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Conflict of Laws--Wrongful Death--New York Rejection of Massachusetts Damage Limitation Held Not a Violation of Full Faith and Credit (Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962))

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actions [43] awaiting a final decision upon the precise issue of whether the existence of fraudulent concealment tolls the statute of limitations. While it is clear that the holding in the principal cases removes the defense of the statute of limitations to actions brought on violations which occurred many years ago, it should be remembered that the gathering of evidence and proof of damages on such claims will present a formidable task to plaintiffs.[44]

Although there has been considerable confusion with regard to the congressional intent, the Second and Eighth Circuits seem to have adopted the ancient legal maxim that courts are not disposed to allow a party to profit from his own wrong. The Tenth Circuit in a recent decision has adopted the result reached by the instant cases.[45] Consequently, there is no doubt that a federal trend is emerging, but it remains for the United States Supreme Court to effect the judicial clarity urgently required in this growing area of civil litigation.

CONFLICT OF LAWS — WRONGFUL DEATH — NEW YORK REJECTION OF MASSACHUSETTS DAMAGE LIMITATION HELD NOT A VIOLATION OF FULL FAITH AND CREDIT. — Plaintiff, administratrix of a New York domiciliary killed when defendant's airliner crashed in Massachusetts, instituted a wrongful death action pursuant to the Massachusetts wrongful death statute [1] in a federal district court in New York, jurisdiction being based on diversity of citizenship. Defendant's motion to limit the recovery to $15,000 as prescribed by the Massachusetts statute was denied by the district court on the ground that the New York Court of Appeals had previously declared that the limitation was contrary to New York's public policy and not binding on New York courts.[2] The Court of Appeals

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[43] Public Serv. Co. v. General Elec. Co., Civil No. 7140, 10th Cir., March 15, 1963.

[44] Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles,* 57 NW. U.L. REV. 29, 52 (1962).

[45] Public Serv. Co. v. General Elec. Co., *supra* note 43.

[1] MASS. ANN. LAWS ch. 229, § 2 (1955). "If the proprietor of a common carrier of passengers . . . by reason of his or its negligence . . . causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant. . . ."

[2] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961) (dictum).

for the Second Circuit[3] reversed, one judge dissenting, holding that the district court's refusal to apply the Massachusetts limitation violated the full faith and credit clause of the federal constitution. On rehearing en banc, the Court reversed the decision of the panel, three judges dissenting, and *held* that in a wrongful death action, it is not a violation of the full faith and credit clause for a forum, wherein decedent was domiciled and defendant transacts a large segment of its business, for reasons of public policy, to refuse to recognize the damage limitation of a sister state's statute upon which the cause of action is based. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (1962), *cert. denied*, 83 Sup. Ct. 726 (1963).

Traditionally, in the conflict of laws area, where a tort committed in one state is sued on in another state, the substantive law of the state wherein the tort was committed is controlling, while the forum applies its owns procedural rules.[4] In light of this it would appear that the determination of whether damages are substantive or procedural should determine whether the law of Massachusetts or the law of New York is controlling on the amount recoverable.

In an early New York case, *Wooden v. Western N. Y. & Penn. R.R.*,[5] the Court of Appeals held that damages are strictly remedial and do not in any way affect a plaintiff's rights or his cause of action. However, this does not seem to be the generally accepted view.[6] Judge Cardozo, in the later case of *Loucks v. Standard Oil of N. Y.*,[7] refused to extend or apply the rule of *Wooden*.[8] That case also concerned the applicability of the Massachusetts limitation on damages in a wrongful death action, but the court did not find the limitation to be against the public policy of New York and held that it was binding on New York courts in assessing damages.[9]

Chief Judge Desmond, however, in *Kilberg v. Northeast Airlines, Inc.*, upon which the district court in the present case relied,

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[3] Pearson v. Northeast Airlines, Inc., 307 F.2d 131 (1962).

[4] Baldwin v. Powell, 294 N.Y. 130, 61 N.E.2d 412 (1945); Johnson v. Phoenix Bridge Co., 197 N.Y. 316, 90 N.E. 953 (1910); Murray v. New York, Ont. & W.R.R., 242 App. Div. 374, 376, 275 N.Y. Supp. 10, 12 (1st Dep't 1934); 3 BEALE, CONFLICT OF LAWS § 584.1 (1935); see RESTATEMENT, CONFLICT OF LAWS §§ 391-92 (1934).

[5] 126 N.Y. 10, 16-17, 26 N.E. 1050, 1051 (1891).

[6] Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914); Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Royal Indem. Co. v. Atchison, Topeka & Santa Fe Ry., 297 N.Y. 619, 75 N.E.2d 631 (1947); Colliton v. United Shipyards, Inc., 256 App. Div. 923, 9 N.Y.S.2d 784 (2d Dept), *aff'd mem.*, 281 N.Y. 582, 22 N.E.2d 161 (1939); Curtis v. Campbell, 76 F.2d 84 (3d Cir.), *cert. denied*, 295 U.S. 737 (1935).

[7] 224 N.Y. 99, 120 N.E. 198 (1918).

[8] *Id.* at 109, 120 N.E. at 201.

[9] *Id.* at 111-12, 120 N.E. at 202.

concluded that the substantive-procedural question was not settled in New York.[10] Since New York provides for unlimited damages in wrongful death actions,[11] he reasoned that the Massachusetts limitation was against the public policy of New York. That being the case, New York is not required to apply the Massachusetts limitation,[12] and therefore, Judge Desmond treated the measure of damages as a procedural matter, to be governed by the law of New York.[13] He stated, however, that the plaintiff must still rely on the Massachusetts statute to establish his cause of action.[14]

The position taken by Judge Desmond, that a plaintiff must rely on the Massachusetts statute for a cause of action but can recover damages measured by the New York law, had been expressly rejected by Mr. Justice Holmes in *Slater v. Mexican Nat'l R.R.*[15] He stated that it would be "unjust to allow the plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." [16] The notion that the *lex loci* determines whether or not a tort has been committed and that the *lex fori* determines the amount of liability was found to be clearly unacceptable.[17]

It cannot be said that the dictum in *Kilberg* classifies New York as a state which considers damages a matter of procedure in *all* actions. Judge Desmond prefaced the classification of damages as procedural with the determination that the Massachusetts limitation was against the strong public policy in New York *as to death action damages*.[18]

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[10] Kilberg v. Northeast Airlines, Inc., *supra* note 2, at 41, 172 N.E.2d at 529, 211 N.Y.S.2d at 137 (dictum).

[11] N.Y. DECED. EST. LAW § 132.

[12] Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

[13] Kilberg v. Northeast Airlines, Inc., 9 NY.2d 34, 41-42, 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 137 (1961) (dictum).

[14] *Id.* at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136 (dictum).

[15] 194 U.S. 120 (1904). The plaintiff brought this action in a Texas circuit court for wrongful death. The basis of the action was a Mexican statute, death having occurred in Mexico. The Court held that it was error to instruct the jury that damages were to be measured by Texas law.

[16] *Id.* at 126.

[17] *Ibid.* Mr. Justice Holmes reaffirmed this view in Cuba R.R. v. Crosby, 222 U.S. 473 (1912) and Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914); see Maynard v. Eastern Airlines, Inc., 178 F.2d 139 (2d Cir. 1949). *But see,* Klaxton Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) wherein the Court found that prejudgment interest was an incidental item of damages with respect to which a forum court has been commonly free to apply its own law or some other law as it sees fit. *Id.* at 498.

[18] Kilberg v. Northeast Airlines, Inc., *supra* note 13, at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137. Judge Fuld and Judge Froessel wrote separate concurring opinions in which the former found no justification for going beyond the precise issue presented (whether the plaintiff had a second cause

The question presented to the Second Circuit in *Pearson* was whether the district court, relying on Judge Desmond's opinion in *Kilberg* as the law in New York, had violated the full faith and credit clause [19] in not giving effect to the Massachusetts limitation. The requirements of full faith and credit in the area of state statutes have been subject to varying interpretations. It has been said that "the essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred." [20] It has also been said that the clause was intended to impose a duty on the forum to apply the statutes of another state upon which a cause of action is found.[21]

However, this clause has also been construed so as to allow a forum, which has a "legitimate interest" in the outcome of the suit, to apply all of its own law, without regard to the law of the place where the injury occurred.[22] In *Alaska Packers Ass'n v. Industrial Acc. Comm'n*,[23] a contract of employment was drawn in California for work which was to be performed in Alaska, where the injury occurred. The contract provided that should any injury occur, the parties would be bound by the Alaska compensation law. On the other hand, California compensation law provided that the California commission was to have exclusive jurisdiction in all controversies arising from injuries without the state where the injured employee was a resident of California at the time of the injury and the contract of employment was made in California. The Supreme Court found the "legitimate interest" of California to be (1) an expressed legislative policy that the California compensation laws should have exclusive applicability in all actions

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of action for breach of contract to carry safely), and the latter stated that the Chief Judge's dictum was "in effect overruling numerous decisions of this court, and completely disregarding the overwhelming weight of authority in this country." *Id.* at 46, 172 N.E.2d at 532, 211 N.Y.S.2d at 142.

[19] U.S. CONST. art. IV, § 1.

[20] First Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396, 400 (1952) (concurring opinion).

[21] Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 544 (1926). The author points out that to argue that the only duty imposed by the clause is to recognize the validity of the foreign statute, and then contend that the statute only operates as law in the courts of the state which enacted it, is to make the full faith and credit clause meaningless. *Ibid.*

[22] Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939); see Richards v. United States, 369 U.S. 15 (1961) (dictum).

[23] Alaska Packers Ass'n v. Industrial Acc. Comm'n, *supra* note 22, at 547.

within its courts, and (2) to prevent the injured employee from becoming a public charge of the state.[24]

Where the interests of two states come into conflict, the Supreme Court weighs the two interests one against the other and accordingly determines whether the full faith and credit clause requires the forum to apply the law of the other state.[25] In *Hughes v. Fetter*,[26] the Supreme Court reversed the decision of the Supreme Court of Wisconsin which had dismissed a wrongful death action instituted in Wisconsin for a death suffered in Illinois. A Wisconsin statute permitted an action only for deaths caused within the state. In weighing the interests involved, the Court held that the Wisconsin statute violated the full faith and credit clause. It noted that while the clause does not automatically compel a forum to subordinate its own statutory policy to a conflicting statute of another state, Wisconsin was not antagonistic to wrongful death actions[27] and to give effect to the Wisconsin exclusionary rule might amount to a deprivation of all opportunity to enforce a valid death claim created by Illinois.[28]

The majority in the panel decision in *Pearson* stated that the conflict between the strong unifying principle embodied in the full faith and credit clause and the public policy of New York, as expressed in the *Kilberg* dictum, was analogous to the conflict presented in *Hughes*.[29] The panel, applying the rationale of *Hughes*, found that New York had no antagonism to wrongful death actions, and as between the two conflicting interests, that of full faith and credit should prevail.[30] The panel found that if the defendant were deprived of the protection of the limitation imposed by the law which created the liability, he would be unjustly treated.[31]

On rehearing en banc, the majority noted that it and the minority agreed New York had sufficient "contacts" with the transaction to warrant the application of all New York law.[32]

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[24] See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 19-20 (1958).

[25] Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, *supra* note 22, at 502.

[26] 341 U.S. 609 (1951).

[27] *Id.* at 612.

[28] *Id.* at 613.

[29] Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 134, *rev'd en banc*, 309 F.2d 553 (2d Cir. 1962).

[30] *Ibid.*

[31] *Id.* at 135; Davis v. Mills, 194 U.S. 451, 454 (1904); Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904).

[32] Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 557 (2d Cir. 1962). The Court found the sufficient contacts of New York to be (a) the purchase of the ticket at a New York office of a foreign corporation doing a large part of its business in New York; (b) the decedent's domicile in New York, and the fact that most of the flight was conducted over New York; and (c)

However, the majority did not agree with the argument that although New York was not required to give *any* faith or credit to the Massachusetts statute, once it gave *some* faith and credit, it should have given *full* faith and credit.[33] Rather, a single transaction may contain several distinct issues in which either or both states might have a "legitimate interest" to the extent that each state would be justified in applying its own law.[34] The fact that New York had adhered to a traditional choice-of-law rule by designating the Massachusetts statute as the basis of the cause of action, said the Court, does not mean that that statute is controlling on all the issues or that New York is precluded from applying its own law to an issue in which it has a "legitimate interest."[35]

While both *Pearson* and *Kilberg* set forth public policy arguments to sustain their finding that the Massachusetts limitation is not applicable in New York, the approaches of the courts are not the same. *Kilberg,* applying the public policy of New York against limitations on damages in a wrongful death action, determined that damages are a procedural matter and are thus governed by New York law. *Pearson,* however, cautions against making substantive-procedural determinations. The majority in *Pearson* stated they would not condone a forum's application of its own rules in a "wanton manner by labeling matters 'procedural' while arbitrarily choosing the parts of a foreign statute it wishes to enforce by labeling them 'substantive'." [36]

The *Pearson* approach is an extension of the "legitimate interest" theory as developed by the Supreme Court in *Alaska Packers* which would allow a forum, having a legitimate interest in the outcome, to apply *all* of its own law. Recognizing that an action contains several distinct issues and that the forum may have a "legitimate interest" in some of these issues, *Pearson* makes the substantive law of the forum applicable to those issues in which it has the "legitimate interest" while the substantive law of the *lex loci* controls on the other issues. It is this application of the substantive law of both the *lex loci* and the *lex fori* which makes unique *Pearson's* application of the "legitimate interest" theory.

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the New York domicile of the administratrix and beneficiary under the wrongful death act.

[33] *Ibid.*

[34] *Id.* at 560. The Court found the distinct issues in the instant case to be the conduct which created the liability, the parties who may bring the action, the extent of the liability, and the period during which the cause of action may be sued upon. *Id.* at 561.

[35] *Id.* at 560-61.

[36] *Id.* at 559.

What *Pearson* does, in effect, is split the Massachusetts statute. It applies the first part of that statute which gives rise to the liability, but disregards the second part which limits the amount of that liability. It could be argued that the splitting of the Massachusetts statute in the present case did not prejudice the defendant because in either jurisdiction it would have been liable for damages.[37] It would seem that this argument could not be made if, for example, the Massachusetts statute, instead of limiting the liability of carriers, had made them immune from suit. The question would then arise whether a court, following the *Pearson rationale,* could constitutionally apply the part of the Massachusetts statute which gives a cause of action for wrongful death, and disregard the part of that statute which would make the defendant immune from such suit.[38] Certainly, such a splitting of the Massachusetts statute would prejudice the rights of the defendant. Application of the *Pearson* rationale, under such circumstances, would seem to undermine the entire rationale of the full faith and credit clause.

CONSTITUTIONAL LAW — SIXTH AMENDMENT AND DUE PROCESS — APPOINTMENT OF COUNSEL REQUIRED FOR INDIGENT DEFENDANT IN ALL CRIMINAL CASES. — Petitioner, an indigent defendant, convicted in a Florida state court of a felony — breaking and entering with intent to commit a misdemeanor — filed a habeas corpus petition in the Supreme Court of Florida alleging that the refusal of the trial court to appoint defense counsel was a denial of his right to counsel as guaranteed by the sixth amendment of the federal constitution.[1] That court denied relief.

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[37] However, the dissent in *Pearson* would not make such an argument. A layman would certainly feel that he would have been prejudiced if his liability were extended from $15,000 to $160,000 (the amount recovered by the plaintiff in the present case). Pearson v. Northeast Airlines, Inc., *supra* note 32, at 567-68.

[38] The argument has also been made that since the Massachusetts statute is the source of the plaintiff's right to maintain the wrongful death action, the Massachusetts legislature, by providing for the liability limitation, intended to create only a limited right where none existed before. 35 ST. JOHN'S L. REV. 357, 361 (1961).

[1] U.S. CONST. amend. VI provides in part that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense." Under the laws of the State of Florida, however, a court can only appoint counsel in criminal cases where a capital offense is charged. FLA. STAT. ANN. § 909.21 (1944).