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## COMMENTS

### GRIFFITH v. UNITED AIR LINES, INC.: A JUSTIFICATION FOR UNCERTAINTY

In the quest for the rule of law, we must insist on including its reasons, and on lifting them out into the open. That human death may or may not be the subject of an action, — that truth is or is not a defense for the libeller, — that a judge is privileged absolutely or only qualifiedly, — that a secondary boycott is or is not justifiable, — all these rules and principles rest on reasons of some sort; they may be reasons of ethics, of politics, of economics, of public health, or a dozen other sorts. They may be found in experience or dogma. But they are given to us independently of the rule of law itself. The rule of law must be tested by the philosophy of the subject . . . we must be students of reasons as well as of rules. And the conservative needs this quite as much as the reformer.<sup>1</sup>

A rule of law, once adopted, becomes programmed into the intellectual apparatus of our legal system. It has a tendency to be accepted without further justification. Its constant repetition in effect makes it self-evidently correct. When such a rule creates unreasonable results, it becomes the duty of the courts to consider the basis of the rule, be it policy, expediency or whatever. A rule is *not* a rule merely because it is a rule, but rather because it is based on the reasonable needs of a particular society.<sup>2</sup>

The rule which has most recently come under such judicial scrutiny is that of *lex loci delicti*. The Pennsylvania court, having applied the above analysis, recently rejected this inflexible rule which applies the law of the place of the wrong in a choice of law situation. *Griffith v. United Airlines, Inc.*, 203 A.2d 796 (Pa. 1964).

Deceased plaintiff, George H. Hambrecht, was a domiciliary of Pennsylvania when he purchased a round-trip ticket to Phoenix, Arizona, from United Airlines, Inc. He boarded the Phoenix-bound plane in Philadelphia, but was killed when it crashed in Denver, Colorado, a scheduled stop. United, a Delaware corporation, has its principal place of business in Chicago. It regularly does business in Pennsylvania and maintains operational facilities therein.

After decedent's will had been probated in Pennsylvania, his executor brought an action in assumpsit against United and certain of its employees for breach of contract to transport decedent safely from Philadelphia to

1. WIGMORE, *CASES AND MATERIALS ON TORTS* ii (1st ed. 1928).

2. *Contra*, Roberts, *A Rule Is A Rule Because It Is the Rule: Intellectual Crisis In Conflict of Laws*, 9 *VILL. L. REV.* 200 (1964).

Phoenix. Plaintiff alleged that "certain of United's named employees, in the course of their employment, had negligently operated, managed, maintained, inspected and controlled the airplane, from which negligence the crash and death resulted."<sup>3</sup>

The Court of Common Pleas sustained the cause of action as to United but dismissed the individual defendants. However, the Court further held that the law of the place of the injury, Colorado, must control on the matter of damages and gave plaintiffs leave to amend their complaint to conform to the Colorado Survival Statute. Plaintiff filed no amendment and the action was dismissed, which dismissal was appealed to the Pennsylvania Supreme Court.

The Supreme Court held, five to one, that the law of the forum, Pennsylvania, was to control the question of damages. In so doing, the Court expressly overruled clear precedent reasserted as recently as 1963<sup>4</sup> that the law of the place of wrong determines whether a person has sustained a legal injury. The so-called *lex loci delicti* rule, as the dissent aptly pointed out, was deeply entrenched in Pennsylvania jurisprudence, but though the Court was given an opportunity to avoid a great confrontation with the issue,<sup>5</sup> it directly attacked this opinion and reversed its former position. Mr. Justice Roberts stated that the "wooden application of a few overly simple rules, based on the outmoded 'vested rights theory,' cannot solve the complex problems which arise in modern litigation and may often yield harsh, unnecessary and unjust results."<sup>6</sup> The majority went on to say that in adopting this new approach it must, of necessity, overrule its earlier cases based on *lex loci delicti*.

The newly-adopted rule conforms with the position advocated by the *Restatement Conflict of Laws 2d*<sup>7</sup> "that torts should be governed by the

3. Griffith v. United Air Lines, 203 A.2d 796, 797 (Pa. 1964).

4. Vant v. Gish, 412 Pa. 359, 194 A.2d 522 (1963).

5. There were two routes the court could have followed and completely avoided the entire question of the *lex loci delicti* rule. Since in Pennsylvania there still exists a distinction between assumpsit and trespass actions, the court could have based its opinion on these distinctions. The action was brought in assumpsit and could easily have been disposed of as such. It could either have been decided to be an allowable contract action in which the Colorado limitation would not apply or an action that could only properly be brought in trespass. The court, however, apparently chose to ignore the distinctions between the two, stating: ". . . under the facts before us, an action for simple breach of contract would not and could not justify a substantial recovery by plaintiff. The essentials of this case remain the same regardless of the label. Mere technicalities of pleading should not blind us to the true nature of the action. The choice of law will be the same whether the action is labeled trespass or assumpsit." *Lex loci* has traditionally been a rule in trespass, a point apparently overlooked by the court in the previous statement.

This oversight has apparently created a new warranty, one of "non-negligent carriage" rather than one of "safe carriage." This was an attempt on the court to avoid the latter warranty which they felt would make the carrier an insurer.

The most sensible avoidance procedure would have been to adopt the rationale in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961). Since the court by its decision has shown that it was determined to decide *Griffith* on tort principles, it could easily have adopted *Kilberg*, holding that the public policy of the forum precluded application of the limitation of the *lex loci* state and that measure of damages was, in fact, a procedural matter to be governed by the law of the forum.

6. Griffith v. United Air Lines, 203 A.2d 796, 801 (Pa. 1964).

7. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

local law of the state which has the most significant relationship with the occurrence and the parties, and that separate rules apply to different kinds of torts.”<sup>8</sup> The contacts that are considered to be significant in such a determination are: place of injury, place of conduct, domicile of the parties and place where the relationship between the parties is centered.

In applying these principles to the instant case it can readily be seen that the state where the injury occurred had little interest in the amount of recovery, since none of its citizens were involved or affected. Pennsylvania, on the other hand, had significant interest in the litigation. The deceased and his family were domiciled there, his estate was probated and administered there and the relationship between decedent and defendant was entered into there. Therefore, under the new “most significant contacts” or “center of gravity” test the law of the forum must be applied. The Court recognized the problems that can arise from the institution of this rule, however, it held that “ease of application and predictability are insufficient reasons to retain an unsound rule.”<sup>9</sup>

Thus with the instant case, Pennsylvania has joined a modern trend in the abolition of the place of the injury rule. This trend began with exceptions to the rule.<sup>10</sup> In *Auten v. Auten*,<sup>11</sup> New York abandoned the traditional choice of law rules in contracts cases in favor of a “center of gravity” theory. Finally, in *Babcock v. Jackson*,<sup>12</sup> New York applied this reasoning to an action in trespass. Judge Fuld, in *Babcock*, concluded that that “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.”<sup>13</sup>

The Court points out that although the overwhelming majority of writers are opposed to retention of the place of the injury rule, there is disagreement as to the successor to that rule.<sup>14</sup> Justice Roberts, in abandoning the strict *lex loci delicti* rule, appoints as its successor “a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.”<sup>15</sup>

“For over 100 years the law of Pennsylvania has been clearly settled, namely, the substantive rights of the parties, as well as the damages recoverable are governed by the law of the place of the wrong or as it is sometimes expressed, the law of the place where the injury occurred — *lex loci delicti*,”<sup>16</sup> so states Chief Justice Bell in his dissent in *Griffith v.*

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8. *Griffith v. United Air Lines*, 203 A.2d 796, 802 (Pa. 1964).

9. *Id.* at 803.

10. *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949).

11. 308 N.Y. 155, 124 N.E.2d 99 (1954).

12. 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

13. *Id.* at 481, 191 N.E.2d at 283.

14. See *Griffith v. United Air Lines*, 203 A.2d 796 (Pa. 1964); *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963); *New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 673 (1963).

15. *Griffith v. United Air Lines*, 203 A.2d 796, 805 (Pa. 1964).

16. *Id.* at 808 (dissenting opinion).

*United Airlines*.<sup>17</sup> He further points out that the majority opinion demonstrates:

(a) that it is impossible to formulate at this time a new and different test which can be applied with definiteness and certainty to many varied situations, and (b) it concedes that there is widespread 'disagreement among the critics as to the successor to that rule,' *i.e.*, *lex loci delicti*, and that it will likely have to be developed and changed, and (c) that it will also almost inevitably and unnecessarily create instability, uncertainty, confusion and conflict of law throughout our Country, and will undoubtedly greatly increase the volume of litigation which is already swamping Courts, and thereby further delay speedy justice.<sup>18</sup>

The position taken by the Chief Justice represents the common arguments made in opposition to changing the doctrine of *lex loci delicti*, the prevailing rule in the United States. The argument consists of two basic tenets: (1) *stare decisis* and (2) the uncertainty of application. Thus it is argued that the abandonment of these two tenets must result in legal chaos.

The argument of *stare decisis* has been raised in other contexts in the past; however, both the judiciary<sup>19</sup> and legal philosophers<sup>20</sup> have expressed the opinion that this argument also should not be sufficient to prevent legal reform. Benjamin Cardozo succinctly demonstrated this point in his book on the judicial process.

The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalization from particulars.<sup>21</sup>

Cardozo expounds further on this principle by quoting Munroe Smith.

In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues

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17. 203 A.2d 796 (Pa. 1964).

18. *Id.* at 809 (dissenting opinion).

19. *Olin Mathieson Chem. Corp. v. White Cross Stores*, 414 Pa. 94, 199 A.2d 266 (1964).

While it is true that great consideration should always be accorded precedent, especially one of long standing and general acceptance, it doesn't necessarily follow that a rule merely established by precedent is infallible. Moreover, the courts should not perpetrate error solely for the reason that a previous decision, although erroneous, has been rendered on a given question. . . . If it is wrong it should not be continued. Judicial honesty dictates corrective action. *Id.* at 100, 199 A.2d at 268.

20. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22 (1921).

21. *Id.* at 22-3.

to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.<sup>22</sup>

Since so much has been written on the pros and cons of *stare decisis* this comment will be confined on the most part to a discussion of the second tenet, uncertainty.

Further the scope of inquiry of this note is limited to the "predictability" of which state's interest will be dominant. Indeed it is "predictability" and "consistency" that is meant by the use of the term certainty. This note emphatically avoids the meaning of "immutability," for a law which is static and does not contain within itself the seeds either of development or of self-destruction is the law of a dead society. Moreover, law is always subject to change by the legislature.

The debate on legal certainty has sometimes been partisan and extreme. Blackstone<sup>23</sup> regarded law as something permanent, uniform and pre-determined, which was subject to change by the legislature but not by the judges. On the other hand, Judge Frank<sup>24</sup> believed that law always has been, is now and will ever continue to be largely vague and variable, and that much of the uncertainty is of immense social value. In fact he characterized the notion of legal certainty as an illusion or a myth.

Somewhere between these extremes lies the preponderance of juristic opinion. The quest for certainty is respected but its complete attainment is impossible. For the basis of our system of fact-finding remains human evaluation of human testimony, and, so long as this is so, some uncertainty is inevitable.

It is argued that the uncertainty caused by our jury system is inherent to our legal system and has developed as the best possible means of providing justice for all. Yet, succeeding generations may reduce this uncertainty by substituting brain-washing, truth drugs and lie detectors.

The advocate of the doctrine of certainty readily concedes the "unknowability" of facts, but condemns the instant case as causing unpredictability in the "unknowability" of the "rules." He argues that *lex loci delicti* had its greatest value in its predictability. It is an *obvious* rule, easily understood and easily applied. In its place the court has adopted an "interest analysis" approach rather than a rule.

Part of the uncertainty caused by the new rule stems from the imperfections of language — the chief tool of the lawyer's trade. Semanticists have long been concerned with the ambiguities of language, and the semantic technique is of great value in the solution of some judicial problems.<sup>25</sup> The problem of uncertainty must be viewed in the realization of the law's

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22. SMITH, JURISPRUDENCE 21 (1909), as cited in *Id.* at 23.

23. BLACKSTONE, LEGAL COMMENTARIES (Sharwoods ed. 1900).

24. FRANK, LAW AND THE MODERN MIND (1930).

25. See Williams, *Language and the Law*, 61 L.Q. REV. 71, 179, 293, 384 (1945); 62 L.Q. REV. 387 (1946).

dependence on the use of words indicating qualities of continuing variation. For example, negligence is defined as conduct which falls short of the standard of the *reasonable* man. The conduct required of an actor is that of an "ideal" individual under the same circumstances. Thus the whole theory of negligence presupposes a uniform standard of behavior of a uniform man. Yet, as Dean Prosser states, "the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court."<sup>26</sup>

Negligence is not the only field in which basic concepts are uncertain. Even an area as basic to our system as constitutional law is fraught with uncertainties. In recent decisions the Supreme Court has aptly shown the variability of *due process*,<sup>27</sup> *fair play and substantial justice*<sup>28</sup> and the concept of *equal protection*.<sup>29</sup> In criminal law the act committed must be sufficiently *proximate* to constitute an attempt to commit a criminal act.<sup>30</sup> As can be seen from the aforementioned examples, our body of law is constructed of many legal "uncertainties." Yet we still have not been faced with the absolute chaos that those who oppose the institution of this new rule warn us is inevitable.

There can be no doubt that this new rule will create new problems. Every judicial reform necessitates the passage of time to establish precedent. It might be useful here, however, to raise a few of the problems that will inevitably arise under this new theory. From such analysis of the new rule, working guidelines, equivalent in certainty of application to *lex loci delicti*, will arise.

All of the critics of the new rule have assumed that *lex loci delicti* has been abandoned, but is this really true? At first blush, the answer must be yes. But after a careful analysis and projection of the problems in this area, the conclusion can be drawn that the courts, having realized the rigid restrictions of this antiquated rule, are merely attempting to add some flexibility to it. Considering the new rule from this point of view, we may better approach the problems that can arise in different but possible factual situations.

In a great many situations it will be obvious that one jurisdiction will have had the most significant contacts with the litigants. Before proceeding

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26. PROSSER, TORTS 153, § 32 (3rd ed. 1964).

27. Compare, for example, the interpretations of what is due process in *Wolf v. Colorado*, 338 U.S. 25 (1949), with *Mapp v. Ohio*, 367 U.S. 643 (1961).

28. Compare, for example, the language in *Pennoyer v. Neff*, 95 U.S. 714 (1878), with that in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

29. Compare, for example, *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Educ.*, 347 U.S. 483 (1954); and *Colegrove v. Green*, 328 U.S. 549 with *Baker v. Carr*, 369 U.S. 186 (1962).

30. PERKINS, CRIMINAL LAW § 9(c) (1957). Professor Perkins suggests that, perhaps, "conceivably a different set of tests of proximate cause might be established for each particular crime." *Id.* at 604.

further, it might well serve to pause and consider a defect within the language of the rule itself. The rule states that the law of the jurisdiction with the most "significant contacts" should apply. Does this mean the jurisdiction possessing most of the significant contacts, or the jurisdiction possessing those contacts which are most significant? If the latter, then there must necessarily be some hierarchy of importance of these contacts. However, it would appear from the opinions that the former is closer to the intention of the courts. This so-called "interest analysis" can be very easy, *i.e.*, where all the contacts are with one jurisdiction except for the happening of the tort. This is the case in *Griffith*.

The application of the new rule to factual situations similar to *Griffith* does not cause the uncertainty that some commentators fear. Where the only contact with the *lex loci* state is the place of harm, as in *Griffith*, it then becomes the task of the advocate to present evidence showing which state has the most "significant contact." In most cases this state will be the forum state.

Perhaps this would be a good place to consider some of the hypotheticals that will present serious problems to the court. A great deal of the litigation in this area involves motor vehicle accidents and though we cannot present all of the complex situations that may arise, the following are representative of common situations involving accidents:

- I. Plaintiff, a resident of State A, collides with an automobile driven by defendant, a resident of State B, in State C. This is the extreme situation with all three jurisdictions having seemingly equal "significant contact" with the action. (It must be noted that plaintiff will never bring his action in any state that prohibits his action if another forum is available. He will also choose the jurisdiction which possesses no limit on his action or wherein the law is most favorable to his side.) Consideration of existing limitations seems to have borne considerable weight in previous decisions. In this hypothetical it would seem that whichever jurisdiction the plaintiff chose to bring his action in could show enough "significant contact" to justify applying its law. A would claim it has a duty to protect the interests of its residents besides being plaintiff's chosen forum. B would claim that plaintiff had voluntarily chose its jurisdiction and that it had an interest in regulating the conduct of its residents. C would claim that it had an interest in regulating its highways and also that plaintiff had chosen its forum. Thus, where three states possess equally "significant contacts", the plaintiff's choice of forum will determine whose law will apply. In many cases this choice will make little difference since the laws of A, B, and C are similar.
- II. However, what if C prohibited the action, B allowed the action but limited the recovery, and A allowed both the action and complete recovery. Plaintiff naturally will attempt to bring the action in A. Thus the new rule appears to be leading to an application of the law of the forum where the "significant contacts" appear. Obviously, the plaintiff will attempt to obtain jurisdiction in the forum most favorable to his interest.



- III. If both plaintiff and defendant reside in State A and the accident is in State B, State A's interest in having its rules apply becomes more evident since it has the right to regulate the conduct of its residents and since no interest of State B other than its traffic laws has been involved.<sup>31</sup> This hypothetical appears to be easier than the factual situation in *Griffith*. However, what if state A limits recovery while state B does not? Plaintiff will attempt to bring the action in B; if he obtains jurisdiction, will B apply the limitations of A? It would appear that A's law should apply, although B's application of this rule is doubtful. No case has arisen where the forum-state is the *lex loci* state, and yet, all of the remaining "significant contacts" are with another state. Forum plus *lex loci* coupled with a hardship to the plaintiff by another state may be sufficient for B to apply its law rather than A's law.
- IV. Another difficult problem arises where the parties live in different jurisdictions and the accident occurs in the resident jurisdiction of one of them. In most instances, if there are no existing restrictions, the state possessing the dual contacts should have its law apply. However, once a limitation is present, plaintiff will seek the jurisdiction possessing no limit. If it is his state that has both jurisdiction and dual contacts, he will probably be held to that limitation. However, if defendant's jurisdiction has the limitation, plaintiff's forum will probably refuse to apply the restriction even though defendant's jurisdiction had the dual contacts.
- V. Assume the factual situation of hypothetical I, however adding a passenger in the plaintiff's car who is a resident of state D. This original plaintiff has brought an action in A which has applied its own rule, deciding A has the most "significant contacts." The passenger now brings an action against the same defendant in D. Is D bound by the finding of "significant contacts" by A? It would seem not, since the basis for deciding the choice of law rests on the relationship between the *particular* parties to the action.
- VI. Assume the factual situation of V, however the passenger brings the first action against both drivers of the two automobiles as joint tortfeasors. The driver of the first vehicle crossclaims against the second driver. Will state D look to the "significant contacts" of the relationship between the first driver and the second driver, or will D apply the choice of law between the passenger and the joint tortfeasors to the cross claim? It would appear that one choice of law should govern the entire action since the first driver has chosen D's forum to cross-claim against the second driver. However, should the rule that one choice of law should govern the entire action apply even where third party defendants have been joined in the action?

There can be no general rule evolved from our hypotheticals. They serve only to illustrate the rules which will be evolved. At the present

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31. See *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953). The court faced with this situation avoided the direct issue by characterizing the action as a matter of administration of decedent's estates, which is governed by the law of the forum. For a comment on this decision by the writer of the opinion see Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).