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BY VED P. NANDA*

INTRODUCTION

In *First National Bank v. Rostek*,[1] the Supreme Court of Colorado squarely rejected the mechanical application of the conflict of laws doctrine of lex loci delicti to multistate tort problems. Instead, it adopted specific choice of law rules to resolve host-guest controversies, and, for all other issues, the court announced the adoption of the *Restatement (Second) of Conflicts'* "general rule of applying the law of the state with the most 'significant relationship' with the occurrence and the parties . . . ."[2] While the court's rejection of the Bealean-*Restatement First*[3] dogma is a desirable step to be welcomed by all proponents of modern approaches to conflicts, the merit of its preference for formulating choice of law rules is debatable. Since the court's announcement has implications not only for future multistate tort controversies coming before Colorado courts, but also for the general development of this area of the law, which is still very much in flux, this brief comment is intended to offer a review and appraisal of the court's approach in *Rostek*.[4] The court's selection of the choice of law and its reasoning will be examined in light of the alternatives available to the court.

I.

Although the Colorado Supreme Court acknowledged that

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[1] 514 P.2d 314 (Colo. 1973).

[2] *Id.* at 320.

[3] For earlier commentaries on the RESTATEMENT OF CONFLICT OF LAWS (1934), see Lorenzen & Heilman, *The Restatement of the Conflict of Laws*, 83 U. PA. L. REV. 555 (1935); Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183 (1936). *See also* J. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933); Nussbaum, *Conflict Theories of Contracts: Cases versus Restatement*, 51 YALE L.J. 893 (1942).

[4] See also in this issue Walsh, *Heads: Lex Loci Delicti; Tails: Lex Loci Domicile — The Conflict of Laws Coin on Edge* — First National Bank v. Rostek, 514 P.2d 314 (Colo. 1973), 51 DENVER L.J. 567 (1974).

the broad based doctrine of lex loci delicti offered "some predictability of result and ease of application by courts,"[5] it refused to opt for its application to the facts and circumstances of *Rostek* in the face of the demonstrated "injustice and irrationality" which would result if it were to be applied automatically.[6] The stipulated facts in *Rostek* were uncomplicated. John and Carol Rostek, husband and wife, both Colorado citizens and residents, were returning to Colorado after a day-long trip to Iowa and South Dakota when their twin engine airplane crashed during a takeoff in Vermillion, South Dakota. The airplane was operated by the husband and both were killed in the crash. In a wrongful death action brought in Colorado, the guardian of the natural children of Carol Rostek, all Colorado residents, alleged that the husband's negligence caused the death of his guest passenger. The applicable Colorado law[7] would permit recovery; however, under the South Dakota Aircraft Guest Statute,[8] such an action would be barred unless willful or wanton misconduct on the part of the aircraft operator could be proved.

The trial court considered itself bound by Colorado precedents to apply lex loci and, therefore, granted the defendant's motion for summary judgment. The Colorado Supreme Court granted certiorari "for the sole purpose of determining if Colorado courts are compelled to apply the doctrine of *lex loci delicti* (the law of the place of the wrong)"[9] to the facts in *Rostek*. Chief Justice Pringle, writing for the court en banc, emphatically answered the question in the negative, observing that the doctrine "appears in Colorado law more by default than by design."[10] The point was illustrated by reference to two earlier cases, one decided in 1887[11] and the other in 1906,[12] when the place of the wrong rule was accepted doctrine "and none challenged it or gave any thought to its justification or its fairness."[13]

The reference to lex loci in a 1956 case, *Pando v. Jasper*,[14] was

[5] 514 P.2d at 318.

[6] *Id.*

[7] Although Colorado has a guest statute which might bar recovery [COLO. REV. STAT. ANN. § 13-9-1 (1963)], its definition of "vehicle" as a "motor vehicle" [*id.* § 13-6-2(6)] excludes "vehicles . . . that travel through the air" [*id.* § 13-6-2(2)].

[8] S.D. COMPILED LAWS ANN. § 32-34-1 (1967).

[9] 514 P.2d at 315.

[10] *Id.*

[11] Atchison, T. & S.F.R.R. v. Betts, 10 Colo. 431, 15 P. 821 (1887).

[12] Denver & R.G.R.R. v. Warring, 37 Colo. 122, 86 P. 305 (1906).

[13] 514 P.2d at 316.

[14] 133 Colo. 321, 295 P.2d 229 (1956).

disregarded as "unquestionably dicta." Finally, the court asserted that it was not bound by a federal court's determination in a 1969 case, *Bannowsky v. Krauser*,[15] since, while sitting as a diversity court, it had misread *Pando* in applying lex loci as Colorado law, "it being well settled that a state court is not bound by federal court interpretation of state law."[16] Thus, the way was clear for the court to conclude that it "must decide, as a matter of first impression, whether the broad rule of *lex loci delicti* should be adopted and applied to this case, or whether a more flexible choice of law rule should control."[17]

Next, the court traced the rise and fall of lex loci and the major reason for its rejection by many other jurisdictions in favor of a more flexible and rational choice of law approach. To a student of conflicts, it is familiar ground. The mechanical application of lex loci has "often yielded harsh, unjust results" unrelated to contemporary state interests or to the parties' realistic expectations, and it "no longer provided the high degree of predictability and uniformity which were considered its primary virtues."[18] Influential publicists had exposed extensively its weaknesses and the courts which had initially used manipulative devices such as "characterization" to escape the unacceptable results of its rigid application eventually abandoned lex loci in their "constant search for a result which would comport with reason and justice . . . ."[19]

After rejecting the traditional doctrine, the court examined the available alternatives in its search for a substitute. It identified various current approaches to choice of law problems with their varying emphases on the place of the forum, the expectations of the parties, and governmental interests by referring to their major proponents in string citations.[20] It noted that all of these approaches suffered from common deficiencies: they had to be applied in an ad hoc fashion and they all contained "indeterminate language with no concrete guidelines."[21] The court felt uncomfortable with the resulting lack of "consistency in application" and "predictability of results" and expressed its preference

[15] 294 F. Supp. 1204 (D. Colo. 1969).
[16] 514 P.2d at 316 n.1.
[17] *Id.* at 316.
[18] *Id.* at 317.
[19] *Id.*
[20] *Id.* at 318 nn.4 & 5.
[21] *Id.* at 318.

for the adoption of rational choice of law rules instead of dealing with each case on an ad hoc basis. It agreed with Professors Willis Reese[22] and Maurice Rosenberg,[23] two major advocates of formulating choice of law rules, that the adoption of rational rules in multistate torts is necessary to accomplish the objective of providing "a concrete and viable system for the equal application of just laws."[24]

The die was cast. In the court's words: "While we recognize that a rational and equitable approach to choice of law is desirable, we now harmonize that approach with the genius of the common law which always sought to provide to its consumers some degree of predictability and consistency in application."[25] The search was thus narrowed for a "workable" choice of law rule to be applied in the guest-host area. The majority opinion in a 1972 New York case, *Neumeier v. Kuehner*,[26] written by Chief Judge Fuld, was found to be eminently suited for that opportunity. There, Chief Judge Fuld had admitted the lack of consistency in New York cases ever since that court had adopted the interest analysis approach in *Babcock v. Jackson*.[27] His concurrence in *Tooker v. Lopez*,[28] in which he had enunciated specific rules to resolve host-guest controversies, which eventually became the majority rule in *Neumeier*, had received the unqualified support of Professor Willis Reese, the reporter of the *Restatement Second*.[29] The court was persuaded that the first two of the three *Neumeier* rules ought to be accepted in Colorado and it did so, finding them "just and equitable."[30] Commenting in general on the *Neumeier* formulation, the court said that it "generally embodies the rational underpinnings of the newer approaches to choice of law problems, emphasizing the expectations of the parties and the interests of the different jurisdictions involved."[31] The two rules adopted were: (1) When the guest-passenger and the host-driver are domiciled in the same state, and the vehicle

[22] The court cited Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972). 514 P.2d at 319.

[23] The court cited Rosenberg, *Comments on* Reich v. Purcell, 15 U.C.L.A.L. REV. 551, 641 (1968). 514 P.2d at 319.

[24] 514 P.2d at 318-19.

[25] *Id.* at 318.

[26] 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

[27] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[28] 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

[29] *See* Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 562 (1971).

[30] 514 P.2d at 319.

[31] *Id.*

is registered there, that state's law should govern the question of host-guest immunity; and (2) When the guest-passenger is from a state which permits recovery and the host-driver is from a guest statute state, the law of the state where the accident occurred should apply.[32] However, under "special circumstances," a driver might "be permitted to interpose the law of his state as a defense" if he causes the accident in the state which permits recovery.[33]

Rostek was a "comparatively easy" case,[34] to which the first *Neumeier* rule was applicable. However, since the court had already rejected lex loci, and since the *Neumeier* rules applied only to host-guest controversies, it announced the adoption of the *Restatement Second's* most "significant relationship" formulation, "as presented and defined" in section 145, to all other multistate torts.[35] Acknowledging that "this Restatement rule is somewhat broad," the court expressed the hope that "at some time in the future, as the body of case law develops, we can lay down more specific choice of law rules governing other areas, as we have done today in the area of guest statutes."[36]

II.

The following questions raised by *Rostek* will be discussed here briefly: (1) What are the implications of *Rostek* for Colorado conflicts law and the law of conflicts in general? (2) Did the court succeed in its quest for certainty, uniformity, and predictability by the adoption of the *Neumeier-Restatement Second* formula? and (3) Is it desirable to formulate precise choice of law rules for multistate torts at this stage in the development of conflicts law?

A. *Implications of* Rostek

The Colorado Supreme Court accepted the responsibility that lies on the highest state courts to play a major role in the development of a coherent body of conflicts law, especially in the choice of law area.[37] The court's discussion of the New York experience since *Babcock* and its reference to several other jurisdictions and to leading commentators show the court's awareness

[32] *Id.*

[33] *Id.*

[34] *Id.* at 320.

[35] *Id.*

[36] *Id.*

[37] State courts have ample freedom in making choice of law decisions since constitutional restraints on such selection are minimal. *See, e.g.*, Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

and concern with the inconsistencies and tensions of the last decade resulting from the fact that there has been no consensus on the selection of a substitute for lex loci. However, the court refused to follow the lead of some of its sister states in adopting a wait-and-see attitude;[38] instead, it rejected lex loci and accepted the challenge to search for a workable solution. It would be a reasonable observation to suggest that the vested rights approach would give way in Colorado to modern approaches in other areas of conflicts as well, especially as applied to contracts.

In deciding *Rostek*, the court could have adopted any of the modern choice of law approaches and would have arrived at the just and rational result which it eventually achieved by applying the *Neumeier* rule. The court's reading of the various comments on *Babcock*[39] had shown it that its choice of any of the contact-policy variants which would result in the application of Colorado law would have pleased almost all commentators except a staunch advocate of vested rights supremacy who might lament the passing of the good old days. Initially the court began to look at the contacts with concerned states and the court mentioned the term "interests" a few times, but it did not further pursue its analysis of concerned interests to select the applicable law. Instead, it sought concrete rules, not only to decide the controversy in *Rostek*, but to lay a foundation on which it could build further with the passage of time. As a result, the court felt uniquely comfortable with the rules and rationale of *Neumeier*. In approaching and accepting the rules, though, the court seems to have lost options and flexibility which are necessary for further experimentation and for evolution and growth of the law in a sound common law setting.

The court viewed the adoption of the *Neumeier-Restatement Second* rules as a harmonious blending of "[a desirable] rational and equitable approach to choice of law . . . with the genius of

[38] Many courts have rejected the new approaches. *See, e.g.*, Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Friday v. Smoot, 211 A.2d 594 (Del. 1965); Colhoun v. Greyhound Lines, Inc., 265 So. 2d 18 (Fla. 1972); McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); Cook v. Pryor, 251 Md. 41, 246 A.2d 271 (1968); Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969); Peterson v. Dean, 186 Neb. 716, 186 N.W.2d 107 (1971); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964); Heidemann v. Rohl, 194 N.W.2d 164 (S.D. 1972); Click v. Thuron Indus., Inc., 475 S.W.2d 715 (Tex. 1972).

[39] The court referred in *Rostek* to two comments on *Babcock*, one each by Professors Currie and Reese, from a symposium issue: *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233, 1251 (1963). 514 P.2d at 318 n.4.

the common law which always sought to provide to its consumers some degree of predictability and consistency in application."[40] The invocation of the "genius of common law" initially sounds attractive. However, a closer examination of the court's methodology and rationale in adopting narrow rules, not only to resolve the *Rostek* controversy but as the applicable law for the future, leads one to conclude that the court displayed an affinity for legal positivism by suggesting that only a formulation of narrow, precise rules would comport with the common law.

Notwithstanding the merits of codification in specific areas of the law, the fact remains that the common law is not perceived or known to comprise a system of neat, precise, infallible rules; it allows for experimentation, evolution, and growth resulting in a gradual accumulation of wisdom over a period of time which eventually finds expression in legal propositions, definitions, concepts, principles, and rules.[41] In a recent essay,[42] Professor Simpson of Oxford forcefully refutes positivism by observing that:

> [It] consequently distorts the nature of the system to conceive of the common law as a set of rules, an essentially precise and finite notion, as if one could in principle both state the rules of the common law and count them like so many sheep, or engrave them on tablets of stone.[43]

In addition to the problems of positivism, the discussion in the next section will suggest that the court's objective of achieving predictability and consistency by the application of the rules it has formulated is illusory.

B. *Would the Rules Adopted by the Court Achieve Predictability, Certainty, and Uniformity of Application?*

The application of the first *Neumeier* rule to *Rostek's* facts offers a just and rational solution. In host-guest cases before the New York Court of Appeals from *Babcock* to *Neumeier*, including *Dym v. Gordon*,[44] *Macey v. Rozbicki*,[45] and *Tooker v. Lopez*,[46] and

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[40] 514 P.2d at 318.

[41] *See generally* Dworkin, *Is Law a System of Rules?*, in ESSAYS IN LEGAL PHILOSOPHY 25 (R. Summers ed. 1968).

[42] Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE (Second Series) 77 (A. Simpson ed. 1973).

[43] *Id.* at 88. It is a feature of the system that "uniquely authentic statements of the rules which, so positivists tell us, comprise the common law, cannot be made." *Id.* at 90. *See also, id.* at 88 for a citation to F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 249 (3d ed. 1911) where Pollack observes that the common law professes "to develop and apply principles that have never been committed to any authentic form of words."

[44] 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

[45] 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

[46] 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

before lower New York courts, such as *Kell v. Henderson*,[47] *Arbuthnot v. Allbright*,[48] *Weinstein v. Abraham*,[49] and *Bray v. Cox*,[50] the courts undertook extensive analysis of the policies underlying the statutes and the interests of concerned jurisdictions in the application of their respective laws to the specific issues involved in the controversies. The courts in *Dym* and *Macey* relied on the now discarded "seat of the relationship" test,[51] to apply Colorado law and deny recovery in the former case but to apply New York law and permit recovery in the latter.

Whatever the objective of the guest statute—the protection of insurers and the maintenance of low insurance rates, the protection of hosts from ungrateful guests, or the prevention of fraudulent claims by passengers in collusion with drivers[52]—it seems desirable that if both parties are domiciliaries of a state where the vehicle is also insured and garaged, and that state permits recovery, that state's law should apply even if the state of injury as the forum has a guest statute. Conversely, when the state of the injury permits recovery and the state of the parties' domicile where the vehicle is insured has a guest statute, the forum should apply the latter law, notwithstanding the former's interests in encour-

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[47] 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966).

[48] 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (1970).

[49] 64 Misc. 2d 76, 314 N.Y.S.2d 270 (Sup. Ct. 1970).

[50] 39 App. Div. 2d 299, 333 N.Y.S.2d 783 (1972).

[51] The majority in *Tooker* explicitly rejected the seat of relationship test, stating that "[w]here the guest-host relationship 'arose' or is 'centered' is wholly irrelevant to policies reflected by the laws in conflict. Any language in our earlier opinions lending support to a contrary view has . . . been overruled." 24 N.Y.2d at 579 n.2, 249 N.E.2d at 400 n.2, 301 N.Y.S. 2d at 527 n.2.

For a convincing criticism of the seat of relationship test see Rosenberg, *Two Views on Kell v. Henderson—An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 462-63 (1967).

[52] The California Supreme Court invalidated California's 44-year-old automobile guest statute in Brown v. Merlo, 8 Cal. 3d 855,506 P.2d 212, 106 Cal. Rptr. 388 (1973). *See generally* Baer, *Two Approaches to Guest Statutes in the Conflict of Laws: Mechanical Jurisprudence Versus Groping for Contacts*, 16 BUFFALO L. REV. 537 (1967); Ehrenzweig, *Foreign Guest Statutes and Forum Accidents: Against the Desperanto of State "Interests"*, 68 COLUM. L. REV. 49 (1968); Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws": I*, 69 YALE L.J. 595, 599-602 (1960); Hodges, *The Automobile Guest Statutes*, 12 TEXAS L. REV. 303 (1934); Weber, *Guest Statutes*, 11 U. CINC. L. REV. 24 (1937); Note, *Guest Statutes: Have Recent Cases Brought Them to the End of the Road?*, 49 NOTRE DAME LAW. 446 (1973); Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968); Comment, *The Future of the Automobile Guest Statute*, 45 TEMP. L.Q. 432 (1972). *See also* Pahmer v. Hertz Corp., 32 N.Y.2d 119, 122, 296 N.E.2d 243, 245, 343 N.Y.S.2d 341, 343 (1973).

aging highway safety, compensating accident victims, protecting the economic interests of its vendors dealing with accident victims, and ensuring that nonresident accident victims do not become public charges. An analysis of the advancement of relevant state policies should point to these suggested results.[53] The same results would also be reached by applying any of the other modern approaches such as principled preferences,[54] most significant relationship,[55] and functional analysis.[56] It should be added that, although predictability in multistate torts is mostly irrelevant, it is of consequence when questions concerning the parties' relationship giving rise to their rights and duties and questions of insuror's liability are in issue.[57]

It should be noted that in one recent case,[58] the Supreme Court of Minnesota applied Minnesota negligence law, rejecting the Ontario guest statute even though all of the parties involved in an accident in Minnesota were Ontario residents and the automobile was registered, insured, and garaged in Ontario. During a 1-day trip from Ontario to Duluth, Minnesota, the car went off the road in Minnesota, seriously injuring the plaintiff-guest. The court adopted the "better law" approach, suggesting that Minnesota as a "justice-administering state" would have its governmental interests furthered by the application of its own "better law." It was "firmly convinced of the superiority of the common

[53] For a brief but incisive discussion, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 237-44 (1971); Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 133-34 (1973) and the authorities cited therein. Professors Ehrenzweig and Rheinstein consider interest analysis unworkable. *See generally* Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966); Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965); Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847 (1967); Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632 (1962). *See also* Rosenberg, *supra* note 51, at 463-64.

[54] *See generally* D. CAVERS, CONTEMPORARY CONFLICTS LAW IN MODERN PERSPECTIVE (1970); D. CAVERS, THE CHOICE-OF-LAW PROCESS 139-203 (1965); Cavers, *The Value of Principled Preferences*, 49 TEXAS L. REV. 211 (1971).

[55] *See* Note, *Most Significant Contacts Method: An Empirical Analysis*, 25 VAND. L. REV. 575, 591-97 (1972).

[56] *See generally* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 76-79, 102-25 (1965).

[57] Professor Weintraub, however, considers the "talk of 'surprising' the insurer [as] . . . very likely to be talking nonsense." R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 206 (1971), *citing* McNamara, *Automobile Liability Insurance Rates*, 35 INS. COUNSEL J. 398 (1968), and Stern, *Ratemaking Procedures for Automobile Liability Insurance*, 52 PROC. CAS. ACTUARIAL SOC'Y 139 (1965).

[58] Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973).

law rule of liability to that of the Ontario guest statute,"[59] and preferred to apply the Minnesota law consistent "with our own concept of fairness and equity."[60] Professors Leflar[61] and Ehrenzweig[62] were quoted extensively by the majority to lend support to its decision. Among cases relied upon by the court were *Kell v. Henderson*,[63] *Clark v. Clark*,[64] and *Conklin v. Horner*.[65] Other supportive cases included *Bray v. Cox*,[66] *Arnett v. Thompson*,[67] and *Gagne v. Berry*.[68] This combination of lex fori and the better law approach could serve as an escape mechanism, permitting courts to apply their own law without facing hard choice of law questions. This is lex loci in a different, albeit more palatable form. But the risk of parochialism and of mechanical application render this combination even more dangerous than the already discarded rule.

Under the second *Neumeier* rule adopted by the Colorado court, the law of the state where the accident occurred would apply when the guest-passenger is from a state which permits recovery and the host-driver is from a guest statute state. The court was not obliged to adopt this rule to resolve the controversy presented in *Rostek*. Why then did it adopt the second rule, especially when it did not adopt the third *Neumeier* rule which is applicable to other situations where the passenger and the driver are domiciled in different states? As stated by Chief Judge Fuld, the third rule will normally apply the law "of the state where the accident occurred, but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system, or producing great uncertainty for litigants."[69]

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[59] *Id.* at 417.

[60] *Id.*

[61] The court cited Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 279 (1966), and Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). Milkovich v. Saari, 203 N.W.2d at 412, 414.

[62] The court quoted extensively from Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847, 853 (1967). Milkovich v. Saari, 203 N.W.2d at 414.

[63] 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966), cited in Milkovich v. Saari, 203 N.W.2d at 411.

[64] 107 N.H. 351, 222 A.2d 205 (1966), cited in Milkovich v. Saari, 203 N.W.2d at 411.

[65] 38 Wis. 2d 468, 157 N.W.2d 579 (1968), cited in Milkovich v. Saari, 203 N.W.2d at 416.

[66] 39 App. Div. 2d 299, 333 N.Y.S.2d 783 (1972).

[67] 433 S.W.2d 109 (Ky. 1968).

[68] 290 A.2d 624 (N.H. 1972).

[69] 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.

Both the second and third rules which are strongly territorially oriented are reminiscent of the *First Restatement* philosophy. *Neumeier* involved the application of the third rule. It was a difficult case for Professor Currie's governmental analysis approach,[70] since it involved the "unprovided for" case,[71] in which neither contact state had an identifiable, legitimate governmental interest in the application of its law. The defendant, a New York resident, drove to Ontario, Canada, where he picked up his guest, an Ontario resident, and, on a trip between two points in Ontario, collided with a train, resulting in the death of both the guest and the host. Ontario had a guest statute requiring willful negligence to be proved for recovery while New York had no guest statute which would bar recovery. Thus, New York's policy favoring compensation would have no application since the plaintiff was a nondomiciliary. Similarly, regardless of the rationale underlying Ontario's guest statute,[72] it would not be applicable to the issue of guest-host immunity in a case involving a New York defendant and a New York insuror.[73] The court concluded that, because the defendant was a New York resident, it would not serve the substantive law purposes of New York to displace lex loci in this case, since the application of New York law would only result in the "exposure of this State's domiciliaries to a greater liability than that imposed upon resident users of Ontario's highways."[74] New York, the court said, "has no legitimate interest in ignoring the public policy" of Ontario and "in protecting the

[70] Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 presents Professor Currie's original theories which he subsequently modified. *See generally* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1961); Hill,*Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961); R. Traynor, *Is this Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959).

[71] Professor Currie discussed the dilemma in Currie, *Survival of Actions: Adjudication versus Automation In the Conflict of Laws*, 10 STAN. L. REV. 205, 229 (1958). *See also* Baade, *Judge Keating and the Conflict of Laws*, 36 BROOKLYN L. REV. 10, 30 (1969); Baade, *The Case of the Disinterested Two States:* Neumeier v. Kuehner, 1 HOFSTRA L. REV. 150, 165-67 (1973) [hereinafter cited as Baade]; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963); Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on* Neumeier v. Kuehner, 1 HOFSTRA L. REV. 125 (1973).

[72] Section 105(2) of the Highway Traffic Act of Province of Ontario, REV. STAT. ONT. ch. 172 (1960), *as amended* by Ontario Statute of 1966, ch. 64, § 20(2). For a thorough and incisive analysis of the statute see Baade, *supra* note 71, at 150-56.

[73] Baade, *supra* note 71, at 161-62; Sedler, *supra* note 71, at 137-38.

[74] 31 N.Y.2d at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.

plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders."[75]

It is not the purpose here to analyze the New York court's justification for the application of Ontario law on the immunity issue. Others have done that extensively and meticulously, pointing to the need for the identification of a common policy of New York and Ontario in compensating the victim.[76] However, the point is that if the Colorado court deliberately refused to adopt the third *Neumeier* rule because of the rule's strong territorial bias and the court's distaste for it, it would also seem that the second *Neumeier* rule is as heavily oriented toward lex loci. Furthermore, if the prior case law in other jurisdictions[77] and the recent New York wrongful death case, *Rosenthal v. Warren*,[78] offer any insight, the goal of consistency and uniformity in result is still an illusory ideal.

In all tort controversies not involving the host-guest relationship the *Rostek* court has announced that Colorado will follow the *Restatement Second's* section 145, which is a characteristic black letter formulation:

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.[79]

It further delineates "factual" contacts to be identified in selecting the state with the most significant relationship to the tort. Of primary significance among the specified contacts is the place where the injury occurred. This is followed by: the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, or place of business of the parties; and the place of the center of relationship between the parties.[80] The *Restatement Second* sections applying section 145 to specific torts[81] place heavy reliance upon lex loci to identify the state with the most significant relationship.

Section 6 identifies factors relevant to the choice of the appl-

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[75] *Id.* at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.

[76] Baade, *supra* note 71, at 161-67; Sedler, *supra* note 71, at 137-42.

[77] *See, e.g.*, Bennett v. Macy, 324 F. Supp. 409 (W.D. Ky. 1971); Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968).

[78] 342 F. Supp. 246 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 438 (2d Cir. 1973).

[79] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1969).

[80] *Id.* § 145(2).

[81] *Id.* §§ 146-55.

icable law. These principles which courts are asked to consider[82] include: the needs of interstate and international systems; the relevant policies of concerned states and basic policies of the particular field of law; the protection of justified expectations; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied.[83]

The major criticism of the *Restatement Second* approach[84] is that it does not offer sufficient guidelines and criteria for the selection of the state of the most significant relationship. Its major emphasis on physical contacts, giving priority to the place of injury, is likely to lead a court to the application of lex loci, which the *Restatement Second* apparently took great pains in discarding. This concern is especially serious for two reasons: first, the *Restatement Second* does not emphasize the need for analysis of the nature and content of the physical contacts with a view to identifying relevant contacts, and especially those contacts which advance the interests of concerned states and parties mentioned in section 6; and second, courts have yet to develop criteria for the weighing of these factors and contacts. Hence, the results are likely to be erratic, arbitrary, and less certain.[85]

C. *Is the Formulation of Choice of Law Rules at This Stage of the Development of Torts Conflicts Desirable?*

There seems to be a consensus that the formulation of all-embracing, broad rules of the lex loci genre will stifle the evolutionary process begun by *Babcock*. But beyond that there is lack of agreement on the desirable course of action. For instance, Professors Reese[86] and Rosenberg,[87] and Chief Judge Fuld[88] advocate

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[82] *Id.* § 6(2).

[83] *Id.* § 6. *See also* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

[84] The major critic of this approach is Professor Ehrenzweig. *See, e.g.*, Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963); Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal For Its Withdrawal*, 113 U. PA. L. REV. 1230, 1235-36 (1965). *See also* Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 269 (1972); Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762 (1963). *But see* Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963); Morris, Book Review, 21 AM. J. COMP. L. 322 (1973).

[85] A. EHRENZWEIG, CONFLICTS IN A NUTSHELL 26-28 (3d ed. 1974).

[86] Reese, *Chief Judge Fuld and the Choice of Law*, 71 COLUM. L. REV. 548 (1971); Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

[87] Rosenberg, *Comments on* Reich v. Purcell, 15 U.C.L.A.L. REV. 551, 641 (1968); Rosenberg, *Two Views on Kell v. Henderson—An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459 (1967).

[88] Chief Judge Fuld's imprint is seen in Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d

narrow choice of law rules; Professor Cavers[89] offers his principled preferences; and Professors Leflar[90] and Ehrenzweig[91] suggest better law and lex loci respectively. Their main concern is that, in the absence of narrow rules, ad hoc interest analysis will create further confusion in the already chaotic state of affairs, especially in conflicts involving multistate torts.

In the wake of demolishing the vested rights concept, *Babcock* left many questions unanswered. What exactly was to be substituted for lex loci was not clear then and still is not. However, a decade is not such an intolerably long period for experimentation with various approaches that one should equate the lack of any precise rules of law with chaos and anarchy. It is a salutory development that courts in this country[92] and abroad[93] have sought just and rational results by the application of various approaches which demand an appraisal of varying state and governmental interests and the parties' interests with a view to arriving at just, rational, and equitable results.

In seeking workable choice of law rules Chief Justice Pringle is in good company. The Reese-Rosenberg-Fuld coalition has formulated the New York law and many jurisdictions are likely to follow the New York-Colorado model, for courts are hesitant to conduct ad hoc analysis and usually are comforted by the ease of

394, 301 N.Y.S.2d 519 (1969), and Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). *See also* Reese, *Chief Judge Fuld and the Choice of Law*, 71 COLUM. L. REV. 548 (1971).

[89] *See* note 54 *supra*. *See also* Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEXAS L. REV. 141 (1967); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966).

[90] R. LEFLAR, AMERICAN CONFLICTS LAW 233-65 (1968); 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); Leflar, *The "New" Choice of Law*, 21 AM. U.L. REV. 457 (1972).

[91] A. EHRENZWEIG, *supra* note 85, at 39-52; Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960).

[92] A summary of significant cases is contained in R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 234 n.36 (1971).

[93] *See, e.g.*, Lipstein, *Conflict of Laws 1921-1971—The Way Ahead*, 31 CAMB. L.J. 67 (1972); *International Developments in Choice of Law Governing Torts*, 19 AM. J. COMP. L. 1 (1971). For comments on the House of Lords decision of Chaplin v. Boys, [1969] 3 W.L.R. 322, [1969] 2 All E.R. 1085, see Karsten, *Foreign Torts and English Courts: II. Chaplin v. Boys: Another Analysis*, 19 INT'L & COMP. L.Q. 35 (1970); North & Webb, *Foreign Torts and English Courts: I. The Effect of Chaplin v. Boys*, 19 INT'L & COMP. L.Q. 24 (1970); Reese, *Choice of Law in Tort Cases—Chaplin v. Boys—(England: Court of Appeal and House of Lords)*, 18 AM. J. COMP. L. 189 (1970).

applying precise rules to cases and controversies before them. There is no denying that rules can serve a useful purpose; but the point is that in order to be just, rational, and equitable they should reflect community consensus, and the timing at which a consensus has emerged in any one area is of the essence. In torts conflicts the formulation of precise rules remains premature. The *Restatement Second's* guidelines show remnants of the *First Restatement's* vested rights philosophy. However, if courts properly understand and apply the principles contained in section 6, always keeping in perspective the interests of parties and of concerned states, and always mindful of the danger that physical contacts could be manipulated with ease to favor the application of lex fori or lex loci, the most significant relationship would merely be another way of identifying a just and rational resolution of controversies.

CONCLUSION

The Supreme Court of Colorado has assumed the role of a forward-looking state court in charting a new course in choice of law for multistate torts. Since it has recently taken a similarly enlightened approach in other areas of the law as well, it is expected and hoped that it will watch with a keen eye the operation of the rules it adopted in *Rostek* and that it will not hesitate to review and revise them if and when the need to do so is demonstrated. The role of the highest state courts in fashioning rational, just, equitable, and workable choice of law approaches with a view toward eventually creating a coherent body of law cannot be overstated.