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To Where Does One Attach the Horses?

BY AARON D. TWERSKI*

After digesting the most recent addition to Kentucky conflicts literature, *Foster v. Leggett*,¹ I was reminded of an apocryphal story related to me by my father many years ago. In the small hamlet of Hornistapol, Russia, the first railroad tracks had been laid and all the townspeople came out to see the new modern marvel—the steam locomotive. A simple townsman stood watching this awesome contraption and wondered aloud how this piece of machinery really worked. The town scholar seeking to educate the townsman to the twentieth century took pains to explain the entire operation at great length. He told him that wood and coal were burned in part of the cabin and that water was heated to steam and that steam pressure built up and, properly channelled, it caused the axles to churn and the wheels to move. The townsman listened attentively and nodded knowingly and then when the scholar was finished with his elaborate lecture he said, “Yes, yes, this is all fine but tell me—to where does one attach the horses?”

At the time, if I recall correctly, my father was attempting to convince a rather impetuous young man that educating people to new ideas is a rather difficult task. It requires more than arranging words next to each other in a logical sequence so that they are intelligible as sentences. Words, as the conveyors of ideas, must penetrate deeply into the psyche before they have their impact. Otherwise, the student will parrot the words but will still seek to “attach the horses.” The decision of the Kentucky Court in *Foster* is one more in the long tradition of conflicts decisions which are based on an orientation to decision making which in the opinion of this author is peculiar to conflicts juris-

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¹ 484 S.W.2d 827 (Ky. 1972).

prudence. From the regime of *lex loci*, to interest analysis, to most significant contacts there has been in evidence a most disturbing syndrome. The courts look for and find some theory, some gimmick to decide conflict cases—become wedded to the theory and then proceed to decide the case. Justice, fairness, evenhandedness—values which affect decision making in almost every substantive area of the law—are somehow forgotten. That a conflicts case might require what Professor Kegel has called “conflicts justice”² just as a tort case would require tort justice is viewed as unimportant. The decisions do not deign to speak in those terms. It is evident that this author’s evaluation of the majority opinion will be a sharply critical one. The result reached by the court is not disturbing. In fact, to the surprise of some, I might even agree that I would have decided the case the same way.³ What disturbs me greatly though is the absence of elementary reasoning designed to convince the reader of the result. Formulae and iconic symbols are no substitute for reasoned convincing decisions. The courts are capable of them in every other area of the law. In conflicts, sound judicial instincts can accomplish this selfsame result. At this time of turmoil and revolution

² Professor Kegel used this phrase in Kegel, *The Crisis in Conflict of Laws*, 112 RECUEIL DES COURS 91 (1964-II). He states at 184-85: “What is considered the best law according to its content, that is, *substantively*, might be far from the best *spatially*. . . . One must be ready, therefore, to accept the concept of a specific *justice of conflict of laws*, as distinguished from the justice of substantive law.” (Final italics are author’s). See also Cavers, *Cipolla and Conflicts Justice*, 9 DUQUESNE L. REV. 360 (1971). This author’s position is that the two are inextricably woven together, *i.e.*, conflicts justice is heavily tied to the underlying concepts which dominate the substantive law framework of the laws which are in conflict. See text accompanying footnotes 49-54 *infra*.

³ In an article entitled *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQUESNE L. REV. 373 (1971) [hereinafter cited as *Enlightened Territorialism*], this author discussed *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970). The case is factually similar to *Foster*, the subject of this symposium. In both cases the defendant-driver was domiciled in the state which had a host-guest statute. In both cases plaintiff was domiciled in a state which followed the common-law rule providing for liability in cases of ordinary negligence. In both cases the accident took place in the defendant’s home state. The similarity ends at this point. In *Foster* the relationship between plaintiff and defendant was heavily Kentucky oriented. The territorial dimensions of the case are slanted toward Kentucky, the state which follows the common-law rule. See text accompanying footnotes 8-12 *infra*. In *Cipolla*, the facts were heavily oriented toward Delaware, the state with the host-guest statute. Commenting on the essentially Delaware relationship I took the position that when there was a real relationship between the parties in the state which had common-law liability I would be willing to apply the common-law standard rather than the host-guest statute even when defendant was a domiciliary of the state in which the accident took place. See *Enlightened Territorialism* 388-91. In light of the fact that this is only the second conflict case with this fact pattern it is most surprising that the court did not even allude to *Cipolla*.

in the conflicts area there is hope that the courts, unshackled at last from the rigid rules of the first *Restatement*, will use their new-found freedom to reason to their results rather than plug in facts to new formulae. To help foster this rather ambitious goal I now turn my attention.

THE FOSTER FACTS AND ENOUGH CONTACTS

The background to the Foster-Leggett litigation is of rather substantial importance to a *reasoned* conflicts decision. For one seeking to plug in a conflicts theory, an elaborate development of the factual pattern would not be necessary. Indeed for some it might suffice to state the facts in the following manner: Plaintiff, a domiciliary of a state which has no host-guest statute, was killed while a passenger in a car driven in the continental United States. The driver was guilty only of ordinary negligence.⁴ For others, it might be relevant to add that defendant was a domiciliary of a state which has a statute providing that a host is not liable to a non-paying guest unless injury or death is brought about by the wanton or willful misconduct of the operator.⁵ Still others might find it significant that the accident occurred while the defendant

⁴ B. CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177, 184 (1963) [hereinafter cited as *Notes*]. Currie's position was that if a state had a legitimate interest it must apply its own law. Although Professor Currie later modified his position somewhat, Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROB.* 754, 757-58 (1963) [hereinafter cited as *Third State*], the initial set of facts set forth above would probably be enough to make the result a foregone conclusion. In most instances if plaintiff is a domiciliary of a state which has a compensation interest, Professor Sedler would find this fact alone sufficient. See Sedler, *The Territorial Imperative Automobile Accidents and the Significance of a State Line*, 9 *DUQUESNE L. REV.* 394, 403 (1971). In those situations when defendant is acting in a socio-economic area distinct from that of plaintiff and defendant's insurer does not do business in plaintiff's home state, Professor Sedler would agree that defendant's protective law should apply. There is little doubt that most of the Currie disciples would line up for plaintiff on the grounds that the domicile's compensation interest is the crucial interest which determines the result. See Baade, *Judge Keating and the Conflict of Laws*, 36 *BKLYN. L. REV.* 10 (1969) [hereinafter cited as *Keating*], and Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 *TEXAS L. REV.* 141 (1967).

Thus for all the vaunted enlightenment of interest analysis and its commitment to close factual analysis it may be that the determination that the state of plaintiff's domicile has a compensation interest will be both the necessary and sufficient conditions for the imposition of liability. Note that a single factor will determine the result. Some may see an analogy in this approach to the rigidity of *lex loci*. See text accompanying footnotes 55-61 *infra*.

⁵ For those who would weigh the interests and take into account other types of interstate values, it would be necessary to gauge the interest of defendant's domicile. See Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 *N.Y.U.L. REV.* 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 *CALIF. L. REV.* 1584 (1966).

was driving the car in his own home state, and that the host-guest relationship arose in the domicile of the plaintiff.⁶

The factual development detailed heretofore would be sufficient for those seeking to apply a rigid theory or rule of law in deciding a conflicts case. Yet, it seems to me that such a factual investigation is clearly inadequate. Choice of law cases such as *Foster* raise sensitive problems as to the appropriate law to be applied when people have arranged their lives such that their fortunes are touched by the jurisprudential systems of two states. Surely all the facts which give color to their interstate activity are worthy of consideration. Some will stop reading at this last sentence. I beg you to go on. This is not a brief for "free law" or "ad hoc" decision making in a time when most conflict scholars are clamoring for a rules-oriented approach to bring the courts out of the never-never land of interest analysis.⁷ Rather I invite the reader to join me in creating an intricate mosaic from the factual pattern of the *Foster* case. Hopefully, when we step back to view the mosaic in its entirety, the pictorial representation will be a revealing one.

John Leggett and Helen Stringer were close friends who had been dating for some time.⁸ They had both been divorced and had both worked for several years in the same office in Russell, Greenup County, Kentucky for the C. & O. Railroad. Mrs. Stringer had lived all her life in Greenup County, Kentucky. John Leggett, on the other hand, split his allegiance between Kentucky and Ohio. He made his home and technical domicile in Portsmouth, Ohio. But his connections with Kentucky were strong. Not only did he work in Kentucky, but he rented a room in Russell, Kentucky at the YMCA and would stay there two to five nights a week.⁹

⁶ See Chief Judge Fuld's concurring opinion in *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 403 (1969), and his majority opinion in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454 (1972); RESTATEMENT (SECOND), CONFLICT OF LAWS § 145 and § 6 (1971) [hereinafter cited as RESTATEMENT (SECOND)]; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 247-49 (1971) [hereinafter cited as COMMENTARY] and *Enlightened Territorialism*, *supra* note 3.

⁷ See, e.g., Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972); Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 551, 644 (1968); and D. CAVERS, THE CHOICE-OF-LAW PROCESS 139-203 (1965).

⁸ 484 S.W.2d at 828.

⁹ Appellant's brief states that appellee Leggett roomed in Kentucky five nights a week. Brief at 4. Appellee's brief alleges that he stayed in Kentucky on the average of two nights a week. Brief at 2.

The day before the fatal accident John and Helen got together for a game of golf. At that time they planned for the morrow a day in the big city, Columbus, Ohio, some 100 miles north of both Russell, Kentucky and Portsmouth, Ohio.¹⁰ In order to get an early start the next day John spent the night in his room at the YMCA. The next morning he picked up Helen at her home and then proceeded on U.S. Highway No. 23 to Columbus, Ohio. They had planned that John would transact some business and Helen would do some shopping. They would then get together for dinner, go to the show or the races, and then return to Russell the night of the same day. On the way John attempted to pass another car. It was raining and the roads were wet. In the process of passing, John lost control of the car and crossed the median colliding with a vehicle going south on the highway. Helen Stringer was killed in the collision.

In a suit brought by Carole Foster as administratrix for the estate of Helen Stringer the problem faced by plaintiff was that under the law of Ohio she could not recover for the injuries of the decedent. The defendant, John Leggett, was guilty at most of ordinary negligence. Under the Ohio host-guest statute there can be no recovery by the guest against the host unless plaintiff can prove that the defendant was guilty of wanton and willful misconduct.¹¹ The Kentucky rule sets up no such obstacles—ordinary negligence on the part of the defendant will suffice.¹²

When one steps back and seeks to evaluate this factual pattern certain themes come through loud and clear. This case has "Kentucky" writ over it in large bold letters.¹³ It is not that

¹⁰ These are estimated distances calculated by the author on the basis of scale from an atlas.

¹¹ OHIO REV. CODE ANN. § 4515.02 (Page 1965).

¹² See *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967).

¹³ Professor Reese's symposium comments came to this author's hands after this manuscript was completed. He has taken the position that *Foster* is a hard case which he, on balance, would decide by applying Ohio law. He indicates that following the rule articulated in Chief Judge Fuld's concurring opinion in *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394 (1969), and his majority opinion in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454 (1972), he is led to the conclusion that Ohio law should apply. The part of the rule applicable to *Foster* reads as follows:

When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. 24 N.Y.2d at 585.

(Continued on next page)

the factual contacts are predominantly in Kentucky (although that is true enough). The parties are both in a sense Kentuckians. The defendant John Leggett, although technically domiciled in Ohio has spent a significant portion of his time for the past several years in Kentucky. Not only were his working hours and relaxing hours spent in Kentucky, but he had also rented a room so that he could spend more time among his friends in Kentucky. On the day in question the defendant picked up his girl friend and entered into a host-guest relationship in Kentucky (not something to be sneezed at when the issue is host-guest liability).¹⁴ The trip was to take the plaintiff and defendant to a place in Ohio which was not home to either of them. This is not a case of an Ohio defendant driving a Kentucky plaintiff around the block in defendant's home town.¹⁵ The parties are both, so to speak, in strange country for the purposes of this trip. The trip began in Kentucky and was to end there, were it not for the fatal crash. The relationship, goals and ends of this trip were oriented to Kentucky from its very inception to its planned conclusion, shattered only by the realities of an Ohio accident.

Given the very strong factual connections with Kentucky one might have expected that the Kentucky Court would have developed legal reasoning to reflect the strength of the relationship, contacts and expectancies which were centered in Kentucky. They could have evaluated the "interests" or "policy considerations" behind host-guest statutes and then have placed those policy considerations in interstate perspective by appraising their importance in light of the heavy centrifugal force which pulls this case to Kentucky. Instead of a strong evaluative and reasoned decision the Court decided that Kentucky would apply

(Footnote continued from preceding page)

Although Professor Reese would grant the Kentucky court the right to by-pass this rule by creating an exception when both host and guest reside in the same state, it is interesting to speculate as to the reason why Professor Reese finds *Foster* to be a close case. Is it not perhaps because Judge Fuld's rule is so clear and provides specifically for the *Foster* fact situation? If there were no rule setting forth the result in this fact pattern, would Professor Reese find the *Foster* facts to be so close, or would he read the fact pattern as this author has suggested (*i.e.* as a clear Kentucky case)?

¹⁴ *Enlightened Territorialism*, *supra* note 3, at 388-90.

¹⁵ In such a case there would be broad agreement among many conflicts scholars that Judge Fuld's rule should prevail. See, Petersen, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQUESNE L. REV. 436, 437 (1971).

its own law in all instances when it had "enough contacts."¹⁶ The Court thus chose to "attach the horses" to a new rule.

The Kentucky "enough contacts" rule can now take its rightful place in conflicts history together with such illustrious rules as *lex loci*, *lex domicilli*, *lex fori*, most significant contacts, interest analysis and policy-centered analysis. These shorthand expressions of approaches to the resolution of conflict problems all suffer one common ill. They are what my colleague Professor Sedler has aptly called "academic solutions of universal application."¹⁷ Defining this term in my own peculiar way I would say that a *rule or theory of universal application in choice of law arises when it purports to provide a methodology that will resolve all problems on the basis of a single dominant factor, be it factual or theoretical*.¹⁸ According to this definition, the highly structured, single-minded approach of interest analysis qualifies it as a rule of universal application. Indeed when one observes the reasoning of the "interest analysts" one can only marvel at the new rigidity they have imposed on the choice of law scene.¹⁹ It is little wonder that courts have moved from the rigid rule of *lex loci* to the rule of "enough contacts." They have been led every step of the way to their detriment by academic commentators who had discovered "the theory" to resolve the many complex issues in choice of

¹⁶ 484 S.W.2d at 829.

¹⁷ Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27, 30 (1967). Professor Sedler has used this term to describe a choice of law rule that will provide a result without regard to the factual constellation of the case and its interplay with the relevant social and economic policies found in the supposedly conflicting laws. He would reject, I am certain, this author's characterization of his position and that of other interest analysts as rigid. The reader will of necessity make the final judgment as to the accuracy of the characterization.

¹⁸ Perhaps the "most significant contacts" rule of RESTATEMENT (SECOND) § 145 is not a rule of universal application. This depends on whether the RESTATEMENT (SECOND) sections are read as black letter rules which encourage contact counting or rather as guides to decision making which include a multiplicity of factors. The schizophrenic approach of the RESTATEMENT (SECOND) and the difference between its black letter statements and the fine analysis in its comments has been much discussed. See COMMENTARY, *supra* note 6, at 209. The concern remains that judges will pay too much attention to the black letter statements—witness the approach of Judge Reed dissenting in *Foster* and his discussion of RESTATEMENT (SECOND) § 175. It is not altogether clear that Judge Reed was contact counting. He expressed true concern that a defendant should never be held liable while acting in his home state, if the standard of liability in his home state would exculpate him. He buttresses his decision with a presumption in favor of application of the *lex loci*. This is simply a mirror reflection of the majority's presumption in favor of *lex loci*. See text accompanying footnotes 23-39 *infra*.

¹⁹ See Peterson, *Developments in American Conflict of Laws: Torts*, 1969 U. ILL. L.J. 289, 308 (1969).

law.²⁰ I join Professor Sedler in his call for the courts to return to the judicial method of deciding cases, only after careful consideration of the fact pattern before the court.²¹ But for me this would mean abandoning allegiance to gimmicks and all pervasive theories which dictate results without sensitive consideration of *all* the factual nuances as they develop on the interstate scenario.²²

THE GIMMICKRY OF INTEREST ANALYSIS AND THE FOSTER ANALYSIS

Displacing Forum Law

When the court has jurisdiction of the parties its primary responsibility is to follow its substantive law. The basic law is the law of the forum, which should not be displaced without valid reasons.²³

So spake the Kentucky Court in defending its conclusion that in *Foster*, Kentucky should not abandon its common law rule when litigating the host-guest issue in a Kentucky court. The burden of persuasion is thus on the party seeking to displace forum law to convince the court that the foreign law has a greater claim to application. I believe it a fair statement that this proposition has become an article of faith for many policy-centered theorists. It has become step number one in the analytical approach they offer.²⁴ And it is a prime example of the rigidity inherent in the new methodology.

How did this *rule* develop? What are its origins? Its genesis I believe can be traced to one of the earlier brilliant writings of the late Professor Brainerd Currie entitled *On the Displacement of the Law of the Forum*.²⁵ The touchstone for his discussion was the now famous case of *Walton v. Arabian-American Oil Co.*²⁶ Suit was brought in a federal court in New York, where the

²⁰ Notes, *supra* note 4; Baade, *supra* note 4; A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 309 (1962).

²¹ Sedler, *supra* note 17, at 113. See also Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L.J. 8 (1970) [hereinafter cited as *Characterization*].

²² See text accompanying footnotes 43-54, *supra*.

²³ 484 S.W.2d at 829.

²⁴ Notes, *supra* note 4; B. CURRIE, *On the Displacement of the Law of the Forum*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 3, 76 (1963) [hereinafter cited as *Displacement*]; Sedler, *supra* note 17, at 105; and Baade, Keating, *supra* note 4.

²⁵ *Displacement*, *supra* note 24.

²⁶ 233 F.2d 541 (2d Cir. 1956).

defendant was incorporated, to recover damages for an automobile accident occurring in Saudi Arabia. Neither the plaintiff nor the defendant offered any proof as to Saudi Arabian law. The facts were such that plaintiff clearly made out a case of negligence, if not recklessness, against the defendant. The court held that since the tort occurred in Saudi Arabia, the plaintiff's "rights" if any, "arose under Saudi Arabian law." The plaintiff had the burden of showing that he had a "right" under the law of the locus of the accident. Since he failed to prove that the law of the locus created such a right he was thrown out of court. Professor Currie sharply attacked the court's reasoning:

The most shocking aspect of the *Walton* decision is the holding that Saudi Arabian law displaced the law of the forum although the court presumably had no idea what the relevant provisions of that law—if any—were. The application of foreign law is justified when the law expresses a policy of the foreign state, when the connections of the case with the foreign state are such as to give it a legitimate interest in having its policy applied, and when there is no conflicting interest of the forum state. A court is not justified in holding that foreign law displaces local law as the rule of decision when it cannot make the determination that the interest of the foreign state is entitled to recognition, and it can seldom make that determination when it has no information concerning the foreign law and policy.²⁷

He thus argued that it was the business of the party seeking application of the foreign law to bring to the attention of the court those policies which support its application. However, in *Walton* neither plaintiff nor defendant were New York domiciliaries. What then was the presumptive reason for New York to apply its own law? New York would not necessarily be advancing a "governmental interest" in applying its own law. To this Professor Currie responded:

Grant that no governmental policy of New York respecting the problem of personal injuries will be advanced by the application of its law to a dispute between two foreigners arising out of a collision in Saudi Arabia; grant also that neither party regulated his conduct or planned his affairs

²⁷ *Displacement*, *supra* note 24, at 48.

with reference to New York law. The fact remains that there is a law suit pending in a New York court. The harsh alternative to deciding it according to New York law is to dismiss it. No conflict of interest among states being apparent, justice between the parties becomes the sole consideration. Justice between the parties requires a decision on the merits. And where should the New York court look for a rule of decision that will do justice between the parties but to the body of principle and experience which has served that purpose, as well as the ends of governmental policy, for the people of New York in their domestic affairs?²⁸

One can hardly find fault with the Currie argument. But, what relevance does it have to *Foster*? In *Foster* defendant argued ably for the application of the Ohio host-guest statute. Not only did he present the substance and tenor of the statute, but he also sought to convince the court of the justice of applying Ohio law to the case at bar.²⁹ Are we now to talk of the presumptive application of Kentucky law or the base law being that of the forum? The Court is being asked to make a decision as a matter of justice as to whether the law of Kentucky or Ohio has greater claim to application given a certain set of facts. Why can it not proceed to the business at hand, viz., logically reasoning to the appropriate decision in the case? Where else in the law do we find such talk as presumptively one rule applies unless you can convince the court overwhelmingly that another rule ought to apply? The presumption of innocence in a criminal case or the presumption of non-liability in a civil case are instances where a court insists on a certain degree of convincing before it will change the status quo. But, here we have no status quo—we are challenged with a question of justice. The defendant is arguing that it is more just for the Ohio rule to govern this case. What kind of answer is it to tell him that even if on balance we believe he is right he has not done enough to “displace the law of the forum”? He rather thought that it was the business of the courts to decide on an appropriate substantive rule to govern his case. Why, he may ask, *are the courts hiding behind presumptions when they should be deciding my case?*

²⁸ *Id.* at 65.

²⁹ Brief for Appellee at 4-8.

Nothing substantiates my contention that the "interesters" are involved in a rigid system of choice of law more than this fall-back on the forum law as the base. It stands as a "brooding omnipresence" to remind us all that here is "the law" not to be driven away by finely tuned argumentation or sensitive balancing of interstate policy considerations.

At an earlier stage in the development of interest analysis methodology there was an answer to the question previously posed. It was originally part of the theology of interest analysis that once a state interest was made out by the forum the inquiry was over—the forum had an obligation to apply its own law to further its state interest.³⁰ But we all know that the strongest advocate of this aspect of the theology had a change of heart. Professor Currie recognized that states with even a slight state interest might under this approach be required to apply their own law even when they well knew that another state's interest was greater and more significant when opposed to their own "interest." To prevent this exercise of state chauvinism Currie backtracked and decided that a state might well interpret its own state interest in a "moderate and restrained fashion" so as to take into account interests and policies of sister states.³¹ Each state would not then be required to read its law to apply to every fact situation to which it could constitutionally stretch its law to govern. This process, as Professor Cavers has correctly noted, is the equivalent of fashioning choice of law rules or approaches; for how else will one determine whether in a given interstate fact pattern one state's interest should be read moderately to avoid conflict with the interest of another state.³² Professor Currie essentially agreed but contended that there is a difference between a moderate interpretation of forum law and fashioning choice of law rules. I remain with others in the conflicts field³³ unconvinced by Professor Currie's rebuttal:

. . . [T]hough the function is essentially the same, there is an important difference between a court's construing domestic

³⁰ Notes, *supra* note 4, at 183.

³¹ B. CURRIE, *Justice Traynor and the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 688-89 n.236 (1963); *Third State*, *supra* note 4, at 757-58.

³² Cavers, *The Changing Choice of Law Process and the Federal Courts*, 28 *LAW & CONTEMP. PROB.* 732, 734 n.9 (1963).

³³ Petersen, *supra* note 15, at 443.

law with moderation in order to avoid conflict with a foreign interest and its holding that the foreign interest is paramount. When a court avowedly uses the tools of construction and interpretation it invites legislative correction of error—or at least criticism from the law reviews. When it weighs state interests and finds a foreign interest weightier it inhibits legislative intervention and confounds criticism.³⁴

Whether one agrees with Currie or not, it is clear that having given one the major premise—that a state must always apply its law if it has an interest—he is now forced to a rather tenuous argument to support the proposition that forum law is presumptively applicable. Forum law can only be presumed applicable if a moderate reading of that law in an interstate setting still requires a court to say that its interest is substantial. But, in a case where the argument made by the party seeking foreign law is that in *this case* a moderate interpretation of the forum law would result in the application of foreign law, what value is there in speaking of the presumptive application of forum law? We must turn to the business at hand and face the issues the parties are laying before the court.

After a century of fictions and mumbo jumbo the last thing the law of conflicts needs is new stumbling blocks to logical and persuasive reasoning. The presumption favoring forum law is just such an obstacle. Indeed, even Professor Sedler, who has championed the base law of the forum³⁵ might inquire as to whether this rule has not in fact harmed reasoned decision making in the second of the Kentucky trilogy of cases, *Arnett v. Thompson*.³⁶ It will be recalled that in that case two Ohio residents, husband and wife, were involved in an automobile accident in Kentucky. The wife sued her husband to recover damages for her personal injuries. The husband, claiming the law of the State of Ohio was applicable pleaded the Ohio guest statute and in addition thereto pleaded the common law of Ohio which denied the wife the right to sue her husband for a tort. The Kentucky Court for the first time articulated its “enough contacts” rule³⁷ and found that the fact that the accident occurred in Kentucky

³⁴ *Third State*, *supra* note 4, at 759.

³⁵ Sedler, *supra* note 17, at 105.

³⁶ 433 S.W.2d 109 (Ky. 1968).

³⁷ The Court stated the rule as follows:

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provided a sufficient contact for Kentucky to apply its own law. The Court in *Arnett* recognized that there was a substantial argument for Ohio law to be dispositive of the case since the host was covered by Ohio insurance and the immunity was designed for Ohio spouses. The major policy reason or interest supporting the application of Kentucky law was the "medical creditor" rationale. Under this reasoning Kentucky has an interest to see that, in accidents arising from the negligence of defendants in Kentucky, the plaintiffs are compensated. The cost of providing medical treatment in Kentucky should legitimately be met by the tort-feasor. Professor Sedler has questioned the validity of this interest and has made the rather common sense observation that if two Kentucky residents injured in Ohio are entitled to Kentucky law, perhaps two Ohio residents injured in Kentucky are entitled to Ohio law.³⁸

The Court's reasoning in *Arnett* indicates rather clearly that the Court did not want to undertake *weighing* of interests in a true conflict case. They made it quite clear that when there were "*enough contacts*" with Kentucky its own law would govern. But why this fear of *weighing interests*? Does it stem from the Currie fear that it is inappropriate for courts to make those kinds of decisions and that they impede legislative criticism?³⁹ If I may be excused some skepticism, I rather doubt that anything so esoteric was on the Court's mind. I believe that the Kentucky Court in *Arnett* felt that if the base law was that of the forum then once the slightest "contact" or "interest" was made out then it would become impossible to overcome the already existing presumption favoring forum law. Given a tabula rasa the Court might have written a good common sense choice of law decision sensitively balancing the interests. The greatest gift the academic commentators could give the courts is a green light to use their own judicial instincts. We have burdened them with rules, approaches and presumptions for long enough.

(Footnote continued from preceding page)

Upon further study and reflection the court has decided that the conflicts question should not be determined on the basis of *weighing* of interests but simply on the basis of whether Kentucky has *enough contacts* to justify applying Kentucky law. *Id.* at 113.

³⁸ Sedler, *supra* note 17, at 123. Professor Reese has taken a similar position on *Arnett v. Thompson*. Reese, *The Kentucky Approach to Choice of Law: A Critique*, 61 Ky. L.J. 368 (1972).

³⁹ *Third State*, *supra* note 4, at 759.

Interests and Policy Gimmickry

The interest analysts brought to the field of conflicts brilliant jurisprudential insights. Beyond doubt, their most important contribution was the observation that one could not realistically decide a conflicts case without some tolerable understanding of the substantive content of the rules of law that were in supposed conflict.⁴⁰ The mechanical rules of the first *Restatement* had imposed an automatic solution to a conflicts case without regard to the content of the rules. With the interest analysis approach, by scrutinizing the conflicting rules of law and the policies embodied therein, we might determine that given the facts of the case at bar, the policies might not really conflict. This was the situation in *Wessling v. Paris*,⁴¹ the first case in which Kentucky indicated that it had entered the new era in choice of law. Two Kentucky residents took a trip from Louisville, Kentucky across the Ohio River to New Albany, Indiana where an auto accident occurred. The guest was injured due to the negligence of the host who sought to defend on the grounds that the Indiana host-guest rule applied. Plaintiff sought the application of the common law negligence standards of Kentucky. The decision was not a difficult one for policy-centered analysts. After all, the primary reasons offered for the existence of special host-guest statutes which limit liability are: (1) there is fear of collusion by friendly hosts and guests against insurance companies and (2) it is wrong for ungrateful guests to sue their hosts for ordinary garden-variety negligence. Since both host and guest were Kentucky residents, it hardly seemed proper for Indiana law to govern the consequences of the host-guest relationship. The parties were insured in Kentucky which had expressed its policy that compensation was to be favored over the possibility of collusion. As to the host-guest relationship and the possibility of ingratitude, why should Indiana intrude on this Kentucky host-guest relationship? Thus goes the standard argument. Had the Kentucky Court focused only on the locus of the accident, Indiana law would have controlled and liability would have been denied.

⁴⁰ For this insight the credit must go to Professor David Cavers. His article, Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933), remains one of the seminal pieces in conflicts literature.

⁴¹ 417 S.W.2d 259 (Ky. 1967).

In *Wessling* the Kentucky Court followed an analysis similar to this, although one could have hoped for greater precision in their reasoning.⁴² Whether they have been true to the interest analysis approach is a matter we shall shortly inquire into.

For all the brilliance which this approach signifies it suffers from severe limitations. The first and most serious limitation is that it is built on the belief that policy reasons behind statutes or common law policies can be identified at a given point in time with a fair degree of exactitude.⁴³ In fact so confident are the "interesters" of their policy analysis that they have prepared elaborate charts in which they set forth variables which include such factors as plaintiff's residence, defendant's residence, place of accident and forum.⁴⁴ They then attempt to work out the various combinations in which conflict problems can arise. A quick look at the chart will indicate whether we have a true or false conflict on the basis of a given policy. It is all very scientific and clinical. In most instances one need only feed the factors into the IBM machine and out will pop the result. Even in the difficult true conflict cases the choice for the court is sharply delineated. Again, may I ask where else in the law have we been treated to such a spectacle? For several years now I have toiled with torts classes on the proximate cause issue. I am at the point where I would welcome a chart. 'Tis a consummation devoutly to be wished. Yet, I know that it is not to be. The factual shadings of the cases are not given to charting. One cannot differentiate *Palsgraf v. Long Island R.R. Co.*⁴⁵ from the *Wagon Mound Cases*⁴⁶ on the basis of chartable factors. Sensitive evaluation of the

⁴² The case does not clearly set forth the interests or policies behind host-guest rules. However, it is reasonable to assume, from the authorities cited by the Court (both primary and secondary) that they were following standard interest analysis as to what is considered a false conflict case.

⁴³ Rosenberg, *Two Views on Kell v. Henderson, An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967); D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 96-101 (1965); Reese, *supra* note 38, at 368.

⁴⁴ See B. CURRIE, *Married Woman's Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77, 84 (1963), and B. CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 147 (1963). Professor Sedler's most recent charting can be found in Sedler, *Characterization*, *supra* note 21, at 60.

⁴⁵ 248 N.Y. 339, 162 N.E. 99 (1928).

⁴⁶ *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.) (N.S.W.); *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.*, 1 A.C. 617 (P.C.) (N.S.W.).

factual patterns will result only where courts are willing to look at a broad range of considerations. Is it plausible then to maintain that in choice of law cases we can decide questions of incredible complexity—questions which raise the problem of the appropriate allocation of law making responsibility in an interstate setting—by *focusing on one aspect* viz. the legislative or judicial policy behind a given rule?

The cavalier fashion with which courts and scholars alike have dealt with the issue of territoriality and foreseeability is indicative of the scope of the problem. These complex issues have been relegated to a status of unimportance under the onslaught of single minded interest analysis. The statement is almost legion that "unfair surprise" rarely exists in a tort-conflict case.⁴⁷ The argument is a twofold one. First, it is argued that defendants do not orient their activity or shape their conduct to take account of rules of liability or of the measure of damages. Second, the almost ubiquitous presence of insurance on the liability scene supposedly makes the only relevant surprise not that of the principal defendant but that of his insurer. Since insurance actuaries do not base their rates in contemplation of conflicts problems (which are so to speak "bizarre" occurrences), they cannot be the beneficiaries of an "unfair surprise" argument for denial of liability.⁴⁸ This leads to the conclusion that when plaintiff has made out a governmental interest in behalf of his recovery there is little reason to deny it to him except in those rare instances when the "unfair surprise" argument would catch defendant without adequate liability insurance.

An example of the narrowness of this brand of interest analysis can be seen in a case coming from the Court of Appeals of New

⁴⁷ COMMENTARY, *supra* note 6, at 204-06; Weintraub, *Response to the Critiques of Professors Sedler, Twerski and Walker*, 57 IOWA L. REV. 1258, 1263 (1972); Leflar, *Choice-Influencing Considerations in Conflicts Law*, *supra* note 5, at 310; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, *supra* note 5, at 1591.

⁴⁸ This argument is usually supported by a citation to Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961). The now famous quote from that article ridiculing the foreseeability argument states that:

[T]he theory . . . is tautological. The rules of liability are to be dictated by insurance practices which are, in turn dictated by the rules of liability. All that can be concluded from such a premise is that whatever is, should be. *Id.* at 581-82.

York. In *Miller v. Miller*⁴⁹ a resident of New York, embarked on a short business trip to Brunswick, Maine, where his brother resided and where they had mutual business interests. Two days after his arrival he went for a ride in a car owned by his sister-in-law and driven by his brother. Mr. Miller was killed when the vehicle suddenly swerved off the road and crashed into a bridge railing. Some *three months after the accident* the decedent's brother and sister-in-law, who had been Maine residents, returned to reside in New York. Shortly thereafter, the decedent's wife filed suit against the decedent's brother and sister-in-law for the wrongful death of her husband. The defendants raised as a partial defense the \$20,000 wrongful death limitation in effect in Maine at the time of the accident. The New York law permitted unlimited liability in wrongful death cases. Indulging in some fanciful interest analysis the court found for plaintiff and permitted unlimited liability recovery. It reasoned that New York had a strong interest in protecting its domiciliaries (the decedent's family) so that they be adequately compensated for the loss of the "bread-winner."

Having established a strong New York interest, the court set about destroying Maine's interest in having its wrongful death statute applied to the case at bar. The court reasoned that in light of the possibility of unlimited liability in cases in which the plaintiff was not killed it could not conclude that the Maine defendant relied on the Maine wrongful death limitation in purchasing inadequate insurance. With respect to the liability of the insurer and its expectations, the court concluded that the insurer must have expected that it might have to pay claims for accidents *outside of* Maine in which the limited liability rule would not apply. The court also found it to be relevant that the defendant had moved to New York following the accident thus diminishing any interest Maine might have in "regulating the rights of its citizens" (protecting them from high speculative wrongful death claims).

Query: Is it foreseeable that a Maine driver who was driving his brother, a New York resident, in the State of Maine on a trip that was to begin in Maine and was to end in Maine, would be

⁴⁹ 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

subjected to the law of New York? To state the question is to answer it. Yet, one may ask why is it important that one have foreseeable law applied to his case? If indeed there is no reliance by the defendant on the rule of law in advance of his actions why should it matter that it was not foreseeable that foreign law would apply? And what of the argument that since bizarre cases are not taken into account in rating by insurance companies, paying off a bizarre claim will not impose unfair surprise to them?

Justice Breitel speaking for the dissent in *Miller v. Miller* was quite cognizant of the distinction between reliance and foreseeability. He argued that:

[I]t is jurisprudentially significant that parties' rights be determined by the law or system of rules which they most probably believed would control their relationship. In this respect, the application of the proper law of the tort exercises an influence in "promoting an unconscious acceptance of legality and legal order." . . . In view of all the Maine elements in this case, it is hard to deny that these parties would have felt that Maine law controlled every aspect of their liability *inter se* regarding a Maine accident during a trip occasioned by and incidental to their mutual business in Maine. To this extent, the law of the place of the wrong assumes significance, albeit not that which it had under older territorial thinking involving a mechanical, rigid and unacceptable approach, but to the degree that the place of the wrong may reflect the conscious understanding and choice of persistent localized activity of the parties⁵⁰ (emphasis added).

Not only is foreseeability important in the jurisprudential sense, it bears careful scrutiny as a matter of pure substantive law. Lest we forget, we are not only deciding a *conflicts* case, we are also deciding a case involving *tort* liability. Plaintiff in *Miller* was suing for the negligence of the defendant. The limited liability question arose in the context of a negligence case and the question concerned the appropriate amount of damages for the negligent act of defendant. Does not the substantive law of negligence, which is based so heavily on foreseeability, impose constrictions on the fanciful imagination of judges in imposing results in a *conflicts* case that are clearly outside the scope of

⁵⁰ *Id.* at 28, 237 N.E.2d at 886-87, 290 N.Y.S.2d at 747-48.

foreseeability?⁵¹ Now it may well be argued that if we only define these bizarre results as foreseeable, then for posterity they will remain so, and that foreseeability is thus a foolish threshold question.⁵² That argument has been made, but it is in this author's opinion invalid. To understand the core concept of foreseeability one must be "street wise." The common sense limitations which Justice Breitel sought to impose on interest analysis stem from a deep commitment to basic underlying concepts which pervade tort law. There is no proximate cause case, no matter how extraordinary the results, about which one could not say—"it is within the scope of foreseeability." But to do so would destroy foreseeability as a working legal concept in the law of torts. As long as that concept remains central to tort law it must remain central to conflicts law.

This argument goes to the contention of the foreseeability of insurance companies as well. Let us assume for the moment that we were litigating a purely domestic tort case and hypothecate a "result outside the scope of the risk" of an insured defendant. Would we dare say that an insurance company must pay the claim since the result is "bizarre" and "bizarre" cases do not affect rating standards? The insurer contracts to defend the insured and pay if he is liable. The insurer is permitted to raise any defenses that the insured could have raised. These contracts have not been held to be against public policy, as yet. If the insured as an individual would be permitted to raise the defense of proximate cause, would it be a permissible argument in a domestic tort case to say that such an argument is not available to the insurer? The logic of those who have made this argument in the conflicts area would support the reasoning that insurers only take into con-

⁵¹ The author can only refer the reader to the voluminous literature on proximate cause. The scope of the risk theme is pervasive in that literature. See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 236 (4th ed. 1971).

⁵² See Morris, *supra* note 48, and COMMENTARY, *supra* note 6, at 204-06. Professor Sedler, too, is prone to taking this circular argument seriously. In discussing the impact of state lines on a case like *Cipolla v. Shaposka*, 267 A.2d 854 (Pa. 1970), where defendant acted wholly within his state lines, Professor Sedler argues that paying obeisance to state lines is wrong and that it is not necessarily "the price of federalism." It is only the price of federalism if we are willing to pay it or if we attach independent significance to the state line. Sedler, *supra* note 4, at 401. The fallacy of that argument is the same fallacy that exists in Morris' foreseeability argument. Certain values and concepts are part of our substantive law. We are not writing on a blank tablet. The concepts are in the law and manifest their presence in innumerable instances. We are not at liberty to eviscerate them at will and then hope to have a cohesive legal system.

sideration the incidence of claims not their foreseeability to the insured. Perhaps this is good argument for doing away with the foreseeability concept in tort and abolishing negligence as the tool for tort compensation.⁵³ But, we *cannot* temporize. We cannot live in two legal worlds at the same time. The life of the law is still logic, first and foremost. It does not take a shrewd observer to note the profound impact of insurance on the development of the law of torts.⁵⁴ But, the underlying concepts have remained sound and true to the fundamentals upon which the common law was built. To use the law of conflicts to eviscerate fundamental tort law concepts is to compound confusion. It is to allow decisions from the same court on the same day which cannot be reconciled—either in letter or spirit.

This discussion of foreseeability and its impact on choice of law is not meant in any sense to be definitive. It does, however, exemplify the great complexity of a conflicts case. These kinds of considerations cannot be adequately dealt with under standard interest analysis. No theory, interest or gimmick will be an adequate substitute for tough analytical thinking. Only close attention to the factual pattern plus a solid grounding in the underlying substantive law principles involved can yield a sophisticated result. It is not to be accomplished by charts and diagrams. Interest analysis as presently expounded is a simplistic tool which stands in the way of sensitive judicial evaluation of complex issues of fact and law.

A Hard Look at Foster

What has all this to do with *Foster*? Much will depend on our reading of the *Foster* decision. If the Court's statement means that Kentucky law will apply any time there are "enough contacts" with Kentucky without regard to whether they generate Kentucky interests, then much of what the policy-centered analysts have to say will be irrelevant.⁵⁵ But, the *Foster* decision deserves an

⁵³ The no-fault development in the past several years is designed to accomplish this result. See R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

⁵⁴ It has, for example, expanded the proximate cause concept well beyond its conservative beginnings. See R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963).

⁵⁵ There is little doubt that some will read the decision in this fashion. Professor Reese's symposium article at 370 suggests that the Court may be saying that contacts divorced from interests may now be sufficient in Kentucky.

honest reading and I hardly think that the Court has come to the conclusion that in a false conflict case it would apply Kentucky law simply on the basis of contacts with the state, even where those contacts don't generate interests. It has not as yet applied Kentucky law to a case in which there were contacts but no interests.⁵⁶ If this be so, the major question left unanswered by the "enough contacts" rule is—just how much is "enough" in the context of a presumption which favors forum law unless it is displaced?

To appreciate the dimensions of this question one need only focus on one simple fact. Every citizen of Kentucky has at least one contact with Kentucky. He is a Kentuckian or a Kentucky domiciliary.⁵⁷ Let us hypothecate a Kentucky plaintiff who has gone to Ohio to spend the day with a close friend, a bona fide Ohio resident. They decide to go golfing and on the way to the golf course the Ohio host is negligent in driving his car injuring his Kentucky guest. Assume further that by agreement the host accepts service of process in Kentucky. The insurer now seeks to raise the Ohio host-guest statute. The concern about colusion, if anything, is buttressed by the fact that plaintiff and defendant have already started their shenanigans in arranging the Kentucky forum. This is not the "power-myth" of jurisdiction⁵⁸ operating since this is the exercise of jurisdiction by the Kentucky courts based on one of the oldest forms of jurisdiction—consent.

Is the plaintiff's domiciliary status in Kentucky a sufficient interest or contact for Kentucky law to apply? If Kentucky will allow compensation and Ohio will deny liability in the absence of willful or wanton negligence, we have a true conflict. Will the Kentucky Court focus on the domiciliary status of the plaintiff

⁵⁶ In *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968), the Court may have come close to doing so. But, the place of the accident clearly retains rather substantial interests. See D. CAVERS, *supra* note 7.

⁵⁷ Seidelson, *Comment on Ctpolla v. Shaposka*, 9 DUQUESNE L. REV. 423, 423-24 (1971), has put it very well:

The essence of that interest, which made Pennsylvania "a concerned jurisdiction," presumably was a concern that one of its domiciliaries, injured and uncompensated, might become an indigent ward of the state. To the extent that the concern represents a legitimate interest on the part of Pennsylvania, it suggests just how broadly interest may be defined in interest analysis. After all, everyone has to be domiciled somewhere.

⁵⁸ Ehrenzweig, *The Transient Rule of Personal Jurisdiction; The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

to allow for recovery? It would not take an over-expansive reading of the Kentucky cases to conclude that Kentucky's compensation interest could be deemed sufficient. Interest analysis per se provides no method for differentiating the fact pattern of a true Ohio defendant who is acting solely within his home town and a quasi-Ohio defendant driving a Kentucky plaintiff through Ohio on a U.S. highway. The reason that it cannot give meaning to these factual nuances is clear enough. In order to define the purposes behind the statutes or common law rules it must question what are the *general* purposes behind them. It thus must develop such interests as compensation, fear of collusion, etc. When one attempts to invoke the judicial method to apply these purposes to the facts of a particular conflicts case, serious problems arise. The goals are gross—they are not finely tuned to factual patterns and it is almost impossible to do so within the confines of a particular conflicts case.

Many conflicts scholars have attempted to address themselves to this problem. They have recognized that such finely tuned concepts as foreseeability and territoriality have an impact even under an interest analysis approach, but they have had a hard time rationalizing the reason for the impact.⁵⁹ Professor Weintraub, a devotee of interest analysis has taken the position that in the case I have postulated where the Ohio resident has an accident while driving the plaintiff, a Kentuckian, on a purely local Ohio trip that Ohio law should govern. He argues that plaintiff's residence should not assert its compensation interest unless either the defendant or the defendant's course of injurious conduct has some nexus with the plaintiff's residence that makes it reasonable for the residence to pursue its compensation interest.⁶⁰

Professor Weintraub is obviously straining to find some method of limiting the impact of interest analysis. The problem with attempting to do it on the basis of the nexus that the defendant has developed with the plaintiff's domicile is that it does not affect the interest involved one whit. The interests have already been defined by Professor Weintraub and others as the

⁵⁹ Weintraub, *supra* note 47, at 1261. Sedler, *Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, 57 IOWA L. REV. 1229, 1235 (1972), and Sedler, *supra* note 4, at 407.

⁶⁰ Weintraub, *supra* note 47, at 1261.

desire of the domiciliary state to make sure that its favorite son does not go uncompensated. There is just no way that the compensation interest will disappear. It will not do to say that the plaintiff's home state should not seek to assert its interest. One must ask why. The answer must be that defendant could not foresee such a result in the context of his actions. If foreseeability is a factor it must be dealt with realistically and honestly.⁶¹ It is a value which stands on its own merit. *If foreseeability has standing as an issue in a conflicts case it must be due to some inherent feeling that, interests aside, there are cases where the results of applying one state's law are so unforeseeable that it would be wrong to do so.* For this writer it leads to the conclusion that even in false conflicts cases the fact pattern of a particular case may be such that applying another state's law may be outside the realm of foreseeability.⁶² Courts and scholars alike will have to come to grips with this question sooner or later. The attention paid to "interests" has been so intense that conflicts literature has not faced the other values which are and must be a part of the choice-of-law scene.

In some cases the foreseeability problem can become most extreme. *Barrett v. Foster Grant Co.*⁶³ raises the problem in a striking manner. Foster Grant was a Delaware corporation which had its principal place of business in Massachusetts. It purchased in Massachusetts from the Massachusetts Electric Company several transformers to reduce transmission voltage of 13,800 volts, the "high" side, to 550 volts, the "low" side. The transformers were oil cooled and it was necessary periodically to change or recondition the oil. For the first several years this service was performed by Massachusetts Electric Company, the seller of the

⁶¹ The contradiction faced by Professor Weintraub is substantial. One need only recall his views denigrating the importance of foreseeability and "unfair surprise" on choice-of-law in torts. His position was that unfair surprise to an insurer was nonsense. COMMENTARY, *supra* note 6, at 206. Yet when faced with the prospect of compensating a plaintiff for an accident caused by the defendant wholly within his own home state, Professor Weintraub falls back on an unfairness type argument which can only have its base in a foreseeability approach. COMMENTARY, *supra* note 6, at 247-49. He cannot have it both ways. Either foreseeability is or is not a factor to be reckoned with. This criticism has validity in contract choice-of-law problems as well. The question there again is whether territorial contacts have independent significance. See Twerski, *Choice-of-Law in Contracts—Some Thoughts on the Weintraub Approach*, 57 IOWA L. REV. 1239 (1972).

⁶² *Enlightened Territorialism*, *supra* note 3, at 380, 385.

⁶³ 450 F.2d 1146 (1st Cir. 1971).

transformers. Later, Transformer Service, a New Hampshire corporation approached defendant, Foster Grant, regarding a better technique it had developed for changing the oil. Under the old method the transformers had to be closed down for several hours, thus interrupting plant operation. Under the method devised by Transformer Service the oil could be reconditioned without shutting down operations. Part of Transformer Service's sales pitch was that it had well trained personnel who could accomplish this job safely. Foster Grant contracted with Transformer Service to do the reconditioning. There is no question of Transformer Service's independent contractor status under the above stated contractual arrangement.

Fourteen years of service passed without problems. In 1968 plaintiff Barrett, an employee of Transformer Service and a New Hampshire resident, while connecting a hose, came in contact with a bare uninsulated lead wire on the high side of the transformer and suffered severe burns necessitating the amputation of his right forearm. On appeal the threshold question faced by the Federal Circuit Court of Appeals was whether Massachusetts or New Hampshire law would govern.⁶⁴ The danger of the uninsulated wire was an open and obvious one to which the plaintiff had been alerted. Massachusetts law was clear—a landowner owes the employee of an independent contractor a duty to warn only of hidden dangers. He does not owe a general duty of reasonable care. There is a respectable argument to the effect that New Hampshire has expanded the duty of a landowner under these circumstances to do more than just warn but to undertake reasonable steps to obviate the danger.

How would the Kentucky Court handle this type of problem? Would they say that plaintiff's domiciliary status is enough combined with the presumption in favor of foreign law to apply the favorable law of plaintiff's domicile? Professor Sedler has already indicated that he believes *Barrett* is a hard case⁶⁵ and the result

⁶⁴ The court reversed the finding of the United States District Court in New Hampshire. Apparently the choice of law issue was raised for the first time on appeal, since there is no mention of the issue in the District Court opinion. See *Barrett v. Foster Grant Co.*, 321 F. Supp. 784 (N.H. 1970).

⁶⁵ Sedler, *The Last Treatise*, 50 TEXAS L. REV. 1064, 1076-77 n.51 (1972), reviewed R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971); Sedler, *Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, *supra* note 59, at 1238 n.45.

is supportable only because the *defendant relied on Massachusetts law*. With all due deference to Professor Sedler, I believe that his analysis is close to outrageous. If a Massachusetts corporation acts within its own state in a totally localized fashion and is charged with a *property tort* then Massachusetts law should apply. One need not assert that the Massachusetts corporation has conformed its behavior to Massachusetts law. It is most probably a myth in this case. One need only recognize that unforeseeable tort liability is an aberration of negligence law. My view notwithstanding, if one attempts to gauge how the Kentucky Court would deal with such a case, one must admit that given the present framework of "enough contacts" it is far from clear that plaintiff's domiciliary status would not be sufficient for the application of its own law. The Court might just agree with Professor Sedler, and it is not unfair to prognosticate that if the Kentucky Court finds a hard case because of strong local interest, forum law will prevail.

The independence of the foreseeability-territoriality issue can be made even clearer if we postulate one minor change in *Barrett v. Foster Grant Co.* This time instead of the defendant being a Delaware corporation with its principal place of business in Massachusetts let us suppose that it is a New Hampshire corporation with its principal place of business in New Hampshire but that it maintains a branch plant in Massachusetts. Now with both plaintiff and defendant being New Hampshire domiciliaries would conflict scholars treat the case as a false conflict? Presumably one could argue that Massachusetts still has an interest to attract business to its state by the imposition of less restrictive tort liability. But realistically the argument is nonsense. It is high time to stop making up fairy tale stories about non-existent interests for the consumption of conflicts students. Whatever reasons a New Hampshire corporation has for setting up a plant in Massachusetts one can be assured that impending tort liability is not one of them. It would seem that in this case one must finally come to grips with the crucial issue. Is there a territorial dimension to the law of conflicts? If there is, "conflicts justice" will call for Massachusetts law to apply. The fact that the case is a false conflict will not be determinative of the choice of law issue.

Again I fear that Kentucky placed in the position of New Hampshire would say that there are certainly enough contacts to apply its own law. If contacts mean interests, and interests only, then Kentucky may in fact be the true disciple of Professor Brainard Currie at the earliest stage of his thinking on choice of law.⁶⁶ His later moderating views made allowance for balancing interests (although he would not call it that), taking into account interstate considerations. Having traversed the long trail from the first *Restatement* to a thoughtful and analytical approach to choice of law, I can only hope that the Kentucky Court will not cast its lot with rigid interest analysis. Should the court follow this rigid approach, it would be trading in the best of its judicial instincts for a wooden rule. And, as with the townsman in the apocryphal story I related earlier, it would be seeking to "attach the horses" to modern turbine engines.

⁶⁶ Notes, *supra* note 4.