Neumeier: Through the Eyes of Nullifidians

Josephine Y. King
EARLY in the fall semester at Hofstra's new School of Law, a skeptical instructor launching a Conflicts class of second and third year students decided to indulge in a choice-of-law experiment. The first report of Neumeier v. Kuehner was at hand. How would students without specific knowledge of choice of law theory react to the question: Should the host driver's conduct and potential liability be governed by the Ontario guest statute or New York law?

The students were presented with the basic facts of the unidentified case, stripped of party names, procedural history and judicial analysis. Concededly, these were not tabulae rasae upon which the facts of Neumeier were imposed. With modesty, we maintain that our students at Hofstra have been rigorously and imaginatively trained. In their first and second year studies, they have encountered choice-of-law issues in substantive courses. In the Conflicts class, we had progressed through the introductory material and the chapter on domicil. We had engaged in some preliminary discussion of territorial versus interest analysis, and concepts such as most significant

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1. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
2. An Experiment in Virgin Adjudication:
   The following fact pattern is drawn from an actual Conflicts case decided by an appellate court. Without reference to any textual materials, discussion with your classmates or special knowledge of choice of law rules:
   1. Decide which state's law should be applied to the controversy.
   2. Give your reasons for your decision. Indicate the order of importance of the reasons on which you based your decision.

K, a New York resident, was the owner and driver of a car registered in New York and involved in an accident in Ontario in which K and his guest passenger, N, were killed. K drove the car from his residence in Buffalo to Fort Erie in Ontario, Canada. He there picked up N, a domiciliary of Ontario. Their trip was to take them from Fort Erie to Long Beach (also in Ontario) and thence back to N's home in Fort Erie. The car was struck by a train (Canadian National Railway Co.) at a railroad crossing in Ontario.

N's wife and administratrix, a domiciliary of Ontario, commenced a wrongful death action, based on negligence, in New York against K's estate and the Canadian Railway. Defendants pleaded, as an affirmative defense, the Ontario Guest Statute which provides that the owner or driver of a motor vehicle is not liable for damages resulting from injury to or death of a guest passenger unless he is grossly negligent. Plaintiff (N's wife and administratrix) asserted that the Ontario statute was not available as a defense and moved to dismiss the defense. (If plaintiff's motion is granted and the defense dismissed, plaintiff needs to prove only ordinary negligence on the part of defendants).
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relationship, substantial interest, and center of gravity. Only section 6 of the Second Restatement had received specific attention; section 145 lay several hundred pages ahead. Thus, as subjects of experimentation, the students could be described as nullifidians; they had not professed faith in any choice-of-law dogma which could, even subliminally, direct their approach to Neumeier.

Out of 31 responses, 27, or approximately 87 percent, came down emphatically on the side of Ontario law. What reasons supported this preference?

1. Ontario was the situs of the accident. More than two-thirds of the respondents clearly assigned high priority to this fact. They did not distinguish conduct from injury; both events having occurred in Ontario, a composite label, “accident,” was descriptive.

2. Ontario was the domicil of the decedent plaintiff, his family, administratrix and defendant railway. This factor was a strong second consideration for more than half of the students.

3. The relationship of the parties arose, continued and was to terminate in Ontario. One-third of the students selected the seat and course of the relationship as a relevant factor.

By way of contrast to the three Ontario-pointing factors, one half of the students emphasized that the only “contact” with New York was the residence of the driver and the registry of the car.

Is there a familiar ring to place of accident (injury and conduct), place of domicil, and center of relationship? Indeed there is. The students intuitively gravitated toward the Restatement’s “contacts to be taken into account.”

Was the exercise simply one of counting contacts, or were the factual links between Ontario and the parties and events treated as auxiliary data for the application of the principles of section 6?

3. Restatement (Second) Conflict of Laws § 145(2):
Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, 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.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.
4. Id. at § 6 which states in part:
The factors relevant to the choice of the applicable rule of law include:
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
The latter approach is discernible. For example, one can interpret the large number of statements that plaintiff was forum shopping, that New York was not a convenient place of trial and that the choice of forum should not dictate result, as a recognition of the need for rationality and impartiality in deciding multi-state cases.\textsuperscript{5}

The "relevant policies of the forum"\textsuperscript{6} received scattered attention: New York's ordinary negligence standard was in part designed to protect New York plaintiffs (a consideration not relevant in this case); New York had no interest in refusing application of Ontario law (no adverse effect on defendant, or his estate). Understandably, the few students who elected New York law rested, in part, upon the superiority of a generous forum policy of compensation for accident victims and a preference for a higher standard of driver care and for compulsory insurance.

The "relevant policies of other interested states"\textsuperscript{7} were expressed in terms of the "right" of Ontario to regulate the standard of care on its highways, to protect its court system and drivers from excessive lawsuits, even though uncompensated, injured domiciliaries might become a financial burden upon Ontario.

The "protection of justified expectations"\textsuperscript{8} minimized by the Restatement\textsuperscript{9} and discounted by the New York Court of Appeals\textsuperscript{10} in torts cases was selected by one-third of the students as an important determinant. The parties "expected" Ontario law to govern; the defendant driver did not assume that the local law of New York adhered to him wherever he might travel.

Some references to "unfairness" and "injustice," on both sides, described the outcome if the student's choice of law was disregarded. A number of respondents came close to a result-selective approach, a predilection for enforcing the better law, with supportive reasoning to follow. But very few expressed the opinion that New York law,

\textsuperscript{5} Id. at § 6(2)(a).
\textsuperscript{6} Id. at § 6(2)(b).
\textsuperscript{7} Id. at § 6(2)(c).
\textsuperscript{8} Id. at § 6(2)(d).
\textsuperscript{9} Id. at § 6, comment g; id. at § 145, comment b.
because it was the law of the forum, should prevail. A bald, *lex fori* principle, therefore, possessed no inherent attraction for the students.

Such were the untutored reactions of the Conflicts class arrayed in terms of the basic choice-of-law principles and the selective contacts of the Restatement. Only two of several other possible comparisons will be noted. Was the preponderant choice of Ontario law by the students in conformity with the principles Chief Judge Fuld announced in *Tooker v. Lopez*\(^1\) and affirmed in *Neumeier v. Kuehner*?\(^2\) And, did any respondent employ a pure interest analysis in reaching a choice of law decision?

The third principle of the Chief Judge's scheme of analysis is in point:\(^3\)

> [W]hen the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that 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 multi-state system or producing great uncertainty for litigants.

Judging from the tenor of the student responses to the *Neumeier* facts, they believed the "normally applicable rule," the place of the accident, was appropriate. Those who considered such values as certainty of result and the rational functioning of a multi-state system of adjudication discerned no impairment of those objectives in applying Ontario law.

Lastly, few students ventured upon an interest analysis. No one primarily addressed himself to the policies underlying the competing rules and then evaluated each jurisdiction’s interest in recognition of its policy as unyielding, vigorous, equivocal or passive; direct or indirect; superior or inferior; dominant or negligible. Under such an approach, the facts would have been examined as indicia of the force of each interest rather than as contact *foci* which, in the aggregate, yielded the "most significant relationship." A pure interest analysis could have reached the conclusion that the case represented a false conflict.

\(^1\) 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532-3.

\(^2\) 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.

\(^3\) Neumeier v. Kuehner, 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70; *Tooker v. Lopez*, 24 N.Y.2d at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532-3.
CONCLUSIONS

Without ascribing teleologic significance to the results of the Hofstra Conflicts experiment, I believe that one can extrapolate from the responses certain insights and directions of analysis.

1. The students considered first the physical facts, but not solely the place of the accident.
2. The place of origin, the purpose and the course of the relationship of the parties were important facts in their estimation.
3. But the students did not terminate their analysis after assembling the “contacts.” They did examine the policies underlying the competing rules.
4. To some extent, they attempted to interweave the indicia of § 145 with the general guidelines of § 6.
5. A few students extended their comments to a comparison of the governmental interests of the two jurisdictions in effectuating their policies.

What emerged from the more comprehensive responses was a strain of “pure” Babcock:14 "Justice, fairness and ‘the best practical result’ . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.” This is not to say that their starting point was an identification of interests which were then weighed by selecting and organizing the facts. They approached the problem through the facts, but no one fact was jurisdiction-selecting. To some extent, this became a search for a priori rules. But at the same time, they were defining the purposes of New York law and the Ontario guest statute. Some students progressed past this point to recognize and evaluate the “concern” or interest of each jurisdiction in the issue before the court.

This pattern of analysis may well reflect how the practitioner, non-specialist in Conflicts, approaches a choice-of-law question. While theoretical exercises are the delight of the professor, the attorney with a client looks for guidelines which are logical and comprehensible. That the students, independently and without prior indoctrination, selected an approach so closely paralleling § 145 and § 6 underscores the appeal of the compromise, common sense principles of the *Restatement (Second) of Conflict of Laws* for choice-of-law problems in Torts.

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