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Conflict of Laws--Wrongful Death Measures of Damages-- Substantive or Procedural?

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unless the grounds upon which the agency acted, in exercising its power, were those upon which its action could be sustained. *Baudin v. Dulles* 235, F.2d 532 (D.C. Cir. 1956). It has been decided that if the agency's action is arbitrary the injured party will have the right to judicial review. *Joint Anti-Fascist Refugee Comm. v. McGrath*, *supra*; *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955).

It seems, therefore, that the decision of the principal case does not vary from the rules already established concerning agency action. This case will inhibit the use of publicity type enforcement techniques if such techniques are used in an arbitrary or capricious manner. On the other hand, if the press release is issued in a valid exercise of the agency's authority and is in compliance with the law the decision of the case will not affect it, for the courts will not interfere in the valid exercise of an agency's power.

The courts in these situations are placed in a delicate position, for they must not only promote the public's interest in the administration of the law but also safeguard the constitutional right of each individual. But, as the cases indicate, the rights of the individual rise higher than the preservation of enforcement techniques employed by administrative agencies.

Thomas Franklin McCoy

**Conflict of Laws—Wrongful Death Measure of Damages—
Substantive or Procedural?**

The intestate, a passenger of *D's* common carrier aircraft, was killed in a crash in Massachusetts, the state of *D's* incorporation. *P*, as administratrix of her husband's estate, brought suit in federal district court, in New York, on diversity of citizenship. On appeal, only the cause of action based on the Massachusetts wrongful death act was considered. The district court applied the Massachusetts statute, but refused to apply the 15,000 dollar limitation, as being contrary to the public policy of New York. The circuit court reversed. Upon rehearing, the court, sitting en banc, *held*, reversed and affirmed the district court. If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, neither the Full Faith and Credit Clause nor the Due Process Clause requires that the law be applied. *Pearson v. North-*

east Airlines, Inc., 31 U.S.L. WEEK 2256 (2d Cir. Nov. 8, 1962).

It is a well settled principle of conflict of laws that the right to maintain an action for wrongful death is governed by the law of the place of the wrong subject to the qualification that if such law is contrary to the strong public policy of the forum, the forum may, in its discretion, refuse to enforce the right. *Stewart v. Baltimore & O. R.R.*, 168 U.S. 445 (1897); *Northern Pac. R.R. v. Babcock*, 154 U.S. 190 (1894); *Royal Indem. Co. v. Atchison, T. & S. F. Ry.*, 272 App. Div. 246, 70 N.Y.S.2d 697, aff'd, 297 N.Y. 619, 75 N.E.2d 613 (1947). See GOODRICH, CONFLICT OF LAW, § § 11, 92 (3rd ed. 1949); LEFLAR, CONFLICTS OF LAWS, § 48 (1959); RESTATEMENT, CONFLICT OF LAWS § § 391, 412, 147, 612 (1934). Equally settled is the rule that the law of the forum governs all matters procedural in nature while the law of the place of the wrong governs all substantive matters. *Franklin Sugar Refining Co. v. Lipowicz*, 247 N.Y. 465, 160 N.E. 916 (1928).

The court in the instant case, has applied the rule as laid down as dictum by the New York court in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961). The *Kilberg* Case, which arose from the same accident as the instant case, held that the plaintiff could not maintain an action for breach of contract in causing his intestate's death, but that this did not preclude the plaintiff from recovering more than the \$15,000 maximum specified in the Massachusetts act. The New York court stated that the Massachusetts wrongful death action was not only sustainable, but in applying this act the court would refuse to apply the limitation of the Massachusetts statute because New York public policy prohibits the imposition of limits on such damages. In effect, the *Kilberg* case says that the question of damages is one of procedure rather than one of substance. Judge Froessel, in affirming dismissal of plaintiff's action for breach of contract, said that the overwhelming weight of authority in New York and the United States is in accord with the rule that the law of the place of injury governs not only the existence of the cause of action for wrongful death but also the measure of damages. *Kilberg v. Northeast Airlines, Inc.*, *supra*. The New York court appears to have placed its decision on alternative grounds—that New York public policy prohibits the enforcement of the limitation, and that the question of damages was procedural, rather than substantive, in nature. Both grounds call for the application of the law of the forum. Having determined that New York public policy prohibits the

imposition of a limit on the amount recoverable by the New York plaintiff, it seems unnecessary for the court to hold that the damage issue is procedural. The great weight of judicial authority supports the view that the measure and amount of damages recoverable for wrongful death or a limitation on that amount are just as much questions of substantive law, and therefore governed by the law of the place where the fatal injury was inflicted, as the right to recover for the wrongful death. *Maynard v. Eastern Airlines Inc.*, 178 F.2d 139 (2d Cir. 1949); *Jackson v. Anthony*, 282 Mass. 540, 185 N.E. 389 (1933); *Royal Indem. Co. v. Atchison, T. & S. F. Ry.*, 272 App. Div. 246, 70 N.Y.S.2d 697, *aff'd*, 297 N.Y. 619, 75 N.E.2d 613 (1947); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918). For a collection of cases on this principle listing twenty-four jurisdictions, including New York with the majority, see Annot., 15 A.L.R.2d 759 (1951).

The dictum of the *Kilberg* case that is applied in the instant case is based on *Wooden v. Western N.Y. & P. R. Co.*, 126 N.Y. 10, 26 N.E. 1050 (1891). The doctrine of this case is criticized by Judge Cardozo in *Loucks v. Standard Oil Co.*, *supra*. In the *Loucks* case, although it was suggested the court might refuse to enforce a right based upon a foreign statute "that outrages the public policy of New York", the court held that a Massachusetts statute, similar to the one in the instant case, must be enforced, despite the fact that New York could not give them the same amount of damages as the New York law would give if the wrong had occurred there. Thus Judge Cardozo clearly indicated that the maximum damages would be controlled by the Massachusetts statute.

At a later date the court refused to apply New York law as to additional liability. It was held to be well established that a cause of action for wrongful death and the extent of the damage recoverable is governed by the laws of the place where the injury causing death was inflicted. *Royal Indem. Co. v. Atchison, T. & S. F. Ry.*, 272 App. Div. 246, 70 N.Y.S.2d 697, *aff'd*, 297 N.Y. 619, 75 N.E.2d 613 (1947).

Since federal jurisdiction rests on diversity, it is well settled that the court in the instant case is obliged to apply the law of the forum, including its conflict of laws doctrine, unless some provision of the Constitution of the United States precludes its application. *Klexon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). By a 2-1 majority, the court, in the first hearing of the instant case,

held that the trial court's refusal to apply the limitation of the Massachusetts statute violates the Full Faith and Credit Clause of the Constitution. See U.S. CONST. art. IV, § 1. Judge Irving Kaufman, who dissented to the first decision of the Second Circuit, stated that he believed that the dull conformity which would result from the use of the Full Faith and Credit Clause as a strait-jacket confining the body of conflict of laws doctrine was far less desirable than the results which would be achieved by a more flexible interpretation of the Constitution. *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131 (2nd Cir. 1962).

In cases of this nature a court must decide between its own conflict of laws rule and the policy which prohibits limitations on wrongful death claims. Faced with such a choice, the forum cannot possibly decide in favor of the latter policy and avoid, as the court has attempted to do, doing violence to the former. There is a significant difference between public policy as a rule for the judicial guidance of local affairs and as a rule of conflict of laws. Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26 (1938). A strong forum policy against a foreign substantive law has been held to justify the forum's refusal to apply that law. See STRUMBERG, *CONFLICTS OF LAW* 198 (2d ed. 1951). It may be urged, however, that only violation of a "fundamental principle of justice" warrants dismissal on that ground of a plaintiff's claim based on foreign law. *Loucks v. Standard Oil Co.*, *supra*. The "fundamental policy" (of the New York wrongful death statute) is that there shall be some atonement for the wrong. *Loucks v. Standard Oil Co.*, *supra*. The Massachusetts statute fulfills this policy and the court should therefore have applied the Massachusetts law.

"Public policy" is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice of law rule. Rather than to change or modify the supposedly applicable rule the court may refuse on public policy grounds to apply the law to which the rule makes reference. Paulsen & Sovern, "*Public Policy*" in *the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956). "Public policy" could serve as a kind of residual equity principle to relieve against the harshness of a general rule as it applies to a specific situation involving important foreign facts. The recognition of public policy as a tool for doing substantial justice in particular cases is a dangerous matter. Applied without the strictest limitations it could undermine the usual conflict rules

by causing refusal to grant recovery against a local defendant every time he makes an improvident bargain. Paulsen & Sovern, "*Public Policy*" in *the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956). The principal vice of the public policy concept is that it provides a substitute for analysis. The concept stands in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws. Paulsen & Sovern, "*Public Policy*" in *the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

Chief Justice Desmond in the *Kilberg* case rationalized his decision by saying that an air traveler from New York might fly over any one of the 14 jurisdictions that limit death case damages, and because the plane might be forced down in any one of them, the place of the injury becomes entirely fortuitous. He went on to say that the court should protect its citizens against the unfair treatment of the lawsuits which result from these disasters. *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961). Would this same protection be afforded a citizen of another state who happen to board a plane in New York, or is this protection reserved only for the citizens of that state? Judge Kaufman in the instant case, indicates that New York's interest in the welfare of its citizens extends beyond the economic and human loss which they sustain since New York has assumed a duty to provide for those unable to care for themselves. This would seem to infer, that if the plaintiff had not been domiciled in New York the rule of the *Kilberg* case would not apply. Assume that a New Jersey citizen's representative sued in New York, and the court in its discretion did not apply the doctrine of *forum non conveniens*, and because of the possible full faith and credit question decided not to apply the *Kilberg* dictum to a non-domiciliary plaintiff. The court then might well have denied the plaintiff the due process or equal protection of the law guaranteed by the fourteenth amendment. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANNOTATED, 967-1170 (Corwin ed. 1952). Thus, the *Kilberg* dictum making the application of the Massachusetts limitation turn on the citizenship of the plaintiff, creates a dilemma. If the dictum is applied to all plaintiffs, regardless of citizenship, a full faith and credit question may arise when the plaintiff is not a New York citizen. If the dictum is applied only to citizens of New York, and not to other plaintiffs, the equal protection and privileges and immunities rights of the fourteenth amendment may be denied.

The West Virginia court has held in actions to recover for wrongful death, that the law of the place of the wrong rather than the law of the forum govern the right of action in this state. *Keesee v. Atlantic Grayhound Corp.*, 120 W. Va. 201, 197 S.E. 522 (1938). The West Virginia court later said that the substantive law of the foreign jurisdiction controls the right to recover and that the question of survivability of a cause of action was one of substantive law. *Tice v. E. I. Du Pont De Nemours & Co.* 144 W. Va. 24, 106 S.E.2d 107 (1958). These cases seem to indicate that West Virginia would follow the majority, at least as to the procedural issue, and be contra to the instant case.

By determining that the law of the place of the injury is contrary to public policy of the forum and is procedural rather than substantive, the court in the instant case concluded that the law of the forum must be applied on the issue of damages. This view tends to negate both the rationale of certain conflict of law rules and the reason for their existence—namely, to prevent the outcome of a lawsuit from differing according to the place chosen to institute the suit. While the decision of the instant case is no doubt both popular and benevolent, it seems to be an open invitation to forum shopping. To avoid this, it seems that legislation need be enacted either by New York to give a contract cause of action, or by the Congress under the commerce power to provide that damage limitations in common carrier accidents would be unlawful and void. By these methods it would be possible to achieve the same laudable results as the *Kilberg* and the instant cases without resorting to the legal reasoning found here.

Earl Moss Curry, Jr.

Criminal Law—Conspiracy—Consistency Rule

X and *D* were indicted on several counts, including criminal conspiracy, and were tried jointly. *D* entered a plea of guilty to the charges of conspiracy. He was sentenced on October 20, 1958. Previously, on October 8, 1958, *X* had been tried on the conspiracy charge and acquitted. *D* served one sentence and brought habeas corpus to be released from serving the second consecutive sentence. The lower court granted the writ and *P*, the warden, appealed. *Held*, affirmed. In order for a court to have jurisdiction in a case it