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CONFLICT OF LAWS—AN ALTERNATIVE TO LEX LOCI DELICTI IN WEST VIRGINIA

Until the decision of the New York Court of Appeals in Babcock v. Jackson,1 conflict of laws had become a settled, if not stagnant, area of the common law. Perhaps because of the numerous variables involved in resolving cases arguably related to more than one state, a group of fixed rules had emerged to control choice of law problems. Among these rules, probably none achieved more universal adoption than that governing in tort actions. When the fact situation involved more than one jurisdiction, and hence seemed to require a choice of law, the traditional rule of lex loci delicti automatically determined that the law of the place of the wrong controlled the rights and liabilities of the parties.2 Although the rule was occasionally criticized by legal scholars,3 no court expressly denounced it in favor of another approach to tort conflicts questions until the Babcock decision,4 where the court applied the substantive law of the state with the most significant relationship to the controversy.5 Since the time of that opinion, however, a clear split of authority has emerged between those states adhering to the lex loci delicti rule and those adopting the Babcock approach.4 Without acknowledging the development of alternative means to decide choice-of-law questions, the West Virginia Supreme Court of Appeals invariably has followed the traditional rule.7 By comparing a recent West Virginia decision with the Babcock case, this note will examine the general attributes and shortcomings of both the lex loci rule and the most-significant-

2 See, e.g., Owen v. Appalachian Power Co., 78 W. Va. 596, 89 S.E. 282 (1916). For the purposes of this note the difference between the place-of-the-wrong and the place-of-the-injury rules is immaterial. The phrase "place of the tort" is used in this discussion to apply to either situation.
5 12 N.Y.2d at 481, 191 N.E.2d at 283.
relationship approach. While the older rule offers some advantages over the most-significant-interest test, the kind of approach adopted in Babcock should be appealing to the West Virginia Court for two primary reasons. First, it allows determination of the choice-of-law question by the routine common-law process of examination of the respective interests of those states involved; second, it avoids application of a fixed choice-of-law rule when no actual conflict in state interests exists.

The application of foreign law by a forum court is no recent development. Despite its long history, however, the subject has developed so slowly and independently from other elements of the common law that one author claims, "It cannot be said that a "body of conflicts law" has emerged from principles developed in decided cases." The commentator's point identifies a central problem in choice-of-law rules. The traditional rules like lex loci delicti crystallized rapidly but have been applied in robot-like fashion whenever a fact pattern seems to involve several states. When the appropriate situation appears, a fixed-rule method, rather than the usual common-law method, is employed. This mechanical characteristic of the rules of choice of law has inhibited

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* Although some United States Supreme Court decisions of the 1920's and 1930's indicated that the application of one state's law as opposed to another's might conceivably violate the Constitution, the Court rapidly retreated from that position. Sedler, Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws, 56 Ky. L.J. 27, 53 (1967-68) [hereinafter cited as Sedler]. The elusive concept of comity is now considered the basis on which a forum recognizes the laws of another state. No state is constitutionally compelled to give effect to another state's laws when the issue is merely one of choice of law; rather, when courts do so they act out of respect, courtesy and good will. Some dicta in an early West Virginia case explains:

While it is true that the citizens of the several States are one people and one nation under the national government as the supreme authority within the limitations of the Federal Constitution, still the States themselves are severally sovereign, independent and foreign to each other, in regard to their internal . . . affairs . . . . Such being the case, it results therefrom that the State Constitutions and laws have no extraterritorial force anywhere, except as conceded to them by mere comity.


* For a capsulized treatment of the historical development of choice of laws from thirteenth-century Italy to twentieth-century America, see Sedler, supra note 8, at 27-81.

* Id. at 82.
the development of a viable body of conflicts law. As Justice Traynor astutely observed in an article published four years before Babcock v. Jackson, "The law of conflicts has been kept in its infancy all too long to survive another deep freeze."11

The usual common-law method looms in contrast to the mechanical, rigid rules controlling conventional conflicts decisions. An interesting description of the means by which legal rules evolve at common law reveals, "Common-law judges regularly solve one problem at a time and count themselves lucky if they get the easy one first . . . . After a score of years or a century, the rule as ultimately stated may resemble but slightly its first formulation."12 The common-law method is inherently inductive, moving from the particular facts of one case and its resolution to the different facts of the next case. This process is more than the means by which the law grows—it is the life-blood and essence of the law. Holmes' observation of the nature of the common law contrasts with the fixed-rule method so long engrained in conflict of laws. Inimitably, he writes, "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."13

A definition of conflict of laws and a general statement of its function must be formulated before a more detailed consideration of the strengths and weaknesses of lex loci delicti and most-significant-relationship rules can be undertaken. The search for a satisfactory definition produces the realization that essentially two kinds of definitions exist. Not surprisingly, proponents of the lex loci rule advocate one meaning of the term, while supporters of the most-significant-relationship rule propose another. The former group defines a conflict-of-laws issue in relatively general terms as the choice-of-law question which arises whenever the forum state differs from the place of the tort or whenever the fact pattern giving rise to the cause of action crosses state boundaries. One definition suggests, "A conflict of laws situation is presented whenever a legal situation arises in which there is foreign element."14

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Markedly different is that definition offered by the sponsors of the newer rule:

A question of conflict of laws may be said to arise whenever a case contains some foreign element, that is, whenever some or all of the legally significant facts occurred in a jurisdiction other than that in which the suit is brought and/or all the parties are non-residents of the forum state.\(^5\)

The difference in the two definitions pervades the controversy between the two groups. The problem with the general definition given first is that in order to have a conflict of laws resulting in the forum's making a choice, there must initially be "competition" between the laws of the states involved. Of course, the mere fact that one state's position on a particular legal issue differs from another's on that question does not create a conflict of laws. An actual conflict requiring choice of law arises only when: 1) a difference exists between the two states' positions, and 2) those facts occur which directly juxtapose the legitimate reasons for each state's rule to be applied to the facts.

This limitation on the definition of conflict of laws to those occurrences which involve "competing" state interests not only appeals to common sense by its refusal to apply conflicts rules needlessly, but also promotes the ultimate objective of the subject. Professor Cheatham explains the function of conflicts:

Conflict of laws has as its task the coordination of the laws of our interstate and international systems as they bear on an occurrence. To do this wisely, it must have a flexibility of method that will enable it to cope with the infinite variety of human transactions that cut across state and national frontiers.\(^6\)

Only in light of this definition of conflict of laws and of the ultimate function of this legal field can one effectively contrast the traditional *lex loci delicti* method with the Babcock approach.

The first statement of West Virginia's adoption of the *lex loci delicti* rule appears in *Owen v. Appalachian Power Company*.\(^7\) Although the action was brought in the Circuit Court of Mercer County, West Virginia, the plaintiff, a Virginia resident, was in-

\(^5\) Sedler, * supra* note 8, at 28 (emphasis added).


\(^7\) 78 W. Va. 596, 606, 89 S.E. 262, 267 (1916).
jured in Virginia by high voltage from one of defendant’s power lines extending across a farm in Virginia. Defendant corporation was chartered under the laws of that state and had its principal place of business in Richmond.  

The court applied Virginia law to determine the plaintiff’s rights: “Plaintiff’s injury occurred in the state of Virginia, and his right to recover depends upon the law of that state.” Although the court did not question the validity of or examine the reason for this conflicts rule, it cited for support Western Union Telegraph Co. v. Brown, where the United States Supreme Court adopted the rule. Despite the persuasive nature of the highest court’s decision, West Virginia was not bound to follow the conflicts rule stated in Western Union. The United States Supreme Court did not ground its decision in that case on any constitutional provision; nor did it mention an alternative rule. Of course at the time of the Western Union decision in 1914, no court in the country seemed to adhere to any rule significantly different from the predecessor of the lex loci theory. The opinion of the Supreme Court on this point is couched in terms analogous to the vested-rights doctrine, the forerunner of the place-of-the-injury rule. In his opinion Justice Holmes wrote:

[It is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery.]

Although perhaps in theory this concept of an obligation differs slightly from the strict vested-rights theory, the two are practically indistinguishable and achieve the same end—in both, the law of the place of the tort controls. A brief explanation of the vested-rights theory is that the right to recover for a foreign tort “owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law.”

The effect of the West Virginia court’s adoption of the place-of-the-injury rule was to allow a plaintiff who was injured in Virginia by high voltage from one of defendant’s power lines to recover in Virginia, despite the fact that the defendant corporation was chartered under the laws of Virginia and had its principal place of business in Richmond. This decision was based on the principle that the right to recover for a foreign tort is created by the law of the place of the tort, and that this right is not only the ground but the measure of the maximum recovery.

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18 Id.
19 Id. at 606.
20 Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914).
21 Id. at 547.
of-the-tort rule in *Owen* is neither disturbing nor inequitable. Two of the more attractive features of the place-of-the-tort rule are mentioned below: "[E]ven though the place of accident may be fortuitous, the application of its law may be justified on the ground that it is readily ascertainable and leads to uniform results."23 Perhaps conflicts rules in torts would have progressed more rapidly in West Virginia had the application of the rule in this early case effected a different result. Several facts, however, make the use of Virginia law sensible. First, the West Virginia forum had no contact with the controversy other than hearing the case; consequently, it had no significant interest in the controversy. Under this place-of-the-tort choice-of-law rule, the West Virginia court is bound by the Virginia court's decisions on matters of substantive law. Furthermore, the case involved a negligence question and, as the West Virginia court noted, "[W]e are not aware of any distinction between the laws of the two states on that subject."24

In a case comparable to *Owen*, the vested-rights or place-of-the-tort theories operate satisfactorily. Moreover, the use of the rule's test is quite simple: in what state was the plaintiff injured? Because the rule works so well with this particular kind of fact pattern, the court failed to distinguish subsequent significantly different cases from *Owen*. In the more than sixty years since this decision, the West Virginia Supreme Court of Appeals has opined no challenge to the *lex loci delicti* approach to conflicts problems, although frequently the application of the old rule obtains inequitable and harsh results.

In contrast to the *Owen* case in which the place-of-the-tort rule by chance referred the court to the law of the only state with a significant interest in the controversy, hovers a series of decisions in which the sole contact with the state whose law controls is the occurrence of the tort within that jurisdiction.25 A quite recent decision by the West Virginia court exemplifies this category of cases. *Hopkins v. Grubb*26 involved a suit by a guest passenger and her husband against her hostess driver to recover for injuries sustained in a one-car accident. Defendant Grubb and plaintiff Hop-

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23 Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Groping for Contacts*, 16 Buffalo L. Rev. 537, 538 (1967) [hereinafter cited as Baer].
24 78 W. Va. at 606, 89 S.E. at 267.
kinds, both residents of West Virginia, left their homes in McDowell County early one morning to drive to Johnson City, Tennessee, where the defendant was to have her eyes examined. Driving in the rain on a four-lane highway in Tazwell County, Virginia, the defendant decided to pass a truck, glanced in her rear-view mirror and started around the other vehicle. As she swerved into the left lane, she heard a horn sound, cut back to the right, and lost control of her car which turned a circle, crossed all four lanes and settled in a ditch. Plaintiff Hopkins suffered serious, permanent injuries in the accident. At the time of the wreck, Virginia had in force a guest statute requiring a guest to prove gross negligence in order to recover from a host for injuries resulting from the host's negligence.

Citing several precedents for the application of the lex loci rule, the court reiterated the rule without examining its effect, the interests of the states involved, or trends in other jurisdictions. Writing for the majority, Chief Justice Caplan stated, "This unfortunate incident, having occurred in the state of Virginia, the substantive law of that state will be applied." Thus, the court held that the trial court properly required plaintiff to prove gross negligence to recover against her hostess. Because the jury found the defendant guilty of gross negligence, and, consequently, returned the verdict for the plaintiff, the application of the Virginia guest statute in this case did not effect a different result than would have been reached under West Virginia substantive law, which requires only a showing of ordinary negligence.

An examination of Justice Neely's dissent, however, reveals the majority opinion's avoidance of the harsh effect of West Virginia's lex loci choice-of-law rule. As Justice Neely noted, "The evidence in this case is clearly insufficient to present a jury question on the issue of defendant's gross negligence, if the cited Virginia standard is to be honestly observed." By claiming that reasonable persons could differ on the issue and, thus, allowing the jury to determine the question of gross negligence, the trial and appellate courts shunned the responsibility of allowing the defendant to receive a directed verdict, avoided the result of the lex loci

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7 Id. at 472.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id. at 474.
delicti rule, and, yet, maintained the facade of consistency and uniformity by appearing to apply Virginia law. The West Virginia court claimed to be using the Virginia substantive law. In fact, the Virginia definition of gross negligence required "... utter disregard of prudence amounting to a complete neglect of safety of the guest. It must be such a degree of negligence as would shock fair-minded men ...."23 Comparing this definition to the facts of the Hopkins case, gross negligence is hard to find. The majority asserted that several elements combined to create the gross negligence: "All of these factors presented a proper question for jury consideration."24 Quite simply, however, the defendant's conduct neither exhibited utter disregard of prudence nor shocked the fair-minded observer. Notably, even the majority opinion contains no expression that the defendant's conduct did either of these. As the dissent correctly observed, although the court claimed to conform to Virginia substantive law, it surreptitiously avoided doing so to prevent a harsh result.25

The majority opinion in Hopkins v. Grubb demonstrates some of the difficulties with the use of the traditional choice-of-law rule in tort actions. Another weakness emerges when one examines the purpose of the Virginia guest statute to decide if that objective would be promoted by the application of the Virginia statute in a case like Hopkins. Unquestionably, guest statutes were passed in response to persistent lobbying by insurance companies to protect themselves from collusive suits between a driver and his guest.26 While such an aim may be legitimate, it was not furthered by application of the statute in the instant case. The Virginia General Assembly passed its statute to protect Virginia insurers; in contrast, West Virginia had no such statute at the time either of the wreck or of the suit. Where, as here, a West Virginia defendant and plaintiff leave their state and become involved in an accident in Virginia, it is doubtful that a Virginia insurer could be harmed by the plaintiff's recovery against the hostess. If the purpose of the Virginia statute is not promoted, there is no reason to apply it.27

24 230 S.E. 2d at 473.
25 Id. at 473-74.
26 Sedler, supra note 8, at 108.
27 Another justification for application of lex loci delicti in conflicts cases with guest statutes depends on the theory that people act in accordance with the law of the jurisdiction where they are present. This reasoning is inappropriate in automobile tort cases because, as Ehrenzweig argues, the driver of a car is not more careful because his insurer will be liable for injuries to his guests caused by his negligence;
CONFLICT OF LAWS

Praised by one commentator as "the most important conflicts case of the century," Babcock v. Jackson offers an attractive alternative to the traditional choice-of-law rule in tort cases involving more than one jurisdiction. Factually similar to Hopkins v. Grubb, Babcock concerned New York residents who traveled to Ontario and were involved in an accident there. Ontario's guest statute completely barred an action by an injured guest against a host driver, but under New York law the suit would not have been barred. The New York trial court granted the defendant's motion to dismiss on the ground that the law of the place of the tort governed, and, hence, the Ontario statute prevented plaintiff from recovering. Over a vehement dissent, the intermediate appellate division affirmed the dismissal.

After a brief recitation of the facts, however, Judge Fuld gave notice in his statement of the issue that the New York Court of Appeals would reverse. He wrote:

The question presented is simply drawn. Shall the place of the tort invariably govern the availability of relief for tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?

This framing of the issue reveals the court's cognizance of an alternative theory to the lex loci rule. The court recited the old rule, noted criticism of it, observed a "judicial trend towards its abandonment or modification," and finally began its discussion of a new rule. The court cited Auten v. Auten, where a "grouping of contacts" theory had been applied to a conflicts decision involving a contract dispute, and Kilberg v. Northeast Airlines, Inc.,

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12 N.Y.2d at 477, 191 N.E.2d at 280-81, 240 N.Y.S.2d at 746.

Id. at 479-80, 191 N.E.2d at 281-82, 240 N.Y.S.2d at 747-48.


where the court refused to follow the place-of-the-tort rule in a suit involving a plane wreck when the plaintiff's trip originated in New York, but the accident occurred elsewhere. Two common elements about these and other similar decisions were observed: 1) the rejection of the inflexible place-of-the-tort rule where that state is essentially disinterested; 2) the adoption of the law of the state with the more compelling interest in the issue under consideration.46

Finally, Judge Fuld compared New York's and Ontario's interests:

The present action involves injuries sustained by a New York guest as a result of the negligence of a New York host in the operation of an automobile, garaged, licensed, and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.47

The court then examined the purpose of Ontario's guest statute, found it to be the prevention of fraudulent claims against insurers, and concluded that the Ontario legislators could not have been concerned with protecting New York insurers.48

An important distinction appears later in the opinion. The majority made certain that the case was not to be confused with one wherein the statute related to the manner in which the defendant had been driving his car. Appropriately, the court recognized that the place of the tort has a proper interest in controlling the conduct of persons within its boundaries. The opinion closes on this important distinction:

Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.49

46 Id. at 479, 191 N.E.2d at 282, 240 N.Y.S.2d at 749.
47 Id. at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.
48 Id. at 484, 191 N.E.2d at 286, 240 N.Y.S.2d at 750. But see Baer, supra note 23, at 553-54. The Babcock court also notes, "[G]iven the facts of the present case, the result would be the same and the law of New York applied where the foreign guest statute requires a showing of gross negligence." 12 N.Y.2d at 484 n.14, 191 N.E.2d at 285 n.14, 240 N.Y.S.2d at 752 n.14.
49 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.
This departure from traditional choice-of-law rules seems at first glance to be a radical change. Upon closer scrutiny, however, the final qualification in Fuld’s opinion makes clear that the effect of Babcock is not wholesale substitution of the most-significant-relationship theory for the lex loci delicti rule, but rather the demotion of the place of the tort from its position as the sole factor in deciding which law governs to one of several factors to be considered. Where the place of the tort is a significant element, as in Owen, proper weight should be attached to it. On the other hand, where the place of the tort is merely fortuitous, as in Babcock and Hopkins, that factor should give way to more significant ones.

Not surprisingly, the Babcock decision has suffered its share of criticism. Termining it “wholly indefensible,” one author claimed that the decision “destroys uniformity.”50 Another argued that it diminishes the certainty necessary for settlement and trial processes.51 While these objections are not entirely meritless, the courts’ use of escape devices, as exemplified by West Virginia’s questionable handling of the Virginia law in Hopkins,52 had already eroded any real certainty and predictability the old rule once afforded.

In The Nature of the Judicial Process53 Justice Cardozo recognized the importance of uniformity in the law, but he also demonstrated a keen awareness of the atrophying effect of blind adherence to outdated rules:

One of the most fundamental social interests is that the law shall be uniform and impartial . . . . But symmetrical development may be bought at too high a price . . . . The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.54

An understanding of the paramount importance of the development of a rational and progressive body of conflicts rules echoes in the following words: “Courts striving to emulate Babcock in this

52 For another example of a court’s avoidance of the harsh result of traditional conflicts rules, see Levy v. Daniels’ U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928).
54 Id. at 112-13.
spirit may not achieve uniformity but they are likely to attain a much closer approximation to justice than those ... past decisions that have rubber-stamped the place-of-injury rule.\textsuperscript{55}

A final criticism of the opinion in \textit{Babcock} arises from the court's use of a variety of terms to describe its choice-of-law method. Because of the adoption of such different words as "interests," "contacts," and "significant relationships," "several learned authors found support [in the opinion] for their pet theories."\textsuperscript{56} Although this criticism of the loose language makes a valid point for the scholar attempting to distinguish various theories, the following comment undermines the critique with a practical observation. It explains, "[T]here is no reason for [a court] to accept a \textit{particular} policy-centered theory. . . . What is necessary is that the court employ the traditional method of judicial decision in a conflicts case as it has done in all areas of the law."\textsuperscript{57}

Among the finest attributes of a policy-centered approach exemplified by \textit{Babcock} is its effectiveness in identifying and dealing with "false conflicts."\textsuperscript{58} Simply defined as instances where only one state has any real interest in the application of its law,\textsuperscript{59} this concept is a useful tool when fact situations include several jurisdictions. Unlike the traditional rule which mechanically applies \textit{lex loci} whenever the facts involve more than one state, this offspring of the policy-oriented approach examines the various state interests before making a choice of law. By doing so, it obviates the necessity of making a selection where only one state is interested and no real conflict exists. Recollection of the facts of the \textit{Hopkins} case, for example, brings to mind that both plaintiff and defendant were West Virginians; they left West Virginia to travel to Tennessee; the lawsuit arose in West Virginia; and only by incidence of fate did the accident occur in Virginia. In such a case as this, Virginia has no real interest in the application of its substantive law. Its guest statute was passed to protect \textit{Virginia} insurers against collusive lawsuits. West Virginia, on the other hand, is the concerned state. Application of a \textit{Babcock} approach to conflicts choices in tort cases reveals the \textit{Hopkins} case to be one involving no actual conflict between states' laws.

\textsuperscript{56} Baer, \textit{supra} note 23, at 551.
\textsuperscript{57} Sedler, \textit{supra} note 8, at 86.
\textsuperscript{58} \textit{See} Note, \textit{False Conflicts}, 55 CAL. L. REV. 74, 75 (1967).
\textsuperscript{59} \textit{Id.} at 74.
The traditional choice-of-law rule presently in force in West Virginia offers some appeal. *Lex loci delicti* is easy to apply; it seems to offer certainty, predictability and uniformity. No doubt some lawyers and courts will find these factors sufficiently important to justify adherence to this mechanical means of determining what law to apply in conflicts decisions. As one author observed, "[A] careful review of post-*Babcock* decisions reveals that pragmatically *Babcock* has not sounded the death knell of *lex loci delicti* . . . ."60 In an obscure section of *Babcock v. Jackson*, however, Judge Fuld explained why New York had not changed its position on this issue earlier than 1963. His comment reflects the present position of the West Virginia court: "[T]he question here posed was neither raised nor considered in those [earlier] cases . . . ."61

A court able to escape the bounds of *lex loci delicti* affords itself a variety of attractive advantages. More importantly, such a court finally becomes free to develop a rational body of conflicts law which follows the traditional common law method of examining the interests of the states involved, resolving issues on a case by case basis, and recognizing (and appropriately dealing with) false conflicts.

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60 Chappell, *supra* note 22, at 257.
61 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751.