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## Conflict of Laws - Wrongful Death Statute - Refusal to Apply Damage Limitation of Foreign Wrongful Death Statute

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*International Shoe* holding which involved a state test of "doing business". As can be seen from the *Lone Star* case, as well as the instant case, it has come to be accepted that the *International Shoe* formula applies to jurisdictional problems in both the federal and state courts.<sup>26</sup> Why this rule concerning the constitutional limits of state jurisdiction should be relevant in cases concerning federal jurisdictional questions has never been made clear. One court maintained that it imposes a fifth amendment due process limitation on federal jurisdiction, yet that same court failed to shed any illumination on the nature of this limitation.<sup>27</sup> Whatever the reason, the fact remains that the *International Shoe* criteria is in essence the underlying principle of the cases which cling to a federal test, thus making the distinction between the state and federal jurisdictional tests largely academic. Removed from the judicial haze of its inception into the sunlight of reality, this judicially created "distinction" vanishes.

*William F. Coyle*

CONFLICT OF LAWS—WRONGFUL DEATH STATUTE—REFUSAL TO  
APPLY DAMAGE LIMITATION OF FOREIGN WRONGFUL  
DEATH STATUTE.

*Kilberg v. Northeast Airlines, Inc.* (N.Y. 1961).

Plaintiff's intestate, a resident of New York, purchased an airplane ticket in New York from defendant, Northeast Airlines, Incorporated. The flight originated in New York and ended in a crash at Nantucket, Massachusetts, in which intestate was killed. Both Massachusetts and New York have wrongful death statutes, but the former's statute limits recovery to fifteen thousand dollars. Plaintiff, administrator of decedent's estate, brought suit in New York and sought to circumvent the Massachusetts recovery limitation by alleging, along with a first count in tort, a cause of action in contract arising out of defendant's breach, through negligence, of an implied contractual duty to carry decedent safely to his destination. The Supreme Court, Appellate Division, reversed the trial court's decision and granted defendant's motion to dismiss plaintiff's contract cause of action.<sup>1</sup> On appeal, the Court of Appeals of New York, with three judges concurring in the result, affirmed, *holding* that the plaintiff could not sue for damages in contract for an alleged wrongful death which occurred in Massa-

26. Note, *Jurisdiction of Federal District Courts Over Foreign Corporations*, 69 HARV. L. REV. 508, 515 (1956).

27. *Bach v. Friden Calculating Machine Co., Inc.*, 167 F.2d 679 (6th Cir. 1948).

1. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 198 N.Y.S.2d 679 (App. Div. 1960).

chusetts,<sup>2</sup> but that plaintiff could recover under the Massachusetts wrongful death statute, and New York public policy would not permit application of the Massachusetts damage limitation. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (1961).

Wrongful death actions, unknown to the common law,<sup>3</sup> were initially enacted to provide financial compensation for the survivors of persons who were killed in accidents negligently caused by common carriers.<sup>4</sup> As this type of statute developed and gained acceptance, other potential wrongdoers were added to the list along with common carriers until eventually all wrongdoers became subject to this statutory form of tort liability.<sup>5</sup> Though each individual wrongful death statute applies only within the territorial limits of the enacting state, the cause of action created, like most tort actions, is transitory.<sup>6</sup> A system of comparing the wrongful death statute of the place of death with that of the forum developed in order to determine if the two statutes were of similar character and import; this test was devised to detect the opposition, if any, of the foreign statute to the public policy of the forum.<sup>7</sup> Substantial similarity formed the foundation of the comparison, and dissimilarities in the amounts recoverable,<sup>8</sup> or as to the persons in whose names actions might be brought,<sup>9</sup> were not considered important enough to permit the forum to refuse to apply the foreign statute. Eventually, some courts abandoned the test of similarity as the controlling factor in accepting or denying jurisdiction and adopted the more general policy of accepting jurisdiction unless the foreign statute clearly outraged the public policy of the forum.<sup>10</sup> However, the problem of dissimilar recovery clauses was not always decided solely on policy grounds and, in these instances, discussion centered around the nature of recovery clauses, that is whether they are to be considered an integral part of the substantive law or merely a matter of procedure. The majority of courts have treated the recovery clause which is set out in a wrongful death statute as part of the substantive law and have applied that statute's

2. The court in dismissing the contract action concluded that: (1) plaintiff's cause of action which alleged breach of contract was nothing more than a disguised tort claim and therefore the only relief which plaintiff could obtain would be limited to a tort action upon proof of negligence; (2) decedent's cause of action for injuries did not survive his death; (3) plaintiff's tort claim was therefore limited to a wrongful death action; (4) wrongful death actions derive from statute only and the controlling statute is that of the *lex loci delictus*. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 198 N.Y.S.2d 679 (App. Div. 1960).

3. This fact was expressed by Cardozo, J. in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 104, 120 N.E. 198, 199 (1918).

4. *Id.* at 105, 120 N.E. at 199.

5. *Ibid.*

6. *Id.* at 107, 120 N.E. at 200.

7. *Kiefer v. Grand Trunk Ry.*, 12 App. Div. 28, 42 N.Y.S. 171 (1896); *Leonard v. Columbia Steam Nav. Co.*, 84 N.Y. 48, 52, 53 (1881); *McDonald v. Mallory*, 77 N.Y. 546, 550 (1879).

8. *Keep v. National Tube Co.*, 154 Fed. 121 (3d Cir. 1907).

9. *Davidow v. Pennsylvania R.Co.*, 85 Fed. 943, 944 (2d Cir. 1898); *Boston & M.R. v. McDuffey*, 79 Fed. 934, 936 (2d Cir. 1897).

10. *Hanlon v. Frederick Leyland & Co.*, 223 Mass. 438, 111 N.E. 907, 908 (1916); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

damage clause.<sup>11</sup> This issue, however, was settled by a small minority of courts by calling recovery procedural (or remedial) and applying the law of the forum.<sup>12</sup> The law of the forum was sometimes used to limit damages below (but never increase them above) the amount allowed by the law of the place of the wrong on the ground that plaintiff waived his right to greater damages by electing to sue in a jurisdiction where local policy restricted recovery;<sup>13</sup> this has been particularly true where the defendant was domiciled within the forum.<sup>14</sup>

In *Hughes v. Fetter*,<sup>15</sup> the United States Supreme Court recognized that a wrongful death act is a "public act" within the protection of the full faith and credit clause,<sup>16</sup> but also that this clause does not automatically require a state to enforce a foreign act if local public policy is strongly opposed to its application. It held, however, that, in the event of a state's refusal to enforce such a foreign statute, the Supreme Court could and should weigh the conflicting policies involved and make an independent determination of whether or not there was in fact a substantial basis in policy for such refusal. In *Broderick v. Rosner*,<sup>17</sup> the Supreme Court decided that New Jersey was required to enforce a New York stockholders liability act on the theory that a state ". . . may not, *under the guise of merely affecting the remedy*, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties." [Emphasis added]. In the instant case, the court does not deny general jurisdiction, but rather it treats the question of damages as remedial; the majority claims that this finding as to the nature of damage clauses is demanded by New York's strong public policy against arbitrary limitation of damages.<sup>18</sup>

By applying the Massachusetts statute while refusing to apply the limitations imposed by it, the New York Court is, in effect, giving local policy an extraterritorial effect. Also, the majority decision could be viewed either as an absolute refusal to apply the Massachusetts statute when the plaintiff is a citizen of New York and the amount in controversy exceeds fifteen thousand dollars, or as the creation of a new cause

11. *Powell v. Great Northern Ry.*, 102 Minn. 448, 113 N.W. 1017, 1019 (1907). See also, Annot. 15 A.L.R.2d 765, 766.

12. *Wooden v. Western N.Y. & Pa. R.Co.*, 126 N.Y. 10, 26 N.E. 1050 (1891). However, one must consider the criticism of the *Wooden* case in Justice (then Judge) Cardozo's majority opinion in *Loucks v. Standard Oil Co.*, note 3, *supra*, where he discussed the fact that the *Wooden* decision restricted recovery against a local resident and concluded that ". . . the authority of the *Wooden* case does not extend beyond the specific point decided." See also, Annot. 15 A.L.R.2d 767, 768.

13. *Armbruster v. Chicago, R.I. & P.Ry.*, 166 Iowa 155, 147 N.W. 337, 340 (1914).

14. *Wooden v. Western N.Y. & Pa. R.*, 126 N.Y. 10, 26 N.E. 1050, 1051 (1891).

15. 341 U.S. 609, 71 S. Ct. 980 (1951).

16. U.S. CONST. art. IV, § 1.

17. 294 U.S. 629, 55 S. Ct. 589 (1935).

18. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 529, 198 N.Y.S.2d 679 (App. Div. 1960).

of action in Massachusetts for wrongful death claims involving more than fifteen thousand dollars. In either case, its position would seem to be a dubious one. The ability of a court to apply a foreign statute and ignore the damage limitation found therein has been severely criticized on the theory that an obligation and its extent are inseparable when the only source of that obligation is the *lex loci delictus*.<sup>19</sup> This reasoning is shored up by the common sense notion that it would be unjust to allow a plaintiff to go into his own state court ". . . absolutely depending on the foreign law for the foundation of his case and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."<sup>20</sup> Assuming that it was necessary to decide not to give force to the Massachusetts recovery limitation,<sup>21</sup> the majority claims the support of three factual propositions to form the basis of its present policy decision: that there are no prior decisions to the contrary which are binding on the forum; that New York abolished its limitations on recovery with the adoption of the state constitution in 1894;<sup>22</sup> that it is unjust to subject a travelling citizen of New York to the arbitrary damage limitations of other states when the place of injury might be, as in the instant case, entirely fortuitous.<sup>23</sup> The United States Supreme Court ultimately may be called upon to decide the full faith and credit question posed by the instant case by balancing the opposing policies involved.<sup>24</sup> It would seem, after carefully weighing these opposing policies, that the three-tier foundation of New York's refusal to apply the Massachusetts recovery limitation is not sufficiently strong to support and justify such a refusal. Certainly, New York has an interest in the welfare of its citizens even when they are beyond its borders, but this interest alone would not seem to justify injecting an unlimited recovery clause into the wrongful death statute of Massachusetts, whose legislature not only created the source of plaintiff's cause of action and defendant's liability, but who also saw fit to limit the latter to fifteen thousand dollars.

*Ned W. Manashil*

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19. *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 34 S. Ct. 955 (1914); *Faron v. Eastern Airlines, Inc.*, 193 Misc. 395, 84 N.Y.S.2d 568 (1948).

20. *Slater v. Mexican Nat. R.*, 194 U.S. 120, 126, 24 S. Ct. 581 (1904).

21. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 529-530, 198 N.Y.S.2d 679 (App. Div. 1960). Judge Fuld's concurring opinion indicated that the only question for review was whether or not the judgment dismissing plaintiff's contract cause of action should be affirmed or reversed and that the issue concerning the measure of damages was not properly before the court at this time.

22. N.Y. Consr. art. I, § 18.

23. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 528-529, 198 N.Y.S.2d 679 (App. Div. 1960). Perhaps this third reason could encourage the New York courts to apply New York's wrongful death legislation in favor of a New York resident who had been killed in a jurisdiction having no such statute.

24. *Hughes v. Fetter*, 341 U.S. 609, 611, 71 S. Ct. 980, 981, 982 (1951). Concerning the problem of when a state's local policy must yield to a conflicting act of another state, Mr. Justice Black announced the opinion of the Court that ". . . it is for this Court to choose in each case between the competing public policies involved."