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ARTICLES

SUBSTANTIVE POLICIES AND CHOICE OF LAW

Willis L.M. Reese*

Certainty and predictability of result are important values. Unfortunately, they are extremely difficult to attain in choice of law. In part, this is because of the breadth of the subject, covering as it does all reaches of the law. In larger part, this is because the field is still quite unexplored and, almost surely, will remain so for many years to come. The possible combinations of factors, i.e., territorial contacts and local law rules, are almost limitless in number, and it will be a long time before even a fair percentage of these combinations come before the courts. As a result, it is inevitable that any choice-of-law rule of reasonably broad scope will prove applicable, if read literally, to situations that were never envisaged by the original draftsmen. Herein lies the dilemma. Rules are necessary if certainty and predictability of result are to be achieved. On the other hand, faithful adherence to rules, formulated in light of our present knowledge, will almost surely lead, on occasion, to unfortunate results. Obviously, some accommodation must be made between the goals of cer-

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tainty and predictability and the flexibility needed to permit a court to arrive at the correct decision.

It is believed that the best course for the years immediately ahead is to lay down broad guides that state what should usually be the correct choice-of-law solution but also make clear on their face that they are subject to exception. Initially, both guides and exceptions will perforce be general in character. Then, as experience accumulates, their scope of application can hopefully be narrowed and made more explicit. To illustrate how the process may develop, we will here turn our attention to that part of tort law which is concerned with personal injuries and damage to tangible property.

Today, torts comprise the area of choice of law which, ostensibly at least, is in the state of greatest confusion. It was generally accepted for many years that the governing law should be that of the state of injury.¹ As time went on, however, the courts became more reluctant to accept what they deemed to be unfortunate results to which the place-of-injury rule would sometimes lead. With increasing frequency, some courts avoided these results, while still continuing to pay lip service to the rule, by characterizing what in actuality was an issue of tort as an issue of family law,² contracts,³ or procedure,⁴ or by stating simply that in the particular instance the rule of the place-of-injury was obnoxious to the public policy of the forum and that accordingly the relevant rule of the forum should be applied instead.⁵ Sensible results were achieved by these decisions. On the other hand, the courts that used them could justly be charged with being both hypocritical and misleading. Furthermore, use of these devices could only lead to increased uncertainty, since the opinions provided no indication of the circumstances which would induce a court to escape the place-of-injury rule and of the route the court would choose to effectuate its escape.

During the last quarter of a century, much support has been evidenced for what is commonly described as a governmental interest approach.⁶ This requires the court, in the first instance, to ascertain

1. RESTATEMENT OF CONFLICT OF LAWS §§ 377-378 (1934).

2. *See, e.g.*, *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

3. *See, e.g.*, *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928).

4. *See, e.g.*, *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

5. *See, e.g.*, *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

6. The initiator and foremost exponent of this approach was Professor Brainerd Currie, many of whose writings are collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

the policy underlying the relevant local law rules of each of the states having significant contact with the case. If the policy embodied in only one of these rules would be served by the rule's application in the particular case, that is the rule which should be applied. When, however, the policy underlying each of two or more of the rules of each of the forums would be served by the rule's application, the problem becomes more difficult. One suggested solution is that the forum rule should always be applied in such a case if its underlying policy would be served by so doing.⁷ Another possibility is that the rule embodying the strongest policy should be applied⁸ or, alternatively, that the rule to be selected is the one whose underlying policy would be most impaired if the rule were not applied.⁹ A difficulty with this approach is that it is often difficult to determine the exact policy that underlies a given rule and whether this policy would be furthered by the application of the rule in the given case. It is even more difficult to determine which of two or more policies is the strongest or which would be most impaired if the rule in which it is embodied was not applied.¹⁰ Also, application of the forum rule in all instances where this would further its underlying policy might be thought to foster anarchy and to be antithetical to the needs of the interstate and international system by reason of its total disregard of the interests of other states.

Recent choice-of-law cases in tort promote the suspicion that frequently the courts first determine upon the result they wish to reach. Only then, after having in effect reached their decision, do they seek to attribute policies to the relevant rule of the states having contact with the case in order to justify application of the rule that would lead to the result they desire.¹¹

One valiant attempt at laying down rules of choice of law in tort was made by the New York Court of Appeals in *Neumeier v. Kuehner*.¹² In discussing the standard of care owed by the host-

7. See the statement by Currie in REESE & ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 478 (8th ed. 1984) [hereinafter cited as REESE & ROSENBERG].

8. VON MEHREN & TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

9. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963). This approach has been adopted by the Supreme Court of California. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), *cert. denied*, 429 U.S. 859 (1976).

10. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 557-59 (1971).

11. See, e.g., the cases cited in REESE & ROSENBERG, *supra* note 7, at 487-527.

12. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). This case is the subject of a symposium in 1 HOFSTRA L. REV. 93, 104-82 (1973).

driver of an automobile to a guest-passenger, the court stated (1) that the law of the parties' common domicile should be applied if the automobile was there registered, (2) that the driver should not be held liable if there would be no liability under the law of his domicile and the accident occurred there and conversely that the driver should be liable if the accident occurred in the plaintiff's domicile and that state's law would impose liability, and (3) that in all other situations the law of the state where the accident occurred should normally be applied. This approach has the advantage of stating hard-and-fast rules when it is deemed possible to do so in the light of common sense and experience and of laying down a general guide for the situations that remain. The difficulty is that there are few areas in tort where it would be possible on the basis of present knowledge to state rules of any precision. For the foreseeable future, it will be necessary, as previously stated, to rely on broad guides that are subject on their face to broad exceptions and trust that it will be possible to refine both guides and exceptions as experience accumulates.

It is the thesis of this paper that in formulating choice-of-law rules or guides, and in seeking to make them more precise, considerable assistance can be obtained by first seeking to determine whether a single policy underlies the particular field and then, if this be the case, by developing choice-of-law solutions that further the policy. It will, of course, also be necessary to continue to rely on territorial contacts if only for the reason that it is the division of contacts between states that gives rise to choice-of-law problems. Furthermore, attention must be directed to the particular issue since it is now firmly established in American conflict of laws that the decision is to be made on an issue-to-issue basis.¹³

There is already firm precedent for the proposition that the courts should seek to further basic substantive policies in choice of law. So, for example, the basic policy in contracts is to protect the justified expectations of the parties and accordingly the courts tend, in the absence of strong considerations to the contrary, to apply a law that will uphold those expectations.¹⁴ For similar reasons, the courts make obvious efforts in their choice-of-law decisions to validate both marriages¹⁵ and trusts.¹⁶ No similar statement can be directed to the broad area of torts because different policies underlie various areas

13. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comment d (1971).

14. *Pritchard v. Norton*, 106 U.S. 124 (1882). See Ehrenzweig, *Contracts and the Conflict of Laws*, 59 COLUM. L. REV. 973, 1171 (1959).

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 comment b (1971).

of that field.¹⁷ So, for example, in the areas of defamation and of privacy, the constitutional value of freedom of expression may outweigh the policy which favors the award of compensation to the injured plaintiff.¹⁸ Furthermore, deterrence of anti-social behavior may well be the basic policy underlying such torts as alienation of affections and criminal conversation.¹⁹ On the other hand, it is believed that the basic policy underlying the field of personal injuries and of damage to personal property is to award compensation to the plaintiff in large part because of the prevalence of liability insurance and the consequent feasibility to spreading the risk.²⁰ Accordingly, the following formulations will be directed only to this latter field. It must be emphasized that these formulations are intended to be nothing more than guides. The area is too wide and too undeveloped to permit the statement at this time of hard-and-fast rules.

BASES OF LIABILITY - STANDARDS OF CONDUCT

The formulations that follow deal with what law should be applied to determine whether the defendant's conduct gives rise to liability for fault, intentional misconduct and negligence, or to strict liability, namely liability in the absence of fault.

When the defendant's conduct and the resulting injury occur in the same state, the law of this state should be applied to determine whether this conduct created liability, except in the rare situation where holding the defendant liable under the law of another state with which the defendant has substantial contact would not be unfair to the defendant and would further the interests of the latter state.

The rationale for this rule seems obvious enough. The state where conduct and injury occur will be, subject to rare exceptions, the state of greatest concern. Being the state of conduct, it has an obvious interest in determining whether the conduct was liability-creating. Being the state of injury, it has an equal interest in the question of

16. *Hutchison v. Ross*, 262 N.Y. 381, 187 N.E. 65 (1933); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 (1971).

17. W. PROSSER & R. KEETON, THE LAW OF TORTS 20-26 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

18. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Both cases illustrate the Supreme Court's struggle to define the proper line of demarcation between the law of defamation and the freedoms of speech and press protected by the First Amendment.

19. *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass.), *aff'd*, 178 F.2d 888 (1st Cir. 1949). See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 154 comment b (1971).

20. See, e.g., SCOLES & HAY, CONFLICT OF LAWS 605-06 (1982).

whether the plaintiff should be compensated for his injuries. Likewise, application of the law of this state to determine this issue can hardly be unfair to either the plaintiff or the defendant.²¹

There will, however, be rare situations where it would be proper to hold the defendant liable under the law of some other state. These will be situations where the parties' principal contacts are with another state or possibly where, although the parties come from different states, each of these states has the same rule on the issue in question. Take, for example, the case where parties, domiciled in state X, are injured while passing through state Y on an automobile trip. The accident would not have occurred if the automobile had been equipped with a particular safety device. Liability should be imposed upon the driver, it is thought, in such a situation if equipment of the automobile with the safety device was required by Y law although not by that of X. Surely, effect should be given to a state's interest in imposing liability for conduct that the state deems improper and which took place within its territory. But now let us take the converse situation and suppose that the safety device was required by X law but not by that of Y. Here imposition of liability under X law would seem appropriate. X is the state where the parties lived and where the automobile would be located most of the time. Hence X would have a real interest in imposing liability under its law for failure to equip the automobile with the safety device, and it is difficult to believe that any interest of Y would be impaired by such imposition since the only effect of requiring the safety device would be to make travel in Y safer. Also, application of X law would not be unfair to the defendant since to the extent that he relied on any law at all in equipping the automobile, it would undoubtedly be the law of X.²² Another example of a situation that might call for holding a defendant liable by application of a rule other than that of the state of conduct and injury is where a plane crashes through pilot error in state Z while en route from state X to state Y.

When the defendant's conduct and the resulting injury occur in different states, the law of whichever one of these states is more favorable to the plaintiff should usually be applied, provided, in the case of the state of injury, that the defendant could reasonably have foreseen that his conduct might cause injury in that state.

This rule is derived from the basic policy of providing compensation to the plaintiff which is believed to underlie the area of torts

21. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 comment e, 157 (1971).

22. Cf. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

that is concerned with personal injuries and damage to tangible property. The rule provides for the usual application of what to the plaintiff is the more favorable rule, whether in strict liability or for fault, of either the state of conduct or of injury.

The rule does not disregard the interests of the states involved. The state of conduct has a clear interest in regulating activity that takes place within its territory. Application of the more onerous liability rule of this state would further this interest and would be unlikely to impair any interest of the state of injury. On the other hand, the state of injury has an equally clear interest in providing compensation for locally sustained injuries and application of its more onerous liability rule would be in line with this interest. To be sure, such application would be contrary to the interest of the state of conduct in what would probably be the unlikely event that the more lenient liability rule of this state was designed to encourage the carrying on of the activity in question. But this conflict of state interests should be resolved in favor of the plaintiff by reference to the basic policy of providing compensation. Also, there can be no significant reason why in such a case the interest of the state of conduct should be permitted to override the interest of the state of injury.²³ Out of considerations of fairness to the defendant, the rule provides that the law of the state of injury should not usually be applied unless the defendant had reason to foresee that his conduct might have consequences there.²⁴

The rule is phrased to call only for its "usual" application. This qualification is needed for a variety of reasons. There may be occasions when application of the law of the state of injury would not be unfair to the defendant even though he had no reason to foresee that his conduct might cause injury there. This might be true, for example, in a situation where the defendant intended to cause, or had reason to foresee that his conduct would cause, injury in a particular state and this state happened to have the same rule on the issue in question as did the state where the injury actually took place. There may also be occasions when application of the law of the place of injury would in all circumstances be unfair to the defendant as might be true if the state of conduct required by law that the defendant act in the way he did and in the place where he did.

23. Reese, *The Law Governing Airplane Accidents*, 39 WASH. & LEE L. REV. 1303 (1982) [hereinafter cited as Reese]. Cf. *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975).

24. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

There will also be situations where there are two or more places of conduct or where the actual place of conduct cannot be identified. Instances of this sort are particularly likely to arise in the area of products liability. Take, for example, a product on which work is begun in state X and then completed by the same organization in state Y. Here it may be that the defect which caused the injury was the result of activity in both X and Y or it may be impossible to identify the state where the defective work was done. In both instances, it would seem appropriate to hold the defendant subject to whichever is the more onerous rule of liability of the two states involved. Again, particularly in the field of products liability, there will be situations where it would seem appropriate to hold a defendant subject to a rule of liability which is not that of the state of conduct or of injury. An example might be one where the plaintiff domiciled in state X purchases an automobile in state X, and in Y, an adjoining state, is injured in an accident which was allegedly caused by a defect in the automobile. Here it might be appropriate to hold the defendant manufacturer subject to the strict liability rule of X even though there could only be recovery for negligence under either of the law of Y, the state of injury, or of the law of the state where the automobile was manufactured. This result would be based (a) on the basic policy of providing compensation to the plaintiff, (b) on the obvious interest of state X in affording protection to its domiciliary, and (c) on the fact that no injustice would be done the defendant manufacturer since it could readily have foreseen that in a variety of circumstances its liability to the purchaser of an automobile who is domiciled in state X and who made the purchase in X would be held to be governed by X law.²⁵

DAMAGES

When conduct and injury occur in a single state, the law of that state should be applied to determine the measure of damages unless a larger recovery could be obtained under the law of a state which is either that of the parties' common domicile or else has a substantial connection with the defendant and the occurrence.

This rule, and those that follow on damages and immunities, do not come into play until it has been first determined that the defendant is liable to the plaintiff in tort.

25. Cf. *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974).

The rule can be criticized on the grounds of vagueness. There are, as has already been suggested, the uncertainties that can arise from the reference to "conduct" as, for example, in the case where the defendant's activity is spread over two or more states.²⁶ Use of the term "substantial connection" raises still greater difficulties. Unfortunately, generalities cannot be avoided in a rule that is directed to so broad an area and which in large part remains unexplored. The main thrust of the rule is, however, clear. The court must look first to the law of the state of conduct and injury and apply the law of another state only in the stated circumstances and by way of exception. Some refinement of the circumstances in which application of the law of another state would be appropriate will be attempted.

The law of the state of conduct and injury should usually be applied to determine the rights and liabilities of the parties.²⁷ Being the place of conduct, this state, as has already been said, will have a very real interest in having its law applied to determine whether the defendant's conduct was liability-creating. This state also has an interest in determining the measure of damages. Being the place of injury, it will have a natural concern in providing the plaintiff with what it deems to be appropriate compensation. As the place of conduct, it also has an interest in protecting the defendant against the imposition of excessive damages.

The grounds for applying the law of the state of conduct and injury become even stronger when additional contacts are located there. So, if both the defendant and the plaintiff are domiciled in the state, its law should, almost invariably, be applied. If the defendant alone is domiciled there, the reasons for applying the law of this state are almost as compelling. The fact that the plaintiff is domiciled in a state whose law provides for a greater measure of recovery should not affect a defendant who has acted and caused injury at home.²⁸ In such a case, the interest of the state of the defendant's domicile in having its own law applied must prevail. On the other hand, the defendant should not profit from the fact that recovery in the plaintiff's state would be less. This follows, for the reason among others, that fidelity to the basic policy calling for the award of compensation for injuries suffered demands that a plaintiff who sustains injury in a state at the hands of a defendant who is domiciled there

26. See *supra* text accompanying note 24.

27. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (1971).

28. *Contra* Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973).

should at least be given the measure of damages provided by that state's law.

The reasons for applying the law of the state of conduct and injury are also compelling when it is the plaintiff who is domiciled there. In such circumstances, this state has a clear interest in providing the plaintiff with what it deems to be appropriate compensation. In turn, the defendant, having ventured into the state, cannot justly complain of the application of that state's law.

There will, however, be situations where the plaintiff should receive a higher measure of recovery under the law of a state which is not that of conduct and injury. To qualify, this state must have a substantial connection with the defendant as opposed to the plaintiff, and sometimes with the occurrence as well. The first requirement is clearly satisfied by a state where both the defendant and the plaintiff are domiciled.²⁹ This state will usually have a greater interest than any other in determining what is appropriate compensation for the plaintiff and in protecting the defendant against excessive loss. On the other hand, the state of conduct and injury also has an interest in these issues. If this state would provide the plaintiff with a more generous measure of recovery then would the state of common domicile, its law should usually prevail by reason of the basic policy underlying this area of the law of torts. In situations where the parties have different states of domicile but the law of each of these states is the same with respect to the measure of damages, the case should be treated as if it were one of common domicile.

When the other state is not the common domicile of both the defendant and the plaintiff, it will be necessary for its law to prevail, that it have a substantial connection not only with the defendant but with the occurrence as well. The fact that the defendant is domiciled in the state will not be enough of itself to justify application of its law. For example, a defendant who injures a domiciliary of state Y while passing through that state in the course of an automobile trip should not be subject to the higher measure of damages of state X simply because he is domiciled in that state. For X law to apply, in such a case, it would be necessary for state X to have in addition a substantial connection with the occurrence. The two requirements of substantial connection with both the defendant and the occurrence are likely to be satisfied in cases involving foreign corporations. By way of example, suppose that an airline operates many flights that originate in state X and terminate in state Y. In such a case, it

29. *Cf. Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968).

might well be appropriate to apply the higher measure of damages provided by X law to a plaintiff who boarded the plane in X and suffered injury when the plane crashed through pilot error while attempting to land in Y. This would be so even though the airline was incorporated and had its principal place of business in Y.³⁰ Other examples calling for a similar conclusion can easily be imagined.

Application of a law other than that of the place of conduct and injury is particularly likely in situations where that place can be considered to have only a fortuitous connection with the parties. Take, for example, the case where the plaintiff purchases an airplane ticket in state X for a flight from X to state Y and then is injured en route when the plane crashes through pilot error in state Z. Here Z, the state of conduct and injury, has little real connection with the parties and there would be good reason for the application of the more generous measure of recovery of state X or, even perhaps, of state Y.

It should be pointed out that the suggested rule may lead on occasion to discrimination between persons who are similarly situated. Suppose that the defendant-driver and a guest-passenger, who are both domiciled in state X, start off on an automobile trip in state X. In state Y, they pick up another guest-passenger, who is domiciled in Y, and there they are involved in an accident in which both passengers are injured. Under the rule as stated, the X passenger would receive damages under X law, assuming it provides the more generous measure of recovery, since X was the common domicile of both the passenger and the driver. But the Y passenger might well be granted only the Y measure of recovery since Y was not only the state of his domicile but also that of conduct and injury.³¹ Discrimination of this sort is inevitable in the case of any rule whose application may depend, at least in part, upon a person's domicile.

Corporations raise special problems. They have no domicile in the ordinary sense, but they do have a state of incorporation. There will be situations, however, where a corporation has relatively little contact with that state. For this reason, it is thought that in the case of corporations the reference should usually be to their principal place of business rather than to their state of incorporation.³²

When conduct and injury occur in different states, the law of whichever one of these two states would grant the larger recovery should usually be applied provided that, in the case of the state of

30. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

31. *Cf. Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394 (1969).

32. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 comment 1 (1971).

injury, the defendant could reasonably have foreseen that his conduct might have consequences in that state or unless a larger recovery could be obtained under the law of another state which is either that of the "parties" common domicile or otherwise has a substantial connection with the defendant and the occurrence.

Much of what has been said about the situation where conduct and injury occur in the same state is applicable here. Accordingly, there will be no discussion of the rule's inherent vagueness. Also it will be enough to reiterate that in the case of corporations the principal place of business should be substituted for the domicile of a natural person. In addition, little will be said about the role that should be played by the state of the parties' common domicile or to the meaning of the phrase "substantial connection with the defendant and the occurrence." All these matters have been discussed above.³³

The main thrust of the rule is that the plaintiff is entitled to receive the larger of the two recoveries that could be obtained under the law of either the state of conduct or of injury. The rule finds its basic support in the policy of providing compensation to the plaintiff which underlies the area of torts concerned with personal injuries and damage to tangible property. It also will often be in line with the interests of the two states involved. The interest of the state of injury is to ensure that a person who is injured within its territory should receive adequate compensation for his injuries. This interest would in no way be infringed if the plaintiff were to receive a larger measure of recovery pursuant to the law of the state of conduct. Also it could hardly be contrary to the interest of the state of conduct if the defendant were required to pay damages in accordance with the provisions of its law. The situation is different where recovery would be larger under the law of the state of injury. Here the interests of the two states may be in conflict, but the policy of providing compensation suggests that in this instance the interests of the state of injury should prevail. Considerations of fairness to the defendant will usually demand, however, that he should not be required to pay the damages imposed by the law of the state of injury unless he could reasonably have foreseen that his conduct might have consequences in that state.³⁴

There will also be situations where recovery should be granted under the law of a state which is neither that of conduct nor of in-

33. See *supra* text accompanying notes 26-30.

34. CAVERS, *The Proper Law of Producer's Liability* in CONTEMPORARY PROBLEMS IN THE CONFLICT OF LAWS, ESSAYS IN HONOR OF JOHN HUMPHREY CARLISLE MORRIS (1978); Reese, *Products Liability and Choice of Law*, 25 VAND. L. REV. 29 (1972).

jury. This will be so where both plaintiff and defendant are domiciled in a state whose law provides for a more generous measure of recovery than would be accorded by the law of the state of either conduct or injury.³⁵ This will also be so where, although the parties have different domiciles, the law of these two states is the same with respect to the measure of damage and provides for a greater recovery than would either the state of conduct or of injury.

It will have been noted that the rule is phrased so as to call only for its "usual" application. This qualification is due in part to the breadth of the area covered and the consequent probability that there will be situations falling within its scope that would call for a different result. In particular, the rule is qualified by reason of the obvious difficulties posed by the situation where under the law of the state or states of the parties' domicile recovery would be less than could be obtained under the law of either the state of conduct or of injury. The state, or states, of the parties' domicile will usually have the greatest interest in them, and it could therefore be argued with force that its law should prevail. On the other hand, the policy favoring the award of compensation to the plaintiff would call for a different result and it is difficult to believe that the policy of the state of the plaintiff's domicile would be infringed if the plaintiff were granted a higher recovery under the law of some other state. If, however, recovery would be less under the law of both the state of conduct and of the defendant's domicile, the combined interest of both of these states might well be enough to warrant departure from the usual rule.

There will finally be situations where the plaintiff should have the benefit of the larger measure of recovery provided by the law of a state which has a substantial connection with the defendant and the occurrence but is not the state of conduct or of injury or the common domicile of the parties. This connection must be with both the defendant and the occurrence; a connection with the plaintiff or even with the defendant alone will not suffice. An example might again be that of an airline whose planes frequently depart from state X and where an injury results through pilot error at some intermediate point between state X and the plane's destination in state Y. Here it might well be appropriate to apply the higher measure of recovery provided by the law of X, the state of departure.

35. Cf. *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968).

PUNITIVE DAMAGES

Punitive damages are designed to punish the defendant, and the fact that they are awarded the plaintiff is only incidental to their purpose. As a result, this form of damages does not fall within the scope of the policy that calls for providing compensation to the plaintiff. The interests of the state of injury, if it is not also the state of conduct or has some other substantial relationship with the defendant, would seem to be limited to the award of what it deems to be appropriate compensation. On the other hand, the state of conduct clearly has an interest in imposing punishment on one who transgresses its law. And the same may be true of a state which has a close relationship with the defendant, such as the state of domicile in the case of an individual and that of the principal place of business in the case of a corporation. Whether the award of punitive damages would be appropriate and, if so, in what amount should accordingly be determined by the law of one of the latter states.³⁶

IMMUNITIES

The rules that follow are concerned with situations where one person is immune from liability, or only has a limited liability, to another person in tort. Examples are the immunities that may arise from an interspousal relationship (e.g., husband-wife), an interfamily relationship (e.g., parent-child) or one between driver and guest-passenger.

When the parties have a common domicile, the law of that state should usually be applied to determine an issue of immunity even though no immunity would exist under the law of a state having a closer connection with the occurrence as, for example, the state of conduct and injury.

The state of common domicile is the one that has the greatest interest in determining whether one party should be immune from tort liability to the other party. The interest of this state is twofold; it has an interest in protecting the defendant from liability and it has an equal interest in imposing a disability to recover upon the plaintiff.³⁷ The interest of the state of common domicile in applying its rule of immunity is greater than would be the interest of that state in the

36. *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594 (7th Cir. 1981). See Reese, *supra* note 23, at 1303.

37. *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394 (1969); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

application of its rule on the measure of damages. In the case of immunity, choice of the applicable law is akin to a choice between black and white, namely between immunity and no immunity. By contrast, in the case of the measure of damages, the choice is more like one between varying shades of gray; that is to say, the choice is between laws providing for different measures of recovery. In other words, the policy of the state of common domicile would be totally frustrated by the application of the law of another state which takes a different position on the question of immunity. The clash of interests is less extreme in a situation that involves the choice of a law to govern the measure of damages.

The interest of the state of common domicile is most clearly implicated when, as will usually be the case, the relationship between the parties that gave rise to the claim to immunity is centered in that state. This will almost invariably be so in the case of an inter-family relationship.³⁸ On comparatively rare occasions, on the other hand, another relationship, such as one between driver and guest-passenger, will be centered elsewhere. This would be so, for example, in a case where persons domiciled in state X meet for the first time in state Y, and there, one of these persons is injured while riding as a guest in the other's automobile. Even in such a case, it is felt that the law of the state of common domicile should usually prevail.³⁹

It is particularly this last sort of case which requires that the rule should do no more than call for the usual application of the law of the state of common domicile. The state of injury has an interest in providing compensation to those injured within its territory and this interest is even more evident when the relationship between the parties is centered in the state. It should also be considered that basic policy considerations call for the award of compensation for injuries suffered. The reason for applying the law of the common domicile is at its weakest in a case where this state would grant the defendant immunity while liability would be imposed under the law of the state of conduct and injury as well as that where the parties' relationship is centered. In such a case, it would probably be appropriate to apply the liability rule of the state of conduct and injury, particularly if the relationship of one or both of the parties to the state of common domicile is of an attenuated nature.

When the parties have different domiciles but the law of each state of domicile is the same with respect to the issue of immunity,

38. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1971).

39. See *supra* authorities cited in note 37.

that is the law which should usually be applied. Also, as in the case of the previous rules, the principal place of business should be substituted for domicile when a corporation is involved.

When the parties are domiciled in different states with different rules on the issue of immunity, the law of the state of conduct and injury should usually be applied provided that this state is the domicile of either the defendant or of the plaintiff.

The law of the defendant's domicile should be applied on the issue of immunity when conduct and injury occurred in that state. There can be no doubt on this score in situations where this law does not provide for immunity. Surely a defendant who acts and causes injury in the state of his domicile should not be able to claim immunity under the law of some other state. The law of the defendant's domicile should also be applied in these circumstances when it provides for immunity. Being the state of domicile, this state has a clear interest in having its law applied for the protection of the defendant. Furthermore, this interest is fortified by the fact that the state is also the one of conduct and injury. Likewise, the defendant would have just cause to complain if he were denied immunity in such a case by application of the law of some other state.⁴⁰

The suggested rule calls for application of the immunity rule of the state of the plaintiff's domicile if conduct and injury occurred there. When this law would not give the defendant immunity, its application is clearly required both by the interest of the state in protecting the plaintiff and by the basic policy of providing compensation. The problem is more difficult in the reverse situation where the defendant would have immunity under the plaintiff's law but not under that of his own state of domicile. In these circumstances, the policy of compensation would point toward the discard of the rule. Nor would the interest of the plaintiff's state be furthered by application of its rule of immunity to the extent that this rule was designed solely for the protection of its own domicilaries. But it must be remembered that this state is not only the domicile of the plaintiff; it is also that of conduct and injury. As such, it has an interest in extending protection to those who act within its territory and in affording them the equal protection of its law. For these reasons, it is concluded that the law of this state should usually be applied even when it would afford the defendant immunity. On occasion, this

40. See the rules set forth by the New York Court of Appeals in *Neumeier v. Kuchner*, 31 N.Y.2d 121, 286 N.E.2d 454 (1972).

might not be so, as perhaps in a situation where the relationship between plaintiff and defendant was centered in some other state.

As in the case of the previous rules, the principal place of business should be substituted for domicile in the case of corporations.

The suggested rules on immunity do not cover situations where the plaintiff and the defendant are domiciled in different states with different rules on immunity and where conduct and injury occur in still another state or states. These situations may involve many different groupings of contacts and of laws relating to immunity. It would be unwise at this time to suggest a rule of any degree of precision that would apply to them. Of necessity, it will be necessary to continue to rely upon some general formula, such as application of the law of the state of most significant relationship or of the closest connection. Eventually it may be possible in the light of further experience to develop rules of greater precision. In the meantime, a guide to decision should be found in the basic policy that calls for the award of compensation to the plaintiff. In the absence of persuasive considerations to the contrary, the courts should seek to apply a law that would deny immunity to the defendant.

OTHER ISSUES

Many other issues, of course, may arise in the course of an action seeking recovery for personal injuries or for damage to tangible property. Some of these issues will relate to procedure, or more properly to judicial administration, and as such will be governed by the law of the forum.⁴¹ Statutes of limitations involve special problems that will not be dealt with here.⁴² The remaining issues should be dealt with much in the same manner as those discussed above. An example is the issue of survival. At common law, tort claims did not survive the death of either plaintiff or defendant. This rule has been abrogated in many states.⁴³ In others, it persists in modified form. It is believed that choice-of-law questions involving survival should be handled much in the same way as was suggested above in the case of immunity.

41. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971).

42. A growing number of courts are departing from the rule that questions relating to the statute of limitations pertain to procedure and hence are governed by forum law. See Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 27 HAST. L.J. 1 (1975).

43. See PROSSER & KEETON, *supra* note 17, at 940-61.

CONCLUSION

The attempt has been made above to suggest an approach to the formulation of choice-of-law rules for issues in tort that involve either personal injuries or damage to tangible property. The rules proceed on an issue-to-issue basis. They are based both on territorial contacts and on the policy of providing compensation for injuries suffered which is thought to be basic to the substantive field involved. On the other hand, the rules place little emphasis on the parties' expectations, since it is believed that, by reason of human nature and also perhaps because of the prevalence of liability insurance, persons rarely mold their conduct to conform to any particular rule of law in the areas of tort that are considered here.

The suggested rules are more precise, and in this sense more desirable, than any general formula which calls, for example, for application of the law of the state of most significant relationship or of closest connection. The rules are more precise because they proceed on an issue-to-issue basis and also because they look for guidance to what is thought to be the basic policy underlying this particular field. The rules are phrased to call only for their "usual" application since it is recognized that there may well be situations in which the rules, if literally applied, would lead to unfortunate results. Much time must elapse before it will be possible on the grounds of knowledge and experience to state rules that are not subject to qualification.

It is firmly believed that the effort should be made in choice of law to develop rules that are more precise and afford greater predictability. These qualities are singularly lacking in the formulations that are currently found in the area of tort. An approach to development of more precise rules has been suggested above.