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THE CASE OF THE DISINTERESTED TWO STATES: NEUMEIER V. KUEHNER

Hans W. Baade*

Amercians are known to be rather uninterested in things Canadian. To take but one example: None of my 150 students in Conflicts last semester could identify Sir John A. MacDonald, Canada's George Washington and architect of the British North America Act. Some connected him with a well-known hamburger chain; others prudently assumed that he was a British (in distressingly many cases: an English) authority on the conflict of laws; and one student with nary a thought to what went on at Glencoe, committed the ultimate sin of linking him to Campbell's Soups. Yet there was at least one near miss: the student who thought that Sir John A. was the "Prime Minister (sic) of Ontario who wrote that province's guest statute."

The reference is, of course, to what is now § 132(3) of the Ontario Highway Traffic Act. It should not really come as a surprise that this statute is the best-known Canadian statute south of the border—better known even than the B.N.A. Act. Nor, indeed, should we be too astonished to see Sir John take second place to Mr. Hepburn under whose premiership the Ontario guest statute was passed, for ever since Professor Linden's famous indiscretion, it has been

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2. 50 & 31 Vic., c. 5, as amended (Imp.) (The British North America Act, 1867); D. CREGHTON, JOHN A. MACDONALD (2 vols., 1952 & 1955).
3. This is an oblique reference to In re Dorrance's Estate, 309 Pa. 151, 163 A. 509 (1932), New Jersey v. Pennsylvania, 287 U.S. 580 (1932), and In re Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601 (1934). For background, see Campbell's Soup, 12 Fortune 69 (Nov. 1935).
4. R.S.O. 1960, c. 172, § 105(2), as amended by Ont. Stat. 1966, c. 64, § 20(2). This subsection, now R.S.O. 1970, c. 202, § 132(3), reads as follows:

Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle, except where such loss or damage was caused or contributed to by the gross negligence of the driver of the motor vehicle.
5. The British North America Act, 1867, note 2 supra.
6. Linden, Comment, 40 CAN. B. REV. 284, 286, n.11 (1962):

A prominent Toronto negligence lawyer tells a story about Mitchell Hepburn who had just been elected Premier of Ontario when the subsection was passed. It is said that he had vowed to pass such a statute if he ever became Premier because he had once been sued by two hitchhikers who were injured while gratuitous passengers in his automobile.

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fashionable to see a personal link between the Premier and the statute. And the Ontario guest statute is, of course, the most frequently litigated piece of Canadian legislation in the United States. It has been judicially considered no less than three times by the New York Court of Appeals7 and once by the Supreme Court of Michigan.8 In addition to these four decisions of courts of last resort, there have been a number of published decisions of intermediate appellate courts;9 virtually all of these decisions have given rise to extensive academic comment.10 It is probably no exaggeration to say that for some time after Babcock v. Jackson11 broke the ice in 1963, the Ontario guest statute was litigated more frequently in the United States than in Canada.12 Be that as it may: there can be little doubt that the legislative policy behind this Canadian statute and its scope for conflict-of-laws purposes have been discussed more widely, both judicially and by commentators, in the United States than in Canada.

Having had my say on several of these American decisions,13 I do not feel tempted to undertake an in-depth analysis of the most recent addition to the list. I am content to leave the general exposition of the governmental-interests approach to this particular case in Professor Sedler’s capable hands,14 and instead propose to limit myself

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11. Note 7 supra.

By far the largest number of reported cases (17), including two of the Supreme Court decisions (Ouelette and Teasdale), involve the interpretation of the term "compensation". See, e.g., Platt v. Katz, [1971] 15 D.L.R.5d 296 (1970); Feldstein v. Alloy Metal Sales Ltd. and Mathews, [1962] 32 D.L.R.2d 628. There were six guest statute cases decided between 1963 and 1968, but since that time, there has been a marked increase of cases, mainly concerning the interpretation of "gross negligence" (nine cases to date). See notes 26 and 27 infra.
to some brief remarks on three subjects: the purpose or purposes of the Ontario statute as revealed by its legislative history, the issue of contribution between joint tortfeasors, and the puzzling phenomenon of the disinterested two states.

I. 25 Geo. V, ch. 26, Sec. 11 (Ont.), As Amended

The original version of what is now the Ontario guest statute is contained in Sec. 11 of the Highway Traffic Amendment Act, 1935, which received the Royal Assent from the Lieutenant-Governor on April 18, 1935.15 This provision corresponds literally to Sec. 10 of a bill (No. 82) to amend the Highway Traffic Act, which was introduced by Mr. Thomas B. McQueston (Lib. Hamilton-Wentworth), the Minister of Highways in Mr. Hepburn’s administration. It is thus clearly, and indeed quite naturally in a system of parliamentary government such as that prevailing in Ontario, a Government measure.16 The bill received its first, second, and final readings on March 29, April 10, and April 12, 1935, respectively; there were no amendments between the first and final readings, although one section was added so as to take care of a private member’s bill.17 Unfortunately, as there are no verbatim Hansards for 1935, we have little information as to the views of the government of the day, and of the Legislative Assembly, as to the purpose or purposes of the bill. However, in the Newspaper Hansard of March 30, 1935, i.e., the day immediately following the introducing of Mr. McQueston’s bill, we find the statement that “… the amendment is the answer of the department to the insurance companies’ plans to double the passenger liability insurance rates in the Toronto area on April 1.”18

15. Ont. Stat. 1935, c. 26. In connection with the following, I gratefully acknowledge the invaluable research assistance of Mr. Roy E. Stephenson, presently a student at the Faculty of Law, University of Toronto.


18. Newspaper Hansard, March 30, 1935. A substantially identical bill (Bill No. 78) had been introduced in the 1934 session of the Legislative Assembly. The learned Editor of the Forthnightly Law Journal, Mr. R. M. W. Chitty, promptly noted that the “passenger hazard had been productive of frauds upon insurance companies” which “would be just as glad to get rid of the passenger risk,” and attacked the bill, inter alia, as an attempt to make the majority suffer for the fraud of the few. 8 Forthnightly L.J. 241 (1934). A resolution adopted by the Law Students’ Ass’n of Hamilton, Ont., also opposed the proposed amendment of the Highway Traffic Act, noting that it was “legislation for the benefit of a class, insurance companies, against the rest of the subjects.” Id. at 312. The bill was withdrawn in response to this criticism, and a legislative committee appointed to study the matter. The committee filed a report.
This statement has to be read together with the following observation by a highly qualified observer in a reasonably contemporaneous issue of the leading Canadian academic legal periodical: "Undoubtedly the object of this provision is to prevent the fraudulent assertion of claims by passengers, in collusion with drivers, against insurance companies. . . ."

We must keep in mind, of course, that we could not, as counsel in Canadian litigation, set forth this legislative history in our factum without inviting judicial displeasure. Anglo-Canadian law does not permit recourse to legislative history for purposes of interpretation; and while this restrictive practice seems to be presently crumbling, we can hardly expect that the sort of circumstantial evidence presented above would be deemed relevant by a Canadian court. Still, in so far as the legislative purpose of foreign statutes is pertinent for choice-of-law purposes in the United States, and to the extent that legislative history serves to illuminate such purposes, I submit that American courts can look at foreign legislative history even if the courts of the relevant foreign country would not do so. This approach is somewhat akin to ascertaining the governmental interests of a

noting that while 50 per cent of Ontario motorists were insured at the time, passenger claims thereunder amounted to one-third of all claims. Province of Ontario, Legislative Assembly, [1934] Journals of the House 155; see also MacDonald, The Negligence Action and the Legislature, 13 Can. B. Rev. 535, 546, n.62 (1935). No legislation followed that report, however, as there was a dissolution later that year.

19. Robinette, Ontario, Survey of Canadian Legislation, 1 U. Toronto L.J. 364, 366 (1936). The author of that comment, J. J. Robinette, was at that time the editor of the Ontario Law Reports, a member of the Faculty of Law of Osgoode Hall, in practice in Toronto. He is presently one of the leaders of the Ontario bar. See also MacIntyre, The Rationale of Imputed Negligence, 5 U. Toronto L.J. 368, 371 (1944): " . . . the legislature, yielding to pressure which made two arguments—(1) hardship on a generous driver, and (2) (the real one), that the action provided a fruitful field for collusive suits against the driver's insurer—abrogated that common-law right of action." The only source on which a somewhat different conclusion could be based is the reference of Ferguson, J., in Feldstein v. Alloy Metal Sales Ltd. and Mathews, [1962] 32 D.L.R.2d 628, 636-37, to "the supposed injustice to a good Samaritan who picked up a person—to use the vernacular—as a hitchhiker, being held liable if through his negligence on the journey, the passenger suffered injuries" in connection with the 1935 amendment. In view of the massive contemporaneous evidence to the contrary, see note 18 supra, I do not find this dictum convincing—if, indeed, it was intended to state a causal relationship. It has seemingly passed unnoticed until now. This is not to say, however, that the good samaritan argument may not have been actually used in the Legislative Assembly; cf. the somewhat cryptic remarks of Mr. Chitty in 4 Fortnightly L.J. 289-90 (1935). That would only serve to underline Dean Wright's characterization of the 1935 amendments as one of the "most vicious pieces of legislation which an active insurance lobby was able to foist on an unsuspecting public." Comment, 23 Can. B. Rev. 344, 347 (1945) (emphasis supplied).


foreign state for choice-of-law purposes even if that state follows blindly jurisdiction-selective choice-of-law rules, and is clearly impermissible only when the courts of the enacting state have specifically addressed themselves to the purpose of the statute at issue.

It is one thing to use the Newspaper Hansards and contemporary academic comment in order to ascertain the purpose of an Ontario enactment; it is quite another to dignify apocryphal Osgoode Hale or Queen's Park rumors in a like manner. This refers to Professor Linden's anecdote reference to the old timers' rumor that the 1935 guest statute was enacted only because Premier Hepburn, having himself been sued by two hitch-hikers, had set his mind then to prevent the recurrence of such acts of ingratitude. There is nothing in the record to substantiate this story. Even if it were true, however, it would show no more than the Premier's personal motives for lending his support to a legislative measure that was designed to keep down insurance rates. These private motives, I submit, are irrelevant for the purpose of statutory interpretation.

The 1966 amendments have a somewhat more fully documented legislative history. On February 2, 1966, Mr. Elmer Sopha (Lib., Sudbury), a leading member of the Ontario bar with a large civil litigation practice, introduced Bill No. 20, which provided for the straight repeal of section 105(2) of the Highway Traffic Act. This bill never received the second reading that was originally scheduled for the following day. On May 24, 1966, the Minister of Transport, Mr. Haskett, introduced Bill No. 121, which contained a number of proposed amendments to the Highway Traffic Act. One of these, which emerged from Committee without amendment, changed section 105(2) so as to permit recovery by the guest for damage caused by the gross negligence of the host-driver. Mr. Sopha asked one question as to the gratuitous passenger section, but this was only for purposes of information. The bill received its second and final readings on June 1 and 23, 1966, and was assented to on July 8, 1966.


23. Note 6 supra. Professor Linden does not appear to attach any legal significance to this anecdote. See A. Linden, The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents, ch. IV, p. 5 (1965): "The policy reason for this provision is the fear of fraudulent and collusive claims by friends and members of the driver's family. By barring altogether the right of action of gratuitous passengers, the danger of collusion is said to decrease."


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companion bill which brought the Negligence Act into line with this amendment by permitting the recovery of damages, contribution, and indemnity where the host-driver was grossly negligent, was introduced by the Attorney-General, Mr. Wishart, on June 9, 1966 (Bill No. 170). On first reading, the Attorney-General was invited by Mr. Singer (Lib., Downsview) to define “gross negligence” as defined in the bill but declined, saying that “the courts have considered the term gross negligence down through the years in relation to motor vehicle cases; perhaps not in this province so much, but in many other circumstances....”25 The same point was made at second reading by Mr. Renwick (NDP, Riverdale), who added that he saw “no reason whatsoever for making this distinction in an already complicated field of law to provide for recovery only in cases of gross negligence.” The Attorney-General replied as follows:26

I must also admit that it may increase to some degree the extent of litigation in automobile accident claims. We are opening here a new field in giving to a gratuitous passenger the right to recover where the owner or driver is guilty of gross negligence but we must, I think, leave that definition to the courts, as is done in the whole field of accidents and in negligence.

We have not extended the principle of negligence to any degree whatever, because I think to do so would be an unwise provision.

This legislative history has to be assessed against the background not only of the 1935 enactment but also of the work of the Select Committee on Automobile Insurance appointed by the Ontario Legislative Assembly. In its Interim Report of March 21, 1961, the Select Committee expressed its belief that it was “important to consider the desirability of giving a right of recovery to gratuitous passengers upon a finding of gross negligence or wanton or wilful misconduct on the part of a driver.”27 It would appear to be this

27. LEGISLATIVE ASSEMBLY OF ONTARIO, SELECT COMMITTEE ON AUTOMOBILE INSURANCE,
recommendation that was implemented in 1966; its nexus to the insurance factor seems obvious.

In conclusion, I submit that the sole apparent legislative purpose of the Ontario guest statute as enacted in 1935 and as amended in 1966 is to protect insurance companies against claims which would necessitate an increase of motor vehicle insurance rates in Ontario.

II. How About the Choo-Choo?

Even if the sole purpose of the Ontario guest statute is indeed the protection of the Ontario insurance industry, it does not follow that this purpose is irrelevant in the instant case. Arthur Kuehner, a resident of Buffalo and driving a New York-registered and insured station wagon, picked up his Canadian nephew by marriage, Aime Nuemeier, at the latter's house in Fort Erie, Ont., for a ride to Long Beach, Ont., where Kuehner owned some summer cottages. The accident—fatal to both Kuehner and Neumeier—was a collision with a Canadian National Railway Company train at a grade crossing in Sterkston, Ont. Mrs. Joan Neumeier, Aime's widow and administratrix, sought to recover damages from the CNR, as well as from the Kuehner Estate, alleging negligence by both. CNR, while denying negligence on its part, cross-claimed against the Kuehner estate for injury to its Diesel engine and for contribution.

The railroad is, of course, as Canadian as the Maple Leaf; and the accident occurred in Ontario on a wholly intra-Canadian and even intra-Provincial run. Decedent Neumeier was a Canadian citizen and Ontario resident; his widow, the administratrix of his Ontario estate, was at all times here material a resident of that Province. As between these parties and with respect to this accident, Ontario law has a strong prima facie claim of applicability. What, then, is the Ontario rule as to the liability of joint tortfeasors towards the guest in guest statute cases?


Counsel for the defendant strongly urged upon me that the failure to observe a stop sign ought not to constitute gross negligence and since Ontario has adopted recently gross negligence as a basis of recovery by gratuitous passengers he urged that it becomes of importance to the insurance industry to know its position when defending such claims.

The impact of the legislative change on insurance companies (but also on defendants) is likely to be quite substantial. In *Doxator* and *Tucker* there was recovery in excess of $180,000 and over $200,000, respectively; in *Jackson* recovery was over $220,000, even after a 10 per cent deduction for contributory negligence (leaning on door and not using seat belt).

28. Hereinafter CNR.

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The Negligence Act, as last amended in 1966, lays down four rules pertinent for present purposes. First, joint tortfeasors are liable jointly and severally towards the person injured. Secondly, as between themselves, they are entitled to contribution and indemnity in accordance with the degree of fault. Third, in an automobile guest’s action, no damages, contribution, or indemnity are recoverable for injury caused by the simple negligence of the host-driver. Fourth, the third rule does not apply if the host-driver is grossly negligent. It follows that if in the instant case, both Kuehner and the railroad were negligent but Kuehner was not grossly negligent, the railroad is liable towards the Neumeier estate only for that portion of the damage which is attributable to its own negligence. If, on the other hand, Kuehner should be found to have been grossly negligent, the CNR is liable jointly and severally with his estate. As a practical matter, this means primary liability beyond the individual defendant’s insurance coverage and other resources (the Neumeier estate is claiming damages in the amount of $500,000). It seems somewhat odd, at first sight, that the third party should actually be in a worse position if the other tortfeasor acts with less care, but on closer inspection, this emerges as a logical consequence of the joint and several liability of (notionally) joint tortfeasors.

New York’s rules on contribution and indemnity have been completely reshaped (or, perhaps, even revolutionized) by the recent decision of the Court of Appeals in *Dole v. Dow Chemical Co.* There is still joint and several liability towards the injured party, but as between themselves, joint and concurrent tortfeasors are entitled to

30. R.S.O. 1960, c. 261 §§ 2 & 3, as last amended by Ont. Stat. 1966, c. 98, § 1, now R.S.O. 1970, c. 260 § 2(2). As regards the legislative history of the 1966 amendments, see notes 25 & 26 supra. The crucial provision reads as follows:

In any action brought for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from a motor vehicle other than a vehicle operated in the business of carrying passengers for compensation, and the owner or driver of the motor vehicle that the injured or deceased person was being carried in, or upon, or entering, or getting on to, or alighting from is one of the persons found to be at fault or negligent, no damages are, and no contribution or indemnity is, recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver except, subject to subsection 4, where such portion of the loss or damage was caused by the gross negligence of the driver of the motor vehicle, and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

31. For illustrations involving collisions with railroads, see *Gives v. C.N.R.* [1941] 4 D.L.R. 625 (railroad 20 per cent negligent; driver 80 per cent negligent; recovery of 20 per cent of the damages from the C.N.R. only); *Verroche v. Russell & N.S. & T. Ry.*, [1946] 2 D.L.R. 348 (70 per cent recovery against railroad).

contribution in accordance with the degree of fault attributable to each. In other words, as regards the first two rules enumerated above, Ontario and New York law are substantially identical. There is, of course, also identity as to the fourth rule: a New York joint tortfeasor in a purely domestic case would be jointly and severally liable towards the automobile guest, injured by his fault and the gross negligence of the host-driver, but could now obtain contribution (no doubt a hefty one) from the driver. Rule Three, on the other hand, does not apply in terms because there is no guest statute in New York. But how would New York deal with the basic question of contribution by a joint tortfeasor who, because of a relationship covered by an insulating rule, is not himself liable to the victim?

Part of the answer to this question might be found in Dole itself, where defendant Dow was successful in claiming over against the employer of plaintiff's decedent who would not himself have been liable towards the estate in tort, as the New York workmen's compensation law provided the exclusive remedy between these two parties. The Court disposed of this issue by holding, on the strength of the Westchester Light & Co. case, that a third party suing an employer in circumstances such as these is seeking to enforce an independent duty or obligation and not the workman's claim. It expressly rejected the seemingly sensible view, set forth in Chief Judge Crane's dissent in Westchester, that the employer's liability as an indemnitor or contributor should be limited in amount to workmen's compensation coverage. Since there is no guest statute in New York, and since intra-family immunity was abandoned before the recent liberalization of the law of contribution and indemnity, the question here posed can still not be answered with full assurance. The safest conclusion would appear to be that while New York would probably follow, at least in principle, the general rule that there can be no contribution from one who is not himself liable towards the person injured, this rule will not apply wherever a tortfeasor owes what is called an "independent duty or obligation." It perhaps follows that if Arthur Kueh-

34. N. Y. Workmen's Comp. Law § 11 (McKinney 1965).
36. 278 N.Y. at 184-85, 15 N.E.2d at 571.
39. Note 37 supra.
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Kuehner's negligence was casual in his collision with the CNR train, CNR could obtain contribution from his estate under New York law even if, as between Kuehner and his guest Neumeier, the former is immunized from liability, but this is a somewhat doubtful conclusion since there is only partial immunity in workmen's compensation cases. However—and this is the other side of the same coin—if the CNR was itself negligent toward Neumeier, Kuehner's concurrent negligence (whether simple or gross) clearly will not, under New York law, reduce the liability of the railroad towards the guest-passenger even if the latter could not recover from his host.

To sum up: Under both New York and Ontario law, the CNR is liable towards the Neumeier estate only if it was negligent. Under New York law, this liability is unaffected by any immunities of joint tortfeasors. Under Ontario law, however, the immunity conferred upon a merely negligent host-driver by the guest statute reduces, pro tanto, the liability of the railroad towards the guest. There is no joint and several liability in this case, as the host-driver is immunized from both liability and contribution. If, however, the railroad was negligent and the host-driver was grossly negligent, the railroad is jointly and severally liable for the full amount of the damage under both New York law and Ontario law, but is, again under both laws, entitled to a contribution from the other tortfeasor based on an apportionment of the degrees of fault.

It follows that the difference between the Ontario and the New York schemes of joint and several liability and contribution becomes material only if the CNR is found to have been negligent and if Arthur Kuehner is also found to be ordinarily but not grossly negligent. In that case, under Ontario law, the railroad is liable only for the quantum of damage attributable to it, while under New York law, it is liable for the whole damage suffered by Mr. Neumeier's estate, possibly subject, however, to contribution as between the tortfeasors. Is there any justification for the application of the New York rule in the present situation?

Contribution, one supposes, is one subject where students of the conflict of laws prefer their own swamps or quagmires to whatever may pass for terra firma among torts scholars. Still, the reason for the difference between the New York and the Ontario rules on con-


The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.

tribution seems simple enough. Ontario seeks to keep down insurance rates by eliminating liability for mere negligence on the part of host-drivers. This policy in favor of underwriters in such situations is so strong that it inures to the benefit not only of the host-driver but also of third party joint tortfeasors who, since as a rule they are the drivers of the “other car”, are similarly likely to carry liability insurance.\(^{41}\)

New York, on the other hand, is interested first in full compensation for the victim, and secondly in a fair apportionment of the burden between the wrongdoers as among themselves. These interests are so strong that they override, as a practical matter, any relation-based immunizing rules which would protect one of the tortfeasors in a two party-situation.

Ontario clearly has an interest in applying its immunizing rule in the instant case to the advantage of the CNR, a local defendant. This is so even though Kuehner carried New York, not Ontario, insurance, for the CNR either carries Ontario insurance, or is self-insured in reliance on Ontario law, or belongs to that lucky category of parties who merely benefit more or less accidentally from a legislative policy because effective policies, perforce, must be applied with some generality. But insulating the railroad from liability for the damage caused by an ordinarily negligent host-driver to his guest has no necessary consequences, as seen from Ontario, for the question actually decided by the Court of Appeals in *Neumeier v. Kuehner*\(^{42}\). If interest analysis should call for the application of New York law with respect to the guest statute issue, it would still be neither illogical nor unfair for the Ontario court to apply the Ontario Negligence Act\(^{43}\) so as to insulate an Ontario party from joint and several liability for damages caused by the out-of-province host-driver. While this would limit the number of pockets to choose from, the Ontario automobile guest had no expectation as to this particular Ontario purse. Furthermore, the result is not unfair as between the joint tortfeasors, as the fairest of all solutions for the distribution of liability for harm jointly or concurrently caused, apportionment in accordance with the degree of fault, will then be applied quite radically.

These considerations would appear to indicate the parameters of New York’s interest on the issue of contribution. The compensatory policy of full recovery (compensatory because it makes little sense to

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\(^{41}\) See MacIntyre, *supra* note 19, at 371, where it is said that the Ontario solution “overshoots the legitimate argument of the insurance companies” as to the collusion factor. Cf. Mr. Chitty’s comments in *3 Fornerty L.J.* 242 (1934) and *4 id.* 289 (1935).

\(^{42}\) 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

\(^{43}\) Note 30 *supra*. 
admonish someone to avoid someone else’s concurrent fault) can hardly be intended to afford a broader basis for recovery by Ontario victims from Ontario defendants with respect to Ontario accidents than the one afforded by Ontario law. Nor is the result unfair if the New York party should, by an analysis such as that suggested by Professor Sedler,\(^4\) still be held liable if only ordinarily negligent. Again, each party defendant would be held liable only for damages caused by it. New York would rationally advance its policy of admonishing New Yorkers to drive carefully everywhere,\(^5\) and it would also afford compensation to an automobile accident victim in a situation where New York considers such compensation to be desirable. These arguments are, of course, not entirely compelling, and they have been rejected, at least inferentially, by the Kuehner majority. However, in the present context of seeking to determine the scope of New York’s rule as to contribution—an issue which by definition would become controversial only if Kuehner had been held to be ordinarily negligent and still liable—either the former or the latter argument must be accepted as persuasive.

In conclusion, it is submitted that while there is a crucial difference between New York and Ontario law on the issue of liability of, and contribution between, joint tortfeasors where one of them is insulated from liability towards the victim, Ontario’s interest would be served, and New York’s interest at least marginally advanced, by applying the Ontario rule in the instant case. It follows that if Arthur Kuehner should be found to have been ordinarily but not grossly negligent, the CNR should not be held liable, either in Ontario or in New York, for the quantum of damages attributable to him.

III. WINDFALL OR ALTRUISM?

I do not suppose that civilization will come to an end whichever way this case is decided.

O. W. Holmes, Jr.\(^46\)

The third remarkable feature of Neumeier v. Kuehner\(^47\) is the odd fact that if Arthur Kuehner should be found to have been ordinarily but not grossly negligent, neither New York nor Ontario

\(^{44}\) Note 14 supra.  
\(^{45}\) See Note, 37 ALBANY L. REV. 173, 186 (1972).  
\(^{46}\) Haddock v. Haddock, 201 U.S. 562, 628 (Holmes, J., dissenting). There are still traces of a rumor that he used much stronger language in the oral version of his dissent.  
would have much of a stake in the actual outcome. No New York resident would be deprived of compensation provided at least partially in the public interest if the Ontario guest statute defense were to succeed; no Ontario underwriter would be unfairly surprised, and no Ontario insurance rate structure adversely affected, if this defense were to fail. To be sure, New York has some marginal interest in admonishing New Yorkers to drive carefully everywhere, and Ontario has the twin interests in admonition and compensation wherever its liability-insulating policy is inapplicable. But as seen from Ontario, these policies should not suffice to decide the case. Even an uninsured Ontario host-driver benefits from the Ontario guest statute; and it seems somewhat grasping, if not chauvinistic, to treat the insured foreigner worse than the uninsured Ontarian—especially since the law strongly disapproves of the latter.\footnote{48} Such a disposition of the case by an Ontario court would evoke the image of the hick probate judge who highhandedly pretermits a Soviet heir because, according to his limited lights, there is no such thing as private property in the Soviet Union.\footnote{49}

This should serve to point to one insight in no-interest or little-interest cases: One should not be altruistic with other people’s money. If the Neumeier estate can recover only by a generous interpretation of New York’s potentially relevant policies and if this interpretation has not as yet been adopted by New York, Ontario would not be wise to take the first step. (It would in all likelihood not do so merely by applying the rule of \textit{McLean v. Pettigrew}\footnote{50} or some of the many variants of \textit{Chaplin v. Boys}\footnote{51} but this is not relevant for purposes of interest analysis which assumes that a sound and rational method will eventually find acceptance even in Anglo-Canadian conflict law.\footnote{52}) As a rule of thumb, the forum whose citizen stands to benefit from an altruistic interpretation of another state’s interests should wait for, and then defer to, the disposition of like matters by that other state. If the instant case had been brought in Ontario rather than in New York, it should have been stayed or

\footnote{48} Through the imposition of an uninsured motor vehicle fee and financial responsibility requirements, Ontario virtually achieves compulsory insurance, with about 98 per cent of all Ontario vehicles insured as of 1965. \textit{See} Linden, \textit{supra} note 23, at 10-11.

\footnote{49} Such an example is recorded by Berman, \textit{Soviet Heirs in American Courts}, 62 Colum. L. Rev. 257, 263, n.23 (1962).

\footnote{50} [1945] 2 D.L.R.2d 65 (1944); \textit{see also} Gagnon v. Lecavalier, [1967] 63 D.L.R.2d 12.


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dissmissed without prejudice on forum non conveniens grounds;⁵⁵ if brought now, it should be dismissed with prejudice if Arthur Kuehner was only ordinarily negligent.

This last assertion seems to accept that Neumeier⁵⁴ was correctly decided. On closer inspection, however, the point here taken is of more limited scope. We may or may not agree with Chief Judge Fuld's curious amalgam of interest analysis, rule-positivism, and self-congratulation;⁵⁵ we may be against or possibly even for⁵⁶ Judge Breitel's rather quaint anti-academic outburst.⁵⁷ All that is debatable and is, indeed, debated by others in these pages; and the blemishes of style and analysis on the conflicts level are probably such that one should hope for the speedy arrival of what a wise man has felicitorously termed "creative forgetfulness."⁵⁸ But to the extent that the Court of Appeals has undertaken to define the scope of the New York law, service of process out of Ontario "may" be allowed, inter alia, where the action is founded on a tort committed within Ontario, id. (h.). The word "may" signifies discretion to determine whether Ontario is the forum conveniens; see, e.g., Aitken v. Gardiner, [1955] O.W.N. 555, 556 (Marriott, Master). No position is taken on the question of whether the exercise of discretion would be appropriate in the instant case as a matter of Ontario law.

There are no less than three references in Neumeier v. Kuehner to Reese, Chief Judge Fuld and Choice of Law, 71 Colum. L. Rev. 548 (1971), the last of them a quotation expressing approval of the three rules recommended by the Chief Judge in his concurring opinion in Tooker v. Lopez, 24 N.Y.2d 596, 249 N.E.2d 294, 281 N.Y.S.2d 519 (1969). This concurring opinion, too, is quoted at great length, and the opinion concludes with the following sentence from the Reese eulogy: "One can well understand the relief with which the trial judge seized upon Judge Fuld's third rule and followed it by holding the Ontario statute applicable." (The reference is to the trial judge in the instant case.) 31 N.Y.2d at 124, 127, 129-30, 286 N.E.2d at 455, 457, 457-59, 335 N.Y.S.2d at 67, 69, 70-71.

53. Pursuant to Rule 25(1) of the Ontario Rules of Practice and Procedure, service of process out of Ontario "may" be allowed, inter alia, where the action is founded on a tort committed within Ontario, id. (h.). The word "may" signifies discretion to determine whether Ontario is the forum conveniens; see, e.g., Aitken v. Gardiner, [1955] O.W.N. 555, 556 (Marriott, Master). No position is taken on the question of whether the exercise of discretion would be appropriate in the instant case as a matter of Ontario law.

54. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

55. There are no less than three references in Neumeier v. Kuehner to Reese, Chief Judge Fuld and Choice of Law, 71 Colum. L. Rev. 548 (1971), the last of them a quotation expressing approval of the three rules recommended by the Chief Judge in his concurring opinion in Tooker v. Lopez, 24 N.Y.2d 596, 249 N.E.2d 294, 301 N.Y.S.2d 519 (1969). This concurring opinion, too, is quoted at great length, and the opinion concludes with the following sentence from the Reese eulogy: "One can well understand the relief with which the trial judge seized upon Judge Fuld's third rule and followed it by holding the Ontario statute applicable." (The reference is to the trial judge in the instant case.) 31 N.Y.2d at 124, 127, 129-30, 286 N.E.2d at 455, 457, 457-59, 335 N.Y.S.2d at 67, 69, 70-71.

56. One supporter might be Mr. Justice Black, of the Supreme Court of Michigan, in whose view all the trouble started "since Babcock v. Jackson was trumpeted in certain law reviews," and who opposes the "overruling" of previous Michigan authority so as to avoid the "quagmire of unanswered and perceptively unanswerable questions arising out of the proposed new doctrine." Abendschein v. Farrell, 382 Mich. 510, 519, 170 N.W.2d 137, 139-40 (1969).

57. I refer especially to (1) the assertion that "the instability and uncertainty created by the recent departures from traditional lex loci delictus" arose mainly "because the departures have been accompanied by an unprecedented competition of ideologies, largely of academic origin, to explain and reconstruct a whole field of law, each purporting or aspiring to achieve a single universal principle"; and (2) the statement that troubles were intensified when the "new doctrine had been displaced by a still newer one, that of governmental interests developed most extensively by the late Brainerd Currie, and the court was deeply engaged in probing the psychological motivation of legislatures of other States in enacting statutes restricting recoveries in tort cases." 31 N.Y.2d at 130-31, 286 N.E.2d at 459, 335 N.Y.S.2d at 72. Judge Breitel does not deem it necessary to cite any of the works thus referred to, but I am not recommending the academic remedy proposed by Horowitz & Netterville, Unprivileged Refusal to Reap Where One Has Not Sown, 12 J. Legal Ed. 201 (1959).

automobile host-guest rule in concert with the New York compulsory insurance scheme and has, purely as a matter of teleological interpretation of these rules, denied their altruistic interpretation in favor of guest statute state victims of New Yorkers in guest statute state accidents, that is the end of the matter for us. The wisdom of any conceivable choice-of-law rule is debatable at the present, and is likely to remain so for some time. But on this level of analysis, the views of courts of last resort as to the purpose of their own statutes and judge-made rules of domestic law must be accepted as given. In fact, we should always be grateful for such views, for without them, we are forced to engage in speculation; and there is no assurance that commentators will do much better at this than the Court of Appeals did in the instant case with respect to the Ontario guest statute.60

In conclusion, one more point deserves brief mention. How important is the category of "no interest" cases, and what is its significance for governmental-interests analysis? It will be recalled that Brainerd Currie achieved his major conceptual breakthrough in his analysis of Milliken v. Pratt,61 a contracts case posing the perennial question of the capacity of married women as sureties for their husbands' obligations.62 Professor Currie quite convincingly demonstrated that depending on whether the married woman lived in the state affording such protection, all conceivable fact-law patterns could be classified as true- and false-conflicts situations.63 There is no room in this analysis for no-interest cases simply because wherever the state concerned in the welfare of the married woman is not the


It is worth noting, at this point, that, although our court originally considered that the sole purpose of the Ontario statute was to protect Ontario defendants and their insurers against collusive claims . . . "Further research . . . has revealed the distinct possibility that one purpose, and perhaps the only purpose, of the statute was to protect owners and drivers against ungrateful guests." (Reese, Chief Judge Fuld, and Choice of Law, 71 Col. L. Rev. 548, 558; see Trautman, Two Views on Kell v. Henderson: A Comment, 67 Col. L. Rev. 465, 469.)

The reader will have to make up his own mind as to the quality of such further research; see note 10 supra. He may also ponder the spectacle of one American citing a second American who refers to a third American's views as to the purpose of a Canadian statute.

60. 125 Mass. 374 (1878).

61. This capacity was seemingly first restricted by the Senatusconsultum Vellacanum, a corrupt version of which appears in Dig. 16, 1,2 (Ulpian). It is commonly dated 46 A.D., but this is controversial. See F. Schule, CLASSICAL ROMAN LAW 569 (1951).

one with the protective rule, both states would enforce the contract because both favor the security of transactions.

However, a companion article employing the same method and published a few months later, did unearth the category here discussed. The case there analyzed is *Grant v. McAuliffe*, involving the issue of survival of actions. Again, assuming the rational basis of the abatement rule to be that the living should not be mulcted for the derelictions of the dead, most cases can be classified along the true- and false-conflicts dichotomy simply by ascertaining whether the state concerned with the protection of the survivors (typically the state of administration) is the one that follows the abatement rule.

In applying this conceptual scheme, however, Professor Currie came across what he termed “an interesting phenomenon . . . ‘the unprovided case.’” If the plaintiff is domiciled in the abatement state and the accident occurs there, but the decedent tortfeasor is domiciled in the non-abatement state and the estate is there administered, “neither state cares what happens.” If the action proceeds to judgment against the decedent’s estate, no harm will be done to his survivors, as these are not within the ambit of the protection of the abatement rule. If the action is dismissed, no injustice will be done to the plaintiff, since he could not possibly recover against the decedent at home.

Why is it apparently impossible to construct a variant of *Milliken v. Pratt* that poses the same problem? The answer seems to be quite simply that here the policy of upholding agreements entered into in good faith, common to both states, comes into play whenever other interests do not. In *Grant*, on the other hand, there is no such backdrop rule; the “common core” of the law of contracts extends further than that of the law of torts. To take a more recent example: In *Gravina v. Brunswick Corp.* the plaintiff, a Rhode Island resident, sought to recover damages from an Illinois-based corporation, incorporated in Delaware, for invasion of privacy through the unauthorized publication of her picture in bowling equipment advertisements. Invasion of privacy, the Federal District Court in Providence found, was actionable in Illinois but not in Rhode Island. Its

63. 41 Cal. 2d 889, 264 P.2d 944 (1953).
65. 125 Mass. 374 (1878).
Kafkaesque disposition of the case on "better rule of law" grounds need not concern us here. Obviously, a state court in Rhode Island would not have done the same thing, i.e., kept a judge-made rule of domestic law alive for domestic consumption after publicly acknowledging its inferior quality. Assuming, however, that Rhode Island was unwilling to recognize the new tort, Gravina v. Brunswick Corp.\(^6\)\(^7\) has the makings of a classic "no interest" case. No Rhode Island interest would be sacrificed by dismissing the action; no Illinois interest would necessarily be affected by letting it proceed to judgment for plaintiff.

Or would it? Illinois may well be interested, as my colleague Professor Weintraub suggests in a related context, in keeping up the quality of Illinois enterprise, and its general reputation, by the application of domestic admonitory rules even in cases such as these.\(^8\) On the other hand, it might hesitate to increase the cost of the "foreign" operations by Illinois-based companies so as to place them at a disadvantage elsewhere.\(^9\) As suggested further above, this is not the sort of inquiry that is appropriate for a Rhode Island court; by striking the balance in favor of the first consideration, it would be generous with other people's money. The solution, there as here, is dismissal at the plaintiff's domicile for *forum non conveniens*.

But can it not be said that the "common core" of the law of torts does reach the instant case, so that in the absence of an articulated state interest in favor of defendant, the plaintiff should recover? There is a great deal to be said for that position. The value competing with the right of privacy is the freedom of speech and communication;\(^10\) the value competing with the liability of automobile drivers for their torts is not their freedom to drive in company in a carefree manner. The late Mr. Chitty's characteristically sanguine charge that the legislation proposed in 1934 (and enacted in 1935) sacrificed the common-law rights of the subject to the demands of special interests\(^11\) has received a good bit of judicial echo in Canada.

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67. *Id.*

68. R. WeINTRAUB, COMMeNTARY ON THE CONFLICT OF LAWS 257-59 (1971). Professor Weintraub's critique of an earlier draft of the present comment has, as always, been of substantial assistance.


70. See text supra at 162-63.


In *Dokuchia v. Domash*, 73 McRuer, J. A. (as he then was) said that the Ontario guest statute “must be strictly construed in that it cuts down the common law rights of the subject,”74 and this appears to be the general rule.75 In the more recent case of *Kearney v. Livesey*,76 the Court of Appeal was even more specific:77

[In our view the effect of s. 105(2) of the Highway Traffic Act, R.S.O. 1960, v. 172, is not to condone a wrongful act by the driver of a motor vehicle *qua* driver but simply to bar the cause of action with respect to that act. The Legislature, in our view, is quite free to do what it has done in a case such as this namely, to bar a certain cause of action against a wrongdoer without in any way affecting the legal result of the wrongful act with respect to someone else liable for that wrongful act upon some principle of the common law.

This passage was quoted in full, and with approval, by the Supreme Court of Canada in *Cooperators Insurance Ass'n v. Kearney*,78 where the decision of the Court of Appeal in *Kearney* was upheld.

Can we say, then, that *Neumeier v. Kuehner*79 is a false-conflicts case because there is a common-core rule of tort liability and the Ontario exception is, in the light of its purpose, inapplicable?80 So long as Ontario extends the protection of its guest statute to uninsured Ontario motorists, this is not a proper step for Ontario to take.81 However, New York, called upon to be generous, could reasonably determine that no competitive domestic interests are disadvantaged by applying the backdrop common law rule to the Ontario plaintiff's advantage.

Reason and generosity, then, are the ultimate criteria. There is precious little of the latter to be found in *Neumeier v. Kuehner*;82 and the reader will have to determine for himself whether he can find much of the former.

74. Id. at 762.
79. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
80. This is suggested in a valuable note, 37 ALBANY L. REV. 173, 182-87 (1972).
81. See text supra at 162-63.
82. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).