its failure to take account of, and give proper effect to, the social and policy considerations of the states whose laws were involved. It was this precise weakness which led to a limited departure from the strict *lex loci* approach in *Kilberg v. Northeast Airlines, Inc.*¹¹ In that case, a New York domiciliary had purchased a ticket from defendant and had departed from a New York airport. While en route, the plane crashed in Massachusetts and the passenger was killed. Under a strict application of *lex loci*, Massachusetts law would have provided the basis for the New York Court's decision. But, Massachusetts placed a monetary limit on recovery in wrongful death actions which was at variance with New York's constitutional prohibition of such limitations. Because of this strong discrepancy in public policies between the states and since the question was characterized as one of remedy rather than one of right, the Court decided that, although plaintiff's action had to be brought under the Massachusetts statute, the recovery would not be subject to the monetary limitation. Chief Judge Desmond stated the basic rationale for the majority: "Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the law suits which result from these disasters."¹² Although the opinion lacked explicit reference to "grouping of contacts" or "center of gravity," its approach to the problem of the choice of law reflected some consideration for the policies underlying the laws available for possible application.¹³ The abandonment of the strict *lex loci* approach evidenced by *Kilberg* in the tort area was already an accomplished fact in the contract area. In *Auten v. Auten*,¹⁴ the Court used the "contacts" approach, *i.e.*, rather than strictly applying the traditional approach as to place of making and place of performing the contract, the Court emphasized the choice of the law of the state having the most significant contacts with the matter in dispute.

⁹ 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

¹⁰ See 40 ST. JOHN'S L. REV. 266, 267 (1966).

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

¹² *Id.* at 39, 172 N.E.2d at 527-28, 211 N.Y.S.2d at 135.

¹³ *Babcock v. Jackson*, 12 N.Y.2d 473, 480, 191 N.E.2d 279, 282-83, 240 N.Y.S.2d 743, 748 (1963).

¹⁴ 308 N.Y. 155, 124 N.E.2d 99 (1954).

Babcock — *The "Contacts" Approach to the Choice of Law Problem in Tort Actions*

The opportunity for the adoption of the contacts-interests approach in dealing with multi-state tort actions came in the factually ideal setting of *Babcock*. Both the plaintiff-guest and the defendant-host were New York residents who took a weekend auto trip to Ontario. The automobile was registered and insured in New York and the trip began and was to end there. While driving in Ontario, defendant lost control of the auto and plaintiff was seriously injured when the auto struck a wall. The trial court in New York dismissed plaintiff's negligence action on the ground that it would have been barred by the guest statute in effect in Ontario, the place of the accident. The trial court was affirmed by the appellate division.¹⁵ In reversing the decisions below, the Court of Appeals rejected the invariable application of *lex loci* in tort cases and adopted the principle that the choice of law rule should reflect a consideration of other factors which bear upon the purposes to be served by the conflicting laws. To make such a choice, the Court proceeded first to identify the contacts of the parties and the occurrence with each state; then to determine the relative importance of these contacts in terms of the issue involved and the purposes to be served by the tort rules in question; and, finally, to define the rights and liabilities of the parties according to the law of the state which has the most significant relationship.¹⁶ The Court thereby set forth a formula which permits variable results according to individual facts rather than an absolute rule. The contacts in *Babcock* were easily identified: the only contact with Ontario was the entirely fortuitous occurrence of the accident. The contacts with New York, however, were many: the injuries were sustained by a New York guest as the result of the negligence of a New York host whose car was garaged, licensed and insured in New York, and the relationship between the parties had begun and was to end in New York. Similarly, the policies and interests behind the conflicting rules of law were easily determined: the Ontario guest statute had as its purpose the prevention of collusive claims against Ontario defendants and their insurance carriers by injured passengers, whereas New York's tort rule was intended to insure that injured passengers be compensated by negligent drivers, even at the risk of the assertion of fraudulent claims against New York defendants and their insurers. The question was then reduced to whether the denial of recovery would advance any legiti-

¹⁵ *Babcock v. Jackson*, 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (4th Dep't 1962) (memorandum decision).

¹⁶ *Babcock v. Jackson*, *supra* note 13, at 482, 191 N.E.2d at 283-84, 240 N.Y.S.2d at 749-50.

mate interest which Ontario might have, or whether New York's interests were more direct and compelling. The Court concluded that the latter was the case in that Ontario's interest was in protecting Ontario defendants and their insurers and that this interest could not be imposed upon in a New York action by a New York plaintiff against a New York defendant. In short, "Ontario has no conceivable interest in denying a remedy"¹⁷ to a New York resident when neither the defendant nor his insurer was within the legislative concern of Ontario. In contrast, there was New York's strong policy of requiring New York drivers to respond in damages to passengers who are injured because of their negligence, and this policy would be needlessly frustrated by denying recovery through the choice of the foreign law. "Comparison of the relative 'contacts' and 'interests' of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal."¹⁸

Though *Babcock* has been commented upon at great length and cited as support for various positions,¹⁹ it would seem on its face to have been a rather ambiguous platform from which to launch predictions as to the future development of the choice of law problem involved in the case.²⁰ This was so because the factual contacts and legal issue involved were so clearly and readily conducive to the result reached by the Court. The contacts were so heavily oriented toward New York that the Court was not required to focus upon and isolate with precision those contacts which were significant in terms of the relevant policies. It would seem that, at best, *Babcock* had decided that where the legal issue is that of liability for negligence of a driver to a passenger, the legal rule of the state whose contacts relate directly to the policy behind the rule will be chosen, instead of the legal rule of the state or nation whose contact with the occurrence bears no relation to the policy behind its rule. In this light, the place where the relationship originates and is to terminate would not seem to be a significant contact in terms of a further examination into the interest or policy to which such contacts are to be related, *i.e.*, whether a host is to be made to respond to his guest for damages. In short, under the Court's process of reasoning, had the parties begun their trip in Ontario with the same results, the fact that their relationship began there would have been a contact but, it is

¹⁷ *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

¹⁸ *Ibid.*

¹⁹ See, *e.g.*, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212 (1963).

²⁰ "It is unlikely that Judge Fuld will for long recognize in future cases the rule he announced in *Babcock*." *Id.* at 1248.

contended, a qualitatively insignificant contact, in that it would not have changed Ontario's lack of interest in the outcome of the litigation.

Dym — Application of or Departure from Babcock?

Such was the situation in *Dym v. Gordon*,²¹ litigation begun shortly after *Babcock*, wherein the parties were New York domiciliaries spending part of their summer in Colorado as students. The guest-host relationship arose there and the plaintiff guest was injured when defendant's car collided with a car driven by a Kansas resident. Defendant contended that plaintiff's action should be dismissed because, under the Colorado guest statute, plaintiff would have to show defendant's conduct to have been intentional or negligent to the extent of being in willful and wanton disregard of plaintiff's rights, facts which plaintiff could not establish. The trial court rejected defendant's contention and relied on *Babcock* to the effect that the fact "that the present parties had taken up temporary residence in Colorado and intended the transportation provided to be confined within that State differentiates their status from that of the *Babcock* parties only in the degree to which the locus of the accident in a guest statute State can be said to be fortuitous."²² On appeal, the appellate division reversed in a memorandum opinion and indicated briefly that the temporary residence of the parties, together with the origin and intended termination of the relationship within Colorado, indicated the latter to be the jurisdiction which had the dominant contacts and the superior claim for the application of its law.²³ The Court of Appeals affirmed in an opinion which purported to be but an application of *Babcock*.²⁴

The Court restated the *Babcock* process as involving an isolation of the legal issue, an identification of the policies behind the laws in conflict, and, finally, an evaluation of the respective contacts to determine the jurisdiction with the superior claim to the application of its law.²⁵ The isolation of the issue involved was easily accomplished: upon what basis may an injured passenger recover from a negligent driver? However, the identification of the policies behind the conflicting laws presented a difficulty. The majority referred to three policies underlying the Colorado guest

²¹ *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

²² *Dym v. Gordon*, 41 Misc. 2d 657, 660 (Sup. Ct. 1963).

²³ *Dym v. Gordon*, 22 App. Div. 2d 702, 253 N.Y.S.2d 802 (2d Dep't 1964) (memorandum opinion).

²⁴ *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

²⁵ *Id.* at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.

statute: (1) protection against fraudulent claims; (2) prevention of suits by ungrateful guests; and (3) the priority of the rights of injured parties in other cars in the assets of a negligent defendant. It should be noted that the majority cited no judicial or legislative authority for the third policy consideration and, according to the dissent, no authority exists.²⁶ The value of such a New York determined and gratuitously articulated policy for the Colorado statute is, at best, questionable. Furthermore, the relevance of Colorado's interest in preserving the negligent defendant's assets for the occupant of the other car involved in the collision was diminished by the fact that the driver of the other car was a Kansas resident. Furthermore, the ingratitude policy suggested, but not relied on, by the majority also fails to establish itself since, as pointed out by the dissent, Colorado is legitimately concerned with the application of this policy only in relation to matters within its legislative sphere, such as the burdens imposed on Colorado courts, the regulation of the affairs of Colorado citizens and the protection of Colorado drivers and their insurers.²⁷ When none of these is involved, it cannot be said that Colorado has an interest calling for the application of its law and especially so in light of the previous indication in *Babcock* that the seat of the relationship was not a qualitatively significant contact.

These questionable details apart, the central basis of the opinion is that

the parties were dwelling in Colorado when the relationship was formed and the accident arose out of Colorado based activity; therefore, the fact that the accident occurred in Colorado could in no sense be termed fortuitous. . . . Colorado has such significant contacts with the *relationship itself* and the *basis of its formation* [that] the application of its law and underlying policy are clearly warranted. . . . It is neither the physical situs where the relationship was created nor the time of its creation which is controlling but rather these factors in conjunction with the general intent of the parties as inferred from their actions.²⁸

The argument and conclusion is tenable, in *Babcock* terms, only if there is an *actual* policy to which enumerated contacts are directly relevant. It is submitted that the majority's third policy ground should not have been used in the first instance and, had it not been used, the majority would have had no basis upon which to find that the seat of the relationship contact was significant in choice of law terms. It seems clear that, had the

²⁶ *Ibid.*

²⁷ *Id.* at 130, 209 N.E.2d at 798, 262 N.Y.S.2d at 470 (dissenting opinion).

²⁸ *Id.* at 125, 209 N.E.2d at 794-95, 262 N.Y.S.2d at 467. (Emphasis added.)

majority limited its consideration to Colorado's articulated policies, *i.e.*, the prevention of fraudulent claims against Colorado insurers and the prevention of suits by ungrateful guests, the *Babcock* contact-interest analysis would have resulted in the choice of New York law since Colorado would have had no interest in litigation between New York parties flowing from a Colorado accident of a New York garaged and insured car where no Colorado insurer or host was involved.²⁹ In such a case, there would be no difference *qualitatively* from Ontario in *Babcock*. As stated by Judge Fuld in his dissent: "There is thus no question but that Colorado's 'contacts', though quantitatively greater than those of Ontario in *Babcock*, are still not 'significant' as respects the specific issue presented and that the 'contacts' of New York in relation to that issue are decidedly superior."³⁰ In effect, *Dym*, although in form following the process set forth in *Babcock*, failed to reach the result dictated by the analysis in *Babcock*. *Dym* viewed as significant contacts which could not be shown to be directly related to any clearly enunciated Colorado policy, in that it viewed the origin of the relationship in the accident state as having a bearing on the effectuation of Colorado's policy of limiting suits by guests against their Colorado hosts and insurers. It is submitted that in so doing *Dym* departed from the very essence of *Babcock*, which refused to choose foreign law unless there could be shown contacts relating to that law's policy, which policy would be frustrated by refusing to apply that foreign law.³¹

²⁹ *Id.* at 131, 209 N.E.2d at 798-99, 262 N.Y.S.2d at 472 (dissenting opinion).

³⁰ *Id.* at 133, 209 N.E.2d at 800, 262 N.Y.S.2d at 473 (dissenting opinion).

³¹ In *Long v. Pan. Am. World Airways*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965), plaintiffs, the representatives of the estates of Pennsylvania decedents, brought wrongful death actions in New York. The Court of Appeals, relying on *Babcock*, held that Pennsylvania, the jurisdiction in which the decedents were domiciled, where they had bought their tickets and in which the flight had begun and was to end, had the greatest interest in the litigation because of its vital concern with the administration of the estates of its decedents. Pennsylvania law, permitting substantial recovery, was therefore applied rather than that of Maryland, which would have barred the action, since Maryland's only contact was the purely adventitious circumstance that the plane crashed there and since there was no Maryland policy which could be furthered by barring the action. Thus, the result in *Long* is consistent with both *Babcock* and *Dym* since the plaintiffs were domiciliaries of Pennsylvania and, in addition, the relationship between the parties originated and was to terminate in Pennsylvania. *Long*, therefore, does not affect the discussion of *Babcock* and *Dym* presented above.

Impact of Macey on Development of Babcock

To demonstrate the extent of the departure one need only look to the most recent decision of the Court of Appeals in this area. In *Macey v. Rozbicki*,³² plaintiff and defendant, New York domiciliaries, met in Ontario where defendant maintained a summer residence. Plaintiff was to spend ten days at defendant's summer home. While defendant was driving his automobile, in which plaintiff was a passenger, in Ontario, he collided with a car owned and operated by a Canadian, with the result that plaintiff sustained personal injuries. Prior to the instant action, the defendant settled with the Canadian driver of the other car involved in the collision.³³ Thereafter, defendant sought to have plaintiff's action dismissed on the basis of the same Ontario guest statute involved in *Babcock*. Relying on *Dym*, which was factually similar to *Macey*, the trial court granted defendant's motion to dismiss and the appellate division affirmed.³⁴ The Court of Appeals reversed, relying on *Babcock*. The majority opinion, without extended discussion of policy or interest questions, distinguished *Dym* because, in that case, "the parties had separately gone to Colorado for a *comparatively long stay*, there had been no arrangement made in New York for their meeting in Colorado . . . [and] the principal situs of the relationship was in Colorado."³⁵ The Court would not distinguish *Babcock* merely because the parties in *Macey* had a "temporary meeting together in Canada for a *short visit* there, especially since the arrangements for that visit had *undoubtedly* been made in New York State."³⁶ The majority opinion indicates at least a tacit acceptance of *Dym's* finding that the situs of the relationship's origin and the length of the parties' stay ("temporary residence") are significant factors, apart from any demonstrated relevance to a policy or interest which would be affected by the choice of law made by the forum court.

This result disturbed Judge Keating who, in his concurring opinion, argued that "this case and *Dym v. Gordon* are indistinguishable and that *Dym v. Gordon* and *Babcock v. Jackson* are irreconcilable. . . ." ³⁷ To reach these conclusions, he argued that neither the origin of the relationship nor the length of the stay

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

³³ *Macey v. Rozbicki*, 23 App. Div. 2d 532, 533, 256 N.Y.S.2d 202, 203-04 (4th Dep't 1965) (memorandum decision) (dissenting opinion).

³⁴ *Macey v. Rozbicki*, 23 App. Div. 2d 532, 256 N.Y.S.2d 202 (4th Dep't 1965) (memorandum decision).

³⁵ *Macey v. Rozbicki*, 18 N.Y.2d 289, 292, 221 N.E.2d 380, 381-82, 274 N.Y.S.2d 591, 593 (1966). (Emphasis added.)

³⁶ *Id.* at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593. (Emphasis added.)

³⁷ *Id.* at 298, 221 N.E.2d at 385, 274 N.Y.S.2d at 598 (concurring opinion).

had any relation to the interests or policies of either New York or Ontario, as reflected by their varying rules of law as to a host's liability for injuries negligently inflicted on his guest.

The only facts having any significant bearing on the applicable choice of law in guest statute cases are the residence of the parties and the place in which the automobile is insured and registered . . . [since] only these facts have any relation to the policies sought to be vindicated by the *ostensibly* conflicting laws.³⁸

Thus, the fact that the parties began their relationship within Ontario and that they were planning to stay for a short period could give no greater interest to Ontario in the outcome of the New York litigation, since these facts bore no relation to the Ontario statute's purpose to protect Ontario hosts and insureds from fraudulent claims by guests. In short, the only *significant* contacts in *Babcock*, *Dym* and *Macey* were the domicile of the parties and the place where the car was registered and insured. The attempted distinction of *Dym* based upon duration of presence and an intent deduced therefrom can be seen to be inconsistent with the *Babcock* rationale of determining the significance of contacts in terms of their relevance to the policies and interests of the laws involved. Recognizing considerations of *stare decisis*, Judge Keating nevertheless urged the Court to overrule *Dym* before it could become encrusted in the law and confuse an already complex area.³⁹

Having considered the significant decisions bearing on the issue, it becomes necessary to determine, if possible, what is the principle underlying the determinations made in *Babcock*, *Dym* and *Macey*. If *Babcock* was indeed faithfully applied in *Dym*, the answer is not clear since, as pointed out above, *Dym* considers significant contacts which cannot be shown to be vitally related to the policies behind the conflicting rules, an essential element of the *Babcock* process. If, however, *Dym* is an inaccurate rendering of *Babcock*, as contended by Judge Keating in *Macey* and by Judges Fuld and Desmond in *Dym*, the *Macey* majority's attempt to distinguish *Dym* casts some doubt upon the vitality of *Babcock*. To shed some light on the *Dym* decision, it may be useful to examine the outlook or point of view from which the majority opinion in *Dym* appears to have been written. The recurring emphasis is on a rejection of *Babcock* as a declaration of the supremacy of New York "public policy" in conflicts cases involving New York domi-

³⁸ *Id.* at 295, 221 N.E.2d at 383, 274 N.Y.S.2d at 595 (concurring opinion).

³⁹ *Id.* at 298, 221 N.E.2d at 385, 274 N.Y.S.2d at 598 (concurring opinion).

ciliaries. The Court implies that plaintiff's contention that New York law should apply is "reminiscent of the days when British citizens travelled to the four corners of the world secure in the belief that their conduct would be governed solely by the law of England,"⁴⁰ and that "this argument gives one the feeling that a preference for whatever law will compensate the New York tort plaintiff lurks in the background."⁴¹ It seems justifiable to conclude that there was at least some interest in the *Dym* opinion in putting to rest any erroneous interpretation of *Babcock* as a purely parochial and chauvinistic coronation of New York law. It is submitted, however, that dictum to that effect would have been sufficient to allay fears of such an interpretation. Nevertheless, the majority of the Court in *Macey* sought to uphold the validity of *Dym* as representing "no departure from the rule announced in *Babcock*; merely an example of its application. . . ."⁴² The position of the majority in *Macey*, however, must be read in light of Judge Keating's strong concurrence and especially with regard to the *stare decisis* consideration to which he makes reference, a consideration which was likely to have carried great weight with the Court in terms of a precedent of so recent a vintage. In light of these considerations, the question of *Dym*'s present vitality hardly seems to be foreclosed and, with this possibility as a background, the question then becomes one of determining what should be the future course of decision in this area.

It is contended that *Dym* is not a logical application of the process established by *Babcock* and that the reasons for this are amply set forth in Judge Fuld's dissent in *Dym* and Judge Keating's concurring opinion in *Macey*. This being so, it is contended that, in guest statute cases, where there are no real competing interests, the choice of law problem is to be resolved on the basis of the domicile of the parties and the place where the car was registered and insured, the only significant contacts in terms of the *Babcock* interest analysis. Such an approach is not, as implied by the majority in *Dym*,⁴³ an adoption of domicile per se as the controlling consideration in these cases. Rather, it is a recognition that domicile, as a *contact*, is directly relevant to the *interest* sought to be served by the law chosen and, when there is no contact giving rise to a *real* interest in the competing jurisdiction, as in *Babcock* and *Macey*, there is actually no conflict which must be resolved. This approach may be termed mechanical only in the sense that any

⁴⁰ *Dym v. Gordon*, *supra* note 24, at 127, 209 N.E.2d at 796, 262 N.Y.S.2d at 468.

⁴¹ *Id.* at 127, 209 N.E.2d at 796, 262 N.Y.S.2d at 469.

⁴² *Macey v. Rozbicki*, *supra* note 35, at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593.

⁴³ *Dym v. Gordon*, 16 N.Y.2d 120, 126, 209 N.E.2d 792, 795, 262 N.Y.S.2d 463, 468 (1965).

logical process, once fully articulated and developed in relation to a particular problem with consistent results, can be then termed mechanical.⁴⁴

It is contended that such an approach is a logical and consistent development of the *Babcock* process and, to demonstrate this logic and consistency, it may be useful to apply it to some factually varying hypotheticals.

(1) An Ontario host and an Ontario guest are driving in New York in a car insured in Ontario and the guest is injured as a result of the host's negligence. The contacts of domicile of the parties and insurance give rise to a significant interest in Ontario, since these are precisely the factors upon which Ontario's guest statute was intended to operate. New York's only contact with the occurrence might be seen, in the language of *Babcock* and *Macey*, as the purely fortuitous circumstance that the accident took place within its borders. But, the very fact of its occurrence within New York brings into play New York's intense interest in applying its compensatory negligence rules to actions by plaintiffs injured in New York. "*Babcock* was not intended to and did not change the established law of the State of New York that a guest has a cause of action for personal injuries against a host in an accident occurring within this State whether those involved are residents or domiciliaries of this State or not."⁴⁵ Thus, in the case where the law of the state wherein the accident occurs permits no exceptions to its compensatory negligence law (and this is the sole basis for the conflict with the law of another interested state), the choice of law is determined by this pervasive policy. In effect, though a real conflict admittedly exists, the intensity of New York's policy, coupled with the status of Ontario's statute as an *exception* to its general compensatory policy in the negligence area, indicates that a New York court should not apply a law so fundamentally at variance with its own law. Thus, in the factual setting above, New York is the jurisdiction with the predominant interest and its law would therefore be the proper choice.

(2) A New York host, driving a New York insured car, negligently injures a Colorado guest in Ontario. With a guest statute in Colorado similar to that in effect in Ontario, the domicile-insurance-interest approach would indicate that the choice of New York law would be proper. Again, Ontario's only contact with the parties and the occurrence is the fortuitous happening of the

⁴⁴ Chief Judge Desmond expressed, in reply to such a characterization, the following: "'Mechanical' is a mere epithet in this connection." *Id.* at 134, 209 N.E.2d at 801, 262 N.Y.S.2d at 475 (dissenting opinion).

⁴⁵ *Kell v. Henderson*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552, 553 (3d Dep't 1966) (applying New York law on facts identical to those presented in hypothetical above).

event within its borders and this is insignificant in terms of the interest reflected by the Ontario statute. Colorado, however, has a domicile contact with one of the parties which, in a mechanical application of domicile per se as a decisive factor in the choice of law, would result in a basis for the application of its law. But, under the suggested approach, identification is only a first, inconclusive step in the choice of law process: the contact, once identified, must then be directly related to the policy or interest to be served by that jurisdiction's law before it can be considered of any significance in the choice of law. The purpose of the Colorado statute, like that of Ontario, being that of protecting Colorado hosts and their insurers from fraudulent claims, the domicile contact is insignificant since the domiciliary involved in this litigation is a member of neither of those classes and his obtaining a remedy or denial of a remedy will have no effect upon the statutory purpose of Colorado. New York's domicile contact, in contrast, is significant in terms of its policy of requiring negligent drivers to respond in damages to their injured passengers and the existence of this policy negatives any concern on its part for possible imposition on the New York insurer. In terms of the suggested approach, New York is the jurisdiction with the only significant interest in the outcome of the litigation. It should be noted, in response to a possible argument that such a plaintiff fares better in New York than he would have in Colorado, that this is hardly true if, as one is entitled to hope, Colorado were also to adopt the suggested choice of law approach, since the result should remain the same. In addition, support for the application of New York's compensatory rule of law may be found by looking upon Ontario's general compensatory policy as subordinated in cases to which its guest statute applies, but as coming to the surface when that statute has no applicability. Thus, when the case involves neither an Ontario driver nor insurer, its guest statute has no applicability and its general compensatory policy reasserts itself and lends weight to the application of New York's compensatory scheme.

(3) A New York guest and his Colorado host are riding in Ontario in a car insured in Colorado and, as a result of the host's negligence, the guest sustains personal injuries. In an action in New York, the court is faced here with a *real* conflict (in contrast to the preceding situation where, upon analysis, the purported conflict dissolved with the discovery that one jurisdiction lacked significant contacts). Again, as above, Ontario's sole contact is that it was the site of the accident and, as above, Ontario therefore lacked any significant contact with the parties or the occurrence. But, Colorado has both a domicile and an insurance contact which are directly relevant to the purposes of its statute. The Colorado defendant and his insurer are precisely the parties intended to be

protected by the statute's denial of a remedy to a party such as plaintiff. Colorado, then, has *significant* contacts which call for the application of its law. But, New York also has a domicile contact which is directly relevant to its law requiring negligent defendants to compensate persons injured as a result of their negligence and which is therefore significant in the resolution of the choice of law problem. It has been suggested that, where this is in fact the situation, a court has no basis upon which to decide which jurisdiction has the most significant relationship with the parties and the occurrence. In a case where unavoidable conflict actually exists, it has been suggested that the court apply the law of the forum and the *Kilberg* case is cited as an example of this solution.⁴⁶ According to this view, arbitrary though this approach may be, there is no less arbitrary approach possible since there is no basis upon which the court can decide which of two jurisdictions has the most significant contacts. It is suggested, however, that there may be a basis upon which such a choice can be made and it might be found again in Ontario's *general* compensatory law of negligence rising to the surface in cases to which its guest statute *exception* has no application. Thus, the resolution of the conflict between the law of the *interested* jurisdictions, New York and Colorado, might be effected by reference to the law of the *disinterested* situs jurisdiction, Ontario, to give added weight to the law with which it is in harmony. In the fact situation presented, Ontario's law is superficially in harmony with that of Colorado in that both have guest statutes; but, in the concrete situation in question, the real harmony lies in the general compensatory negligence law of New York and Ontario, since Ontario's guest statute exception has no application either to the plaintiff or to the defendant. Ontario's law, then, might be used as a basis upon which to support a choice of New York law. A further basis might be found in the fact that the forum jurisdiction is one of the interested jurisdictions and that, therefore, in cases presenting real conflicts, it should not be called upon to apply a foreign law fundamentally at variance with that of the forum. Thus, where an interested jurisdiction is also the forum jurisdiction, whether it be Colorado or New York, and it is presented with a conflict between its own law and that of another interested jurisdiction, it should be able to give added and decisive weight to the fact that it is also the forum of the action.

Conclusion

At least in regard to the guest statute situation, it seems likely that, but for the majority opinion in *Dym* and its tortured

⁴⁶ Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1233, 1242-43 (1963).

reaffirmation in *Macey*, the orderly development of the *Babcock* process to the point of narrowing the significant contacts down to those of domicile and insurance would be clear. Notwithstanding the above-mentioned factors of ambiguity, it appears at least likely that, with further litigation in this area, the position of Judges Desmond and Fuld in *Dym* and that of Judge Keating in *Macey* will become the controlling law and, it is contended, there is ample basis in logic and law for considering such a development as progressive and welcome. To the possible argument that such an approach would be as arbitrary and inflexible as the now displaced *lex loci* approach, the very clear response is that this approach negatives the arbitrariness of the latter precisely because it involves a reasoned examination of the reason for the choice of law, rather than merely pointing out the law to be applied and thereby avoiding a choice in the first instance. In a very real sense, the suggested approach indicates progress by the mere fact that it requires a carefully weighed choice and this is a sharp differentiation from the prior process of merely articulating a foregone conclusion in terms of a two-word formula.



THE PROBLEMS REGARDING THE FEDERAL TRANSFER STATUTE —MUCH ADO ABOUT NOTHING

Very often the proposed solution to a problem, upon adoption, becomes more of a burden than the problem which it was intended to resolve. The transfer statute set forth in the Judicial Code [hereinafter referred to as section 1404 (a)] enables a district court, once jurisdiction and proper venue have been established, to *transfer* any civil action to another district where it "might have been brought" for the convenience of litigants and witnesses, or in the interest of justice.¹ Enacted in 1948, it substantially replaces, in the federal courts, the common-law doctrine of *forum non conveniens*² which provided for the *dismissal*, without prejudice, of an action even where the jurisdiction and venue requirements were satisfied, when it was for the convenience of the

¹ 28 U.S.C. § 1404(a) (1964).

² *Forum non conveniens* still finds some life in the federal courts: it is available when there is no alternative federal forum to which the action may be transferred. *Menendez Rodriguez v. Pan Am. Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962). But examination of the doctrine after the adoption of the transfer statute is without the scope of this note.