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Conflict of Laws - Choice of Law in Torts - The Significant Contacts Doctrine in Colorado - Briola v. Roy

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COMMENT

CONFLICT OF LAWS — CHOICE OF LAW IN TORTS — The Significant Contacts Doctrine in Colorado. — *Briola v. Roy,* 459 P.2d 288 (Colo. 1969).

ON June 30, 1966, Elizabeth A. Briola, a domiciliary of Colorado, was involved in an accident while driving her car some 3 miles from Turlock, California. Mabel T. Roy, also a resident of Colorado and a passenger in Mrs. Briola's car, suffered serious injuries as a result of the accident. Mrs. Roy brought suit in Colorado claiming damages under the California Guest Statute.[1] Both attorneys pleaded and argued California law,[2] and the jury was instructed on the proper application of the California statute.[3] The verdict was in favor of Mrs. Roy and Mrs. Briola appealed.

Counsel for both parties submitted briefs on California law to the Colorado Supreme Court but were informed by the court at oral argument that the Colorado Guest Statute would control.[4] Although the decision of the trial court was affirmed,[5] the "willful misconduct" language argued by the appellant in

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[1] Roy v. Briola, Civil No. B99587 (2d Dist. Ct. Colo., June 14, 1968).

[2] In the plaintiff's Pre-Trial Data Certificate she pleaded that "[T]he plaintiff will rely upon the following Statutes of the State of California . . . ." (The first statute cited was CAL. VEHICLE CODE § 17158 (West 1960), *as amended,* (Supp. 1971)). In Defendant's Answer it was argued that "[P]laintiff's Complaint and cause of action are barred by the State of California Vehicle Code, Section 17158."

[3] Instruction #6 stated: "[S]ince the accident of June 30, 1966 . . . occurred in the State of California, the statutes of that state regulating vehicular traffic on its highways are applicable." Judge Pinchick also cited the CAL. VEHICLE CODE § 17158 to the jury, which reads as follows:

> No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such a ride . . . has a right of action for civil damages against the driver of the vehicle . . . on account of personal injuries . . . unless that injury resulted from the willful misconduct of the driver.

§ 17158 (West 1960), *as amended,* (Supp. 1971).

[4] According to Reed L. Winbourn, attorney for the appellant, Justice Pringle informed the attorneys during oral argument that the court would use the significant contacts doctrine instead of the old *lex loci delicti* doctrine. The Colorado Guest Statute, cited by the supreme court at 459 P.2d at 289 (Colo. 1969), provides that:

> No person transported by the owner or operator of a motor vehicle as his guest . . . shall have a cause of action for damages against such owner or operator for injury . . . unless such accident shall have been intentional . . . or caused by . . . intoxication, or by negligence consisting of a willful and wanton disregard of the rights of others.

COLO. REV. STAT. ANN. § 13-9-1 (1963).

[5] Briola v. Roy, 459 P.2d 288 (Colo. 1969).

the second assignment of error,[6] referring to the California Guest Statute, appeared in the supreme court's opinion as "intentional disregard"[7] and "willful and wanton misconduct,"[8] the language of the Colorado Guest Statute.

Of central importance to the analysis of *Briola* is the fact that the Colorado Supreme Court applied Colorado law to a California tort. The court's action in this regard appears to be in direct conflict with the doctrine of *lex loci delicti* which has been the undisputed law in Colorado since 1887.[9] The *lex loci* rule provides that the substantive law of the state in which the tort occurred controls the litigation.[10] In the instant case there is no doubt that the tort occurred in California. By applying the Colorado Guest Statute in *Briola*, the court apparently disregarded the doctrine of *lex loci*; yet, at no point in Justice Day's opinion is the choice of law issue raised or discussed.

Prior to the instant case, the Colorado Supreme Court had manifested no inclination to alter the established precedent in this area of conflict of laws. In the earlier case of *Pando v. Jasper*,[11] a passenger sued the driver for injuries suffered in an accident in Kansas. Both parties were domiciliaries of Colorado, and no other cars were involved. The case was tried in Colorado, and the court reaffirmed longstanding precedent by stating that, in such a situation, "[P]laintiff's claim is governed by the *lex loci delicti* . . . ."[12] Although the Kansas Guest Statute was not applied because of the defendant's failure to include the statute in his pleadings, this case has been repeatedly cited as the controlling statement on Colorado choice of law in torts.[13]

Nine months before *Briola*, the Colorado Federal District Court cited *Pando* as controlling in *Bannowsky v. Krauser*.[14] The acts alleged in that wrongful death action occurred in Colorado

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[6] *Id.* at 289.

[7] *Id.* at 291.

[8] *Id.* at 290.

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

[10] *See* RESTATEMENT OF CONFLICT OF LAWS §§ 377-83 (1934); R. LEFLAR, AMERICAN CONFLICTS LAW 317 (rev. ed. 1968); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 200 (1971).

[11] 133 Colo. 321, 295 P.2d 229 (1956).

[12] *Id.* at 323, 295 P.2d at 230.

[13] Annot., 95 A.L.R.2d 12, 19 (1964); 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, 601 (1960); Leflar, *Conflict of Laws*, 34 N.Y.U.L. REV. 21, 37 (1959); Smith, *Choice of the Applicable Law in Colorado*, 35 DICTA 162, 173 (1958); Storke, *Another Decade of Colorado Conflicts*, 33 ROCKY MT. L. REV. 139, 148 (1960); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 234 (1963).

[14] 294 F. Supp. 1204, 1205 (D. Colo. 1969).

while the plaintiff was a domiciliary of New Mexico. In response to arguments made by the plaintiff for the application of New Mexico law, the court stated that "[W]e are not presented with any evidence which would indicate that the Colorado Supreme Court is likely to embrace the new conflict of law principle."[15]

The new principle alluded to in *Bannowsky* is the significant contacts doctrine.[16] This rule, a relatively new approach in conflict of laws, was first introduced in the New York case of *Babcock v. Jackson*[17] and has since been adopted by 21 states.[18] It allows the court to give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or parties, has the greatest concern with the specific issue raised in the litigation."[19]

Under such analysis, *Briola v. Roy* could have been tried under Colorado law, as California had little contact with the parties or the occurrence. However, before it can be said that the court has actually adopted the significant contacts doctrine, it remains to be determined whether, under these circumstances, the court could have applied Colorado law to a California tort without resorting to a significant contacts analysis.

Two possible alternatives come to mind and should be con-

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[15] *Id.* The court footnoted in its entirety the balancing of interests test found in RESTATEMENT (SECOND) CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964) which was argued by plaintiff:

> (1) The local law of the state which has the most significant relationship with the cccurrence and with the parties determines their rights and liabilities in tort.
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> (2) Important contacts that the forum will consider in determining the state of the most significant relationship include:
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> (a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.
>
> (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

[16] The specific label "significant contacts" is relatively unimportant. Other variations on this theme include "center of gravity," "significant interests," and, most recently, "interest analysis." The import of these doctrines is that they all negate the *lex loci delicti* doctrine. For a brief summary in this area see 23 ME. L. REV. 242-47 (1971). For a more detailed analysis see D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice of Law Process*, 46 TEXAS L. REV. 141 (1967); 15 U.C.L.A.L. REV. 551-654 (1968).

[17] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[18] R. WEINTRAUB, *supra* note 10, at 234-35 lists the following states and their leading cases on significant contacts: Alas., Ariz., Cal., D.C., Ill., Ind., Iowa, Ky., Me., Minn., Miss., Mo., N.H., N.J., N.Y., N.C., N.D., Ore., Pa., R.I., Tex., Wis.

[19] 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

sidered. If California law had not been pleaded, the court could have applied Colorado law by following *Pando's* holding with respect to the Kansas Guest Statute. However, as has been discussed, the attorneys did plead the California Guest Statute, and the court accepted their arguments. Since the trial judge also instructed the jury as to the specific California law, there is no possibility that the Colorado Guest Statute was applied under a *Pando* rationale.

Had the court felt that the provisions of the guest statute were procedural, as opposed to substantive, the Colorado Guest Statute could have been applied without resorting to the significant contacts doctrine.[20] A standard definition to follow in analyzing the problem is, "If . . . the foreign rule in issue is not especially difficult to find and apply and if there is any probability that the rule may affect the outcome, the rule should be considered 'substantive' . . . ."[21] The California Guest Statute was obviously easy to find. Moreover, its requirements for negligence demanded the lesser evidentiary showing of "willful misconduct" as compared to the Colorado Statute's "intentional" and "willful and wanton." This suggests that the choice of guest statute might have affected the outcome, thereby making the law substantive, not procedural.

Based on the foregoing it seems reasonable to conclude that the Colorado Supreme Court did apply the significant contacts rule to an out-of-state tort without mentioning the issue in its opinion. Because of the similarity of the statutes involved and the simplicity of the fact pattern, the court was able to embrace the significant contacts analysis without a detailed discussion. The absence of such discussion, however, has resulted in considerable confusion as to what the law really is.

Significant contacts is not an easy doctrine to apply, as other states have discovered.[22] A more complex fact pattern

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[20] *See* Parker v. Plympton, 85 Colo. 87, 102, 273 P. 1030, 1035 (1929): "[M]atters of practice and procedure are almost universally governed by the law of the forum. This is so even when the substantive laws of different states are involved . . . ."

[21] R. WEINTRAUB, *supra* note 10, at 46. *See also* Allen v. Bailey, 91 Colo. 260, 268, 14 P.2d 1087, 1091 (1932): "[W]e mean by substantive law the positive law of duties and rights which gives rise to a cause of action, as distinguished from adjective law, which pertains to practice and procedure, or the legal machinery by which the substantive law is made effective."

[22] *See* Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970); Reich v. Purcell 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966). *See also* the cases which followed *Babcock*: Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

plus a detailed set of criteria for balancing the interests[23] could combine to complicate application and cause confusion. The Colorado Supreme Court has not circumvented the difficulties involved in changing the law by simply refusing to analyze or discuss the issue. Because of this omission, it is probable that the legal community remains unaware of the application of significant contacts in Colorado. Moreover, the few attorneys cognizant of the court's action in *Briola* have no local guidelines for arguing the significant contacts doctrine in the future.

In 1887, the Colorado Supreme Court felt that any departure from *lex loci delicti* "would be more likely to lead to confusion and oppression than to any beneficial results."[24] The current court has made that prediction come true for no necessary reason. Hopefully, the court will take steps to clarify the ambiguous import of *Briola,* and continue to perform its duty of providing the Colorado legal profession with a clear statement of the law.

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[23] *See* note 15 *supra* for an example.

[24] Atchison, T. & S.F.R.R. v. Betts, 10 Colo. 431, 438, 15 P. 821, 824 (1887) Citing Whitford v. Panama R.R., 23 N.Y. 465, 471 (1861).