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RECENT DECISIONS

CONFLICT OF LAWS — NEW YORK PUBLIC POLICY PERMITS AVOIDANCE OF MASSACHUSETTS' LIMITATION ON WRONGFUL DEATH RECOVERY.— Plaintiff's intestate, a New York domiciliary, was killed when one of defendant's airplanes crashed in Nantucket, Massachusetts, on a flight from a New York airport. The Massachusetts wrongful death statute contained a $15,000 maximum recovery limitation.1 Plaintiff brought suit in the New York Supreme Court alleging three causes of action: for damages under the Massachusetts wrongful death statute; for breach of contract of safe carriage, alleging damages of $150,000 for "loss of accumulations of prospective earnings"; and for conscious pain and suffering. The Appellate Division reversed the Special Term's denial of defendant's motion to dismiss the contract action. The Court of Appeals affirmed the judgment of the Appellate Division, agreeing that the action sounded in tort for negligently causing death. However, the Court of Appeals went on to say that if plaintiff amended his first cause of action, it would be possible if the proof so justified, to recover more than the $15,000 maximum specified in the Massachusetts Act. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

The discussion of the effect of the Massachusetts limitation on a New York domiciliary occasioned two separate concurring opinions which took issue with the majority's apparent diversion from the specific question before the Court. A party, on appeal, generally is not permitted to raise questions in the Court of Appeals which have not been presented nor passed upon by the courts below.2 The Court's enormous task of harmonizing the law and cases of the entire state requires such a rule.3 Naturally, if one party raises a new question on appeal which, although not raised below, would

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have conclusively required a decision in his favor, it would be a "perversion of justice" to deny its consideration by the appellate court. However, in the principal case, as Judge Fuld's concurring opinion points out, the question of avoiding the Massachusetts limit was not argued by either party and was not even raised or presented by the record. The Court took it upon itself to discuss the issue and to advise the plaintiff that the $15,000 limitation was not binding. The wide scope of the language used and its possible consequences are noteworthy.

At common law there was no recovery for wrongful death. The first effort to remedy the situation was the passage of Lord Campbell's Act in England in 1846, and at the present time every American state has some type of statutory remedy for wrongful death. However, the passage of these statutes produced the problem of deciding whether the substantive right, or cause of action created in one state, would be enforced in another. Generally, state courts entertain suits arising under foreign statutes if the particular statute creating the cause of action does not violate the public policy of the forum. But, having decided to recognize a right created elsewhere, ordinary reason warns that the court carefully examine the particular foreign statute to determine just what the right entails.

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6 The propriety of the majority's concern with the Massachusetts statute is questionable in view of the underlying concept that the Court of Appeals has no advisory jurisdiction. See COHEN & KARGER, op. cit. supra note 3, at 361-62.
7 Crowley v. Panama R.R., 30 Barb. 99 (N.Y. 1859); Goodrich, Conflict of Laws 294-96 (1949).
8 Fatal Accidents Act, 1846, 9 & 10 Vict. c. 93.
9 Prosser, Torts 710 (2d ed. 1955). Most of the American statutes, "death acts," are modeled after Lord Campbell's Act and create a new cause of action in favor of designated persons; others, "survival acts," seek to preserve the cause of action vesting in the decedent at the moment of death and enlarge it to include the damages resulting from his death. Ibid. See also, McCormick, Damages 335-37 (1935).
11 E.g., Loucks v. Standard Oil Co., supra note 10; Higgins v. Central New England & W.R.R., 155 Mass. 176, 29 N.E. 534 (1892). See Beale, Selections from a Treatise on the Conflict of Laws § 378.3 (1935). In Loucks v. Standard Oil Co., supra note 10, Judge Cardozo noted that courts do not close their doors to a right created elsewhere unless "help would violate some fundamental principal of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." Id. at 111, 120 N.E. at 202. Public policy is defined as "the law of the state, whether found in the Constitution, the statutes or judicial records. . . ." in People v. Hawkins, 157 N.Y. 1, 12, 51 N.E. 257, 260 (1898).
12 No action can be brought for death resulting in another state unless a right is given by the laws of that state. Thus, of necessity, the forum where
Thus, in the principal case, a cause of action for wrongful death arose under the Massachusetts wrongful death statute and the bulk of the Court's opinion was concerned with just how much of that statute governed the action brought by a New York domiciliary in a New York court.

It is a rule of the law of conflicts that the substantive law of the place where the tort action arose governs the action itself, while the law of the forum dictates the procedure to be followed. The courts of the forum are then presented with the difficult problem of determining what is "substantive" and what is "procedural." Considering itself not bound by any controlling New York decisions, the majority in the principal case undertook to decide the proper classification for the measure of damages in this action under the Massachusetts wrongful death statute. The Court pointed out that any limitation on recovery in a wrongful death action was so completely contrary to New York's public policy that a New York court should refuse to apply the limitation portion of the Massachusetts statute—at least where a New York domiciliary was concerned. Swayed by this strong public policy, the Court decided to treat the measure of damages in death actions as procedural and thus a matter controlled by New York law.

By classifying the measure of damages as procedural, the Court of Appeals took issue with most American courts which feel that the measure of damages in a wrongful death action is part and parcel of the cause of action, and thus governed by the law of the place where the tort action is brought must look to a foreign statute. See Beale, op. cit. supra note 11, at § 378.1; Goodrich, op. cit. supra note 7, at 296.

The determination is indeed a difficult one, see Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333 (1933); See also Justice Frankfurter's comments in Guaranty Trust Co. v. York, 326 U.S. 99, 108-10 (1945).

However, as Judge Froessel's concurring opinion indicates, the Court of Appeals affirmed an Appellate Division decision in Royal Indem. Co. v. Atchison T. & S.F.R.R., 272 App. Div. 246, 70 N.Y.S.2d 697 (1st Dep't), aff'd mem., 297 N.Y. 619, 75 N.E.2d 631 (1947), which held, inter alia, that an action for wrongful death and the extent of damages are governed by the law of the place where the tort was committed. In Riley v. Capital Airlines, Inc., 24 Misc. 2d 457, 199 N.Y.S.2d 515 (Sup. Ct. 1960), it was decided that the limitation on recovery in the West Virginia death statute was a matter of substance. In Dike v. Erie R.R., 45 N.Y. 113 (1871), referring to the damages arising from a breach of contract, Judge Allen declared that "the rule and measure of damages pertains to the right and not to the remedy." Id. at 118.

Other elements besides a strong local policy which may enter into the forum's classification of what is substantive or procedural are noted in Leflar, op. cit. supra note 13, at 104-06. The formation of New York's policy on death action recovery is traced by Judge Desmond in the instant case.
place where the deceased suffered injury.\textsuperscript{17} In line with the prevailing opinion, there are some New York cases which also had taken the view that the laws of the place where the injuries causing death were inflicted, govern the cause of action for wrongful death, as well as the extent of the damages recoverable.\textsuperscript{18} Despite this prevalent attitude, there is a somewhat analogous situation in which a different result is recognized. It may happen that the state \textit{where the action is brought} has a statute representative of a strong public policy which prohibits recovery beyond a certain amount. In this case, the statute of the forum may mark the top limit of recovery there.\textsuperscript{19} Such a situation is clearly distinguishable from the principal case where the Court is seeking to avoid and exceed the limit of the place of the wrong, as imposed by its statute.\textsuperscript{20}

Those opposing this prevailing view as to the classification of the measure of damages, look upon it as a matter concerned with the remedy, rather than the right itself, and therefore procedural.\textsuperscript{21} This theory occasions at least two serious difficulties when we have a right created solely by statute, as is the case in the wrongful death action which was non-existent at common law, and the statute itself contains the measure of damages to be awarded.\textsuperscript{22}

\textsuperscript{17} Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904); McCormick, DAMAGES \textsuperscript{6} (1935); RESTATEMENT, CONFLICT OF LAWS \S 417 (1934).

\textsuperscript{18} Royal Indem. Co. v. Atchison, T. & S.F.R.R., \textit{supra} note 15; Faron v. Eastern Airlines, Inc., 193 Misc. 395, 84 N.Y.S.2d 568 (Sup. Ct. 1948). The circumstances of the \textit{Faron} case were very similar to those in the principal case: the complainant sought recovery for the wrongful death of the decedent who died in an airplane crash in Connecticut which had a $20,000 recovery limitation in its wrongful death statute. The court held that the right to bring the action for wrongful death and the extent of the damages depended on the laws of Connecticut. See also Loucks v. Standard Oil Co., 224 N.Y. 99, 109, 120 N.E. 198, 201 (1918); \textit{cf.} Riley v. Capital Airlines, Inc., \textit{supra} note 15.

\textsuperscript{19} See LEFLAR, CONFLICT OF LAWS 119, 220 n.57 (1959); RESTATEMENT, CONFLICT OF LAWS \S\S 417, comment a at 606 (1934). Similarly, when the court in Wooden v. Western N.Y. & P.R.R., 126 N.Y. 10, 26 N.E. 1050 (1891) refused to apply the Pennsylvania damage law which permitted unlimited recovery, New York had a limitation on recovery in death actions of $5,000.

\textsuperscript{20} It seems that by imposing a limitation on recovery, any legislature would be acting within its proper bounds, especially where there was no recovery at all at common law. In Jackson v. Anthony, 282 Mass. 540, 185 N.E. 389 (1935), when confronted with a Rhode Island death statute which fixed both the right and the extent of the right, the Massachusetts court declared that “to substitute for the Rhode Island measure of damages the Massachusetts punitive formula for their ascertainment would produce a result which neither Legislature . . . contemplated.” \textit{Id.} at 546, 185 N.E. at 391. Similarly, it can be recognized that any attempt to \textit{completely ignore} a limitation imposed by a statute would produce a result which the legislature did not contemplate.

\textsuperscript{21} See Wooden v. Western N.Y. & P.R.R., \textit{supra} note 19; GOODRICH, CONFLICT OF LAWS 251 (1949); LEFLAR, \textit{op. cit. supra} note 19, at 118.

\textsuperscript{22} If a statute is silent as to the amount recoverable or if it prescribes no limitation, it can be argued that the legislature did not intend to make the damages a part of the right but merely a remedy to be ascertained in each
For example, in the principal case, plaintiff's right to maintain the wrongful death action arose only because a Massachusetts statute created such a right and yet a New York court set about to avoid a portion of the statute merely by classifying it as remedial or procedural. The sound contention can be raised that the Massachusetts legislature inserted the limitation on recovery because it intended to create only a limited right where none existed before. Viewed in this light, the limitation portion of the statute is more than a remedy—it is the right itself. Secondly, as Judge Froessell's concurring opinion points out, the New York court has no power to determine what the public policy of Massachusetts should be; the Massachusetts public policy against allowing more than a limited recovery can be just as strong as the New York abhorrence of any such limitation. Yet, New York stepped in and substituted its policy for the damage portion of the Massachusetts statute.

The principal case indicates that in future cases involving similar circumstances, New York will apparently delete a portion of a statute promulgated by the legislature of a sister state, which portion limits the amount of recovery in wrongful death actions, and substitute New York's "policy," which prohibits the imposition of a limitation on recovery in such actions. The qualifying word "apparently" is used here because the Court of Appeals made

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23 Cf. The Harrisburg, 119 U.S. 199 (1886) where the Court, while holding that the suit in admiralty for recovery in a death action had to be commenced within the period prescribed by the statute, stressed that if the admiralty was to adopt the statute it had to "take the right subject to the limitations which have been made a part of its existence." The Court went on to say that "the liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." Id. at 214.


26 When the Massachusetts death statute was amended in 1959, the legislators saw fit to retain a limitation although they raised the amount to $20,000.

27 In the past session of the legislature, there was a proposed amendment to the Decedent Estate Law § 130 which, although it died in committee of the State Assembly, is some further illustration of New York's policy. The amendment would have provided that "where a resident of this state originated a plane flight in this state aboard a common carrier pursuant to purchase of passenger accommodations the airline company at the time of the purchase of such passenger accommodations and/or contract for transportation shall be deemed as a part of such contract to consent that if a passenger's death thereafter occurs outside the state as the result of an airplane accident during the course of the trip so purchased, the accident shall be deemed to have occurred in the State of New York in an action commenced pursuant to section 130 of this chapter." A. Inf. 1117, Pr. 1117 (1961).
its attitude known in a portion of the opinion that cannot properly be considered the holding.

From the Court's language, it appears that its entire discussion of the limitation controversy would not have been "necessary" if recovery had been sought for someone other than a New York domiciliary. The question then arises as to how a sister state, Massachusetts, for example, would treat a New York resident seeking recovery in that state under a cause of action arising in New York. Another interesting aspect of the principal case would present itself if the defendant were permitted to remove the case to a federal court in New York. The federal court would look to New York law for the conflict of laws principles to be applied and the problem would present itself as to the weight to be given to the statements of the Court of Appeals in the principal case concerning the treatment to be afforded the measure of damages. Finally, the question of giving full faith and credit to the laws of a sister state is almost certain to arise since the statutory measure of damages, despite New York's policy, is generally considered substantive rather than a matter of procedure; and consequently, when the portion of one state's statute dealing with the measure of damages is ignored by a sister state, substantive rights may be affected. The constitutional issues involved, i.e., denial of full

29 In John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182-83 (1936), the United States Supreme Court held that the Georgia Supreme Court denied full faith and credit to the laws of New York by classifying as remedial, a matter which a New York statute, as construed and applied by New York's highest court, regarded as determining the substantive rights of the parties. Similarly, in Atchison, T. & S. F. Ry. v. Sowers, 213 U.S. 55, 69, (1909), the Court noted that § 906 of the Revised Statutes gave the same full faith and credit to the "Public Acts" of territories (New Mexico was then a territory) as was given to state laws under the Constitution, and that consequently, a cause of action arising in such a territory was to be given the same force and effect if brought elsewhere. It was not to be enlarged because one party saw fit to go to another jurisdiction where service could be obtained on the defendant.

Finally, in Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904), an action was brought in a United States Circuit Court sitting in Texas, under a Mexican death statute. On certiorari, Justice Holmes stated that "it seems to us unjust to allow a 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." Id. at 126. The Court concluded that the Circuit Court was wrong in disregarding the Mexican law and applying the Texas statute, even in the absence of a full faith and credit requirement. Id. at 128.

But see Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953), where the Supreme Court held that the "full faith and credit" clause of the Constitution did not compel Pennsylvania to apply the Alabama statute of limitations to a case arising under the Alabama death statute.
faith and credit or possibly, violation of due process,\textsuperscript{30} merit serious consideration.

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\textbf{CONTRACTS—SPECIFIC PERFORMANCE OF BUILDING CONTRACT—
ARBITER’S AWARD OF SPECIFIC PERFORMANCE CONFIRMED BY COURT.}
Appellant construction company agreed to erect a five million dollar building upon its own land for subsequent rental to respondent. The contract provided for arbitration of all disputes and empowered the arbiter to grant specific performance. The Court of Appeals, affirming the confirmation of an award of specific performance, held that the Supreme Court had acted properly in confirming the award, since, had this matter appeared directly before the court in a suit requesting equitable relief, the court would not have abused its discretion by granting specific performance under the facts of the case. \textit{Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.}, 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

The \textit{Grayson-Robinson} case bears a striking resemblance to the hotly-discussed \textit{Matter of Staklinski},\textsuperscript{1} in which the Court of Appeals confirmed an arbitration award of specific performance which required an employer to continue in its service an officer whom it considered disabled. Both cases came before the court as arbitration awards of specific performance requiring confirmation. Both awards granted affirmative relief in areas where courts of equity have traditionally declined to do so. Both were confirmed by a sharply divided court. In \textit{Matter of Staklinski} the plaintiff received from the court only what he requested—confirmation, nothing more, nothing less. There was not the slightest suggestion that if the merits had appeared originally before the court the result would have been the same.\textsuperscript{2} The majority opinion in \textit{Grayson-Robinson}, however, would appear to contain a far different implication. Chief Judge Desmond states that:

\textquote{[\textit{A}s\textsuperscript{3}]s\textsuperscript{3}uming that the equity court in an original suit would have discretion to refuse specific performance, and even making the very large assumption that}

\textsuperscript{30}See generally \textit{Goodrich, Conflict of Laws} 242-44 (1949). Compare \textit{Home Ins. Co. v. Dick}, 281 U.S. 397 (1930), in which the Supreme Court held that two New York corporations were deprived of property without due process, where Texas had applied a statute which imposed \textit{a greater obligation} than the one agreed upon by the parties in a contract made and to be performed outside of Texas.


\textsuperscript{2}\textit{Matter of Staklinski}, \textit{supra} note 1, at 163-64, 160 N.E.2d at 80, 188 N.Y.S.2d at 543.