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By PETER HAY

I was delighted to note rather substantial agreement between Professor Trautman and me. There are, of course, areas in which we differ, although often these are differences in emphasis or nuance rather than of a fundamental nature. My disagreement with respect to "multistate policies" relates to their formulation by the local forum: there is little evidence that the local forum is really sensitive to the needs of the multistate system. This is the current parochialism in choice of law, which Professor Trautman also acknowledges. Hence my preference for a federal role (legislative or judicial) in the ordering of the relations between and among the states and between and among states and foreign nations.[1]

I agree with Professor Trautman that it is important "to weed out the parochialism in the choice-of-law method"[2] that inheres in Professors Currie and Ehrenzweig's approaches. But I do think, more so than does Professor Trautman, that the restriction of jurisdiction is also important—not to the point advocated by Professor Ehrenzweig or Justice O'Connell,[3] but along the lines of the recent jurisdictional decisions. I endorse the current development, not in order thereby to "bury" the choice-of-law decision, but to particularize further the current "foreseeability" test, for instance, as it may apply to transient jurisdiction. Again, this is only a matter of emphasis because one of my main points had been that the jurisdictional problem, affecting largely the issue of party *convenience*, is not as important as the choice-of-law issue, which affects party *liability*.[4] Given this orientation, I do find attractive the point of Professor Trautman that the determination of judicial jurisdiction should involve an "assessment of the relative positions of

1. *See* Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1673-75 (1981).

2. Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1612, 1625 (1981).

3. *See* Hay, *supra* note 1, at 1651 n.43.

4. *Id.* at 1676.

the plaintiff and the defendant,"[5] rather than a focus exclusively on the defendant. Thus, I could accept the exercise of jurisdiction over a minimally connected or even unconnected defendant as long as this does not mean more or less automatic application of the law of the forum. However, I do fear that, in the case of the "minimally connected" defendant, the present equation of minimum contacts for jurisdiction and choice of law would lead to that result. For this reason, then, I am prepared to solve an unacceptable choice-of-law result by means of stricter, defendant-oriented, jurisdictional standards.

Professor Trautman and I share the view that governmental-interest analysis, to which Professor Sedler adheres, contains aspects that are "untenable,"[6] particularly a parochial forum bias and the overemphasis on "governmental" interests. Professor Sedler writes that we should be "more concerned with the question of 'what is the proper result' instead of 'what is the proper rationale' "[7] and concludes that, in his view, "the present state of conflicts law . . . is quite good"[8] as a consequence of "the simplifying effect of interest analysis."[9] I submit that a result-orientation without regard to an underlying rationale leads to ad hoc determinations and, more often than not, to the forum bias to which I objected in my paper on several grounds. There are indeed a number of decisions—of which *Hague*[10] is but one—that are *not* "good." I do not advocate sterile inquiry into rationales, an inquiry that is divorced from the purpose of asking the question. Of course, our concern must be for the proper result. But, just as I believe that the first Restatement's ultimate weakness was that "the tension between 'conflicts justice' and 'substantive justice' [had grown] too large,"[11] so do I believe that result-selectivity

5. Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1612, 1623 (1981).

6. Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L. J. 1644, 1659-62 (1981). Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1612, 1614 (1981). *See also* Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

7. Sedler, *Concluding Remarks* 32 HASTINGS L.J. 1681, 1683 (1981).

8. *Id.* at 1682.

9. *Id.*

10. Allstate Ins. Co. v. Hague, 101 S.Ct. 633 (1981), discussed in Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L. J. 1644, 1656-59 (1981). *See also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 328-31 (2d ed. 1980) (discussion of the "better-law" approach, which so often forms part of forum-centered interest analysis).

11. Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L. J. 1644, 1666

without rationale (other than one with a built-in forum bias) ultimately also does not lead to "justice," at least not if we accept such traditional conflicts values as fairness and predictability. There is, to my mind, a link—a necessary link—between "substantive justice" and "conflicts justice."[12] Many modern choice-of-law decisions based on governmental-interest analysis (with a dash of the "better-law" approach) are truly ad hoc efforts. They may or may not achieve a just result in the particular case. But that is not the point. Except for the occasional outrageous case,[13] we do not decide ordinary contract, trust, or other cases that way. Why then in conflicts? Is "justice," in an ad hoc approach, not often in the eye of the beholder? To be sure, conflicts cases also implicate multistate concerns and policies not present in the intrastate civil case. The question then becomes who should address these factors that are peculiar to the conflicts case? This, in my view, is the "ordering" function of which I wrote[14] and which should not be left to each individual and, by hypothesis, self-interested forum.

(1981).

12. *Id.* at 1670.
13. *See id.* at 1661 n.99.
14. *See id.* at 1676.