University of Miami Law Review

Volume 17 | Number 3 Article 7

5-1-1963

Conflict of Laws -- "Public Policy" v. Lex Loci Delicti in Actions Based Upon Wrongful Death Statutes

Stuart I. Odell

CONFLICT OF LAWS—"PUBLIC POLICY" V. LEX LOCI DELICTI IN ACTIONS BASED UPON WRONGFUL DEATH STATUTES

I

Conflicts of laws is often described as the body of rules dealing with the effect of foreign "contacts" on the decision of a civil case.[1] "Few principles of conflict of laws are as well settled as that, in an action to recover for wrongful death, it is the *lex loci delicti* which is controlling."[2] It is recognized by the weight of authority that a statute of the place of injury resulting in wrongful death that allows unlimited recovery, controls to the exclusion of a statute of the forum state which limits the amount of recovery.[3] Conversely, the law of the place where the injury resulting in wrongful death occurred, limiting recovery to a specified amount, will usually control to the exclusion of the law of the forum containing no limitation on the amount of recovery.[4] The operation of these rules is subject to a certain recognized exclusion; namely, that the forum state applies its own law as to all procedural matters.[5] This raises the problem of characterization as to what is substantive and what is procedural. Although some courts have characterized the amount of damages recoverable for wrongful death as procedural,[6] the majority

1. EHRENZWEIG, CONFLICT OF LAWS 1 (1962). For a discussion of conflict theories, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

2. Annot., *Death of Passenger—Law Applicable*, 13 A.L.R.2d 650 (1950). See Leicht v. Roche, 198 F.2d 174 (5th Cir. 1952); Stoltz v. Burlington Transportation Co., 178 F.2d 514 (10th Cir. 1949), *cert. denied*, 339 U.S. 929 (1950); Curtis v. Campbell, 76 F.2d 84 (3d Cir. 1935), *cert. denied*, 295 U.S. 737 (1935); Loranger v. Nadeau, 215 Cal. 362, 10 P.2d 63 (1932); Higgins v. Central New England & W.R.R., 155 Mass. 176, 29 N.E. 534 (1892); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931). *But see* Blanchard v. Russell, 13 Mass. 1 (1816). See also RESTATEMENT, CONFLICT OF LAWS § 391-95 (1934); 11 AM. JUR. *Conflict of Laws* § 182 (1937); 2 BEALE, CONFLICT OF LAWS § 391 (1935); GOODRICH, CONFLICT OF LAWS § 102 (3d ed. 1949). It is interesting to note that torts was one of the last areas to be recognized as a legitimate subject requiring conflict of laws rules. The first treatise on the subject of conflicts, STORY, CONFLICT OF LAWS (8th ed. 1834), made this conspicuous by the absence of any mention of torts in the index. At that time, torts was dealt with as an area of damages.

3. Northern Pac. R.R. v. Babcock, 154 U.S. 190 (1894); La Prelle v. Cessna Aircraft Co., 85 F. Supp. 182 (D.C. Kan. 1949); Powell v. Great Northern R.R., 102 Minn. 448, 113 N.W. 1017 (1907); Wooden v. Western N.Y. & Pa. R.R., 126 N.Y. 10, 26 N.E. 1050 (1891); Hanna v. Grand Trunk R.R., 41 Ill. App. 116 (1891).

4. Maynard v. Eastern Air Lines, Inc., 178 F.2d 139 (2d Cir. 1949); Faron v. Eastern Air Lines, Inc., 193 Misc. 395, 84 N.Y.S.2d 568 (1948); Wise v. Hollowell, 205 N.C. 286, 171 S.E. 82 (1933). *Cf.* Wooden v. Western N.Y. & Pa. R.R., 126 N.Y. 10, 26 N.E. 1050 (1891).

5. John Hancock Life Ins. Co., 299 U.S. 178 (1936); Pearson v. Northeast Airlines, Inc., 309 F.2d 131 (2d Cir. 1962); Hupp Motor Car Corp. v. Wadsworth, 113 F.2d 827 (6th Cir. 1940); Zirkelbach v. Decatur Cartage Co., 119 F. Supp. 753 (D.C. Ind. 1954); Grant v. McAuliffe, 41 Cal. App. 2d 526, 264 P.2d 944 (1953); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). See also Comment, 61 COLUM. L. REV. 1497 (1961).

6. Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962); Armbuster v.

view and the better view today considers the amount of damages to be part of the substantive right.[7] This position is fortified in wrongful death actions; the courts reason that since the action is one created by statute, the statutory provision limiting the amount recoverable is part of the same substantive right.[8]

The courts have applied to the *lex loci delicti* rule an exception which has caused much judicial puzzlement. The courts generally recognize that the forum may refuse to apply the law of the state where the accident occurred when the laws of that state are in conflict with the "public policy" of the forum state.[9] Although courts have frowned upon resort to the "public policy" concept to dismiss an action based on foreign law,[10] it remains an acceptable conflict of laws technique.[11]

Chicago, R.I. & Pa. R.R., 166 Iowa 155, 147 N.W. 337 (1914); Rochester v. Wells Fargo & Co. Express, 87 Kan. 164, 123 Pac. 729 (1912); Higgins v. Central New England & W.R.R., 155 Mass. 176, 29 N.E. 534 (1892); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Wooden v. Western New York & Pa. R.R., 126 N.Y. 10, 26 N.E. 1050 (1891).

7. Lewis v. Reconstruction Fin. Corp., 177 F.2d 654 (D.C. Cir. 1949); Hupp Motor Car Corp. v. Wadsworth, 113 F.2d 827 (6th Cir. 1940); Caine v. St. Louis & S. Fr. Co., 209 Ala. 181, 95 So. 876 (1923); Southern R.R. v. Decker, 5 Ga. App. 21, 62 S.E. 678 (1908); Louisville & N.R.R. v. Bryant, 215 Ky. 401, 185 N.E. 389 (1933); Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902 (1962); Faron v. Eastern Air Lines, Inc., 193 Misc. 395, 84 N.Y.S.2d 568 (1948). *Cf.* Slater v. Mexican Nat. R.R., 194 U.S. 120 (1904).

8. "[I]t is well established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanied the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery." Western Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914). See also Lewis v. Reconstruction Fin. Corp., 177 F.2d 654, 655 (D.C. Cir. 1949); Davenport v. Webb, 11 N.Y.2d 392, 393, 183 N.E.2d 902, 903 (1962).

9. Watson v. Employers Liab. Assur. Corp., Ltd., 348 U.S. 66 (1954) (insurance contract); Pacific Empl. Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939) (workmen's compensation); Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961) (dictum); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Wooden v. Western N.Y. & Pa. R.R., 126 N.Y. 10, 26 N.E. 1050 (1891). *Cf.* Northwestern Pac. R.R. v. Babcock, 154 U.S. 190 (1894); Allstate Ins. Co. v. Charneskie, 286 F.2d 238 (7th Cir. 1960); Stoltz v. Burlington Transp. Co., 178 F.2d 514 (10th Cir. 1949), *cert. denied*, 339 U.S. 929 (1950); Curtis v. Campbell, 76 F.2d 84 (3d Cir.), *cert. denied*, 295 U.S. 737 (1935); Every v. Mexican Cent. Ry., 81 Fed. 294 (5th Cir. 1897); La Prelle v. Cessna Aircraft Co., 85 F. Supp. 182 (D.C. Kan. 1949); Loranger v. Nadeau, 215 Cal. 362, 10 P.2d 63 (1932); Hanlon v. Leyland & Co., Ltd., 223 Mass. 438, 111 N.E. 907 (1916); Higgins v. Central New England & W.R.R., 155 Mass. 176, 29 N.E. 534 (1892); Powell v. Great Northern R.R., 102 Minn. 448, 113 N.W. 1017 (1907); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Conklin v. Canadian-Colonial Airways, Inc., 266 N.Y. 244, 194 N.E. 692 (1935); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). See generally, RESTATEMENT (SECOND), CONFLICT OF LAWS § 612 (1958); Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

10. "In the interstate field there is considerable authority to support the view that there is, or should be, no place for the use of the public policy argument." Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 656 (1918); Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26 (1938); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

11. This statement was challenged in Hughes v. Fetter, 341 U.S. 609 (1951) and First

The use of "public policy" to deny a defense recognized under the foreign law has also been widely criticized and has been held to be unconstitutional as a denial of full faith and credit to the foreign law.[12] The Supreme Court said in *Bradford Elec. Light Co. v. Clapper*:[13]

> A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under applicable law of another State . . . subjects the defendant to irremediable injury. This cannot be done.[14]

The constitutionality of the "public policy" exception will be considered further in section III. Notwithstanding the constitutional question, the problem is determining what is "public policy" and what is sufficiently contrary to it to invoke this exception. Until recently, the courts followed the doctrine espoused in *Loucks v. Standard Oil of N.Y.*,[15] wherein Judge Cardozo articulated the "public policy" exception into a useful tool:

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate *some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.*[16]

Resistance to the *lex loci delicti* rule has occurred in cases where the death statute of the place of the injury contained a limitation on the amount recoverable, while the forum's statute did not, and the deceased was a domiciliary of the forum state.[17] A series of recent cases where New York was the forum state has spotlighted this area and created considerable controversy.

Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396 (1952). The Supreme Court, however, found that the statutes of the forum state did not express a contrary public policy, for the forum states had "no real feeling of antagonism against wrongful death suits in general." Hughes v. Fetter, 341 U.S. 609, 612 (1951).

12. Bradford Elec. Light v. Clapper, 286 U.S. 145 (1932).

13. *Ibid.*

14. *Id.* at 160.

15. 224 N.Y. 99, 120 N.E. 198 (1918).

16. *Id.* at 111, 120 N.E. at 202. (Emphasis added.)

17. Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962); Maynard v. Eastern Air Lines, Inc., 178 F.2d 139 (2d Cir. 1949); Curtis v. Campbell, 76 F.2d 84 (3d Cir.), *cert. denied*, 295 U.S. 737 (1935); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961). A similar problem is presented where the state of the injury allows unlimited recovery but the forum maintains a limitation on the amount of damages, and the defendant is a domiciliary of the forum state. See Wooden v. Western N.Y. & Pa. R.R., 126 N.Y. 10, 26 N.E. 1050 (1891).

II

In *Kilberg v. Northeast Airlines, Inc.*,[18] a passenger, a domiciliary of New York, purchased a ticket and boarded the defendant's airplane in New York. The plane crashed in Massachusetts and the passenger was killed. Plaintiff, the administrator of the deceased passenger, brought suit in the New York Supreme Court, alleging:

1. a cause of action for wrongful death under the Massachusetts Wrongful Death Statute;[19]
2. a cause of action in tort for pain and suffering;
3. a cause of action for breach of contract of safe carriage pursuant to section 116 of the New York Decedent Estate Law.[20]

The Special Term denied the defendant's motion to dismiss the third cause of action.[21] The Appellate Division reversed, taking the position that the cause of action based on breach of contract was, in substance, a tort action for negligently causing death, to be governed by the Massachusetts Statute.[22] In the Court of Appeals, Chief Judge Desmond, writing for the majority, sua sponte, went on to state in a strong dictum that the plaintiff's recovery would not be limited by the $15,000 maximum recovery provision of the Massachusetts Statute.[23] The provision was stated to be contrary to the "public policy" against limitations upon recovery in wrongful death statutes as provided in the New York constitution.[24] The *Kilberg* court said that the Massachusetts law applied to the origin of the cause of action, but refused to apply the limitation on recovery found in the Massachusetts Statute. To justify this departure form the common practice, the court went on to say that it will treat the measure of damages as a procedural issue to be controlled by the law of the forum.[25] In so holding, the court expressed a rule of characterization that flies in the face of precedent[26] and has resulted in considerable controversy.

---

18. 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

19. "Damages for death by negligence of common carrier. If the proprietor of a common carrier of passengers . . . causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the *degree of culpability* of the defendant or of his or its servants or agents . . . ." MASS. GEN. LAWS ch. 229 § 2 (1958). (Emphasis added.)

20. "Actions of account, and all other actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators." N.Y. DECED. EST. LAW § 116.

21. Kilberg v. Northeast Airlines, Inc., N.Y.L.J., Jan. 4, 1960, p. 11, col. 1.

22. Kilberg v. Northeast Airlines, Inc., 10 App. Div. 2d 261, 198 N.Y.S.2d 679 (1960).

23. See statute cited note 20 *supra*.

24. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 39, 172 N.E.2d 526, 529 (1961). "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limit." N.Y. CONST. art. 1, § 16.

25. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 41-42, 172 N.E.2d 526, 529 (1961).

26. See note 7 *supra*.

In the subsequent case of *Davenport v. Webb*,[27] the same court that decided *Kilberg* declared that it will limit *Kilberg* to its facts. There the court applied the *lex loci delicti* rule in a wrongful death action even though the statute in the state where the accident occurred differed from the New York statute. The court said,

> The overwhelming weight of authority, recognizing that "the question of the proper measure of damages is inseparably connected with the right of action," . . . has long held that the measure of damages for a tort is to be treated as a matter of substance, governed by the law of the place where the wrong occurred. . . . This has been particularly true in the area of wrongful death actions.[28]

The court went on to say, "*Kilberg* . . . must be held to express this State's strong policy with respect to limitations in wrongful death actions."[29] This implies that the substantive-procedural dichotomy used in *Kilberg* should not be taken literally.

The problems inherent in the *Kilberg* decision were not laid to rest by the court's pronouncement in *Davenport*. In *Pearson v. Northeast Airlines, Inc.*,[30] the issue was again raised. This action was brought in the Federal District Court for the Southern District of New York.[31] Jurisdiction was grounded upon diversity of citizenship. The cause of action arose out of the same airplane crash that produced *Kilberg*. All essential facts were the same as in *Kilberg* except that the action was brought in a federal court. That court followed the *Kilberg* dictum and refused to apply the Massachusetts limitations for wrongful death actions.[32] On appeal, the Second Circuit reversed,[33] holding that the trial court's refusal to apply the $15,000 limitation in the Massachusetts statute violated the full faith and credit clause of the United States Constitution.[34] It said that the "strong unifying principle embodied in

27. 11 N.Y.2d 392, 183 N.E.2d 902 (1962).

28. *Id.* at 393, 183 N.E.2d at 903.

29. *Id.* at 395, 183 N.E.2d at 904.

30. 309 F.2d 553 (2d Cir. 1962).

31. 199 F. Supp. 539 (S.D.N.Y. 1961).

32. *Id.* at 540. In Erie v. Tompkins, 304 U.S. 64 (1938), the Supreme Court held that federal district courts whose jurisdiction is based upon diversity of citizenship must follow the law of the state in which the court is sitting. In Klaxton v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), the Supreme Court refined that doctrine to include the conflict of law rules of the forum state.

33. 307 F.2d 131 (2d Cir. 1962).

34. "Full Faith and Credit shall be given to each State and to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

The court said, "It is . . . true that New York has no antagonism to wrongful death actions in general. Its antagonism is only to the limitation of liability. Its own statute has no limitation but the opinion recognized that plaintiff's rights arise under the Massachusetts statute, not the New York statute. The Supreme Court is the final authority to choose 'between the competing public policies involved.' But on the present appeal this court must make the choice. This court believes that the 'strong, unifying principle' of the full faith and credit clause should prevail." *Id.* at 134.

the Full Faith and Credit Clause" and the "public policy" of New York as expressed in the *Kilberg* dictum conflict and that one must give way to the other.[35] Two months later, the Second Circuit granted a rehearing en banc.[36] The court affirmed the decision of the District Court and rejected the panel decision, saying:

> We hold that the ruling of the New York Court of Appeals in *Kilberg* was a proper exercise of the state's power to develop conflict of laws doctrine; and the court's refusal to apply the limitation of recovery provision in the Massachusetts statute a constitutional exercise of such power.[37]

In rationalizing its position, the Court skipped over the substantive-procedural dichotomy used in *Kilberg*. It intimated that the procedural label placed upon statutes of limitation and readily accepted by the courts as a basis for applying the law of the forum is, in essence, as substantive a right as the limitations often placed upon recovery in wrongful death statutes.[38] The court said that if the characterization of statutes of limitation as procedural does not offend the Constitution, the same characterization of limitations on recovery is no more offensive. It adhered to a standard set out by the Supreme Court in a different factual situation.[39] The court said,

> We . . . hold . . . that a state with substantial ties to a transaction in dispute has a *legitimate constitutional* interest in the application of its rules of law. If, indeed, those connections are tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law.[40]

---

35. *Id.* at 134.

36. The panel decision was entered on July 11, 1962. The panel court consisted of Chief Judge Lumbard and Judges Swan and Kaufman, the latter dissenting and Judge Swan writing the panel majority opinion. The rehearing court consisted of Chief Judge Lumbard and Judges Clark, Waterman, Moore, Friendly, Smith, Kaufman, Hays, and Marshall. Judge Kaufman wrote the majority opinion. Judges Lumbard, Friendly and Moore dissented, Judge Friendly writing the dissent.

37. Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 556 (2d Cir. 1962).

38. *Id.* at 557-58. The Court considered the characterization of the limitation from a constitutional viewpoint, ignoring the position of the majority of jurisdictions. In arguing constitutionality, it dismissed Supreme Court decisions holding the maximum liability provision as an inseparable part of the right by saying these decisions are relics of the "vested-rights" theory. The Court also pointed out that these cases were primarily choice-of-law cases decided by federal courts before Erie v. Tompkins. *Id.* at 558, n.12.

39. Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 547-48 (1935).

40. Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 559 (2d Cir. 1962). It must be recognized that the court went on to say that it did not condone indiscriminate labeling of matters as procedural by a forum in order to apply its own statute as against the foreign statute, indicating the need for substantial ties to the cause of action. However, once New York labels limitations on wrongful death recovery as procedural, because of the rule that the forum state will apply its own procedure even though the cause of action is based upon foreign law, the New York court would apply its unlimited recovery rule. For consistency's sake, this would be true, notwithstanding the fact that there may not be "substantial ties

In evaluating the *Kilberg* doctrine in light of *Davenport* and *Pearson*, it is first necessary to distinguish this concept from the doctrine in *Loucks v. Standard Oil of N.Y.*[41] In *Loucks*, the question was whether New York would entertain an *action* predicated upon a foreign statute which was allegedly contrary to the law of New York. In *Kilberg*, the question was whether New York would recognize and enforce a *defense* based on a foreign statute that is contrary to the laws of the forum. Although these decisions seemingly reach contrary results, they have one factor in common; they both favor the New York citizen. In *Loucks*, the plaintiff was a New York citizen injured in an accident in Massachusetts. The court was faced with the alternative of applying Massachusetts law or dismissing the action. It chose the former, thereby preserving the plaintiff's rights.[42] In *Kilberg*, the court refused to apply the Massachusetts limitation as to the amount recoverable on the wrongful death action, thereby giving the plaintiff the benefit of the liberal New York law. If the *Kilberg* court had based its decision upon this distinction, there would be little difficulty in justifying the holding.

Pearson follows the well established principle that a federal court whose jurisdiction is based upon diversity will follow the law of the forum state, including its conflict of laws[43] rules. The fact that the Second Circuit, en banc, reversed the panel decision declaring the New York position unconstitutional exemplifies the uncertainty of the constitutional limitations in this area.

III

The preceding discussion was predicated upon the presumption that state conflict of laws rules are determined solely by state policy without outside restraint. However, the federal constitution sets outer limits upon the states' discretion.[44] The two pertinent sections of the

---

to the transaction." To hold otherwise would require the court to recharacterize the limitations every time a case is heard. The court has used incongruous rationales.

41. 224 N.Y. 99, 120 N.E. 198 (1918).

42. The question before the court in *Loucks* was whether New York would apply the Massachusetts statute, or else dismiss the action. Cardozo had no doubt that the Massachusetts law was applicable: "Through the defendant's negligence, a resident of New York had been killed in Massachusetts. He left a widow and children who are also residents of New York. The law of Massachusetts gives them a recompense for his death. It cannot be that public policy forbids our courts to help in collecting what belongs to them. We cannot give them the same judgment that our law would give if the wrong had been done here. Very likely we cannot give them as much. But that is no reason for refusing to give them what we can. *Id.* at 111-12, 120 N.E. at 202.

43. See note 32 *supra.*

44. "So far as the Supreme Court of the United States is empowered to lay down rules of Conflict of Laws for the courts of the different states under the 'Full Faith and Credit' clause, the 'Due Process' clause, etc. of the federal constitution, the individual states are not free to act as they please." Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 750 (1924). See also Comment, 28 U. CHI. L. REV. 733, 747 (1961).

Constitution are the full faith and credit clause[45] and the fourteenth amendment due process and equal protection clauses.[46]

The Supreme Court previously has announced various guides for determining whether a conflict of laws rule violates the Constitution. An analysis of the earlier decisions sheds little light on the problem today because of the changes that have taken place in conflict of laws theory[47] and the changes in the economic, political, and social complexion of the nation.

The *Pearson* court, in the panel decision, based its constitutional objection to *Kilberg* upon three relatively recent cases. One of the cases relied upon was *Hughes v. Fetter*.[48] In that case, a domiciliary of Wisconsin was killed in an automobile accident in Illinois. His administrator brought an action in Wisconsin, basing his claim for relief upon the Illinois Wrongful Death Statute.[49] The defendant driver was domiciled in Wisconsin and the defendant insurance company was chartered under Wisconsin law. The defendants moved to dismiss the complaint on the merits, and the motion was granted.[50] The Wisconsin Supreme Court affirmed the dismissal on the ground that a Wisconsin statute, which created an action for wrongful death only if the death occurred within Wisconsin, established a public policy against Wisconsin entertaining suits brought under the wrongful death acts of other states.[51] The United States Supreme Court reversed the Wisconsin de-

45. U.S. CONST. art. IV, § 1.

46. U.S. CONST. amend. XIV, § 1.

47. "Torts are the most recent subject of the Law of Conflicts. In the past, *lex fori* controlled unless justice could not be done, in which case the court rejected jurisdiction." EHRENZWEIG, CONFLICT OF LAWS 541 (1962). "The first mention of the doctrine that the law of the state where the tort occurred should control is found in [STORY, CONFLICT OF LAWS (8th ed. 1883)]. . . . The Restatement adopted this in conjunction with the 'vesting of rights' [doctrine]. . . . The first appearance of *lex loci* was where the foreign state's law was a defense to plaintiff's claim. . . . Fairness to the tortfeasor became the rationale of [the] new principle." *Id.* at 543. "Then this doctrine was extended to foreign claims as well as defenses." *Id.* at 544.

48. 341 U.S. 609 (1951).

49. "Wherever the death of a person shall be caused by the act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereto, then . . . the party who . . . would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured. . . ." ILL. STAT. ANN. ch. 70, § 1 (1959). The Act also provided for a $20,000 limitation upon recovery, effective until July 14, 1955, with provision for subsequent increase. ILL. STAT. ANN. ch. 70, § 2 (1959).

50. This decision was not reported.

51. Hughes v. Fetter, 257 Wis. 35, 42 N.W.2d 452 (1950). The pertinent section of the Wisconsin statute reads as follows: "Wherever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then . . . the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this state.*" WIS. STAT. ANN. § 331.03 (1958). (Emphasis added.) The Act limits recovery to $15,000 with exceptions increasing the maximum to $22,500. WIS. STAT. ANN. § 331.034 (1958).

cision, holding that Wisconsin's interpretation of her wrongful death statute violated the full faith and credit clause of the Constitution, and that the Wisconsin courts were required to entertain the action.[52] The Court found:

> [This case presents a conflict between] the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states . . . [and] the policy of Wisconsin, as interpreted by its highest court against permitting Wisconsin courts to entertain this wrongful death action.[53]

The Court concluded "that Wisconsin's policy must give way, That state had no real feeling of antagonism against wrongful deaths in general."[54]

Does the *Hughes* decision imbed into the Constitution the *lex loci delicti* rule in all cases? This is highly unlikely. The Wisconsin court faced the alternative of recognizing Illinois law or dismissing the action and chose the latter. There was no question as to whether Illinois or Wisconsin law should be applied. In fact, there was no real conflict between the Wisconsin Wrongful Death Act and the comparable Illinois law.[55] The Illinois Statute contained a $20,000 limitation upon recovery for wrongful death and the Wisconsin statute contained a $15,000 limitation. The Wisconsin statute also required that the death must have occurred in Wisconsin. Therefore, no conflict of laws existed because Wisconsin had no applicable statute. The Wisconsin Court's refusal to hear the case denied the plaintiff a forum in that state without sufficient cause. In light of this analysis, the position of the Supreme Court is readily justifiable. The Court recognized this distinction in a footnote:

> The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguished the present case from those where we have said the "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted."[56]

It appears from this note that Wisconsin might have applied Wisconsin law if the Wisconsin statute, by its terms, was applicable.[57]

52. Hughes v. Fetter, 341 U.S. 609 (1951).

53. *Id.* at 612.

54. *Ibid.*

55. See statutes cited notes 49 and 51 *supra.*

56. Hughes v. Fetter, 341 U.S. at 612, n.10.

57. Four justices dissented. They said that Wisconsin's interest was great enough to allow it to apply its own statute. The decedent, the plaintiffs, and the individual defendant were residents of Wisconsin. *Id.* at 614-21.

This position is justified by a dictum in another Supreme court case. In *Alaska Packers Ass'n v. Industrial Acc. Comm'n*,[58] the Supreme Court pronounced a standard for testing constitutionality of a *lex fori* situation that involves a "weighing of interests." The opinion stated:

> A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. . . . [T]he conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision *according to their weight*. . . . *Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that the conflicting interests involving those of the foreign state are superior to those of the forum.[59]

Thus, the *Alaska Packers* "weighing of interests" test could easily justify Wisconsin in applying its own statute in lieu of the Illinois statute.

Another case relied upon by the panel in *Pearson* is *First Nat'l Bank v. United Air Lines, Inc.*[60] This action was brought in a federal district court in Illinois, on the ground of diversity of citizenship. A passenger of defendant air lines was killed in a Utah airplane crash. The decedent, prior to his death, was a resident and citizen of Illinois. The defendant was a Delaware corporation doing business in Illinois. The plaintiff, executor of the deceased passenger, based his cause of action upon the Utah Wrongful Death Statute.[61] The Illinois statute provided:

> [N]o action shall be brought or prosecuted in this State to recover damages for a death occurring outside this State where a

58. 294 U.S. 532 (1935). The plaintiff entered into a contract of employment with defendant, a non-resident alien, to do work for defendant in Alaska. The contract of employment was made in California. The applicable California Workmen's Compensation Law required that California law be applied to all employment contracts made in California, notwithstanding a contract provision to the contrary or a *locus delictus* outside the State. The employment contract in question contained a provision that Alaska's Workmen's Compensation Law would apply to any injury arising out of the employment under the contract. An injury occurred in Alaska and plaintiff sued in California. The California courts refused to honor the contract provision or give full faith and credit to the Alaska law. The United States Supreme Court upheld the California decision, relying upon the theory that the contract was made in California, giving California a "legitimate interest" in the litigation.

59. *Id.* at 547-48. (Emphasis added.)

60. 342 U.S. 396 (1952).

61. UTAH CODE ANNOT. tit. 78, ch. 11, § 7 (1953).

> right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.[62]

The District Court dismissed the action and the Court of Appeals affirmed.[63] In so holding, it rejected two constitutional arguments of the plaintiff. The first argument was that a state statute cannot destroy diversity jurisdiction of a federal court. The second was that the Illinois statute violates the full faith and credit clause in providing that claims for Utah deaths shall not be enforced in Illinois where service on the defendant could be had in Utah.[64] The majority of the Supreme Court ignored the first argument and held the statute unconstitutional as a denial of full faith and credit of the Utah cause of action.[65] In so holding, the court relied heavily upon the *Hughes* decision. It recognized the distinction between the Illinois statute in the instant case and the Wisconsin statute in *Hughes*. It said,

> While we said in *Hughes v. Fetter* that it was relevant that Wisconsin might be the only state in which service could be had on one of the defendants, we were careful to point out that this fact was not crucial. Nor is it crucial here that Illinois only excludes cases that can be tried in other states. We hold again that the Full Faith and Credit Clause forbids such exclusion.[66]

Admittedly, this decision narrows the constitutional limits upon the states' discretion in formulating conflict of laws rules. However, by applying the same analysis to this case that was applied to *Hughes*, the same conclusion is reached; namely, that no conflict of laws actually existed and the Illinois court could have constitutionally applied its own law if a substantial conflict had existed.[67] Viewing these facts in light of the "weighing of interests" test espoused in *Alaska*, Illinois has a sufficient interest in the litigation to apply its own law.

Another case relied upon by the panel in *Pearson* was *Richards v. United States*.[68] Petitioners were the personal representatives of pas-

62. ILL. REV. STAT. ch. 70, § 2 (1959).

63. 190 F.2d 493 (7th Cir. 1951).

64. *Id.* at 494.

65. The rejected argument said that the state statute would deprive the federal court of its diversity jurisdiction. The point is well taken, but was dismissed without being considered on its merits by the Supreme Court. The Court said, "We need not discuss this contention . . . for we recently held in [Hughes] . . . that a Wisconsin statute, much like that of Illinois, did violate the Full Faith and Credit Clause." First Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396, 397-98 (1952). One justice concurred, relying upon the jurisdiction argument. *Id.* at 398-401.

66. *Id.* at 398.

67. The conflict here is actually between the policy of Illinois against entertaining actions for wrongful deaths occurring outside the state, and the unifying principles of the full faith and credit clause. There is no real conflict between the laws of the two States. The Supreme Court said that under the circumstances, the national policy should prevail.

68. 369 U.S. 1 (1961).

sengers killed when an airplane, owned by respondent American Airlines, crashed in Missouri en route from Oklahoma to New York. Suit was instituted by petitioners against the United States in the Federal District Court for the Northern District of Oklahoma. The plaintiffs' theory was that the Government, through the Federal Aviation Agency, had negligently failed to enforce the terms of the Civil Aeronautics Act[69] and the regulations thereunder which prohibited the practices then being used by American Airlines in its overhaul depot in Oklahoma. Prior to this action, the petitioners had received or had been tendered a 15,000 dollars settlement from American Airlines, the maximum amount recoverable under the Missouri Wrongful Death Act.[70] They sought additional damages under the Oklahoma Wrongful Death Act,[71] which had no limitation upon the amount recoverable from a tortfeasor. Petitioner's suit against the United States was based upon the Federal Tort Claims Act.[72] The District Court ruled that the complaints failed to state claims upon which relief could be granted under the Oklahoma act because the Oklahoma statute could not be applied extraterritorially when an act or omission occurring in Oklahoma results in injury in the State of Missouri. Even if the Oklahoma law was applicable under the Federal Tort Claims Act, the general law of Oklahoma, including its conflict of laws rule, was applicable. Thus further recovery was precluded since Oklahoma's conflicts rule refers the court to the law where the negligence had its operative effect, *i.e.*, Missouri. On appeal, the Court of Appeals affirmed the lower court.[73] On certiorari to the Supreme Court, the petitioner contended that the reference in Section 1346(b) of the Federal Tort Claims Act to the "place where the act or omission occurred" directs application of only the internal law of that state—here Oklahoma. The Court held that the legislative intent of Congress requires the federal courts, to look to the whole law of the State where the negligent acts took place, including its conflict of laws rules. In citing *Richards* as supporting the unconstitutionality of *Pearson*, the panel ignored the fact that the decision turned upon a judicial interpretation of Congressional intent.[74] The *Richards* opinion states,

69. 49 U.S.C. § 1425 (1958).

70. MO. REV. STAT. § 537.090 (1949). Subsequent to the origination of this action, the Missouri Code was amended to provide for maximum damages of $25,000. MO. REV. STAT., § 537.090 (1959).

71. OKLA. STAT., tit. 12, § 1052-54 (1951).

72. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1958).

73. 285 F.2d 521 (1960).

74. "*Richards v. United States* . . . is favorable to [the defendant]. . . . No constitutional question was there presented; Missouri was the place of death, and Oklahoma the place of the negligence. Missouri, like Massachusetts had a $15,000 limitation on wrongful death damages, and Oklahoma, like New York, had a constitutional limitation against such limitation. The final result of the litigation was to apply the Missouri statute, *where the death occurred.*" Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 136 (1962). (Emphasis added.)

> [W]e need not pause to consider the question whether the conflict-of-laws rule applied in suits where federal jurisdiction rests upon diversity of citizenship shall be extended to a case such as this, in which jurisdiction is based upon a federal statute.[75]

In a dictum, the Supreme Court went on to pronounce recognition of a view that not only undermines the panel decision in *Pearson*, but actually lends support to the majority position upon rehearing. The court said,

> Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity.[76]

The *Pearson* and *Kilberg* decisions also raise the question of whether the defendant was denied a defense otherwise available under Massachusetts law. The Supreme Court, in *Bradford Elec. Co. v. Clapper*,[77] was faced with the similar problem of whether "public policy" can be used to deny a party a defense based upon foreign law. In that case, deceased, a resident of Vermont, was employed by the defendant, a Vermont corporation, as a lineman. His job included work in Vermont and New Hampshire. The contract was made in Vermont and the deceased tacitly agreed to coverage by the Vermont Workmen's Compensation Act.[78] The employee was killed in New Hampshire in the scope of his employment. His administratrix, a citizen and resident of New Hampshire, brought this action in New Hampshire under that state's Employer's Liability and Workmen's Compensation Act,[79] which permitted an employee or his representative to sue for damages at common law. The defendant removed the action to a federal court on the ground of diversity of citizenship. The defendant invoked the full faith and credit clause of the Federal Constitution, and set up as a special defense that the action was barred by the provisions of the Vermont Compensation Act; that the contract of employment had been entered into in Vermont where both parties to the contract then and thereafter resided; and that both the employer and the employee agreed to come under the Vermont act as a condition of employment. The District Court ruled that the action was properly brought under the laws of New Hampshire, and that the Vermont Workmen's Compensation Act had no extra-territorial effect.

75. Richards v. United States, 369 U.S. 1, 7 (1961).
76. *Id.* at 15.
77. 286 U.S. 145 (1932).
78. Vermont Gen. Laws 1917, ch. 241.
79. N.H. Public Laws 1926, ch. 302.

On appeal, the Circuit Court affirmed.[80] The Supreme Court granted certiorari and held that refusal to give full faith and credit to the defense under the Vermont act was unconstitutional.[81]

It can be argued that limitation upon recovery for wrongful death in the Massachusetts statute is, in substance, a partial defense, and that New York cannot, under the *Bradford* decision, refuse this defense to the defendant. However, in *Bradford*, the deceased and the defendant were residents of Vermont. The deceased was employed in Vermont and although he occasionally worked in New Hampshire, the bulk of his work was performed in Vermont. The only significant contacts that the deceased had with New Hampshire were that the injury occurred in that state, and that the action was brought there. In view of these facts, *Bradford* merely represents a situation in which the forum state does not have sufficient contacts to support "public policy" within the confines of the full faith and credit clause. The crux of that decision was the lack of contacts of the forum rather than the fact that a defense was denied the defendant. At least, that would probably be the rationale of a present day court.

It becomes evident that the full faith and credit clause does not, under the factual situations in *Pearson* and *Kilberg*, render the New York position unconstitutional.[82] However, the proposition was also advanced that the due process and equal protection clauses of the fourteenth amendment are violated by the *Kilberg* doctrine.[83] Certainly, the "public policy" argument as a basis for the New York position is sufficiently supported by the facts to avoid offending the fourteenth amendment.[84] The constitutionality of the substantive-procedural dicho-

80. Bradford Elec. Co. v. Clapper, 51 F.2d 992 (1st Cir. 1931).

81. 286 U.S. 145, 154 (1932). See also text accompanying nn. 13 & 14 *supra*.

82. "[A] state court's choice of law will be upset under the Full Faith and Credit Clause . . . only when the state whose law is applied has no legitimate interest in its application . . . ." Currie, *The Constitutional Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 75 (1958). *Cf.* Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 294 U.S. 532 (1935); New York Life Ins. Co. v. Head, 234 U.S. 149 (1914). See also the dissenting opinion of Justice Frankfurter in Carroll v. Lanza, 349 U.S. 408, 414 (1955), in which he classifies the decisions of the Supreme Court in the full faith and credit cases. See generally section III *supra*.

83. "No state shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The question might arise as to whether the privileges and immunities clause requires New York to extend the public policy exception to non-residents as well as residents. A noted authority answered the question thus: "In pursuit of its altruistic interests, a state must stop short of trenching upon the interests of other states; therefore, the privileges and immunities clause does not require a state to extend the benefits of its laws to non-residents where the state has no interest in so doing, and where so doing would interfere with the policy of a state having a direct interest in the matter." Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1365-66 (1960).

84. "Objections which are founded upon the Fourteenth Amendment must, therefore,

tomy could be challenged if it could be proven to be discriminatory or arbitrary. The New York position might be considered arbitrary if the forum had no other "contacts" with the cause of action besides being the forum state. Such is not the case here. The discriminatory qualification might be offended if New York applied its own limitation in a manner so inconsistent that it would amount to caprice. However, *Davenport*[85] indicates that New York will continue to apply the "public policy" exception only under factual patterns similar to *Kilberg* and *Pearson*.[86]

The problems under the fourteenth amendment become more prominent if consideration is given to the substantive-procedural dichotomy used in *Kilberg* and *Pearson*. New York had sufficient "contacts" with the cause of action to apply New York law regardless of the characterization used in *Kilberg* and *Pearson*.[87] Suppose, however, that a domiciliary of Massachusetts was also killed in the crash and his administrator brought the action in New York. Admittedly, New York now has fewer "contacts" with the cause of action. It is safe to presume that under the "public policy" argument, New York would not have to reject the Massachusetts limitations because New York's "public policy" does not extend to Massachusetts domiciliaries.[88] However, if the limitation is

be directed, not to the existence of the power to impose the liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process." Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 541-42 (1935). See Reese, *Full Faith & Credit to Statutes; The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 342 (1952).

85. See note 27 *supra*.

86. See notes 28 and 29 *supra* and accompanying text. See also Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 559 (1962).

87. This assumption might be challenged on the following basis, although the success of such a challenge remains doubtful. Although several courts have, upon occasion, *decreased* the amount recoverable by a plaintiff by applying the law of the forum, (Wooden v. Western N.Y. & Pa. Ry., 126 N.Y. 10, 26 N.E. 1050 (1891)), there is no record of a court, outside of *Kilberg* and *Pearson*, that used the law of the forum to *increase* the liability of the defendant to exceed the amount allowed by the foreign statute. This may be significant with the due process issues, where the state has no substantial connection with the matter to which it seeks to apply its own law. If the forum allows the plaintiff less rather than more than the foreign law allows, no clear question of due process arises since the plaintiff sues in New York out of choice and might sue elsewhere if he did not wish to be subject to its limits. If, on the other hand, more is allowed than under the foreign statute, a definite question arises as to denial of due process to the defendant; he, unlike the plaintiff, has no choice as to where he is sued. "Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum on those who do not." Lauritzen v. Larsen, 354 U.S. 571, 591-92 (1953). The Supreme Court has implied that any question of due process disappears if there are substantial connections between the forum state and the matters in question so as to make the application of the law reasonable. "We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies on slight connections, because it is a forum state." *Id.* at 590-91. See generally LEFLAR, CONFLICT OF LAWS § 59 (1959).

88. The Supreme Court has held that to refuse to apply the law of a state having an interest in the situation, and to apply the law of a state having no interest, is to deny due process of law to the litigants, Home Ins. Co. v. Dick, 281 U.S. 397 (1930), and full faith and credit to the interested state. Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932).

considered procedural, New York would, under the traditional conflict of laws rule, be obliged to apply its own procedure and ignore the Massachusetts limitations. This would result in a situation in which New York would defy good logic in order to be consistent. There is also a possibility that under these circumstances, a denial of due process might exist.[89] The New York court would be faced with three alternatives: (1) it could hear the action and treat the limitations as procedural; (2) it could dismiss the action under the doctrine of *forum non conveniens*;[90] (3) it could create an exception to the procedural characterization and apply the Massachusetts limitations.[91] None of these alternatives solves the problem because each constitutes a piecemeal treatment rather than a full cure.

CONCLUSION

The conclusion derived from the above discussion is that New York could have simplified the situation by relying entirely upon "public policy" and ignoring the substantive-procedural characterization. The question remains, why must a court resort to illogical reasoning in order to justify a logical position?[92] The answer is not altogether clear but can be partially explained by the reluctance of some jurists to accept any view that is inconsistent with precedent, regardless of the fact that modern conditions necessitate change. Nowhere is change and renovation needed more than in the law of conflicts.[93] Concepts

89. Suppose, for example, that both the plaintiff and defendant are domiciliaries of a third state, and the action is brought in New York. Assuming a New York court hears the action, it would apply its own procedure. Since New York has characterized the limitations on recovery for wrongful death as procedural, it would apply the unlimited recovery provision in the New York Constitution. This might be successfully challenged as a denial of due process, since New York has no "substantial contacts" with the cause of action. Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

90. However, *forum non conveniens* may not be available for the court's use because the jurisdiction may not have adopted it. Also, the forum may, in fact, be the most convenient one if all the witnesses happen to reside in the state where the action is brought and the defendant is amenable to service of process. This does not apply as such to New York since it has adopted the doctrine. In fact, it was instrumental in developing it. See Bata v. Bata, 304 N.Y. 51, 105 N.E.2d 623 (1952); Collard v. Beach, 81 App. Div. 582, 81 N.Y. Supp. 619 (1903). See also Braucher, *The Inconvenient Forum*, 60 HARV. L. REV. 867 (1935).

91. Since New York resorted to fiction in justifying *Kilberg*, it might fictionalize further in order to handle a "no contact" situation.

92. To hold the limitation contrary to public policy is, in effect, to characterize the limitation as substantive. For "public policy" is a reason advanced to deny effect to the *substantive* law of the *locus delictus*. If the issue in question was procedural, it was one to be decided by the forum's law and considerations of public policy had no place in the discussion. In *Pearson* and *Kilberg*, either characterization produces identical results. But what right would New York have to apply its public policy if the decedent were not a domiciliary of New York? Clearly none—yet the procedural characterization of the limitation on damages would compel New York, the forum, under the applicable conflicts rule, to apply its own limitations.

93. "When each of two states related to a case has a legitimate interest in the application of its law and policy, a problem is presented which cannot be rationally solved by any method of conflict of laws—that is to say, by any effort, legislative or judicial, on the part

developed in horse and buggy days are still being used in the Jet Age. With fifty jurisdictions having fifty different laws on any given subject, it becomes evident that formulas such as *lex loci delicti* or *lex locus contractus* are not adequate to solve the complicated legal entanglements that occur today. Because of the subject matter of *Pearson* and *Kilberg*, this discussion has been confined to the aviation field, but is is recognized that revamping is needed in other areas also.[94]

> Modern conditions make it unjust and anomalous to subject the traveling citizens of this State to the varying laws of other States through and over which they move . . . . An air traveler from New York may in a flight of a few hours' duration pass through several . . . commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or unexpected developments, or an airplane's catastrophic descent may begin in one States and end in another. The place of injury is entirely fortuitous.[95]

The New York Court of Appeals judicially recognized the inadequacies in the traditional conflict of laws approach.[96] The fact that the court used inconsistent reasoning in order to reach an acceptable conclusion emphasizes the inadequacies in the traditional approach. Of course, it is easy to criticize but often impossible to present a better solution. Text writers have groped with the problem for years and have offered many solutions.[97] However, it is unlikely, if not impossible, that the American judiciary will adopt, en banc, the ideas of one man, assuming one could offer the "perfect solution." Three courses of action seem available at this time. First, the states might adopt a uniform act,

---

of the states concerned to establish universal choice-of-law rules. In such a context, a choice-of-law rule is simply a device which, typically without explicitly saying so, subordinates the interest of one state to that of the other. A court is ordinarily not warranted in sacrificing interests of its own state for the sake of uniformity of result." Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958).

94. Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947).

95. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527 (1961).

96. "The mechanical last event doctrine appears to be firmly so imbedded in American case law that courts are sometimes driven to tortuous processes of reasoning in order to escape from its consequences when common sense revolts." Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881, 889 (1961).

97. COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS, ch. 13 (1949); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Currie, *The Constitution and the Choice of Law; Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Leflar, *Choice of Law: Torts: Current Trends*, 6 VAND. L. REV. 447 (1953); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 165 (1944).

drafted by experts in the field and adopted by all the states for wrongful death actions.[98] This would alleviate the conflict of laws problem, at least in this limited area. However, the likelihood of such an occurrence in the near future, is improbable. Secondly, the courts can retain archaic concepts to meet modern problems. The results could prove disastrous in given situations. Third, the courts can adjust their thinking to meet contemporary problems by recognizing the shortcomings of *stare decisis*. *Kilberg* and *Pearson* recognized that *lex locus delicti* does not provide a workable solution to conflicts of laws in every situation. When the forum has sufficient contacts with the cause of action, and local "public policy" so dictates, the law of the forum should prevail over the law of the *locus delicti*. *Kilberg* and *Pearson* indicate a need for flexibility. The incongruities in these opinions emphasizes the inadequacy of the present state of the law of conflicts.

Kilberg type decisions will continue to be made and jurists and legal writers will ponder their meaning. Viewing *Kilberg* and *Pearson* in this light, we cannot be too harsh with the incongruities. Write it off as the growing pains of a common law legal system.

STUART I. ODELL

98. For an excellent article on wrongful death and survival statutes and a proposed Uniform Act, see Oppenheimer, *The Survival of Tort Action and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942).