CONFLICT OF LAWS: FORUM APPLIES FOREIGN LAW, REJECTING FOREIGN STATUTE OF LIMITATION—AN UNJUSTIFIABLE RESULT UNDER THE GOVERNMENTAL INTEREST ANALYSIS

IN *Lillegraven v. Tengs*,[1] the Supreme Court of Alaska allowed plaintiff to base her tort action on the British Columbia Motor Vehicle Act, but rejected the statute of limitation of that act in favor of the longer Alaska statute of limitation. The court justified this incongruous result with traditional conflicts rules and a policy analysis.

Plaintiff, an Alaska resident,[2] was injured in a British Columbia accident while a passenger in defendant's automobile. Although not present, defendant, also an Alaska resident,[3] had consented to the operation of his car by the person driving at the time of the accident. Plaintiff commenced her suit within the two year period of the applicable Alaska statute of limitation[4] and based it on the British Columbia owner liability statute. The effect of this statute is to make the owner of a motor vehicle vicariously liable for certain torts committed by persons driving with the owner's consent.[5] The lower court granted summary judgment for the defendant, holding the action barred by the one-year limitation incorporated into the British Columbia Motor Vehicle Act. The supreme court remanded, assuming that the foreign owner liability statute was applicable because of the traditional conflict of laws rule that tort liability is determined

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[1] 375 P.2d 139 (Alaska 1962).

[2] Brief for Appellants, p. 2.

[3] Brief for Appellants, p. 2.

[4] ALASKA COMP. LAWS ANN. § 55-2-7 (1949), now ALASKA STAT. ANN. § 09.10.070 (1962).

[5] "In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway . . . every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; but nothing in this section shall relieve any person deemed to be the agent or servant of the owner and to be driving or operating the motor-vehicle in the course of his employment from the liability for such loss or damage." Statutes of British Columbia 1957, Motor-Vehicle Act, ch. 39, § 72 (1).

The policies of this statute are limited in part, however, by a "guest statute" which makes the owner liable for injuries to passengers only when there is gross negligence. Statutes of British Columbia 1957, ch. 39, § 80 (1).

by the law of the place of injury.[6] In rejecting the foreign act's expired limitation, the court referred to the traditional principle that the forum will follow foreign substantive law but is free to follow its own procedural law, and classified the foreign limitation as "procedural."[7]

The use of the substantive-procedural dichotomy to decide conflicts cases involving statutes of limitation has been the subject of considerable criticism. Some commentators attack the theoretical basis of characterization of such statutes as "procedural." Moreover, the flexibility of the characterization process has allowed courts to manipulate this concept to reach what they consider to be desirable results. These commentators therefore assert that any analysis of statutes of limitation as "substantive" or "procedural" is valid, if at all, only within the narrow confines of the traditional system.[8]

This criticism of the characterization method is only part of a broad attack on the orthodox system's failure to furnish a valid and effective method of deciding conflict of laws cases.[9] The fundamental error of the system is that it fails to look to the content of the

[6] 375 P.2d at 140; RESTATEMENT, CONFLICT OF LAWS § 378 (1934) [hereinafter cited as RESTATEMENT]; BEALE, CONFLICT OF LAWS § 378.2 (1935) [hereinafter cited as BEALE]; GOODRICH, CONFLICT OF LAWS § 92 (3d ed. 1949) [hereinafter cited as GOODRICH]; STUMBERG, CONFLICT OF LAWS 182-91 (2d ed. 1951) [hereinafter cited as STUMBERG].

[7] The determination of what is "substantive" and what is "procedural" is generally made by the forum. RESTATEMENT §§ 584-85; BEALE § 584.1; GOODRICH § 80; STUMBERG 134. The general rule is that statutes of limitation are procedural. GOODRICH § 85; STUMBERG 147; see BEALE §§ 603.1-05.1; RESTATEMENT §§ 603-05. However, "If by the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state." RESTATEMENT § 605; see BEALE § 605.1; GOODRICH § 86; STUMBERG 149-52. A statute within this category may be referred to as a "substantive" statute of limitation.

[8] See COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, ch. 6 (1942); EHRENZWEIG, CONFLICT OF LAWS § 161 (1962) [hereinafter cited as EHRENZWEIG]; STUMBERG 147; Lorenzen, *Statutes of Limitation and the Conflict of Laws,* 28 YALE L.J. 492 (1919); *but see* Ailes, *Substance and Procedure in the Conflict of Laws,* 39 MICH. L. REV. 392, 401-18 (1940); Ailes, *Limitation of Actions and the Conflict of Laws,* 31 MICH. L. REV. 474, 491-502 (1933), supporting the "simplicity and convenience" of the common law rule. See generally Comment, 35 TEXAS L. REV. 95, 101-03 (1956).

[9] See, *e.g.,* Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L.J. 171; Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules,"* 49 CALIF. L. REV. 240 (1961); Ehrenzweig, *The Lex Fori: Basic Rules in the Conflict of Laws,* 58 MICH. L. REV. 637 (1960); Ehrenzweig, *The Lex Fori in the Conflict of Laws—Exception or Rule?,* 32 ROCKY MT. L. REV. 13 (1959); Morris, *The Proper Law of a Tort,* 64 HARV. L. REV. 881 (1951); Traynor, *Is this Conflict Really Necessary?,* 37 TEXAS L. REV. 657 (1959); Weintraub, *A Method for Solving Conflict Problems—Torts,* 48 CORNELL L.Q. 215 (1962); Weintraub, *A Method for Solving Conflict Problems,* 21 U. PITT. L. REV. 573 (1960); note 30, *infra.*

laws and the nature of the relationships involved.[10] And, while having a premise of uniformity of result regardless of forum,[11] decisions such as *Tengs* demonstrate that the system fails to satisfy its own objectives. Uniformity of result will supposedly discourage forum-shopping, but *Tengs* indicates the bargain a shopper can obtain. The greatest weakness of the orthodox system, however, is that a court can pick and choose by utilizing characterization and traditional formulae in such a manner as to make applicable the laws of more than one forum in order to secure for the local plaintiff or defendant the benefit of provisions of foreign law more favorable than those of domestic law and reject the less favorable.[12]

Proponents of the traditional system respond to that criticism by asserting that one suggested replacement for the orthodox system is on its face a method, albeit sophisticated, with the primary objective of favoring local interests. The target of this attack is the governmental interest analysis,[13] which determines the relevance of

[10] See, *e.g.*, Currie, *supra* note 9 *passim*.

[11] GOODRICH § 4; STUMBERG 16; see BEALE § 4.12; Dean, *The Conflict of Conflict of Laws*, 3 STAN. L. REV. 388, 392 (1951); *but cf.*, Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 197-200 (1933); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 479 (1928). It is conceded by most advocates of the traditional system, however, that there will be cases which will reach a different result because of the place of the suit. See, *e.g.*, GOODRICH § 4.

[12] See, *e.g.*, Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955); Goodwin v. Townsend, 197 F.2d 970 (3d Cir. 1952).

[13] See, *e.g.*, Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

For an exposition of the broad implications of this analysis, normally directed to particular fact situations, see Currie, *supra* note 9, at 178:

"1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has

certain relationships of the states connected with the litigation and inquires whether such relationships furnish a reasonable basis for the forum's asserting an interest in the application of the policy of its law.[14] The answer to this criticism is that such favoritism will occur only if the analysis is improperly used. A recent article[15] indicates the correctness of a case which some believe reaches an improper result through local favoritism, *Kilberg v. Northeast Airlines.*[16] In *Kilberg,* the forum allowed recovery under a foreign wrongful death statute, while rejecting that statute's limitation on the amount of recovery as not consistent with the forum law's strong policy allowing unlimited recovery, thus partially asserting the forum's legitimate interest in protecting the resident plaintiffs.[17]

Though *Kilberg* was partially rationalized through manipulation of orthodox rules, the court's rejection of the foreign limitation was proper when analyzed in terms of governmental interest.[18] Under the governmental interest analysis, it is first necessary to determine if the forum state has a relevant policy. In *Kilberg,* a strong policy against limiting recovery was expressed by the forum state's constitution.[19] It is necessary to find a concurrent relationship between the forum state and either the parties or the events or the litigation, which in this case was that the victim and his next of kin were residents of the forum state.[20] Thus, the forum in *Kilberg* had an interest in applying its law to effectuate its legitimate policy.[21] Having

an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest." *Ibid.*

Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9, 9-10 (1958), has a more extensive statement of these same principles.

[14] CHEATHAM, GOODRICH, GRISWOLD & REESE, CASES ON CONFLICT OF LAWS (Supp. to 4th ed. 1961, at 68).

[15] Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1.

[16] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). For critical analysis of this decision, see, *e.g.,* 25 ALBANY L. REV. 313; Comment, 61 COLUM. L. REV. 1497; Comment, 26 N.Y.U.L. REV. 723; 12 SYRACUSE L. REV. 495 (1961).

[17] This statement of the holding of the case has been drawn from Currie, *supra* note 15, at 27. In contrast to *Kilberg,* another case having the same set of facts is explicitly written in interest terminology. Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962) (rehearing en banc), *cert. denied,* 372 U.S. 912 (1963).

It has also been suggested that while the forum in *Kilberg* appears to have mechanically applied the foreign wrongful death statute, it actually applied the forum statute, and could properly have decided the case in that manner. Currie, *supra* note 15, at 27-29.

[18] Currie, *supra* note 15, at 6.

[19] N.Y. CONST. art. I, § 16.

[20] Currie, *supra* note 15, at 2.

[21] "[A] 'governmental interest,' as the term is used in conflict-of-laws analysis, must be the product of (1) a governmental policy, and (2) a concurrent relationship with

that interest, it was proper for the forum court to reject the foreign limitation in favor of its law allowing unlimited recovery.[22]

Tengs has a superficial resemblance to *Kilberg*, in that it likewise involved both the law of a foreign state and the law of the forum state. *Tengs*, however, makes reference neither to the governmental interest analysis nor to any similar system of analysis. It does, however, talk in terms of the policy of the forum in determining which statute of limitation applied.[23] It appears that the policy conclusions which the court reached decided the case. From this, it is inferable that the court was using policy in an analysis somewhat similar to that of governmental interest. However, it is submitted that the case represents an improper analysis of the interests involved. The court invoked policy considerations only in relation to statutes of limitation, and did so after it assumed that the foreign owner liability statute applied, using the traditional place-of-injury rule.[24] Under the governmental interest analysis, the Alaska forum, rather than automatically applying the foreign law to this tort action, would first have ascertained whether it had any policy pertaining to owner liability. The Alaska legislature has not expressed any policy that

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the parties, the events, or the litigation such as to provide a reasonable basis for application of the policy." Currie, *supra* note 15, at 50.

For cases using the governmental interest analysis, see, *e.g.*, Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935); Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963); Bernkrant v. Fowler, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961).

[22] See Currie, *supra* note 15, at 27, 55.

[23] 375 P.2d at 141-42. The statute of limitation of the Motor Vehicle Act was considered to be broad and general. Its purpose

"[I]s to encourage promptness in the prosecution of actions and thus avoid injustice that would result from the assertion of claims after evidence has been lost, memories have faded, and witnesses have disappeared. What minimum period of time for commencing actions would best effect that purpose is a matter of *policy of government*. British Columbia has declared it to be one year. But Alaska has chosen a longer period of two years, and it is the forum in which the rights of the parties are being determined. In these circumstances, we can see no good reason why this state's *policy* as to limitation of tort actions should give way to the differing view of a foreign country." *Ibid.* (Emphasis added.)

Statutes of limitations, of course, also have additional policies, such as allowing a plaintiff a reasonable time in which to bring his action, and to facilitate the administration of justice by allowing the courts to deal with litigation of current matters. See Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 728 (1961); Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 34-49 (1962).

For an example of a court which appropriately considered the policies of a statute of limitations, using both the traditional analysis and the governmental interest analysis, see Baldwin v. Brown, 202 F. Supp. 49 (E.D. Mich. 1962).

[24] 375 P.2d at 140-41.

the owner of a motor vehicle should be vicariously liable for the torts of persons driving the owner's vehicle with his consent.[25] While having enacted a compulsory insurance scheme,[26] they stopped short of an owner liability statute. Therefore, the forum appears to have a policy of no vicarious owner liability, and thus may have an interest in applying this policy to protect the Alaska defendant in the instant case.

However, under the governmental interest analysis, Alaska, in determining whether it should assert its interest by application of its own law, should look to the law of British Columbia to determine whether that state has an interest such as to provide a reasonable basis for the application of its statute. Among the policies of the British Columbia owner liability statute is that of financial protection of those persons who may become involved with the accident by going to the aid of the parties, such as mechanics, doctors, and hospitals. British Columbia as the scene of the accident has a legitimate interest in effectuating this policy.[27] Thus, the Alaska court might conclude that British Columbia has such an interest as to warrant the application of their statute to the case, and, moreover, that a British Columbia court, absent the statute of limitation, would have so held. The Alaska court, in view of the British Columbia interest in having its law applied to this situation, could have determined its own interest with moderation and enlightened restraint and thus have concluded that nothing in Alaska's policy required applying their law to this case and that British Columbia law should apply.[28]

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[25] 375 P.2d at 140 n.4.

[26] ALASKA STAT. ANN. §§ 28.20.010-.640 (1962).

[27] This is true even though the instant case does not have any persons who require reparation. The interests of the state of the injury "are large and considerable and are to be weighed not only in the light of the facts of this case but by the kind of situation presented. For we write not only for this case and this day alone, but for this type of case. The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are amoug these . . . . A State that legislates concerning them is exercising traditional powers of sovereignty. . . . [The state of the injury] . . . therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case Carroll's injury may have cast no burden on her or on her institutions." Carroll v. Lanza, 349 U.S. 408, 413 (1954); see Currie, *The Constitution and the Choice of Law: Governmental Interest and the Judicial Function*, 26 U. Chi. L. REV. 9, 21-23 (1958).

[28] It is appropriate for the forum, in determining its policies and interests, "to take into account the possibility of conflict with the interests of a foreign state, and to moderate its interpretation of local policy and interest accordingly." CHEATHAM, GOODRICH, GRISWOLD & REESE, CASES ON CONFLICT OF LAWS (Supp. to 4th ed., 1961, at 68-69 n.9). See Currie, *supra* note 15, at 30; Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65-75 (1959). For a case exercising

Reaching the statute of limitation question through the above analysis, rather than through the traditional rule of place-of-injury, that question could then be analyzed in the same manner. Having determined that the interest of British Columbia should be effectuated, the forum would look to the policy of foreign law with regard to its statute of limitation. The most obvious expression of that policy would be the manner in which the foreign court would decide the case. The statute expresses a policy of protecting defendants from stale claims, the question of staleness having been determined by the legislature. If the defendant were a British Columbian, British Columbia would have had an interest in applying its statute of limitation, and apparently they would extend their protective policy to defendants from other states. Thus, British Columbia would hold the action barred by the statute of limitation. This, then, should be the result of Alaska's deferring to the British Columbia interest in the instant case.

Moreover, the result which would be and was produced by Alaska's application of its own statute of limitation is completely incongruous. The foreign court would hold the action barred by the statute of limitation, the forum's substantive law would deny the plaintiff recovery; and yet here the plaintiff recovered. By applying the British Columbia owner liability statute and the Alaska statute of limitation, Alaska has manipulated the laws of two forums, neither of which would have given recovery, to allow a recovery to the plaintiff which she could not otherwise have obtained.

The difference between *Kilberg,* which reached a proper result and *Tengs,* an example of favoritism, is readily apparent. In *Kilberg,* both states recognized the underlying cause of action for wrongful death; the forum could just as validly have based recovery on its own statute as on the foreign statute. The real conflict was between the policies of limited liability and unlimited liability, and the forum decided that its policy of unlimited liability should be effectuated. In *Tengs,* the underlying cause of action was not present in Alaska, and the first analysis was whether British Columbia's interest was to be effectuated by application of its law. The forum having decided to defer to the interest which they found British Columbia to have in the litigation by applying British Columbia law, it would be an unwarranted abuse for Alaska to ignore the foreign limitation

enlightened restraint in deferring to foreign law, see Bernkraut v. Fowler, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961).

in contravention of the interest of British Columbia which the forum had previously decided to effectuate.[29]

It is regrettable that Alaska unhesitatingly adhered to the traditional conflict of laws system at a time when this system is subjected to concerted attack.[30] Moreover, if the case, though couched in orthodox language, actually used some form of governmental interest analysis, it is even more unfortunate. This interest analysis, properly used, provides an effective method of deciding conflict of laws cases. When it or some similar analysis is improperly used, however, it is possible to reach results which are just as unfortunate as those produced through the traditional conflict of laws rules.[31] Those courts which decide that the proper manner of solving such cases is the governmental interest analysis should be certain that they are using it properly in the particular case, or many horrible hypotheticals will become legal realities.

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[29] There is authority in Supreme Court decisions which would appear to state this conclusion in a somewhat different way, to wit, that while a court might reject a foreign cause of action, it cannot accept the foreign cause and validly reject a defense thereunder.

"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 that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done." Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160 (1932) (Brandeis, J.).

This argument has been criticized as involving a "subtle fallacy," in that the Constitution fails to make any choice between truly conflicting interests, and a state is free to choose between them. Currie, *supra* note 15, at 8, 24. The Supreme Court has also partially, if not completely, rejected this position.

It is submitted that the textual statement is a proper rule of analysis when a case involves a statute of limitations in a situation similar to *Tengs*. This assertion does not rest on the authority of such cases as *Bradford Elec. Light Co. v. Clapper,* but on a proper interest analysis. To draw yet another parallel between *Kilberg* and *Tengs,* assume that in *Tengs* the British Columbia owner liability statute had a self-contained limitation on the amount of recovery, as did the foreign wrongful death statute in *Kilberg*. In this situation, had Alaska decided to effectuate the policy of the British Columbia statute, there would be no plausible interest analysis which would support forum rejection of the limitation, because it had neither a similar statute nor any other policy expressing unlimited recovery under the statutory cause of action. "In order to have an interest a state must first have a policy," Currie, *supra* note 15, at 30 n.91. Any forum rejection of the limitation would be completely unjustifiable.

[30] EHRENZWEIG *passim;* Cavers, *supra* note 11 *passim;* Currie, *supra* note 9 *passim;* CURRIE, *supra* note 15 *passim;* CURRIE, *Married Women's Contracts, passim;* COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS *passim* (1942); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws,* 33 YALE L.J. 736 (1924); note 9, *supra.*

[31] See, *e.g.,* Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Walton v. Arabian Amer. Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied,* 352 U.S. 872 (1956); Goodwin v. Townsend, 197 F.2d 970 (3d Cir. 1952); Lillegraven v. Tengs, 375 P.2d 139 (Alaska 1962); Burr v. Beckler, 264 Ill. 230, 106 N.E. 206 (1914); Nichols & Shepard Co. v. Marshall, 108 Iowa 518, 79 N.W. 282 (1899); Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930).