New York's Expanding Empire in Tort Jurisdiction: Quo Vadis

Richard V. Carpenter
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By Richard V. Carpenter*

WHEN Saul of Tarsus fell afoul of local custom in Jerusalem and occasioned a tumult, he was seized by the authorities and was tied up to await the customary inquisition under the lash. But when the governor discovered his prisoner was a Roman citizen, he became alarmed since it was not legal to bind a Roman. Saul was promptly untied and thereafter treated with respect due a citizen of the Empire. As the proceedings dragged on, Saul appealed to the emperor's court before whom a Roman citizen ought to be tried and the governor again quickly decided to send him to Rome for trial.¹ Such were the special privileges attendant on imperial citizenship in a relatively barbarous age. Today the courts of New York seem determined to make the residents of their Empire State the privileged imperial citizens of our own time wherever they may find themselves.

Miller v. Miller and Prior Developments

A New Yorker visited Maine for a few days and there accepted a ride in a car registered and insured in Maine, driven by his brother and owned by his sister-in-law, both residents of Maine. An accident occurred within Maine boundaries and the New Yorker was killed. Shortly thereafter the brother and sister-in-law conveniently moved to New York where the victim's administrator brought suit against them under the Maine statute for wrongful death.² The issue of the case turned on the trial court's dismissal of the defendants' partial defense—that recovery, if any, should be limited to the $20,000 maximum prescribed by Maine's wrongful death statute as it existed at the time of the accident. In 1968 the New York Court of Appeals in its 4-3 decision of Miller v. Miller³ held that the limitation of damages prescribed by

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the Maine wrongful death statute would not apply to the suit in behalf of New York survivors for the death of a New Yorker.

This decision was a remarkable extension of the now familiar decision in *Kilberg v. Northeast Airlines, Inc.*\(^4\) and *Babcock v. Jackson*\(^5\) in which the New York Court of Appeals had taken a lead in modifying the erstwhile exclusive role of the place-of-wrong rule in determining the choice of law applicable to a tort with multi-state elements. In *Kilberg* the New York Court of Appeals approved of recovery under the Massachusetts wrongful death act\(^6\) without regard to the limitation on the amount of recoverable damages prescribed by the act. Under the facts of the case, however, the deceased victim, a New York resident, had purchased his ticket and enplaned at LaGuardia Airport in New York for a flight routed largely over New York territory but which ended disastrously in Nantucket, Massachusetts, where it crashed, killing everyone on board. The defendant, Northeast Airlines Company, regularly did a large part of its business in New York where the fatal flight had originated. The *Babcock* decision allowed a guest auto passenger to recover damages against the host owner and driver of the car for injuries suffered in an accident in Ontario. The Ontario guest statute\(^7\) would have barred recovery, but the court stressed the facts that both parties to the suit were New Yorkers, the defendant's car was registered and insured in New York, and the host-guest relationship had begun and was to end in New York.\(^8\)

The restrictive caution with which the New York Court of Appeals initially viewed its analysis in the *Babcock* case is evidenced by its decision 2 years later in *Dym v. Gordon*\(^9\) when it refused to apply forum law to a suit between two New Yorkers for injuries suffered in Colorado whose guest statute\(^10\) would have barred recovery. The court distinguished the case from *Babcock* on the grounds that the host-guest relationship had not arisen in New York but was centered in Colorado where the two New York parties were spending some months as summer students, and that the accident involved collision with another car occupied by non-New Yorkers who might be unable to recover fully if the New York plaintiffs were allowed to share the maximum insurance

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provided by the defendant's insurance policy. The *Dym* decision, however, seems to have been a temporary retreat, its authority shaken by the decision in *Macey v. Rozbicki* only a year later and completely demolished by *Miller* and subsequent cases hereinafter discussed.

The New York court has strongly influenced the modern revolutionary trend in conflicts rules affecting torts. This influence has been exerted principally through the *Kilberg* and *Babcock* decisions. Until the *Miller* decision this influence has, in the opinion of the writer, been salutary. The courts of California, Pennsylvania, Iowa, Florida and Rhode Island have followed New York's lead in adopting the *Kilberg* rule, thus abandoning the place-of-wrong rule as the sole standard for the measure of damages. The Seventh Circuit Court of Appeals has also decided a diversity case initiated in Indiana on the same principles. On the other hand Kansas, Oklahoma, Maryland, Missouri, Arkansas and Texas have continued their allegiance to the place-of-wrong standard for measuring damages, as have federal courts in diversity.

12. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966). In *Macey*, the plaintiff, a guest passenger, brought suit against the host driver (her sister) and the owner of the car (her sister's husband). Although the host-guest relationship arose in Ontario, where the accident occurred, the court pointed out that "the relationship of two sisters living permanently in New York was not affected or changed by their 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. Every fact in this case was New York related. . . ." *Id.* at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593.
14. See note 91 infra.
20. "The measure of damages for a tort is determined by the law of the place of wrong." *Restatement (First) of Conflict of Laws* § 412 (1934).
cases initiated in Maine, Ohio, Delaware and North Carolina respectively.

Similarly at least nine states, Wisconsin, Minnesota, New Hampshire, Kentucky, Maine, Missouri, California, Rhode Island and Iowa, have followed New York's lead in deciding cases in accord with the philosophy of the Babcock court while the courts of Florida, Oregon and Mississippi have strongly endorsed that philosophy. On the other hand, the courts of four states—West Virginia, Delaware, Maryland, and Michigan—have continued to adhere to the place-of-wrong rule with respect to host-guest liability. However, the West Virginia court rendered its decision in 1963 when it was apparently unaware of the Babcock case which had been decided shortly before. Other state courts which have continued to abide by the place-of-wrong rule with respect to intra-family liability would presumably also reject the Babcock rule in respect of host-guest liability. These include the courts of Connecticut, Louisiana, North Carolina and Tennessee.

33. Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
34. Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966).
41. Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743, 747 (Fla. 1967).
In tort decisions involving issues other than the measure of damages (Kilberg) and host-guest liability (Babcock), the New York courts have also chosen to apply New York law favoring the plaintiff's recovery rather than the more restrictive rules of the states where the various accidents occurred. Such other issues have included interspousal liability, the liability of an owner of a car involved in an accident and perhaps the immunity of charitable organizations. But until the Miller case, every decision by the New York or any other American court applying Kilberg or Babcock principles has been restricted to a fact situation in which all parties to the suit have been residents of, or otherwise substantially connected with, either the forum state or other states whose laws were in accord with forum law. Not until the Miller decision do we find any American court invoking its own forum law to impose on a non-resident defendant harsher sanctions than would be permitted by the law of defendant's state of residence where occurred all the events culminating in the cause of action. The Miller decision constitutes a sharper break with the traditional American concepts of territorial jurisdiction than heretofore has been seen in our country.

Admittedly, certain extenuating circumstances existed in the context of Miller which have thus far been omitted in our statement. For one thing the defendants were natives and exresidents of New York who had moved to Maine for business purposes just a year or so before the accident. They returned to New York and re-established their residence there shortly after the accident. Also, subsequent to the accident the Maine Legislature amended its wrongful death law by repealing the limitation on damages, although this was not retroactive. With these facts as a backdrop, Judge Keating, speaking for the court majority, held that New York had the predominant interest in the protection and regulation of the rights of the persons involved. He reasoned that the problem involved the manner in which the family of one whose life has been

54. See Blum v. American Youth Hostels, Inc., 21 App. Div. 683, 250 N.Y.S.2d 522 (1964), in which the court said that Kilberg was not reached because the laws of both states were the same.
56. Id. at 14, 237 N.E.2d at 878, 290 N.Y.S.2d at 736.
wrongfully taken is to be compensated for the loss which they have suffered. New York has chosen to prohibit any limitation on recovery and is vitally concerned with the manner in which the wife and children of a New York decedent will be compensated for the economic loss they have suffered as a result of the wrongful killing of their "bread winner." He rejected any countervailing claim in favor of application of Maine law because the defendant had not relied upon it, stating:

[W]e perceive no substantial countervailing considerations of the kind described above which would warrant the rejection of our own law in favor of that of Maine. The Maine statute with which we are concerned here, dealing as it does with the nature of the remedy for concededly tortious conduct, is obviously not the kind of statute which regulates conduct and, therefore, is not the kind of statute upon which a person would rely in governing his conduct. The only justifiable reliance which could be present here would involve the purchase of liability insurance in light of the remedies available to an injured person. No such reliance is claimed here.

Then, adverting to possible unfairness to the insurer, Judge Keating said:

With respect to the liability insurer—the real party in interest—a somewhat different situation obtains. The insurer may have expected that Maine's limitation on death recoveries would apply to accidents in Maine. But here in determining whether any unfairness will result by virtue of the application of New York law, we may also consider the fact that the policy in question was not and could not have been limited to affording protection only to accidents occurring in the State of Maine (Maine Rev. Stat. Ann. tit. 29, § 781 et seq.) and that, therefore, the possibility of liability in excess of $20,000 was certainly not unexpected and was insured against. Moreover, an analysis of the actuarial process as well as an inquiry to the Insurance Commission of the State of Maine reveals that the presence of the limitations had no substantial effect on insurance premiums, and a refusal to apply Maine law here will have an infinitesimal effect, if that, on insurance rates in Maine.

The court went on to hold that the application of New York law would not unduly interfere with a legitimate interest of Maine in regulating the rights of its citizens with regard to conduct within its borders. Thus:

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58. Id. at 18, 237 N.E.2d at 880, 290 N.Y.S.2d at 739. Some support for this paramount emphasis on the law of the state of residence of the decedent and the plaintiffs may be found in the literal language of Justice Traynor in his opinion in Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), but the decision of that case is readily distinguishable on its facts from Miller. See text accompanying notes 131-132 infra.

59. 22 N.Y.2d at 19-20, 237 N.E.2d at 881, 290 N.Y.S.2d at 740.

60. Id. at 21, 237 N.E.2d at 882, 290 N.Y.S.2d at 741.
Here again we perceive no reason to deny application of our own law. To the extent that the Maine limitation evinced a desire to protect its residents in wrongful death actions, that purpose cannot be defeated here since no judgment in this action will be entered against a Maine resident. Maine would have no concern with the nature of the recovery awarded against defendants who are no longer residents of that State and who are, therefore, no longer proper objects of its legislative concern. It is true that, at the time of the accident, the defendants were residents of Maine but they would have no vested right to the application of the law of their former residence unless it could be demonstrated that they had governed their conduct in reliance upon it [citation omitted]—a reliance which is neither present nor claimed in this case. Any claim that Maine has a paternalistic interest in protecting its residents against liability for acts committed while they were in Maine, should they move to another jurisdiction, is highly speculative and ignores the fact that for the very same acts committed today Maine would now impose the same liability as New York.61

Judge Keating’s reliance on the defendants’ post-accident change of domicile suggests the astonishing notion that the jural relations between the parties (viz., their respective rights and liabilities) will shift in chameleon fashion as the parties may thereafter change their residence from state to state. However, if the opinion is read as a whole it appears likely that the post-accident events are not prerequisites to the disposition of the case, but are expediently used for supplemental or makeweight arguments because they were ready at hand under the unique facts of the Miller decision. Miller is open to the construction that New York claims the paramount interest and power to apply its law and policy to provide full compensation in any wrongful death case where the decedent and the surviving plaintiffs are New York residents, regardless of the place of accident or the residence of the defendant.62 Neither the state of defendants’ residence where the accident occurred nor the defendants themselves were deemed to have a sufficient countervailing claim to the protections afforded by their state law, because the defendants were insured or in any event ought to have had insurance protection. Two New York lower courts have so construed Miller despite the absence of any of the extenuating circumstances or post-accident events involved in those cases.63

61. Id. at 21-22, 237 N.E.2d at 882, 290 N.Y.S.2d at 741-42.

One New York trial court, however, after citing the Miller decision, completely
New York's expanding claim to legislative jurisdiction exemplified by the *Miller* line of cases may simply be an extension of its approach 2 years earlier in the Court of Appeals' extraordinary decision in *Seider v. Roth*. The *Seider* decision is a story in itself. It asserted unprecedented *judicial* jurisdiction for the New York courts just as *Miller* claimed unprecedented *legislative* jurisdiction. Under the *Seider* rule the New York courts may assert quasi-in-rem jurisdiction against any tort defendant in the world who happens to carry liability insurance with an insurance company doing business in New York. Since New York is a major financial and insurance center of this country, this rule seems to expose most responsible defendants to the ubiquitous jurisdiction of the New York courts regardless of such defendants' lack of contact or relationship with that state. It is perhaps of more than passing significance that the New York courts should be reaching toward universal legislative jurisdiction in *Miller v. Miller* so soon after their revolutionary grab for unparalleled judicial jurisdiction under the *Seider* decision. The earlier decision may reflect the same expansionist spirit in the New York Court of Appeals which later moved it to reach its *Miller* decision. It is in order, therefore, to comment further on the *Seider* case before completing our discussion of the cases coming after *Miller*.

**Seider v. Roth**

*Seider v. Roth* involved an auto accident in Vermont in which a New Yorker was injured by the negligence of a Canadian. The Canadian carried an ordinary automobile insurance policy with the Hartford Accident and Indemnity Company, which policy had been issued in Canada. Hartford, of course, does business in New York. The New Yorker filed suit in New York against the Canadian by serving him personally disregarding its relevance to the case at hand. In Hancock v. Holland, 63 Misc. 2d 811, 313 N.Y.S.2d 455 (Sup. Ct. 1970), the supreme court refused to apply New York law to an auto accident that occurred in Georgia. The plaintiffs, both New York domiciliaries, were passengers in the car of the defendant, a citizen of Georgia, when the vehicle collided with another auto, driven by a South Carolina resident. Both cars were registered in Georgia and the defendant's car was insured there. The court held that the Georgia guest statute was applicable because Georgia had a superior interest in having its law applied. The court cited *Miller* but did not refer to its facts or attempt to distinguish them from those of the case at bar. The decision seems contrary to *Miller* and clearly conflicts with the results reached by the Tiepkema and MacKendrick courts.

64. See cases cited at note 63 supra.
in Canada and garnisheeing the "debt" which Hartford allegedly "owed" the insured. Hartford's debt under its policy to the insured was based on its obligation to indemnify the insured. The garnisheed debt was thus contingent upon the existence of a valid judgment against the insured. At the same time, the validity of any judgment against the insured in the New York proceeding depended upon the validity of the garnishment of the debt. The court's validation of both the garnishment of the debt and the judgment, by their interdependent effect, was a bit of legerdemain which Judge Burke aptly characterized in his dissenting opinion as a bootstrap operation:

The jurisdiction . . . is based upon a promise which evidently does not mature until there is jurisdiction. The existence of the policy is used as a sufficient basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue. "This is a bootstrap situation."

The rationale advanced in support of the decision is that it merely converted the injured party's claim against the insurance company into a "direct action" which result was said to be warranted by the United States Supreme Court in deciding Watson v. Employers Liability Assurance Corp. Under that decision the Supreme Court sustained a Louisiana statute allowing a direction action against an insurer contrary to the policy's express terms, but under the facts of that case the injury had actually occurred in Louisiana; in contrast, New York had no connection either with the accident in Seider or with the issuance of the policy.

The Seider decision has been subjected to considerable criticism and attack and its constitutionality has been questioned. During
the following year two of the four judges who comprised the slim majority in the decision, retired from the court. Consequently, on an appeal in a similar case, Simpson v. Loehmann,72 the defendant asked the court to reconsider its decision. The Court reaffirmed the Seider rule, this time by a vote of 5-2. Judge Breitel, a new judge who later dissented in the Miller case, agreed with the majority solely on the principled basis of stare decisis, beginning his concurring opinion as follows:

I concur but only on constraint of Seider v. Roth [citation omitted] so recently decided by this court. Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the Seider case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.

It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.73

And again later in his opinion, he said:

As for the effect of the rule, the practical consequences are highly undesirable. This State, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases. [Citation omitted.] On the basis of the rule in the Seider case, it will be a rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with this state.

Judge Bergan, who had dissented in Seider,74 now lined up with the majority by concurring in Breitel's stare decisis rationale. Thus, the curious result is that the Seider rule is still law in New York by fiat of the New York Court of Appeals which at least count strongly disapproved of the rule by 4 to 3.

Nevertheless, under compulsion of Erie v. Tompkins,75 the Second Circuit Court of Appeals applied the Seider rule in a 6 to 3 en banc decision in the diversity case of Minichello v. Rosenberg.76 Writing for the court, Judge Friendly predicted that the constitutionality of the Seider rule would be upheld by the United States Supreme Court. However, to keep its application within constitutional bounds he would impose two caveats or limitations: (1) it should be applied only when the

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73. Id. at 314, 234 N.E.2d at 674, 287 N.Y.S.2d at 640.
74. Id. at 316, 234 N.E.2d at 675, 287 N.Y.S.2d at 641.
75. 304 U.S. 64 (1938).
plaintiff is a bona fide resident of New York, and (2) if the insurance proceeds should be inadequate to satisfy the plaintiffs' full claim of damages, plaintiffs should be estopped from asserting collateral estoppel in any subsequent proceeding.

**Miller and Subsequent Cases**

The cumulative effect of the *Seider* and the *Miller* decisions was manifested in the 1969 case of *Tjepkema v. Kenny*. This case involved the wrongful death of a New Yorker in Missouri, allegedly due to the negligence of defendant, a Missouri resident. The trial court struck out the partial affirmative defense that recovery, if any, must be subject to Missouri's statutory limitation of $25,000. The Appellate Division unanimously affirmed in a per curiam opinion. It ruled that New York's unrestricted measure of damages must apply since the decedent and all plaintiffs were New York residents. The defendant's residence in Missouri, where the accident occurred, and the apparent absence of any connection between him and the State of New York were not even mentioned as factors for consideration by the court. Here New York's assertion of far-reaching legislative jurisdiction is compounded by the fact that its judicial jurisdiction over the Missouri defendant was based solely on the quasi-in-rem attachment of his insurer's obligations under his auto insurance policy in accord with the *Seider* rule.

Finally, in *MacKendrick v. Newport News Shipbuilding & D. D. Co.*, an action was brought for the wrongful death of a New York resident employed by an independent contractor. Pursuant to arrangements made in Pennsylvania between the decedent's employer and a subcontractor for equipment in a Polaris submarine, the decedent went to Virginia to do repair welding on a submarine at defendant's plant. In the course of his work he was asphyxiated. The defendant pleaded in part defense that recovery should be limited to $30,000 by the Virginia Wrongful Death Act, urging that it was a Virginia corporation

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77. This limitation had previously been imposed by the district court in Varady v. Margolis, 303 F. Supp. 23 (S.D.N.Y. 1968), and was subsequently applied in Farrell v. Piedmont Aviation Co., 411 F.2d 812 (2d Cir. 1969).

78. This limitation is contrary to usually accepted principles governing collateral estoppel. United States v. Balanovsky, 236 F.2d 298 (2d Cir. 1956), cert. denied, 352 U.S. 968 (1957); Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189 Miss. 73, 191 So. 94 (1939). Even if collateral estoppel were recognized, however, it would only apply to findings of fact. Presumably it would not impose on the second court in another state the choice of law made by the first court in the quasi-in-rem proceedings.


domiciled in Virginia and having no connection with the State of New York. Judge Spiegel, sitting in the trial court, struck the defense, saying:

Clearly the public policy of our courts is to protect New York domiciliaries, wherever possible, from denial of recovery in another jurisdiction. . . . 81

The Miller case and the two cases following it were all wrongful death actions involving the issue of a limitation on the amount of recovery imposed by the law of the states where the accidents occurred and the defendants resided. With respect to other specific issues New York has also chosen to apply its own rules favoring the plaintiff's recovery rather than more restrictive rules of the states where the various accidents occurred. As we have seen above, such specific issues have included host-guest liability. 82 They also have included interspousal liability, 83 the liability of an owner of a car involved in an accident 84 and perhaps the immunity of charitable organizations. 85 In every such case so far, all parties to the suit were residents of New York. It seems likely that when occasions arise the New York courts will extend the principles of the Miller case to these other specific issues 86 when the injured plaintiffs reside in New York, without regard to the law of the place where the injuries occur or the defendants reside. 87

Constitutional Considerations

A. Due Process

When a state court is called upon to choose between conflicting rules of two or more jurisdictions (whether or not one of those jurisdictions be its own state), its power, strictly speaking, is limited only by

81. Id. at 1011, 302 N.Y.S.2d at 140.
86. In light of the Miller court's reliance upon the precedent of Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), it is clear that the Miller rule will be applied to the issue of host-guest liability.
87. It should also be noted that in its 1962 decision in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962), the New York Court of Appeals declined to apply its own statutory rule to include in damages an item for prejudgment interest. It is quite possible that the New York court, in its current expansionist phase, will overrule its restrictive Davenport decision when the issue next arises.
full faith and credit and by due process, whose strictures on the choice of conflicting laws have become very elastic under the suzerainty of the modern Supreme Court. Nevertheless the Supreme Court continues to indicate that there are some limits beyond which it will not permit a state court to trespass. In *Wells v. Simonds Abrasive Co.*\(^8^8\) in 1953 Chief Justice Vinson said:

> The states are free to adopt such rules of conflict of laws as they choose,. . . subject to the Full Faith and Credit Clause and other constitutional restrictions. The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state.

In the course of his opinion in *Richards v. United States*,\(^8^9\) Chief Justice Warren used language which may reveal the current approach of the Supreme Court to the question. He said:

> Where more than one State has *sufficiently substantial* contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.\(^9^0\)

Under the broad rule enunciated in *Richards*, are the *Miller* and *Tjepkema* decisions constitutional? If a citizen of State A commits a completely local act in State A which accidentally results in physical injury or death to a resident of State B who happened at the time to be present in State A for some purpose of business or pleasure totally unrelated to the accident or to the resident of State A who caused the accident, does State B then have "sufficiently substantial" contact with the event to impose on State A's resident a liability for his act substantially in excess of the liability which State A would permit? In the modern trend courts have gone far to find "sufficiently substantial" contacts to justify one choice of law or another in personal injury cases.\(^9^1\)

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88. 345 U.S. 514, 516 (1953).
89. 369 U.S. 1 (1962).
90. Id. at 15 (emphasis added).
91. The present writer favors most of this modern trend. See Carpenter, *New Trends in Conflicts Rules Affecting Torts: A Chronological Review*, 1 LOYOLA L.J. 187 (Chicago 1970). In some situations, however, the traditional territorial limitations of legislative jurisdiction should be observed. Two federal cases decided in the past six years illustrate this principle: Tramontana v. S.A. Enprese de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965); Ciprari v. Servicos Aereos Cruzeiro, 245 F. Supp. 819 (S.D.N.Y. 1965), *aff'd*, 359 F.2d 855 (2d Cir. 1966). Both cases involved the deaths of Americans traveling in Brazil due to the negligence of a Brazilian airline having no substantial connection with the United States. No questions of due process or international law were explicitly raised but in each case the court without hesitation limited the amount of recovery to the pitifully inadequate maximum ceiling
However, only the New York courts have claimed that State B in the context of our question would have such "sufficiently substantial" contact to justify the imposition of its own heavy sanctions on the hapless State A resident. The question becomes whether State B's imposition of its heavy sanctions under the circumstances would deprive the State A resident of liberty and property without due process of law. Although the United States Supreme Court has never specifically decided this question, there still stands one bastion case which may indicate the approach the Court will take if it is called upon to decide the issue—Home Insurance Co. v. Dick. 92

This case involved a suit in a Texas court by a permanent resident of Texas against a Mexican insurance company on a Mexican policy insuring a boat in Mexican waters. The plaintiff temporarily resided in Mexico at the time he acquired his interest in the policy and at the time he suffered the loss of the boat. Jurisdiction was based on garnishment of sums owed to the defendant under reinsurance contracts with American insurance companies. Suit was filed more than a year after the loss and the question at issue was whether this fact barred the action by reason of a stipulation in the policy that suits thereunder must be filed within 1 year. This stipulation was valid and enforceable by Mexican law but was void by Texas statute. The Texas courts applied their own law to disallow the defense and the question was appealed to the United States Supreme Court. The Supreme Court reversed on the ground that to override the Mexican time limitation by application of the Texas statute would deprive the defendant of property without due process of law. Justice Brandeis, in the course of his opinion for the unanimous Court, said:

[1]n the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy

for damages permitted by Brazilian law. Brazil was deemed to be the jurisdiction with the most significant relationship to the accident. But in the unlabored quickness of the decisions may be discerned the court's implicit sense of fair play and justice. Perhaps the New York courts would distinguish these decisions on the ground that new factors come into play when the choice is between domestic law and that of a foreign nation, jealous of its territorial sovereignty. Here any arbitrary application of domestic law to a foreign occurrence, which application adversely affected the rights of a foreign citizen, could be a cause for embarrassment to the United States Government. The paramount interest of the Federal Government in foreign affairs therefore does limit the freedom of a state court (or a federal court sitting as such in a diversity case) to extend the application of its domestic law under such circumstances. However, the difference, if any, between such a situation and a conflict between two of our own "sovereign" states is only one of degree.

92. 281 U.S. 397 (1930).
were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guarantee against deprivation of property without due process of law.

The New York courts would predictably counter that the rule of Home Insurance Co. should be restricted to contract cases where the reasonable expectations of the parties and predictability of results are paramount considerations. However, to say that the insured plaintiff in Home Insurance Co. had any expectations whatsoever with respect to the policy's adhesion clause for time limitation would be quite as fictitious as any expectations of the parties contemporaneous with a negligent tort.

Whether such tenuous foundations for legislative jurisdiction will withstand examination through the revealing lens of due process is open to serious question. With the expansion of legislative jurisdiction in New York, the Supreme Court will undoubtedly have the opportunity to deal with the issue.

B. Equal Protection

The Miller and Tjepkema decisions also raise disturbing questions about judicial discrimination between plaintiffs of different residential backgrounds; such discrimination would seem to violate the equal protection clause of the Federal Constitution. For example, in the Tjepkema situation suppose the defendant had killed not only the New Yorker but also two Missouri residents, A and B. The families of A and B also lived in Missouri at the time of the accident, but thereafter A's family moved to New York while B's remained in Missouri. Sup-

93. In Siegmann v. Meyer, 100 F.2d 367, 368 (2d Cir. 1938), the late Learned Hand, who was a pioneer in rejecting the old place of wrong rule, stated: "[I]t is basic ... that legislative jurisdiction ... is territorial, and that no state can create personal obligations against those who are neither physically present within its boundaries, nor resident there, nor bound to it by allegiance."

So also Thomas Aquinas in his treatise on human law said, "[T]he subjects of one city or kingdom are not bound by the laws of the sovereign of another city or kingdom, since they are not subject to his authority." Summa, pt. I, 2d pt., question 96, art. 5.

pose also the defendant had no substantial assets from which he could satisfy any judgments taken against him except his insurance policy which provided maximum public liability protection of $100,000. When the New Yorker’s survivors sought to preempt the insurance proceeds by garnisheeing the insurer’s obligation, A’s and B’s survivors also filed suit there. New York would have become a forum conveniens for all three suits since the satisfaction of their respective claims would entail a marshaling of defendant’s assets—by interpleader or otherwise—in order to effect an apportionment of the insurance proceeds among the claimants. Finally, assume that the defendant made a general appearance in the New York court, thus avoiding any question of jurisdiction under the Seider rule raised by Judge Friendly’s opinion in Minichello v. Rosenberg.

Assuming that each plaintiff can prove actual damages of $100,000, what rule of damages would the New York court apply to the respective claims and how would it apportion the insurance proceeds among the claims? Under Miller $100,000 full damages would be awarded on the first claim. The New York court would have open at least three alternate choices of law with respect to the two other claims. First it could apply Missouri law and limit the recovery on the respective claims for A and B to $25,000 each. Or second, the court could include the claimants for A’s death under New York’s imperial mantle of protection since such claimants have become residents of that state before filing suit. Such solution would be consistent with Judge Keating’s handling of the defendants’ post-accident change of residence in the Miller case. This result would open the door to contrived forum shopping but in view of New York’s parochial favoritism for its own residents perhaps ill-favored non-residents should be permitted some forum shopping for the purpose of avoiding unjust discrimination. If this second method were adopted, $100,000 would be awarded on each of the first two claims but only $25,000 on the claim for B. The court’s third alternative would be to apply New York law to all three claims, thus allowing a $100,000 judgment on each claim. It is clear of course, that the method of apportionment of the proceeds will depend on the rule of damages applied to the claims. If the apportionment were made on a strictly pro-rata basis, under the first method the

claimants for the New York decedent would get $66,666 of the insurance money while the claimants for A and B would get only $16,666 each. Under the second method the first two claims would get approximately $44,444 while the claimants for B would receive $11,111. Under the third method the claims would be treated equally and each group of claimants would receive $33,333 of the insurance.

The results reached under either of the first two methods certainly smack of invidious discrimination when New York's sole contact with the underlying cause of action is the residency of the favored claimants within its boundaries. Possibly the New York courts might try to avoid the worst aspects of this discrimination under the first two methods by apportioning the insurance proceeds in the first instance on the basis of the full amount of damages suffered by the respective claimants. Then, theorizing that Missouri law only limits the amount of such damages which can be collected, the court could divide the money equally three ways until the Missouri-based claimants had received the maximum permitted by their law, leaving the balance to the New York-based claimants. Thus, under the first method, $25,000 would be paid on the claims for A and B, respectively, while the New Yorker's surviving family would receive the balance of $50,000; under the second method, $25,000 would be paid on the claim for B and the balance would be divided equally between the first two claims, namely $37,500 for each.

There remains the tantalizing possibility that the New York courts may be approaching the point where they will adopt the third method suggested above: namely, they will apply New York law in all tort claims without regard to the residence of either party or the place where the tort occurs. It is at least arguable that the New York cases are heading in this direction. For example, under its Miller rationale the New York Court of Appeals has dispensed with the defendant's residence as a factor prerequisite to New York's legislative jurisdiction. The 1969 decision in Tooker v. Lopez99 served to clarify the New York court's position. The essential facts here resembled those in Babcock v. Jackson100 except for the additional fact that a second victim was injured who lived in Michigan where the accident occurred. The New York suit involved only the claim for the New Yorker's wrongful death. The dissent, however, commented on the anomaly or inconsistency of allowing recovery for the New Yorker under New York law while the Michigan

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passenger injured under identical circumstances would be barred from recovery by Michigan's guest statute. Replying to this objection Judge Keating, writing the majority opinion 1 year after his Miller opinion, said:

Applying the choice-of-law rule which we have adopted, it is not an "implicit consequence" that the Michigan passenger along with Miss Lopez should be denied recovery. Under the reasoning adopted here, it is not at all clear that Michigan law would govern. (Gaither v. Myers, 404 F.2d 216, 224 [D.C. Cir. 1968]).

We do not, however, find it necessary or desirable to conclusively resolve a question which is not now before us.

It will indeed be a surprising development if, following Judge Keating's suggestion, New York should ever impose higher standards of care or greater liability on its own residents than would be imposed by the law of Michigan where the injuries were inflicted and the injured passenger resided. At least such a course would dissipate the suspicions of partiality and invidious discrimination which are engendered by the Miller and Tjepkema decisions. It seems too much to expect that New York would adopt a choice-of-law rule which actually discriminated against its own residents. It is more probable that if the New York court moves further in that direction it will go the whole way and will apply its preferred New York law in every tort action whenever it chooses, without regard to the residence of either party or the place of tort. This solution will presumably eliminate any question of invidious discrimination or equal protection. On the other hand it will magnify the problem of "due process" if the court attempts to exercise legislative jurisdiction to redefine the rights and liabilities of parties with whom it has no connection and in respect to events or transactions wholly unrelated to New York. New York would then be following the old rule of Machado v. Fontes, recently repudiated by the English courts.

The Contrary Trend in England

It is enlightening to compare recent developments in the English courts with those in New York. Under Phillips v. Eyre, as interpreted

101. MICH. COMP. LAWS ANN. § 257.401 (1967).
102. Gaither v. Myers is poor support for Judge Keating's implied position since it involved admonitory legislation imposing liability for a car thief's torts on a car owner who had expedited the theft by leaving keys in the car. The District of Columbia's legislative jurisdiction could scarcely be questioned since the defendant's penalized conduct occurred within the District.
103. 24 N.Y.2d at 580, 249 N.E.2d at 400, 301 N.Y.S.2d at 528.
104. [1897] 2 Q.B. 231.
105. L.R. 6 Q.B. 1 (1870). In Phillips the plaintiff brought an action for assault
and applied in *Machado v. Fontes*, the rule was long established in England (though seldom applied and at times subject to criticism and attack) that its courts would apply English law to substantive aspects of a foreign tort even when both parties were foreign citizens and residents of the foreign locus delicti. Just at the time when the New York courts seem to be approaching close to that view in *Miller and Tjepkema* (although still limited to situations where at least the plaintiff is a local resident), England has beaten a retreat in recent decisions by the Court of Appeals and by the House of Lords in the case of *Chaplin v. Boys*.

The facts in *Chaplin v. Boys* were relatively simple. In a road accident between two Englishmen while both were on duty with H. M. Armed Forces in Malta, the plaintiff was seriously and permanently injured. Nevertheless he suffered no economic loss since during hospitalization and treatment he was retained in the armed forces and his pay and expenses were paid. Upon his disability discharge in England he almost immediately went into private employment at higher pay. Because he suffered no pecuniary damages, under Maltese law he would have been entitled only to £53 special damages. When the plaintiff sued in the English court, the trial judge invoked the authority of *Machado*. 

and false imprisonment against the Governor of Jamaica who, during a period of martial law, had ordered the plaintiff to be arrested, placed on a ship and taken away. The defense was that a legislative act, passed subsequent to the insurrection, retroactively conferred immunity for liability upon the governor for the exercise of his authority in the suppression of the rebellion. The court held that this defense was good, rejecting the plaintiff's contention that the act could not have any extraterritorial effect. The court then went on to say that a suit for a wrong committed abroad could be brought in an English court only if the following two conditions were met: "First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Id. at 28-29. These two conditions constitute the "rule" of *Phillips v. Eyre*. 

106. [1897] 2 Q.B. 231. In *Machado* the plaintiff, apparently not domiciled in England, brought an action for libel against another non-English Domiciliary. Although the libel was published in Brazil, where an action for libel would not lie, the court held that the defendant's conduct was actionable in England. The court, relying on *Phillips v. Eyre*, L.R. 6 Q.B. 1 (1870), applied the following test to the case at bar: "[W]here the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful . . . both by the law of this country, and also by the law of the country where it was committed. . . ." [1897] 2 Q.B. at 233. Although the defendant would not have been civilly liable in Brazil, he would have been subject to criminal sanctions. The court was therefore of the opinion the act was "wrongful" under the above criterion.


ado v. Fontes\textsuperscript{109} to apply the English law to award him £ 2,250 general damages for pain and suffering and loss of amenities (in addition to the £ 53 special damages). The Court of Appeals dismissed the defendant's appeal by 2-1 vote\textsuperscript{110} and the House of Lord's dismissed the further appeal by unanimous agreement.\textsuperscript{111}

Dismissal of the appeals and affirmance of the trial court's award of general damages under English law were unmistakably indicated so long as the authority of Machado was upheld. In fact, however, a majority of judges who sat on the case in the Court of Appeals and in the House of Lords explicitly disapproved of the Machado decision. Yet, with the exception of Lord Diplock on the Court of Appeals, who was the sole dissenter, all finally reached the same conclusion that the appeals should be dismissed in view of the fact that both parties were Englishmen normally resident in England. In so doing they followed diverse routes of reasoning.

On the Court of Appeals Lord Denning adopted the new American approach of seeking "the proper law of the tort," \textit{i.e.}, the law of the country with which the parties and the act have the most significant connection.\textsuperscript{112} Before doing so, however, he indicated clearly that Machado v. Fontes\textsuperscript{113} was not binding on the court:

Test it in this way: Suppose that in the present case the parties involved in the accident had all been Maltese citizens, ordinarily resident in Malta. The injured man would naturally seek his remedy in the courts of Malta. The cause of action and the measure of damages would be governed by that law. [If the action were brought in England, the] English courts would apply to the law of Malta. The plaintiff would not get a new head of damages by the mere fact that the defendant had happened to come to England.\textsuperscript{114}

Only Lord Upjohn approved of the Machado rule.\textsuperscript{115} He also rejected the "proper law of the tort" test which Lord Denning had advanced:

I would reject any idea that such a principle should be introduced in this country. There is no relevant analogy between the proper law of the contract and a similar concept in tort, for while contracting parties can choose the law by which their relationship shall be governed, the victim of a tort cannot. . . \textsuperscript{116}

Lord Upjohn was of the opinion that the law of the forum should ap-

\begin{itemize}
  \item \textsuperscript{109} [1897] 2 Q.B. 231.
  \item \textsuperscript{110} Boys v. Chaplin [1968] 2 Q.B. 1 (C.A.).
  \item \textsuperscript{111} Chaplin v. Boys [1969] 3 W.L.R. 322 (H.L.).
  \item \textsuperscript{112} [1968] 2 Q.B. at 20.
  \item \textsuperscript{113} [1897] 2 Q.B. 231.
  \item \textsuperscript{114} [1968] 2 Q.B. at 24.
  \item \textsuperscript{115} \textit{Id.} at 26-30.
  \item \textsuperscript{116} \textit{Id.} at 32.
\end{itemize}
ply, for "all questions of the remedy, both as to its nature and kinds or heads of assessment of pecuniary damage, must be determined in an English action entirely by English principles."\textsuperscript{117}

In his dissent, Lord Diplock rejected \textit{Machado}, arguing that the strict rule of \textit{lex locus delicti} should apply in this case.\textsuperscript{118} He disregarded, as being irrelevant for choice of law purposes, the domicile of the parties:

Apart from the chauvinistic dicta of Wightman, J., in \textit{Scott v. Seymour (Lord)}, 1 H. & C. 219, 235, . . . it has never been suggested that a British subject when he goes abroad carries with him as an extra-territorial aura the English . . . law of tort; and any development of our own rules of conflict of laws in the direction of making civil liability for wrongs dependent upon the nationality or . . . the domicile of the wrongdoer or of the victim would seem to me to be a retrograde step in the latter half of the twentieth century.\textsuperscript{119}

In the House of Lords tribunal, Lord Donovan merely affirmed the "general rule" that an English court will apply its \textit{lex fori} to a foreign tort in most cases.\textsuperscript{120} He expressly disapproved of \textit{Machado v. Fontes}, however: "It is enough to say that the case in question [\textit{Machado}], while within the rule, was an abuse of it; and that considerations of public policy would justify a court here in rejecting any such future case of blatant 'forum shopping.'"\textsuperscript{121}

Lord Pearson, after considering several alternatives to the existing rule,\textsuperscript{122} concluded that the \textit{lex fori} doctrine "has advantages of certainty and ease of application. It enables the English courts to give judgment according to their own ideas of justice.\textsuperscript{123} He recognized, however, that such a rule encouraged forum shopping. To discourage it, "it may be desirable as a matter of public policy for the English courts . . . to apply the law of the natural forum. . . . [I]t would prevent a repetition of what may have happened in \textit{Machado v. Fontes}."\textsuperscript{124}

Lord Hodson, although observing that the "proper law of the tort" rule has led to uncertain results, nevertheless used that approach.\textsuperscript{125} He concluded that the law of England was properly applied because, al-

\textsuperscript{117} Id.
\textsuperscript{118} Id. at 43-45.
\textsuperscript{119} Id. at 44.
\textsuperscript{121} Id. at 336.
\textsuperscript{122} Id. at 349, 352-56.
\textsuperscript{123} Id. at 356.
\textsuperscript{124} Id. at 356-57 (footnote omitted).
\textsuperscript{125} Id. at 333.
though the accident occurred in Malta, the parties to the action were English, who happened to be serving in Malta. Hodson also declared that the plaintiff would fail if the court applied the lex locus delicti to the substantive question of the right to damages for pain and suffering, but that "would be a just result if both parties were Maltese residents or even if the defendant were a Maltese resident." 128

Lord Wilberforce accepted the rule enunciated in Phillips v. Eyre. 127 However, he believed that it should not be applied in all situations; rather, it should be rejected if "clear and satisfying grounds are shown why it should be departed from and what solution . . . should be preferred." 128 Wilberforce continued:

The tort here was committed in Malta; it is actionable in this country. But the law of Malta denies recovery for pain and suffering. Prima facie English law should do the same: if the parties were both Maltese residents it ought surely to do so; if the defendant were a Maltese resident the same result might follow. But in a case such as the present, where neither party is a Maltese resident or citizen, further enquiry is needed . . . . 129

General Comment

The New York courts are thus far alone among American courts in applying the harsher sanctions of forum law in any factual situation similar to Miller v. Miller 130—i.e., where the defendant resides and committed the tort exclusively within another state whose law would limit his liability. The two cases most closely analogous are readily distinguishable on their facts. In Reich v. Purcell, 131 a wrongful death case, the California Supreme Court invoked the law of Ohio, as the plaintiffs' and decedents' state of residence, to grant full compensation despite the restrictive law of Missouri where the deaths occurred. However, the defendant in that case did not reside in Missouri but in California, the

126. Id. at 332 (emphasis added).
127. Id. at 339. Lord Wilberforce thought that Machado v. Fontes should be repudiated because it permitted an action in England although the defendant's conduct was not actionable in the place of the act. In short, Wilberforce equated "not justifiable" (the second condition of Phillips v. Eyre, see note 105 supra) with "actionable." Machado, of course, gave a broader meaning to "not justifiable," to include criminal penalties. See note 106 supra. Lord Hodson believed that Machado should have been overruled for the same reason. [1969] 3 W.L.R. at 329. Lord Diplock, who dissented in the court of appeals, had come to the same conclusion. [1968] 2 Q.B. 1, 44 (C.A.).
128. [1969] 3 W.L.R. at 343 (emphasis added).
129. Id.
131. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
forum state, whose law was similar to that of Ohio. The decision, therefore, went no further in principle than Babcock v. Jackson.\textsuperscript{132} Missouri had as little interest in restricting recovery in a suit between residents of Ohio and California, whose laws are equally liberal, as Ontario had in the Babcock case where the suit was between residents of the single state of New York. The second case is Tiernan v. Westext Transport, Inc.,\textsuperscript{133} a diversity action in Rhode Island, which had adopted the Babcock rule. Despite the Massachusetts statutory limitation to recoverable damages\textsuperscript{134} the court indicated it would apply Rhode Island law to allow full compensation for the wrongful death of a Rhode Islander in Massachusetts while riding in the car of a Delaware corporation driven by a New Yorker, which car was struck by a tractor-trailer of a Texas corporation driven by a Vermonter. None of the defendants had an office in or any substantial relationship with either Massachusetts or Rhode Island.\textsuperscript{135} The judge said the interest in restricting the amount of damages under its statute was limited to protection of its citizens from large recoveries and to the deterrence of negligence on its highways. No Massachusetts defendant was here involved and the allowance of a larger recovery would not conflict with Massachusetts's concern in deterring negligence. The court did not mention, however, that none of the defendants' domiciliary states limited damages for wrongful death.\textsuperscript{136}

On the other hand, the Pennsylvania Supreme Court although previously committed to the Kilberg rule and by inference to the Babcock rule,\textsuperscript{137} in 1970 decided Cipolla v. Shaposka\textsuperscript{138} which was directly contrary to the Miller decision. Here the plaintiff was a Pennsylvanian who was injured in Delaware while riding as a guest in a car owned and insured in Delaware and driven by the defendant-host who resided in Delaware. Recovery would have been barred by the Delaware guest statute but not by that of Pennsylvania. The Pennsylvania court applied Delaware law to deny recovery, saying "it seems only fair to permit a defendant to rely on his home state law when he is acting within the state." The court also paraphrased language of Professor Cavers as follows:

\begin{enumerate}
\item 293 F. Supp. at 1264.
\end{enumerate}
Inhabitants of a state should not be put in jeopardy of liability exceeding that created by their state’s laws just because a visitor from a state offering higher protection decides to visit there. This is, of course, a highly territorial approach, but “departures from the territorial view of torts ought not to be lightly undertaken.”

Nevertheless, the court’s approach in the Miller decision was at least partially correct. As a general rule a forum court may properly invoke its own law and implement its own policies with respect to any event or transaction in the outcome of which it has a legitimate interest. It is very doubtful that the Restatement’s latest draft correctly represents the attitude of modern courts when it formulates the “general principle” that the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties. It is simply not true that there is always one particular state whose law ought to govern tortious behavior, and that ideally the choice of law should be uniform regardless of which of the interested states happens to be the forum.

More typical today is the result reached by the New York Appellate Division in Kell v. Henderson whose facts were just the reverse of those in Babcock v. Jackson. In Kell, an Ontario host and guest drove into New York and there had an accident. The court did not apply the Babcock domiciliary rule but continued to adhere to New York’s territorial rule so that the guest recovered compensation for his injuries. Doubtlessly the New York court was influenced by its belief that the New York rule was the better law; clearly, the result was more just than if Ontario law, which rigidly excluded guest recovery, had been applied. Similarly in cases involving conflicts in rules governing inter-spousal or host-guest liability the Kentucky and Wisconsin courts, although previously committed to the Babcock domiciliary rule in allowing their

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144. Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

These decisions and that in Kell are supported by a reasonable application of Professor Leflar’s choice-influencing considerations which are being invoked by more
state residents to recover for out-of-state accidents, nevertheless continued to adhere to their territorial law to allow non-residents to recover for injuries suffered locally within the forum state.

Today it would be prudent for a plaintiff's attorney to engage in a bit of judicious forum shopping prior to commencing an action. For example, in the unique case of Schwartz v. Schwartz a New York housewife sued her husband in an Arizona court to recover damages arising from an Arizona auto accident, despite Arizona's interspousal immunity law. If the suit had been brought in New York, the court under Babcock would clearly have applied its own law to permit recovery whereas there was no precedent to indicate what law Arizona would apply. Fortunately for the plaintiff, the Arizona court decided there was no conflict of interest: it disclaimed any Arizona interest in the marital relationship of the parties while that state's interest in safe driving on its highways was not adversely affected by the application of New York law to permit recovery against the husband. The court's lack of enthusiasm for its own archaic law probably played a part in the outcome. Had the decision gone otherwise, however, the plaintiff's attorney would certainly have been at fault for not having counseled the parties to sue in New York, where the choice of law would have been foreordained under the Babcock rule.

It seems clear, however, the general rule stated above has definite limitations beyond which a court ought not to go. The Miller court has itself indicated that it would be "unfair" to apply forum law where a non-resident or even a resident has patterned his conduct upon the law of the jurisdiction in which he was acting. This criterion, of course, is not particularly relevant to a negligent tort. But the rule should be qualified further to state that a court violates traditional notions of fair play and justice if it applies the heavier sanctions of its forum law in any situation where the forum state does not have territorial or other traditional basis for legislative jurisdiction over either (1) the event or transaction itself, or (2) all the parties involved, or at least the defendant on whom the forum law will impose the heavier burden or liability. Residence or cit-


izenship may be a basis for legislative jurisdiction over any party, but not the mere temporary physical presence of the party in the state independently of the event or transaction. The different rule for judicial jurisdiction has heretofore always been distinguished.

The ambience of law surrounding a court house square in Missouri's foothills is quite different from that on Foley Square in New York City. When a person has accidentally injured another in rural areas there is apt to be more forbearance and moderation in claims for compensation. Claims are more likely to be settled on a voluntary basis. Public opinion does not regard with favor clients or attorneys who aggressively seize upon accidental injuries as opportunities for personal enrichment. Such public opinion is reflected in relatively moderate jury verdicts. Statutory limitations on recoverable damages such as the Missouri Wrongful Death Act remain probably because of rural influence on legislatures. Such limitations are usually disparaged by metropolitan lawyers as archaic or retrogressive.

Consider, for example, a Missouri farmer who has spent all his life in the quiet rhythm of his countryside. He works there and confines his travel to his home state. In some local accident he causes the death of a stranger who, *horribile dictu*, turns out to be a resident of the distant State of New York. Imagine the traumatic shock he will experience when a New York court, after the manner of the *Tjepkema* court, asserts quasi-in-rem jurisdiction over him and applies New York law to determine his liability. A writer in a recent issue of the American Bar Association Journal observed that public respect for courts and lawyers is seriously impaired by the present state of automobile accident

149. See, e.g., Fisher v. Fielding, 67 Conn. 91, 34 A. 714 (1895). See also Grace v. MacArthur, 170 F. Supp. (E.D. Ark. 1959), which held that a state has judicial jurisdiction over a person flying over that state in an airplane.

Regarding the distinction between legislative and judicial jurisdiction, Professor Leflar has written: "Contacts sufficient to satisfy 'fair play and substantial justice' for judicial jurisdiction under the due process clause will often satisfy whatever test . . . the same constitutional clause prescribes for legislative jurisdiction. It cannot be concluded, however, that identical *facts* automatically mark the outer limits of 'fair play and substantial justice' for both constitutional purposes. The 'fairness' and 'justice' which the due process clause requires depend upon the purposes and functions of the law's operation in each specific separated context. . . . The questions of what law may govern and what court may act are similar though not the same." R. LEFLAR, AMERICAN CONFLICTS LAW § 56, at 122 (1968).

litigation. He cited a Missouri survey which found that this lack of respect is particularly prevalent in metropolitan areas among laymen who have there actually seen or participated in a trial. On the other hand the report found that, outside of metropolitan areas, the experience of laymen with auto accident litigation generally improves their attitudes toward courts and lawyers. The author suggested that this difference resulted from the relatively minor influence of the automobile on rural society and the consequent lack of "claims-consciousness" of small town citizens.

In our territorially oriented society there may be said to be a general expectation that no resident of State A, committing acts centered exclusively in that state, will be held liable therefor under the law and heavier sanctions of State B with which neither the actor nor his acts have any connection. That a resident of the latter state had come into State A and fortuitously happened to be affected by the defendant's conduct cannot in fairness justify State B in enforcing its heavier sanctions against the actor whenever it can subsequently capture his person or property. Professor Cavers, quoted in Miller in support of the proposition that the "expectations" of the parties are an obvious fiction having little relevance to laws in conflict, made the following perceptive observation:

[Expectations of the parties are not the only test of fairness to them. In this territorially divided world, I believe we have come to accept as fair the application of territorial law except in some unusual situation as where the parties, the event, or the transactions central to the controversy are closely linked to the law of another state that is relevant to the matter in dispute.]

It would be far fetched to contend that the Miller and Tjepkema cases presented such "unusual situations" that would justify New York's rejection of the territorial laws of Maine and Missouri where the torts occurred and where the defendants resided. The fortuitous fact that the respective decedents happened to be New Yorkers voluntarily present in the respective states at the time of their deaths is too tenous a connection under any theory of jurisdiction heretofore accepted in this country.

It is remarkable that the New York judges have chosen to push to an extreme their claims for New York jurisdiction, just as the English courts are beating a retreat. Is it because the English judges may


unconsciously be influenced by the decline of the British Empire and a wan ing of their imperial spirit? What then explains the contrary direction which the New York judges are taking? Do they believe the star of New York's empire is on the ascendant? We might ask the question once asked about Caesar: "Upon what meat doth this our Caesar feed that he is grown so great?"\(^{153}\)