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E. F. Roberts

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A RULE IS A RULE BECAUSE IT IS THE RULE: INTELLECTUAL CRISIS IN CONFLICT OF LAWS

E. F. ROBERTS†

I.

MECHANICAL JURISPRUDENCE

GRANTED THAT PLAINTIFF sues defendant in "the forum" claiming the right to compensation for damages, say for negligent misstatement; recovery hinges in the first instance on the question whether negligent misstatement is actionable as a wrong within the forum. The answer to this question, of course, depends upon the substantive tort law of the forum, more likely than not case holdings in this particular instance. This answer in turn itself depends upon the calculations of the judiciary as to the wisdom of allowing recovery for negligent misstatement, calculations which involve not merely the facts of the cases actually decided, but which include, albeit perhaps only implicitly, an evaluation of the social and economic consequences of creating such a right.¹ In short, considerations of the policy best suited to the forum have entered the equation and, in theory, if the action exists recovery is allowed because it is in the best interest of the society in the forum.

Suppose, however, that the forum has not allowed negligent misstatement as the basis of a claim sounding in tort, having concluded that recovery would wreak havoc with commercial transactions. Suppose, further, that another plaintiff sues another defendant in the forum, likewise claiming the right to compensation for damages, again because of negligent misstatement, but in this instance, suppose still further that the incident, including both the statement and the resultant harm, occurred in some other single forum.² One reaction might be to

† B.A., 1952, Northeastern University; LL.B., 1954, Boston College; Professor of Law, Villanova University.

1. *E.g.*, *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). See also *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164 (C.A.), *overruled*, *Hedley Bryne & Co., Ltd. v. Heller & Partners, Ltd.*, [1963] 3 Weekly L.R. 101 (H.L.).

2. This supposition avoids the necessity of getting involved in those cases where the act is done in state *A*, but the harm ensues in state *B*. Given the *lex loci delicti* rule, of course, one must have a precise "either/or" answer to this problem, such as the last event doctrine of the *Restatement*. *RESTATEMENT, CONFLICT OF LAWS* § 377 (1934): the place of the wrong is "where the last event necessary to make an actor liable for an alleged tort takes place." Negligence not being actionable without harm resulting to plaintiff, it appears that the place where the harm occurs is the key to the choice of law problem. Yet, is harm actionable without negligence? *Cf. GOODRICH, CONFLICT OF LAWS* 263 (3d Ed. 1949); *Morris, The Proper Law of a Tort*, 64 *HARV. L.*

dismiss the case because such wrongs are not actionable in the forum. But in this instance the case is not a simple tort case necessitating such a reaction, but, since the event transpired elsewhere, it is a conflict of laws case. This being so, the reaction in the forum will involve the application of another body of rules, namely conflict of laws, and, more particularly, the choice of law rules of that discipline. It is a kindergarten fact that the *lex loci delicti* governs the tort, so that now the question whether negligent misstatement is actionable in this instance turns upon the case law of the place where the incident occurred.

Since the event transpired in another place, recovery in the forum turns in part on the policy judgment by the courts of that other place whether to make negligent misstatement actionable. But, and this is crucial, recovery also hinges on the fact that the judges in the forum *choose* to apply the *lex loci delicti* to the question rather than to decide the case pursuant to the *lex fori*. In deciding this the forum has, at least in theory, decided that this way of handling conflict of laws situations is in the best interest of the forum. It follows, therefore, that in the ultimate analysis, recovery in the forum still depends upon the policy of the forum as well as the policy of the other place where the tort happened.³

Why should it be thought that it is in the best interest of the forum to apply the *lex loci delicti* to govern the tort which occurred in the other place? Is it policy, expediency, or what, which prompted the forum to develop this particular choice of law rule? One cannot answer this question in today's terms and arrive at the correct answer. To understand the "why" it is necessary to pose the question in the context where and when it arose, and evaluate the response in the light of the thinking of the times.⁴ Once this is done it will be seen

REV. 881, 887-88 (1951). But if one performs must have a subsidiary rule in order for the primary rule of *lex loci delicti* to function, and if the primary rule is beyond the pale of immediate policy considerations, either event is an equally rational trigger mechanism to cut off debate.

3. It is true, of course, that notwithstanding the actionability of the event according to the *lex loci delicti*, the forum might refuse to enforce the right if to do so would violate its "public policy." *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918); RESTATEMENT, CONFLICT OF LAWS § 612 (1934). Be that as it may, the forum does not purport to apply its own law to the situation, but simply refuses to enforce the right created elsewhere. The policy here may be nothing more than the effort to avoid "scandal": that is, certain claims, valid where they arise, would oppugn the folkways of the forum; that allowing the presentation of the claim in detail and then awarding compensation would outrage the public, bringing the court into public disrespect. The same considerations do not apply when the claim has already been reduced elsewhere to a judgment since the gory details of the underlying claim are then not relevant to the proceedings in the forum. Hence, perhaps, the different result. *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641 (1908).

4. Hence Kluckhohn encountered difficulty making any sense whatever out of certain Navaho activities. Then he realized that while such conduct made no sense to the alien, an observer willing to adapt himself to the mental outlook of the participants themselves could see a great deal of sense in the affair. Kluckhohn, *The Philosophy of the Navaho Indians*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER (Northrop

that this approach was so self-evident that any other approach would have been unthinkable.

In the nineteenth century, after all, it was not at all clear that “civil procedure” and “torts” were distinct disciplines. Indeed, lawyers did not think in terms of “one civil action” and “negligence,” but rather they talked about “trespass” and “case,” commingling writ and right. Events gave rise to causes of actions: a belt with a bat was matched by its coefficient, trespass. But if the act and the wrong, if any, were all part of the whole complex, recourse had to be had to a law, a set of norms, with which to evaluate the event. Event and wrong being one and the same, it was obvious that only the law of the place where the event occurred applied to the question whether or not the act was a wrong. This had to be so since only the polity where the event transpired had authority to regulate the event and hence to categorize it as wrong or no. Little wonder is it then that Mr. Justice Holmes, in speaking of such a case, should say that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts . . . would be unjust . . . ”⁵

While the rule may have appeared obvious to the judges of the nineteenth century, the problem now becomes one of determining why, granted the rule was rooted in a particular conceptual framework, it should have survived with such astounding vigor long after the cultural milieu which saw its birth had itself dissolved. It should be observed that “tort” itself has undergone a tremendous revolution since the mid-nineteenth century; debates about direct versus consequential harm giving way to negligence concepts premised on the risk principle, followed now by an apparently inevitable trend toward absolute liability.⁶ But whereas tort law, as a device used to allocate loss attributable to accidents, was situated in the very vortex of a changing society, conflict of laws was a backwater, relatively divorced from the

ed. 1949); NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* 59 (1959). On the application of this to conflict of laws, see, e.g., EHRENZWEIG, *CONFLICT OF LAWS* 344 (1962): “One of the ‘exceptions,’ which permitted the foreign statute to be enforced only if it was substantially similar to that of the forum, promised restoration of the *lex fori* as the basic law. But this principle was not acceptable to Holmes and Cardozo, judges steeped in the universalist illusion of their time, who were about to lay the groundwork for the grand scheme adopted in the *Restatement*, according to which rights lawfully vested shall be everywhere maintained.”

5. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356, 29 S.Ct. 511, 512 (1909).

6. E.g., in order, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Escala v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944) (concurring opinion); *Goldberg v. Kollman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). See note 37 *infra*.

mainstream of economic and social evolution. Choice of law being relatively a technician's private world insulated from the direct pressure of changes in the structure of society, the *lex loci delicti* rule simply lived on unnoticed. Living on, the rule gained authority by constant repetition, and, as any anthropologist would know, this repetitive phenomenon, at first merely normative, took on the quality of the norm.⁷ Even without the nineteenth century conceptual framework out of which the rule evolved, the rule had become so sacrosanct in its own right that it needed *no* justification: it was *self-evidently* correct.

Lawyers tended, therefore, to react to the stimulus of a conflict situation in torts along the same intellectual circuit, *lex loci delicti* having become programmed into the intellectual apparatus of conflict of laws. Even when courts sometimes avoided the full implications of the rule by deciding a case by extracting from it an issue other than the tort one, as for example, capacity of the parties to sue each other, this served only to reinforce adherence to the rule, highlighting the fact that *lex loci delicti* qua principle itself was unquestionable.⁸ But given the programme built into the legal system, that is, granted judges and lawyers all reacted to the stimulus of tort with the invocation of the *lex loci delicti* rule, this built-in behavior pattern did have practical merit: given a situation involving such a case, prediction as to how the law machine would function was relatively easy. And, it should be noted, the value of the rule as a predictive device served only to increase still further the emotional attachment to the rule by all concerned, since for most people belief in any rule, regardless of its merit, is preferable to a world *sans* rules.

II.

THE NEW LOOK

In *Babcock v. Jackson*⁹ the New York courts were presented with a situation where a New York car owner invited a fellow New Yorker to be a guest on a weekend drive into Ontario and back. Once in Ontario the host lost control of his vehicle and it went into a stone wall

7. "In society what is takes on the compulsive quality of *ought*. . . . What the most do, others should do." HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 15 (1954).

8. There are, of course, a number of instances when the forum avoided the *lex loci delicti* by extracting a different issue from the case: this, after all, merely illustrates the importance of characterization. *Thompson v. Thompson*, 193 A.2d 439 (N.H. 1963); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936). Yet, isn't how the question is framed the key to any case? How did *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), come to turn on the "unconstitutionality" of the course of conduct taken since *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)? How did the issue change from a relative quibble to an all important seminal question on appeal in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916)?

9. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

and the guest was injured. The guest brought suit in New York, alleging negligence on the part of her host. Inexorably the lower courts dismissed the action, this because the automatic invocation of the "conflict of laws, choice of law, torts, *lex loci delicti*, ergo Ontario law governs the tort" equation pointed to the fact that in that Province no cause of action for negligence existed on such facts.¹⁰ The Court of Appeals treatment of the problem, however, was direct and to the point. As seen by that court the issue raised on appeal was whether "the law of the place of the tort [shall] *invariably* govern the availability of relief for the tort. . . ." ¹¹ Thus, avoiding devices such as characterization, or renvoi, the court deliberately attacked the sacrosanct *lex loci delicti* axiom head on. While not once using the precise phrase, the court adopted in lieu of *lex loci* the "proper law" approach reminiscent of recent contract cases, and applied it to the present tort situation.¹²

The proper law approach to contract cases is, of course, an importation from England.¹³ Interestingly enough, the *Babcock* opinion calls to mind an article by J. H. C. Morris, published in the *Harvard Law Review* a dozen years ago, entitled, aptly enough, *The Proper Law of a Tort*.¹⁴ The whole thrust of this article was "to suggest that there is room for a similar approach in the field of torts."¹⁵ Indeed, it may be of interest to read parts of the Morris argument in conjunction with the reasoning of the New York Court.

MORRIS

It may be conceded that in many, perhaps most, situations there would be no need to look beyond the law of the place of the wrong. . . .¹⁶

FULD, J.

Where the defendant's exercise of due care . . . is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern.¹⁷

10. *Babcock v. Jackson*, 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (1962).

11. *Babcock v. Jackson*, 12 N.Y.2d 473, 477, 191 N.E.2d 279, 280, 240 N.Y.S.2d 743, 746 (1963).

12. *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

13. DICEY, *CONFLICT OF LAWS* 717 (7th ed. 1958). *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954):

Although this "grouping of contacts" theory may, perhaps, afford less certainty and predictability than the rigid general rules . . . , the merit of its approach is that it gives to the place having the most interest in the problem "paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction" most intimately concerned with the outcome of [the] particular litigation. (Citations omitted.) *Id.* at 161, 124 N.E.2d at 102. See also, *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 332a (Tent. Draft No. 6, 1960).

14. 64 *HARV. L. REV.* 881 (1951).

15. Morris, *The Proper Law of a Tort*, 64 *HARV. L. REV.* 881, 883 (1951).

16. *Id.* at 884.

17. *Babcock v. Jackson*, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

But we ought to have a conflict rule broad and flexible enough to take care of exceptional situations as well as the more normal ones. . . . Otherwise the results will begin to offend our common sense.¹⁸

Finally, the hypothetical suggested by Morris and the fact of *Babcock*, while quite different, evoke remarkably similar reactions. Thus:

An American co-educational school establishes for its students a summer vacation camp in . . . Quebec. The camp is entirely self-contained and self-supporting and there is no other human being within 50 miles. One of the girls is seduced by one of the boys so that she becomes pregnant; another is bitten by a dog kept in the camp by another boy. Neither incident would have happened but for the negligence of the camp organizers, who are instructors in the school. The girls, the boys, and the organizers are all residents of State X, an American state, where also the school is located.²⁰

Does it make sense to say that the question whether the girls or their parents can sue the boys or their parents or the camp organizers . . . "must" be governed by the law of Quebec, merely because the incidents happened there? To the present writer it does not.²²

This is not to say that the New York court relied exclusively on Morris: it did not.²⁴ Rather, it ought to be observed that the approach

Be that as it may, however, re-consideration of the inflexible traditional rule persuades us that . . . its application may lead to . . . anomalous results.¹⁹

The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a weekend journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.²¹

Per contra, Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law.²³

18. Morris, *supra* note 15, at 885.

19. *Babcock v. Jackson*, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 751 (1963).

20. Morris, *supra* note 15, at 885.

21. *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

22. Morris, *supra* note 15, at 885.

23. *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

24. *Id.* at 478, nn.3 & 4, 191 N.E.2d at 281, nn.3 & 4, 240 N.Y.S.2d at 746-47, nn.3 & 4 (1963).

and the conceptual framework espoused by Morris has become commonplace so that ideas once revolutionary are now reflected as obvious statements in the judicial opinion.

The proper law approach in contracts has been effective because it enables courts to select the proper law, not of the "contract," but the proper law applicable to the precise problem of contract at hand, be it capacity, performance, or illegality. It was Cook, after all, who had suggested that the solution to contract cases lay in isolating the precise problem and making the choice of law as to it.²⁵ Similarly, Morris suggested that "tort" be broken down into smaller units, such as negligence, defamation, and the like, and choice of law be tailored to the problem involved in each kind of case.²⁶ The Court of Appeals, however, goes further; it breaks "negligence" down into its constituent parts, applying New York law to the question of liability for the harm, but, at the same time, noting that the standard of care would be governed by Ontario law.²⁷ In short, just as a contract is a kaleidoscope of distinct issues, each of which involves a separate choice of law, so, too, "there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction."²⁸

III.

PROPHETS OF CHANGE: NEW PUNCH CARDS FOR OLD

Morris's article marked an intellectual turning-point; the mechanical application of *lex loci delicti* was discredited, and an alternative device was suggested. The trouble lay now in the fact that the proffered alternative was not particularly attractive because the actual choice-of-law process, the real dirty work, was left unprogrammed. The lawyer was told that torts ought to be governed by their "proper law," but he was not told *how* he was to ascertain *what* was the proper law. "Absurd" was the reaction of an English commentator,²⁹ question-begging" the objection of American students,³⁰ and, finally, "give-it-up formula" was the charge levelled by an American authority.³¹ Granted then that the *lex loci* rule did work an occasional injustice, it was still preferable until it could be replaced by another choice of law device

25. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 431 (1942).

26. Morris, *supra* note 15, at 884.

27. Babcock v. Jackson, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963).

28. *Ibid.*

29. Gow, *Delict and Private International Law*, 65 L.Q. REV. 313, 316 (1949).

30. Note, *The Second Conflicts, Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762, 776 (1963).

31. EHRENZWEIG, CONFLICT OF LAWS 548 (1962).

capable of providing working guidelines equivalent in certainty of application—in short, until another fully programmed device was invented.

Whether we like to admit it or not, each of us sees the world through concepts common to our own time. A mind trained to think like Ptolemy and another like Copernicus are different instruments: they see the same things differently. We do have our *a priori*—our native twenty-questions-like animal, vegetable, or mineral categories—around, and in terms of which we organize the flux around us.³² These categories, can't helps, postulates, call them what you will, are not *a priori* in the sense that they represent any eternal truths: they simply crystallize ways of thinking which work for us.³³ They remain self-evidently true only so long as we have no cause to doubt them.³⁴ Further, these basic postulates are acquired by the accident that we are born into a particular culture.³⁵ Thus our concepts are formulated by

32. There is a great deal of truth, therefore, in the assertion that "Man exists in a world of his own creation." JOHNSON, *A TREATISE ON LANGUAGE* 29 (Paperbound ed. 1959). Compare LEWIS, *MIND AND THE WORLD ORDER* 29-30 (Dover ed. 1956): "The world of experience is not given in experience: it is constructed by thought from the data of sense. This reality which everybody knows reflects the structure of human intelligence as much as it does the nature of the independently given sensory content."; MONTAGU, *MAN IN PROCESS* 83 (1961): "The law and order that man sees in Nature he introduces there, a fact of which he seems to have grown quite unconscious. Natural systems of classification work so well that, following an unconscious pragmatic principle, they are assumed to be true. . . ." See also Keyser, *The Nature of the Doctrinal Function and Its Role in Rational Thought*, 41 *YALE L.J.* 713 (1932).

This particular approach finds itself reflected in the poetry of Wallace Stevens, particularly in *The Idea of Order at Key West*. WHICHER & AHNEBRINK, *TWELVE AMERICAN POETS* 100 (Oxford ed. 1961): "A final clue to Stevens. . . . The world we inhabit is one we 'half create,' we make the order we perceive." For an interesting diversion read in conjunction with Stevens the following dictum from T. E. Hulme: "Why is it that London looks pretty by night? Because for the general cindery chaos there is substituted a simple ordered arrangement of a finite number of lights." Consider also that the same author put forth the ideas that: "The aim of science and of all thought is to reduce the complex and inevitable disconnected world of grit and cinders to a few ideal counters, which we can move about and so form an ungritlike picture of reality — one flattering to our sense of power over the world" and, "Animals are in the same state that men were before symbolic language was invented." HULME, *SPECULATIONS* 221, 224, 229 (Routledge ed. 1960).

33. For the plight of an individual accustomed to one culture being subjected to the criminal law of a totally alien one, see Wurm, *Aboriginal Languages and the Law*, 6 *U.W. AUSTRALIAN ANN. L. REV.* 1 (1963). An interesting sidelight is set forth in WHORF, *LANGUAGE, THOUGHT AND REALITY* 57-58 (1956).

34. The debt due to C. S. Peirce is obvious: see his "Fixation of Belief" now available in *VALUES IN A UNIVERSE OF CHANGE* 91-112 (Anchor ed. 1958).

35. JASPERS, *MAN IN THE MODERN AGE* 110 (Anchor ed. 1957): "Man is not what he is solely by virtue of biological inheritance, but also . . . what tradition makes him." Compare with this Mr. Justice Frankfurter's opinion in *Minerville School District v. Gobitis*, 310 U.S. 586, 596, 60 S.Ct. 1010, 1014 (1940): "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.'"

Thus it has been said that, "the binding force of law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea." OLIVECRONA, *LAW AS FACT* 17 (1939). Compare FULLER, *THE LAW IN QUEST OF ITSELF* 134 (1940); NEKAM, *THE PERSONALITY CONCEPTION OF THE LEGAL*

society and, per force, are subject to modification as society changes, and our traditional concepts cease to explain and order the flux around us.³⁶

From an assortment of cases premised on "fault," torts is becoming a device to allocate the immense burden of paying for the losses attributable to accidents in our urban, industrialized society. The trend is toward absolute liability: "compensation," "loss distribution," and "insurance" are the concepts by which order is now imposed upon the field of tort cases.³⁷ Granted that the functions performed by torts have changed and that our outlook toward torts has changed, it should cause little wonder should someone suggest that the proper law to govern a tort is the law that the parties and their insurers should have forseen when they calculated the possibility of loss and created a fund to defray it. Thus, granted "enterprise liability" affords an explanation of what is going on in the tort area itself, isn't it only logical to expect that this order-affording concept should be carried over into the conflict of laws field and there be made the keystone of a formula for ascertaining the proper law of a tort?³⁸

At the same time it is becoming more evident that the "common law" has atrophied in this country, if by common law one means a system of case law keyed into a system of rigid stare decisis. Notwithstanding proclamations to the contrary, the law does partake somewhat of a brooding omnipresence in the sky, not existing in concrete cases of a particular jurisdiction but in the "better view." The decision reflecting the best "policy result," attained after "balancing the interests" involved in light of the "social needs" of the times, is the "right result."³⁹ Little wonder again should be engendered should this approach be transferred into the conflict of law area, and the criteria for choosing proper law be oriented around the problem of selecting the best policy in the light of the "governmental interest" of the forum.⁴⁰

ENTITY 1-10 (1938); Shepard, *Law and Obedience*, 33 AM. POL. SCI. REV. 738, 798-99 (1939).

36. To see an example of the reaction when old ideas cease to explain the way the world works, read Frank, *The Principle of Disorder and Incongruity in Economic Affairs*, 47 POL. SCI. Q. 515 (1932). For the wider implications of this see KENNAN, REALITIES OF AMERICAN FOREIGN POLICY 34 (1954); SNOW, THE TWO CULTURES 44 (1959).

37. E.g., Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

38. EHRENZWEIG, CONFLICT OF LAWS §§ 217-226 (1962); Ehrenzweig, *Guest Statutes in the Conflict of Laws — Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws"* (pts. 1-3), 69 YALE L.J. 595, 794, 978 (1960); but see, MORRIS, *Enterprise Liability and the Actuarial Process — The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

39. Goodhart, *Case Law in England and America*, 15 CORNELL L.Q. 173 (1930).

40. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171; Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Currie, *Conflicts*,

Granted that both preceding systems of order reflect thinking in the law schools, it should be noted that these efforts entail imposing an entirely new system of order upon the choice of law phenomenon. Experience ought to warn the wary, however, that there exists a time lag between the law schools and the practicing bar so that, whereas new concepts may be freely imposed upon a class, new concepts must be slowly inserted into the intellectual *Weltanschauung* of the practitioner. Granted, therefore, entirely new approaches in academic circles coexisting with rising general dissatisfaction with the *lex loci delicti* rule, it follows that someone would put forward an intermediate choice of law formula, retaining *lex loci*, but modifying it by adding to the equation some of the factors currently believed to be necessary to obtain a fairer balancing of competing interests.⁴¹

Thus it is that programmes with which the choice of the proper law can be made have been forthcoming since Morris's original suggestion. Each scheme assumes, however, that it is possible to programme the choice of law process, that is, that a principle or set of principles of order can be imposed upon the myriad of factors involved. As a sidelight, moreover, perhaps evidence of the strain inherent in attempting to impose artificial concepts upon the flux and call it order, the competing schools have not been overly kind in their comments about each other.⁴² It is too early to suppose, however, that any of the

Crisis and Confusion in New York, 1963 DUKE L.J. 1; but see, M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961).

41. RESTATEMENT (SECOND) CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963):

- (1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.
- (2) Important contacts that the forum will consider in determining the state of most significant relationship include:
 - (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 involved.

42. *E.g.*, speaking about Ehrenzweig, Currie observed that, "Actuarially that proposal is demolished by Morris. . . . That it would poorly effectuate the interests of the affected states is obvious." Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 37 n.118. Then turning on Reese, the Reporter for the new *Restatement of Conflict of Laws*, Currie has unleashed several broadsides. "Normally casebook editors leave it to the student to distinguish between dictum and *ratio decidendi*." *Id.* at 3, n.10. "The reporter seems to find comfort in the view that the 'decision does not reject the place of injury rule,' That was an understandable interpretation, though not an especially perceptive one, when it was written." Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1240 (1963). Ehrenzweig has contented himself with the protest that, "Far from following Professor Currie in treating my proposal as 'demolished' by actuarial considerations, the instant decision lends it valuable support." Ehrenzweig, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1246 (1963). Reese has adopted a very effective riposte: he treats Currie

schools have *the* answer. The cases are too few, and the ideas about torts itself, much less about choice of law, have not crystallized. If order is consensus in the long run, then in the short run we are left with the *lex loci delicti* rule and some interesting deviations, together with some interesting theories which have yet to prove themselves in the ultimate market-place of ideas about law, namely the courts. For the time being one can only hope, like Morris, to apply the proper law, taking into account the sundry factors now competing with *lex loci* for consideration. By way of conclusion, therefore, a quotation from I. A. Richards seems most apt:

The average educated man is growing more conscious, an extraordinarily significant change. It is probably due to the fact that his life is becoming more complex, more intricate, his desires and needs more varied and more apt to conflict. And as he becomes more conscious he can no longer be content to drift in unreflecting obedience to custom. He is forced to reflect. And if reflection often takes the form of inconclusive worrying, that is no more than might be expected in view of the unparalleled difficulty of the task. To live reasonably is much more difficult today than it was in Dr. Johnson's time, and even then, as Boswell shows, it was difficult enough.⁴³

as nonexistent. Reese, *The Ever Changing Rules of Choice of Law*, NETHERLANDS INT'L L. REV. 389 (1962); Reese, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1251 (1963).

43. Richards, *Science and Poetry*, CRITICISM: THE FOUNDATIONS OF MODERN LITERARY JUDGMENT 506 (Schorer et al. ed. 1948).