

1994

A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in *Cooney v. Osgood Machinery, Inc*

Aaron Twerski

Brooklyn Law School, aaron.twerski@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Other Law Commons](#), [Torts Commons](#), and the [Workers' Compensation Law Commons](#)

Recommended Citation

59 Brook. L. Rev. 1351 (1994)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

A SHEEP IN WOLF'S CLOTHING: TERRITORIALISM
IN THE GUISE OF INTEREST ANALYSIS IN
*COONEY v. OSGOOD MACHINERY, INC.**

Aaron D. Twerski**

INTRODUCTION

Once again the New York Court of Appeals has authored an opinion for the casebooks. *Cooney v. Osgood Machinery, Inc.*¹ is not the first case to raise the issue of contribution in a conflicts setting.² It does, however, discuss the problem in a manner that exposes the policy questions behind the conflict in a sharp and uncompromising fashion.

The story is simply told. In October 1978, Dennis Cooney, a Missouri resident, was injured while working on a metal bending machine.³ The injury occurred while he was working for Paul Mueller Co., a Missouri domiciliary.⁴ The metal bending machine that caused the injury was manufactured in 1957-58 by Kling Bros. and sold in 1958 to a Buffalo, New York company, American Standard Inc., through a New York sales agent, Osgood Machinery. Osgood had assisted American Standard in the setup and initial operation of the machine.⁵ American closed its Buffalo plant around 1961. Little is known as to what happened to the machine in question from 1961 to 1969.

* 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993).

** Professor of Law, Brooklyn Law School.

¹ 81 N.Y.2d 66, 612 N.E.2d 277, 595 N.Y.S.2d 919 (1993).

² See, e.g., *Bader v. Purdom*, 841 F.2d 38 (2d Cir. 1988) (conflict between Ontario and New York law in contribution and indemnity claim); *Mack Trucks v. Bendix-Westinghouse Auto Co.*, 372 F.2d 18 (3d Cir. 1966) (indemnity claim implicating the laws of both Pennsylvania and Florida); *Nicolet, Inc. v. Superior Court*, 224 Cal. Rptr. 408 (Cal. Ct. App. 1986) (false conflict in favor of California law in case where asbestos manufacturer sued insurers for the insurers' failure to indemnify manufacturers), *review granted*, 719 P.2d 987 (Cal. 1986), *dismissed*, 736 P.2d 319 (Cal. 1987).

³ *Cooney*, 81 N.Y.2d at 70, 612 N.E.2d at 279, 595 N.Y.S.2d at 921.

⁴ *Id.*

⁵ *Id.*

However, in 1969, Crouse Company, which obtained the equipment in some unknown manner, sold it to Paul Mueller Co.⁶ Sometime after it purchased the used machine, Mueller installed it in its Springfield, Missouri plant and modified it by adding a foot switch.⁷ Cooney was injured while cleaning the machine: "The machine was running at the time—a piece of wood having been wedged in the foot switch. . . . Cooney was unable to reach the switch to stop the machine and avoid injury."⁸

What then transpired followed a familiar pattern. Cooney filed for and received workers' compensation benefits in Missouri. But unhappy with the limited workers' compensation benefits, he sought out Osgood, the New York sales agent involved in the original sale from Kling Bros. to American Standard, as the seller of the defective product.⁹ Of all the parties involved in the suit, Osgood was almost certainly the least culpable. It immediately brought a third-party contribution action against Mueller, American Standard and Hill Acme (the successor in interest to Kling Bros).¹⁰ Though the case does not set forth the claim in any detail, it would appear that given the modification of the product by Mueller, Cooney's employer, it is quite likely that the lion's share of the fault would rest with Mueller. Even if a claim of defective design could be lodged against the manufacturer or seller, Cooney was injured when a piece of wood became wedged in the foot switch—the very part of the machine that Mueller had modified at the plant site. But, consider now the rub.

Missouri, the domicile of the defendant and the locus of the accident, follows the overwhelming majority rule that an employer who operates under the immunity of workers' compensation is not only immune from suit by the injured plaintiff, but is also immune from any contribution claim by any defendant held liable to the plaintiff.¹¹ This policy rests on the theory that if the defendant is liable for contribution, its workers' compensation immunity is illusory. It ultimately will

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; see also MO. ANN. STAT. § 287.120(1) (Vernon 1993).

be held liable for the workers' injury indirectly. In contrast, New York, the domicile of Osgood, stands alone in allowing a full contribution action against the employer for the percentage of fault allotted to it.¹² The conflict could not be any sharper. New York is at loggerheads with the rest of the nation as to whether an employer should be able to utilize workers' compensation immunity as a shield against what otherwise would be its liability as a joint tortfeasor.

This Article first establishes that contribution conflict of law cases bring the interest analysis and territorialism approaches into sharp conflict. It then demonstrates that New York's insistence upon applying an interest analysis requires it to obscure the reality of tort immunity rules without always ensuring the appropriate result. But this Part also concludes that the *Cooney* court reached the correct result by implicitly applying a territorial analysis. Finally, this Article examines the constitutional implications of Osgood's argument that New York law should apply, concluding that a territorial approach avoids a very real constitutional problem.

I. CONTRIBUTION CONFLICT CASES AND WHY THEY ARE DIFFERENT

Contribution cases will be a source of difficulty for the courts in the years to come. The issue will come up with recurring frequency because manufacturers, with considerable justification, view the majority no-contribution rule as unjust.¹³ They find it unpalatable that an employer, who is often the most culpable of the parties, escapes scot free from liability, thereby shifting the entire cost of the injury to the product manufacturer.¹⁴ Though New York is the only state to allow

¹² See N.Y. CIV. PRAC. L. & R. §§ 1401-04 (McKinney 1976 & Supp. 1993); see also *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) (permitting a third-party complaint against employer for apportionment of damages).

¹³ See ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 76.10 (1993) (explaining that manufacturers, as strangers to the compensation system, believe it is unfair for them to subsidize the system by assuming liabilities that would normally be shifted to or shared with the employer); JAMES HENDERSON & AARON D. TWERSKI, *PRODUCTS LIABILITY PROBLEMS AND PROCESS* 66-69 (2d ed. 1992).

¹⁴ See INSURANCE SERVICES OFFICE, *PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS* 64-66 (1977) (finding that employer

full contribution, other states have allowed partial contribution up to the amount of the workers' compensation award.¹⁵ Unless this issue is resolved by federal product liability legislation,¹⁶ contribution conflicts of this nature are here to stay. Full or partial contribution rules will be at war with the no-contribution rule. One's first reaction to this conflict might well be to ask, "So what?" The law has dealt with the issue of pro-recovery versus anti-recovery rules in a host of conflict settings. A modern policy-oriented conflicts approach should easily adapt to this new problem. But there are several reasons why it will not be easy to resolve these problems without compromising the principles of interest analysis.

First, in the classic contribution conflicts case, the underlying tortious conduct which causes injury to the plaintiff and gives rise to the lawsuit is territorially centered in one jurisdiction.¹⁷ For example, in *Cooney*, the plaintiff was injured while at work in Mueller's plant in Springfield, Missouri.¹⁸

negligence is implicated in more than one-half of all employment-related product liability claims).

¹⁵ See, e.g., *Kotecki v. Cyclops Welding Corp.*, 585 N.E.2d 1023 (Ill. 1991) (employer liable in contribution for amount not to exceed employer's workers' compensation award); *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977) (contribution of employer can be in proportion to its fault, but it cannot exceed employer's workers' compensation award). Several states permit a dollar-for-dollar offset for the employer's negligence. *Witt v. Jackson*, 366 P.2d 641 (Cal. 1961) (injured employee's damages against third party reduced by amount of worker's compensation already received); *Hunsucker v. High Point Bending & Chair Co.*, 75 S.E.2d 768 (N.C. 1953) (same). At least one state follows the proposal of the MODEL UNIFORM PRODUCT LIABILITY ACT § 114 (1979) and permits an offset based on worker's compensation payments without regard to whether the employer was at fault. CONN. GEN. STAT. ANN. § 52-572(F) (West Supp. 1982).

¹⁶ See Product Liability Fairness Act of 1993, S. 687, 103d Cong., 2d Sess. § 205(a)(3) (1994), which provides that an employer's right to recapture workers' compensation benefits from a product liability award is preserved unless the manufacturer can prove by clear and convincing evidence that the employer and/or the claimant's co-employees were at fault in causing the employee's injuries. *Id.* If the manufacturer proves that the employer was at fault, the amount of the judgement is reduced by the amount of the workers' compensation benefits. *Id.*; see also Paul C. Weiler, *Worker's Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 844 (1989). The likelihood that Congress actually will pass federal legislation remains very much in doubt. For over a decade, efforts at enacting products liability reform at the federal level have not met with success.

¹⁷ See, e.g., *Bader v. Purdom*, 841 F.2d 38 (2d Cir. 1988) (New York plaintiff, while visiting Canada, was bitten by a Canadian dog; although New York arguably has an interest in this case, the events transpired exclusively in Canada).

¹⁸ *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 70, 612 N.E.2d 277, 279, 595

Mueller's modification of the metal bending machine also took place at the work site.¹⁹ While the facts do not relate whether the last owner of the used machine, Crouse Co., was a New York domiciliary, this hardly seems relevant. Mueller had no contact whatsoever with Osgood, the New York seller of the defective machine. Furthermore, the contribution plaintiff, Osgood Machinery, Inc., did nothing whatsoever to affiliate itself with Missouri.²⁰ The court noted that "Osgood was not in the business of distributing goods nationwide but limited its activities to New York and parts of Pennsylvania."²¹ Accordingly, contribution conflicts cases such as *Cooney* do not bring into play interstate relationships involving activities of both parties that somehow touch the concerned jurisdictions. There is no bilateralism of any kind.²² A contribution plaintiff or contribution defendant seeks the benefit of its favorable domiciliary law based on little more than its domiciliary status. Admittedly, this problem is not new to conflict of laws.²³ What is of special interest is that contribution cases present this problem structurally.

Second, the contribution cases present to the courts policy conflicts of the highest order. These are not choice-of-law problems stemming from antiquated rules that remain long past the time that they should have passed on to the netherworld.²⁴ These conflicts raise the question of who ought to

N.Y.S.2d 919, 921 (1993).

¹⁹ *Id.*

²⁰ *Id.* at 77, 612 N.E.2d at 283, 595 N.Y.S.2d at 925.

²¹ *Id.*

²² See Linda J. Silberman, *Federal Choice of Law Restraints*, 10 HOFSTRA L. REV. 103, 110-19 (1981).

²³ See, e.g., *O'Connor v. Lee-Hy Paving*, 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978) (New York widow allowed to pursue more favorable New York tort scheme instead of Virginia's workers' compensation scheme for the wrongful death of her husband who was killed in a Virginia industrial accident); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 854 (1973) (New York plaintiff in wrongful death action received the benefit of New York's unlimited damage recovery rule instead of Massachusetts' \$50,000 damage limit, even though events transpired exclusively in Massachusetts).

²⁴ See RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.6 (3d ed. 1986) (arguing that when the conflict is between an anachronistic rule that has been abandoned by a majority of states and a more modern rule, it is appropriate for a court to choose the more modern rule in a conflicts setting); see, e.g., *Offshore Rental, Inc. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978) (applying the stronger, more current Louisiana rule to preclude corporate employer from

bear the cost for institutional immunities. Indeed, this issue was of such significance that, in writing for the *Cooney* court, Judge Kaye seriously considered the argument that for New York to deny the application of its contribution rule would be against its fundamental public policy.²⁵ That she ultimately rejected the argument does not gainsay the simple fact that the court realized that the policy clash was exceptionally serious.

If both of these observations are correct, the contribution cases necessarily cause courts to choose sides. The Currie brand of interest analysis will demand that the forum apply its own law in the case of a true conflict.²⁶ The attempt to diminish the interest of the forum by sensitive factual analysis does not ring true, although Judge Kaye made a valiant attempt to mute the harshness of the conflict in *Cooney*.²⁷ But the reality is that any time an injury takes place out of state, a New York contribution plaintiff is likely to carry the full burden of a serious product liability claim, a result New York views as a terrible injustice. This case, therefore, does not provide the opportunity for New York to read its policy in a "moderate and restrained" fashion.²⁸ If it is to deny its plaintiff recovery, it

recovering damages caused by loss of key employee).

²⁵ *Cooney*, 81 N.Y.2d at 78, 612 N.E.2d at 284-85, 595 N.Y.S.2d at 926-27.

²⁶ BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 119 (1963) ("The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law . . . simply because a court should never apply any other law except when there is a good reason for doing so.").

²⁷ *Cooney*, 81 N.Y.2d at 77-78, 612 N.E.2d at 283-84, 595 N.Y.S.2d at 925-26. Judge Kaye sought to minimize the conflict by suggesting that Osgood could not have been certain that contribution would have been available to it in a products liability action in the sale of industrial equipment. *Id.* at 77, 612 N.E.2d at 284, 595 N.Y.S.2d at 925. She argued that the original sale took place in 1958, some 14 years before the decision in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) (permitting contribution action against employer, even though employer provides workers' compensation). She also emphasized the very significant interest of the Missouri defendant who could not have expected to be haled before a New York court to respond to damages for an accident to a Missouri employee at its Missouri plant. *Id.*

²⁸ Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963). Also, it is not likely that any of the other sophisticated methods for resolving true conflicts, such as comparative impairment, will help when the policy clash is as sharp as it is in this case. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California*

must bow to a territorial principle. That is precisely what New York did. Ultimately, contribution cases pit interest analysis against territorialism in its most raw and naked form. There is no place to hide. In this "conflict" within Conflicts analysis, courts cannot honestly pay allegiance to both regimes.

II. THE *SCHULTZ* FALLACY

Early in conflicts case law, courts noted the distinction between laws that regulate primary conduct, such as standards of care, and those that allocate losses after the tort occurs. They reasoned that where standards of care were implicated, *lex loci delicti* was almost certainly the rule of choice.²⁹ However, where loss-distributing mechanisms were at stake, the locus of the injury was of much lesser importance and the domicile of the respective parties became the focus of the conflicts analysis.³⁰ Critics of First Restatement rules justifiably took issue with the tyranny of characterization.³¹ The recent

Experience, 68 CAL. L. REV. 577 (1980) (advocating that the California Supreme Court should reject the comparative impairment analysis as inconsistent if it wishes to use Currie's methodology to resolve choice-of-law cases). Indeed, a case such as *Cooney* would strain even Professor Kramer's articulation for resolving choice-of-law problems. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990) (arguing that courts should develop canons of construction to create a multistate choice-of-law compact). Where the policy conflict reaches screeching tones and the stakes for the respective domiciliaries are extraordinarily high, policy-oriented solutions to choice of law simply break down. One must take sides with either *Currie* or a territorial approach. New York has clearly done the latter. See *infra* note 38 and accompanying text.

²⁹ See *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963) ("Where defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the alleged[] wrongful conduct occurred will usually have a predominant, if not exclusive, concern.").

³⁰ *Id.* at 483, 191 N.E.2d at 285, 240 N.Y.S.2d at 751 ("Although the rightness or wrongness of [a] defendant's conduct may depend upon the law of the particular jurisdiction through which the automobile passes, the rights and liabilities of the parties which stems from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place.").

³¹ See, e.g., ARTHUR HENRY ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* 166-67, 170 (1940); RUSSEL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 3.2 (3d ed. 1986); WALTER WHELLER COOK, *THE LOGICAL AND LEGAL BASES FOR THE CONFLICT OF LAWS* 159 (1942). Critics of the First Restatement's use of characterization as an important step in choice-of-law analysis note that characterization identifies a problem area but allows for no fact-sensitive evaluation of whether a given policy objective is furthered under the facts of the case to be decided.

attempts by the New York Court of Appeals in *Schultz v. Boy Scouts of America, Inc.*³² and *Cooney* to characterize all tort rules under the heading of either conduct-regulating or loss-distributing is no less tyrannical. The law of torts is too finely textured to allow for such a simplistic, bipolar categorization.

Both *Schultz* and *Cooney* demonstrate the fallacy of the distinction. In *Schultz*, plaintiffs, residents of New Jersey, sued defendants, Boy Scouts of America, to recover damages for personal injuries to themselves and their two sons arising from sexual molestation that took place when the two boys were at a scouting camp in upstate New York.³³ Their negligence claim was premised upon the Boy Scouts' failure to discover that the scoutmaster, who had molested the boys, had a history as a sexual abuser.³⁴ The conflict pitted the charitable immunity rule of New Jersey against the law of New York, which recognized no such immunity. The court began its analysis by downplaying the interest of the locus of the injury:

[W]hen the jurisdictions' conflicting rules relate to allocating losses that result from admittedly tortious conduct, as they do here, rules such as those limiting damages in wrongful death actions, vicarious liability rules, or immunities from suit, considerations of the State's admonitory interest and party reliance are less important. Under those circumstances, the locus jurisdiction has at best a minimal interest in determining the right of recovery or the extent of the remedy in an action by a foreign domiciliary for injuries resulting from the conduct of a codomiciliary that was tortious under the laws of both jurisdictions.³⁵

The attempt to negate New York's interest by labelling the issue as loss regulating is nonsensical. That a neighboring state can immunize with impunity its charities from the obligation reasonably to discover that its employees are sex abusers when the employee is charged with the task of caring for youngsters far away from home is hardly an issue of loss distribution alone. The classic arguments against tort immunities are that they encourage lax standards of care and, concomitantly, lead to negligent conduct.³⁶ There is every reason to

³² 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

³³ *Id.* at 192, 480 N.E.2d at 681, 491 N.Y.S.2d at 92.

³⁴ *Id.* at 193, 480 N.E.2d at 681, 491 N.Y.S.2d at 92.

³⁵ *Id.* at 193, 480 N.E.2d at 684, 491 N.Y.S.2d at 96.

³⁶ During the 1940s through the 1960s, many states abolished common law tort

believe that the immunity had that very effect in *Schultz*. New Jersey had every right to choose the immunity and its resultant relaxation of standards of care for its residents. But must New York recognize New Jersey's right to export sexual abusers to New York's summer camps where, away from the watchful eyes of parents, they are free to do their dastardly deeds? If New York's tort law does not express an admonitory or deterrent goal in this case, it is hard to imagine a case where it does.

It is not difficult to understand why the *Schultz* court sought to negate the New York interest. In defending the common domicile rule in a "reverse" *Babcock* case,³⁷ the court at-

immunities, such as charitable immunity and governmental immunities. This trend rested upon two rationales: (1) that a loss-distribution principle forcing the victim, rather than the negligent party, to bear the cost of his or her injury is unfair, *see, e.g., Stone v. Arizona Highway Comm'n*, 381 P.2d 107, 112 (Ariz. 1963) (refusing to reaffirm a rule "that denies recovery to one injured by reason of negligent maintenance of the highway"), and (2) that immunity from liability fosters negligence. The latter rationale was well stated by Justice Rutledge's leading opinion concerning the abolishment of immunities: "[T]he tendency of immunity to foster neglect and of liability to induce care and caution. . . . To offset the expense [of liability and litigation] will be the gains of eliminating another area of what has been called 'protected negligence.'" *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 824, 828 (D.C. Cir. 1942).

Other courts also have expressed concern about "protected negligence" in abolishing immunities. For example, the Illinois Supreme Court reasoned, "We believe that abolition of [school district] immunity may tend to decrease the frequency of school bus accidents by coupling the power to transport pupils with the responsibility of exercising care in the selection and supervision of the drivers." *Molitor v. Kaneland Community Unit Dist. No. 32*, 163 N.E.2d 89 (Ill. 1959). And even the New York Court of Appeals itself once recognized that, even if an immunity exists for reasons of loss-distribution, negligence often will result:

Liability is the rule, immunity the exception. It is not too much to expect that those who serve and minister to members of the public should do so, as do all others, subject to that principle and within the obligation not to injure through carelessness. . . . Insistence upon *respondet superior* and damages for negligent injury serves a two-fold purpose, for it both assures payment of an obligation to the person injured and gives warning that *justice and the law demand the exercise of care*.

Bing v. Thunig, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 10-11 (1957) (emphasis added).

The New York Court of Appeals would do well to rediscover this rationale and recognize that simply labeling an immunity as loss-distributive ignores the reality that, in not punishing tortious conduct, the immunity fosters negligence.

³⁷ In *Babcock v. Johnson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the parties with the common domicile resided in a "recovery state" and the injury occurred in a "no recovery state." *Id.* at 476-77, 191 N.E.2d at 280, 240 N.Y.S.2d at 745. The court permitted recovery because, under classical analysis,

tempted to demonstrate that both *Babcock* and the "reverse" *Babcock* were false conflict cases. If not, then Rule 1 of New York's *Neumeier* conflicts resolution system could not be counted on to resolve conflicts.³⁸ Indeed, if territorial considerations would become relevant in a common domicile fact pattern, not only was Rule 1 of doubtful value, but even cases such as *Tooker v. Lopez*³⁹ might require reexamination. One then could argue, for example, that the state in which all of the events giving rise to the lawsuit transpired might well have an interest in applying its host-guest rule to give effect to its

the state of the injury has no interest in applying its no-recovery rule to foreign domiciliaries; its no-recovery rule was not designed to encourage negligent conduct. In the "reverse" *Babcock* case, the parties with the common domicile reside in the no-recovery state and the injury occurs in a recovery state. See, e.g., *Tooker v. Lopez*, 24 N.Y.2d 569, 571, 249 N.E.2d 394, 395, 301 N.Y.S.2d 519, 520 (1969).

The argument in favor of the common domicile rule in both instances is much more plausible when the case involves a host-guest rule. It is difficult to imagine a host exercising greater care in driving merely because his or her conduct takes place in a recovery state. If an accident occurs, the host and the guest will both, so to speak, go over the cliff together. In the *Schultz* case, however, New York's deterrent policy, holding foreign charities liable for negligent supervision of employees sent into the state to minister to minors who are domiciliaries of the same state, may well have a substantial deterrent effect. Criminal penalties against a sexual molester alone, on the other hand, will hardly be a sufficient deterrent to the charitable employer who will bear the sting neither civilly nor criminally under the rules promulgated by *Schultz*.

³⁸ In *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the court proposed the following three principles for resolving cases involving a conflict between guest statutes, which subsequently have been used for resolving other tort conflicts as well. Rule 1 provides that if the plaintiff and defendant share a common domicile, that state's law should apply. Rule 2 provides that if the injury takes place in the defendant's home state and that state's law protects the defendant, or if the injury takes place in the plaintiff's home state and that state's law protects the plaintiff, then the law of the place of the injury should apply. Finally, Rule 3 provides that in all cases not covered by Rules 1 or 2, the law of the place of the injury should apply unless different law "will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants." *Id.* at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

Although *Neumeier* was developed through interest analysis reasoning, in practice it represents a territorialist approach. Except when both parties are from the same state (Rule 1), every conflicts case is resolved by applying the law of the place of the injury, unless the difficult out-clause of Rule 3 is met.

³⁹ *Tooker*, 24 N.Y.2d at 569, 249 N.E.2d at 394, 301 N.Y.S.2d at 519 (holding that New York law, not Michigan's guest statute, was applicable in an action to recover for the death of a guest passenger, a New York domiciliary, where the host automobile was registered and insured in New York and operated by a New York domiciliary in Michigan).

policy of discouraging fraudulent collusion.⁴⁰ Thus, for the court in *Schultz*, it was far better to negate any locus interests by labelling them as mere loss-distribution rules and, thus, treating them as of second-order importance. This would rescue *Neumeier* Rule 1 and retain the conflicts resolution system within the bounds of classic interest analysis.

The *Cooney* court preceded its discussion of interest analysis with a similar peroration to the fact that the conflict did not involve conduct-regulating rules:

Contribution rules—as involved in the present case—are loss allocating, not conduct regulating. Had conduct regulating been at issue here, our analysis would be greatly simplified, for the traditional rule of *lex loci delicti* almost invariably obtains. . . . Instead, our analysis is necessarily more complicated, calling upon us to evaluate the relative interests of jurisdictions with conflicting laws and, if neither can be accommodated without substantially impairing the other, finding some other sound basis for resolving the impasse.⁴¹

Unlike in *Schultz*, however, characterizing the issue as loss-regulating did not detrimentally affect the resolution of the case, because the court ultimately decided the case utilizing territorial principles. Nevertheless, the characterization was equally faulty. In discussing Missouri's interest in protecting employers covered by workers' compensation from contribution, the court noted that to negate this interest "would frustrate the efforts of that state to restrict the cost of industrial accidents and to afford a fair basis for predicting what these costs will be."⁴² States that are prepared to deny contribution have consciously chosen to trade high-profile tort deterrence for a much lower cost system of workers' compensation that provides low-level recoveries to plaintiffs. No one doubts that an employer who operates without the threat of tort recovery and sits under the protection of workers' compensation immunity has a reduced incentive to accomplish safety vis-à-vis industrial machinery in the workplace. It is thus simply not true that both states recognize that the conduct is "admittedly tortious." An immunity rule grants the immunized party license to act in

⁴⁰ Aaron D. Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104 (1973).

⁴¹ *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 74-75, 612 N.E.2d 277, 282, 595 N.Y.S.2d 919, 924 (1993).

⁴² *Id.*

a tortious manner and often egregiously so. That a locus state has done so because it seeks to foster a loss-distribution goal does not change the reality that it has eased its conduct-regulating rule.

In spite of New York's failed attempt to resolve this case by categorizing the nature of the interests at stake, the court reached the correct result because the *Neumeier* rules are essentially territorial in nature, and because the court recognized that there was no legitimate reason to apply New York law to what is almost entirely a Missouri fact situation. Nevertheless, New York conflicts jurisprudence would be enhanced if the court were to rid itself of the conduct-regulating and loss-distribution dichotomy; it rings hollow and adds little to thoughtful analysis. In *Schultz*, it blocked the court from grappling with a very real and most serious policy conflict. In *Cooney*, it led the court through a needless, circuitous route to resolving the conflict.

III. CONSTITUTIONAL CONTROL OF CHOICE OF LAW

Does *Cooney* raise serious constitutional questions? The defendant Mueller argued that New York's connection with the case was so tenuous that a decision to apply New York law would be unconstitutional. Judge Kaye thought the argument of sufficient moment to warrant response.⁴³ She was correct. But after brief discussion, she concluded that given the minimal standards for constitutionality set forth in *Allstate Insurance Co. v. Hague*,⁴⁴ application of New York law in *Cooney* would have passed constitutional muster.⁴⁵ Perhaps she was correct, but *Allstate* and *Cooney* are not a perfect fit.

In *Allstate*, the United States Supreme Court upheld a Minnesota court's decision to apply its own law, which mandated the stacking of overlapping coverage policies, contrary to the law of Wisconsin. The Minnesota court did so even though the policy was issued to a Wisconsin domiciliary, who was a passenger on a motorcycle operated by a Wisconsin resident when he was struck and killed in Wisconsin by an automobile driven

⁴³ *Id.* at 70-71, 612 N.E.2d at 279-80, 595 N.Y.S.2d at 921-22.

⁴⁴ 449 U.S. 302 (1981).

⁴⁵ *Cooney*, 81 N.Y.2d at 71, 612 N.E.2d at 280, 595 N.Y.S.2d at 922.

by another Wisconsin resident. The Supreme Court found the aggregation of the following contacts sufficient to meet minimal due process standards: "[1] the decedent was employed in Minnesota; [2] his wife, the appointed representative of the estate, subsequently moved to Minnesota; and [3] the insurance company was at all times present and doing business in Minnesota."⁴⁶

By analogy, Judge Kaye argued that the aggregation of Mueller's contacts with New York were sufficient for New York to apply its own law. She noted that: (1) Mueller has substantial presence in New York in that Mueller does business within the state sufficient for the assertion of jurisdiction; (2) Osgood, the contribution plaintiff, is a New York domiciliary; and (3) Osgood's alleged tortious conduct with respect to the machine arose in New York, where the machine in question was ordered, operated for several years and eventually shipped out of the state.⁴⁷

Although at first blush there is some facial symmetry, the parallels disappear under closer scrutiny. That Osgood's alleged tortious conduct took place within New York hardly seems relevant to the fairness of applying New York contribution law to Mueller. The contribution action focuses on Mueller's conduct in Missouri in altering the machine or otherwise contributing to the injury through workplace negligence. That New York might have an interest in ensuring that Osgood does not bear the burden of Cooney's loss alone arises not from the tortious conduct that occurred in New York, but in its status as a New York domiciliary. Thus, the tortious conduct within the state does not serve to create an independent interest over and above the domiciliary status of the plaintiff. It cannot do double duty.

Osgood's domiciliary status appears to be most directly analogous to the employment relationship of the decedent in *Allstate* with the state of Minnesota. Indeed, Osgood's status is stronger, as he is a bona fide New York domiciliary, while the *Allstate* decedent's relationship with Minnesota was only one of employment. Once again, however, the analogy is less than perfect. Although the domiciliary relationship of Osgood to

⁴⁶ *Id.* (citing *Allstate*, 449 U.S. at 313-19).

⁴⁷ *Cooney*, 81 N.Y.2d at 71, 612 N.E.2d at 280, 595 N.Y.S.2d at 922.

New York clearly gives New York an interest in applying its law, it is much more difficult to bring that relationship home to the defendant. In *Allstate*, the insurer provided coverage for the decedent, who was, in effect, a two-state domiciliary. He lived in Wisconsin near the border between Wisconsin and Minnesota and worked in Minnesota.⁴⁸ Insurers regularly inquire as to whether vehicles are used to commute to work and how far the vehicles are driven on a daily basis.⁴⁹ Thus, the defendant was hardly caught by surprise when Minnesota law was brought to bear on the case. In contrast, the defendant in *Cooney* was involved in purely local conduct within the state of Missouri. It could not reasonably expect that New York law would apply to its workplace conduct in Missouri. Indeed, in the choice-of-law section of the case, Judge Kaye noted this fact.⁵⁰ Such unfair surprise can raise serious constitutional problems. It was notably absent in *Allstate*, but very much present in *Cooney*.

Finally, the court noted that Mueller had sufficient presence in New York to be subject to general "doing business" jurisdiction. Once again, the court drew an analogy to *Allstate*, in which the Supreme Court identified the fact that Allstate Insurance Co. was at all times doing business in Minnesota as a factor supporting the application of Missouri law.⁵¹ But there is an important difference between the two cases that relates to the choice-of-law issue. In *Allstate*, the defendant's presence in Minnesota concerned the very type of business that was the subject matter of the claim.⁵² Allstate is a national insurer selling auto insurance, the subject matter of the conflicts controversy. In *Cooney*, however, the defendant Mueller's business in New York did not relate to the type of claim that was the subject of the contribution claim. In short, although the basis of jurisdiction over Allstate was formally "doing business," the claim had an "arising under" quality to it. In *Cooney*, there is nothing but naked "doing business" jurisdiction. That is a very slender reed upon which to support the application of New York law.

⁴⁸ *Allstate*, 449 U.S. at 305.

⁴⁹ *Id.* at 314-18.

⁵⁰ *Cooney*, 81 N.Y.2d at 71, 612 N.E.2d at 280, 595 N.Y.S.2d at 922.

⁵¹ *Id.*

⁵² *Allstate*, 449 U.S. at 305.

I would conclude that had the New York court sought to apply its own contribution law against Mueller, its holding might well have been subject to constitutional attack. The aggregation of contacts that supported a finding of constitutionality in *Allstate* made it just under the wire. A significant diminution of those contacts justifiably creates real constitutional trouble.

If New York law cannot constitutionally be applied against Mueller, however, can Missouri law constitutionally be applied against Osgood? Does not Osgood have a similar claim that it had no contact with Missouri? It did business only in New York and Pennsylvania and had no contact whatsoever with Missouri. If this is the case, then is *Cooney* a constitutionally "unprovided-for" case? That is, perhaps the law of neither jurisdiction can apply because to do so would invoke the law of a jurisdiction that had no reasonable relation to one of the parties. Thus, although both states have an interest in their domiciliaries, that interest does not overcome the unfairness of applying their law to one of the litigants.

For a confirmed territorialist such as myself, the specter raised by such a state of events is not distressing. It leads me back to my view that the touchstone for choice-of-law must be territoriality.⁵³ The contribution claim is Missouri-based through-out and so overwhelmingly so that its law has claim to application. That one party is a stranger to those territorial events creates no inherent problem. A state that was the locus of the events relevant to a dispute has the right to speak to its fair resolution. No apologies are necessary. Fairness requires me to admit, however, that even true believers in interest analysis have a way out of this conundrum. A plaintiff seeking to recover against a defendant must present a claim with law applicable to the defendant to make out a case.⁵⁴ Thus, it is

⁵³ Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981); Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971).

⁵⁴ See Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989) (arguing that a plaintiff must present a claim with reasonable applicable law to support the cause of action; the failure to do so in a domestic case will support a motion to dismiss, and the same argument supports the dismissal of plaintiff's claim in a conflicts setting).

not that Missouri law is being applied against Osgood. Osgood simply did not present a claim against Mueller with relevant law that would allow for the prosecution of its claim.

CONCLUSION

Cooney is a very good decision and Judge Kaye has written a compelling opinion. She not only has confirmed the highly territorial *Neumeier* rules, but she has demonstrated why they make good sense under the facts of the case. My plea to the New York Court of Appeals, however, is that it disavow the rigid labelling in which rules are characterized as either loss-allocating or conduct-regulating. Doing so adds little to the analysis and gives insufficient credence to the proposition that serious limitations on remedies have a significant impact on primary conduct. It also seems to me that the time has come to take constitutional arguments seriously. *Allstate* itself stretched due process to the limits and should not be read as totally eviscerating the due process clause as a constraint on state choice-of-law principles. One is hardly in "good hands" even when within the four corners of *Allstate*. When the facts are weaker than in *Allstate*, courts should be willing to face the constitutional infirmities and make the unpleasant, harsh statement that a suggested choice of law is not only bad policy but flatly unconstitutional.