

9 HAVE LAWSUIT, WILL TRAVEL

Where am I, or what? . . . Whose favor shall I court, and whose anger must I dread? . . . I am confounded with all these questions, and begin to fancy myself in the most deplorable condition imaginable, environ'd with the deepest darkness.

—DAVID HUME. *Treatise of Human Nature*

For many years Massachusetts law protected doctors and hospitals from lawsuits in cases arising from less than gross negligence. The state kept these laws on its books long after many other states had done away with theirs. One result was that as of roughly the end of the 1960s Massachusetts surgeons were paying only one sixth as much for liability insurance as their more lawsuit-exposed colleagues in New York.

The invisible-fist theory would lead you to expect that by "underdetering" ordinary negligence the Bay State would have attracted an especially bumbling and incompetent medical profession. Somehow that didn't happen. Boston's hospitals won world renown for state-of-the-art medical practice. Patients flocked there from all over the country.

But even good doctors lose patients. That happened in 1969 to Dr. Kenneth Warren, the nationally recognized chief of surgery at the New England Baptist Hospital. Before long Dr. Warren found he was being sued in New York; the patient was from that state, and the lawyers for his family had invoked the innovative long-arm doctrine by which New York courts could pull in complete outsiders whose liability insurance companies did business in the state. The suit also named the hospital as a defendant. It asked for \$1,250,000, a very high figure in those days.

There was one obvious problem. Massachusetts law limited damage awards in cases of this sort to a fraction of that figure, and also required that such awards "be assessed with reference to the degree of . . . culpability," further reducing what the doctor might be made to pay. And the state's "charitable immunity" law exempted the philanthropic Baptist hospital from being sued at all for ordinary negligence.

No problem, said the court. Just because the whole episode from start to finish had taken place in Massachusetts was no reason to apply the liability limits of that state's law. New York and its courts strongly disapproved of such limits, and as the home of the patient and his family would apply its law rather than the "anachronistic" alternative on the books in its sister state. And so Dr. Warren and his hospital could both be sued for as much as if the surgery had taken place in midtown Manhattan. The ruling was upheld on appeal.

For centuries, judges have spent a fair bit of time applying in their courtrooms the laws of other states and even other countries. This is not as strange as it may sound. If you sell someone a car in Tennessee and his lawyers catch up with you in Alabama after it breaks down the next week, neither of you should have to worry about what Alabama law says about car sales. Whether you owe him anything should depend on the law of Tennessee,

where you made the deal. And that is the law Alabama's (or for that matter Zambia's) courts are supposed to apply when they hear his case.

That the first court is out of sympathy with the second's law need make no difference. When Dalip Singh Bir came to this country from India he left behind two wives, both lawfully married to him in the Punjab. He never did go back and died in 1945 an old man, having reached not just one but a pair of golden anniversaries. Should California recognize both wives for purposes of distributing his estate?

A court decided that it would. Of course, it did not suddenly decree the legalization of bigamy in California. In fact, the state might not have deferred to Indian customs so far as to let Singh Bir cohabit with both women on its soil had they come over to join him. But on the less scandalous issue of succession rights, what India had joined California would not put asunder.

Most legal authorities agree that the California court did the right thing. So far as is practical the law should judge people's actions by the rule they acted under at the time, which in this case was "the law and manner of the Jat community," where bigamous marriages "are lawful and valid." Paradoxical as it may sound, judges can often advance the rule of law by applying someone else's law instead of their own—even when the foreign law strikes them personally as bizarre or mistaken.

Over the centuries an enormous and sophisticated branch of legal thinking, variously called choice of law or conflict of laws, grew up to help courts settle on a single standard to judge people's actions. Notice that the question of choice of law—which law can a court apply to your actions or situation?—is quite distinct from the question of jurisdiction—which court can force you to stand trial? As we shall see, however, courts that get rambunctious about grabbing power on the one front do not usually remain shy or retiring on the other.

When conflicts law breaks down and states end up applying different rules to the same affair, the results for the individuals on the scene can be thoroughly disastrous. A New York court calls into question whether it will recognize an old Rhode Island marriage, and six children are suddenly menaced with illegitimacy. Illinois decides it cannot tolerate Kentucky's law permitting cousins to marry, and a widow is done out of her husband's death benefits. North Carolina disagrees with Nevada on the proper terms of divorce and vents its opinion by prosecuting a remarried spouse for bigamy.

The widely reported case of Baby Lenore arose when a New York mother gave her newborn daughter up for adoption and then changed her mind five days later. New York law apparently supported her position, but on advice of counsel the adopting couple moved to Florida, which takes a different view. The woman pursued them. After years of expense and disruption of lives the U.S. Supreme Court in 1972 finally refused to review a ruling that Florida was free to apply its own law instead of New York's, allowing Baby Lenore to stay with her adoptive parents.

Interstate divorces are a perennial chamber of horrors in this branch of the law. When husband and wife live apart, each can usually get his home state to assert its own law over the relationship and any children or property on hand. The race can thus be to get the objects of dispute, human or otherwise, into the favorable state. Mom might be sure of winning custody in West Virginia where the family had made its home, but if Dad could get the kids into Ohio he could open the fray under a much more favorable legal standard. The problem of interstate child-snatching got so completely out of hand that it had to be

made the subject of federal law. But similar games are still played over property. High-earning husbands from pro-homemaker states stow assets away on the sly in pro-breadwinner states, in preparation for a break.

Family breakup aside, fortunately, these tales of woe have been the exception and not the rule. With their customary dread of indeterminacy, the older courts and legal scholars saw certainty of result as more important than getting their own way. The old law was thus fond of simple, sweeping rules intended to provide instant preresolutions of potential conflicts of law. A marriage (the general rule arose) was valid everywhere if it was valid where performed. A will would stand up if it conformed to the law of the place where the signer regularly lived. A question of real estate would be handled under the law of the site of the land. The internal affairs of an association could be contested only under the laws of its state of chartering, no matter where it happened to hold its convention this year.

Ideally, these rules were supposed to allocate each event of life automatically to its proper law slot. The more mechanical the process, the less chance lawyers would have to shop around for favorable laws and perhaps play on judges' natural inclination toward their own citizens and laws. Courts were supposed to make the choice of law without peeking in the envelope, so to speak, to see whether it was their law or someone else's, let alone whether they liked the results. "It would be as unjust to apply a different law as it would be to determine the rights of the parties by a different transaction," wrote Joseph Story, the Supreme Court justice who was long the chief American authority in the field.

The rules of choice of law, like those of jurisdiction, were sometimes thought to follow from abstract ideas about sovereignty. Just as Tennessee could not tread on Alabama's majesty by sending its sheriffs to arrest persons in Alabama, so Alabama could not insult Tennessee by applying its own law to transactions that arose on the soil of, or in some other way belonged to, its sister state. Some dealings might not obviously belong more to one state than the other, as when a Tennessean and an Alabaman strike a deal over the telephone, or the blasting from an Alabama quarry keeps neighbors awake across the state line. But if the two states are to live in peace, or "comity," they should find a way for one to defer to the other's law, rather than risk having both try to grab the wheel at the same time.

For the ordinary citizen, once again, the frigid formalities had some surprisingly favorable implications for individual liberty. The rules of choice of law, like those of jurisdiction, promised to shield the citizen from the wrath of any more than one sovereign on a given matter. The benefits were shrewdly practical as well. If you were arranging a home sale or corporate merger or child's adoption across state lines, you could hope to fit your actions into one set of consistent laws, not two or more potentially contradictory sets.

The right not to be sued civilly under the law of an inappropriate state was understood to be an important part of that right to due process of law guaranteed by the U.S. Constitution. Down through the 1930s the U.S. Supreme Court upheld those rights, as it did the parallel right to be free of the jurisdiction of an inappropriate state.

It's not as if courts owe absolute deference to all foreign law: they wouldn't enforce the order of a cannibal kingdom that its recalcitrant subjects come back to be eaten. Once in a blue moon local "policy" would be invoked in this way as a reason for a court not to take positive steps to enforce a sister state's law on a sensitive matter such as the

enforcement of gambling debts run up in a place where gambling was lawful. But "policy" was hardly ever used as a ground for asserting *affirmative* judicial power: it was too obvious that that way lay chaos. For the most part states showed an amiable modesty about pushing their own policies to the point of collision with those of other states.

This of course did not mean that cases always came out the same way no matter which court they were taken to. Lawyers could still shop around for favorable procedural rules, jury climates, and legal cultures, as we saw in Chapter 4. And they could exploit, or try to exploit, the occasional overlaps between the sweepingly worded choice-of-law maxims. A lawsuit over a property sale might try to invoke whichever was more favorable of the rules for sales (place of signature) or real estate matters (place of the land). Injury suits against product manufacturers might be couched as matters of negligence (place of the wrongful act) or breach of an implied promise of safety (place of sale).

For a while courts and scholars seemed to be making progress toward developing finer sub-rules to handle the borderline cases. But as the long-arm revolution combined with the decay of formalism in the 1950s and 1960s, pressure began building for changes in quite a different direction. Lawyers could now shop around for forums as never before, but it was far harder for them to shop around for laws. And what stood in their way? An artificial system of formal rules.

The initial pressure for change came in one-car auto accident cases where allegedly negligent drivers were sued by their own injured passengers, who often were their own family members. The various states and Canadian provinces followed very different rules on these cases. Many essentially shut such claims out of the legal system. They were afraid of both sincere suits, which might poison relationships between intimates, and insincere suits, where the claimed negligence or even the fact of the accident or injury were essentially means of getting at an insurance policy with the connivance of the nominal defendant ("Yes, your Honor, I sure was negligent. No doubt about that. No sirree.") These states barred lawsuits between husband and wife, parent and child, and by a sort of analogy guest-passenger and host-driver. The argument was that people should provide against these accident risks by buying direct health and disability insurance, which is vastly more efficient than liability insurance, since it pays off without lawsuits.

Other states took a diametrically opposed view of these suits. They were less fearful of fraud or acrimony, and they saw guest-versus-driver lawsuits as a way of getting money to crash victims who as a practical matter had very often not bothered to stock up on direct insurance. So they not only allowed such lawsuits but virtually welcomed them. Between these extreme positions were states that tried to split the difference by putting a dollar ceiling on the amount that could be recovered in guest cases or requiring proof of gross rather than simple negligence.

The geographical differences created a problem for residents of the high-liability states. They were paying the higher insurance rates that inevitably went along with more lawsuit exposure, the hope being that the added rights to sue now available to their friends and family would be worth it. Yet having given up the quid, they were not entirely sure of getting the quo: their guests might be out of luck if hurt in a crash while the family was driving out of state. Wouldn't it be nice if the law on these suits, in line with the typical terms of auto insurance itself, tracked the place a car was normally used

rather than the place it happened to crash? Thus ran the line of academic speculation when Georgia Babcock's case came along.

One autumn Friday in 1960 the Jackson family of Rochester, New York set off for a weekend trip to Canada with their friend Georgia Babcock. They had crossed into the province of Ontario when William Jackson, at the wheel, apparently lost control of the car and went off the highway into a stone wall. Georgia was hurt and sued William in a New York court, which was no problem under old rules of jurisdiction or new since that was where he lived.

No one denied that under the age-old principle of *lex loci delictus* (the law of the place of wrong governs injury lawsuits), Ontario law was to govern the case on such matters as whether William had followed proper rules of the road. But did New York have to recognize and apply Ontario's law against guest lawsuits? The state's highest court announced in the landmark 1963 case of *Babcock v. Jackson* that it would not. It observed that New York had by far the most significant "grouping of contacts" with the dispute: it was where the car was registered, where both parties lived, and where their outing was to begin and end. Yes, the actual crash happened to have taken place in another country. But that was in the nature of a technicality.

The 1963 *Babcock* decision was widely hailed as epoch-making, and other states soon climbed on board with similar rulings. Of course the moment word got out that New York was offering to apply its law to out-of-state accidents, lawyers for plaintiffs from points north and south, east and west began lining up to ask for it. They plausibly declared that their crashes in Michigan, Colorado, and elsewhere had a very compelling grouping of New York contacts: the car was from New York, or the driver, or the guest, or maybe the trip was to begin or end there. The feeling was that a single such contact might not do, but two or three made a promising case.

Forward as along a darkened corridor the New York judges groped their way. First they said they would apply their law only if a guest and driver both from New York had actually struck up their acquaintance in the Empire State, the apparent idea being that a friendship formed in New York, like a marriage, was a distinctive legal entity that persisted whithersoever the principals might wander. Before long, however, they had agreed to apply their law even when the two had met elsewhere. The next step, which arrived in 1970, was for a court to apply New York law where only the driver was from New York, and guest, car, starting point, accident, and destination were all from other states. For a moment the idea seemed to be that New York legal obligations to guests should follow the state's motorists wherever they might drive, around the globe. Then the New York high court retreated from that notion in a 1972 case, though Rhode Island picked it up the next year.

Meanwhile confusion was developing in the cases with the reverse pattern, where a crash happened to take place in New York but its most significant contacts plainly lay elsewhere. Logically you would have expected New York to start applying other states' or countries' law in these cases. Three years after Georgia Babcock's case, its exact mirror image came up. Albert Henderson and Stephanie Kell of Ontario set off in a car registered in that province on a short pleasure trip to New York. Albert drove off the highway and into a bridge, and Stephanie sued him in New York. Would the New York

courts apply the Ontario guest statute against her? No chance, a state appeals court announced; *Babcock* had brought New York law to Ontario accidents, but no one had said anything about doing the reverse.

By now the explorers found themselves entirely in the dark; the last flicker of intellectual coherence had given out. It was quite clear that within some band of cases where the courts thought they could get away with it, they would simply give the plaintiff the more favorable law. (At least one bar review course in the early 1980s taught students to *learn* the New York rule that way but never ever dare *state* it that way on the essay question.) But no one could predict what the state's courts thought they could get away with, and the line kept shifting from year to year. "A New York lawyer with a guest statute case," wrote one leading commentator, "has more need of a ouija board . . . than a copy of Shepard's Citations."

Many theorists in the law schools volunteered to guide the *séance*. And just as the apparitions conjured up by canny mediums tend to voice sentiments their listeners are eager to hear, so the theories of new-wave conflicts writers tended to give courts an excuse to apply their own favorite laws. The most popular theory was called "interest analysis," and centered on the idea that states with laws discouraging litigation did not always have a strong interest in enforcing those laws. A typical technique was to observe that the sister state did not have a really intense commitment to its law; perhaps it had recently shown the feebleness of its attachment by cutting back the scope of its rule, or nearly but not quite passing a bill to repeal it. Thus Rhode Island could assert with confidence that Massachusetts "does not appear to have a strong interest in having its [liability limit] applied even in its own state."

"Interest analysis" offered a powerful way to exorcise not only guest statutes but also a wide range of other unwanted curbs in litigation. And in fact the loudest table-rappings now began to be heard in two-car crashes between strangers, as distinct from one-car crashes among friends. In one landmark case, an Oregon resident had collided with a local car while driving in the state of Washington. The injured Washingtonian sued him back in Oregon, which had a stricter liability law. The Oregon court agreed to apply its law to the Washington accident. It explained that Oregon had an interest in disciplining its errant citizens wherever they might roam. Washington for its part had no real interest in having its milder law applied to help an outsider when the result would just be to keep one of its own citizens from collecting heaps of money. Both states really shared an interest in applying Oregon's law, so Oregon's law it would be.

Observe what was going on here. As the focus of litigation shifted from one-car to two-car crashes, it could no longer be argued that the people filing the suits had in any way expected to come under the more remunerative law of the other state; its application was a pure delicious windfall. And to reach this result the Oregon court had to ascribe to its neighboring state of Washington a grab-what-you-can, look-out-for-number-one philosophy of always wanting its own plaintiff-citizens to win and win big in their disputes with citizens of other states. It had to ignore any possible interest Washington might have in discouraging litigation; in making legal jeopardy more regular and predictable: or in attributing responsibility correctly even when (or especially when) the result was to attribute responsibility to one of its own citizens.

The interest-analysis theory became immensely popular. It helped accustom states to the heady idea of applying their law in cases that to all appearances had squarely arisen in

other states or countries. And about half the time, when a defendant's home law would impose stricter liability than a plaintiff's, it virtually guaranteed that plaintiffs who would have lost under earlier rules would breeze away with the law they wanted, with no need for further inquiry.

But what about the other half of the cases, where the defendant had acted in his own state under a law that exonerated him or limited his liability? What if the defendant's state had recently reaffirmed its antiligation policy in unmistakable terms, or even strengthened its provisions? Here, the law school theorists explained, the clash of sovereignties was real, and the interests of one state or the other would have to yield. But not to worry: the tie had to be broken somehow, and more than one influential scholar argued that the way to break it was simply for each court to go ahead and pick its own law. After all, its own law was the law with whose application it was most familiar and adept; besides, it owed a sort of loyalty to its own law, simply because it was its own. If the court wanted another reason, it could declare (as the judge did in Dr. Warren's malpractice suit) that its own rule was objectively "better" in content, as presumably the other state would some day come to see. The whole process called to mind the way Gilbert and Sullivan's Lord Chancellor persuaded himself to grant his own suit for the hand of the ward-of-the-court heroine:

At first I wouldn't hear of it—it was out of the question. But I took heart. I pointed out to myself that I was no stranger to myself; that, in point of fact, I had been personally acquainted with myself for some years. This had its effect. I admitted that I had watched my professional advancement with considerable interest, and I handsomely added that I yielded to no one in admiration for my private and professional virtues. Conceive my joy when I distinctly perceived a tear glistening in my own eye! Eventually, after a severe struggle with myself, I reluctantly—most reluctantly—consented.

And so began a second War Between the States, in which states began casually to denounce each other's laws as unjust and wrongheaded, and seize on excuses not to enforce them. New York said it had every intention of "protecting its own residents" against "unfair or anachronistic" laws that they might encounter in their travels elsewhere in the United States. Kentucky announced that it would stamp its law onto each and every traffic accident on its own roads, and also onto out-of-state accidents where "there are significant contacts— not necessarily the most significant contacts"—with Kentuckians. All thoughts of symmetry, let alone displays of Alphonse-and-Gaston deference, were forgotten. Some courts began to count, for purposes of getting to apply their own law, contacts that arose by happy coincidence *after* the event being litigated, such as a plaintiff's move into their territory.

It was boasted in the palmy days of the British Empire that an Englishman's rights clung to him wherever he might venture around the world. A similar privilege now seemed to attend plaintiffs from the states with the most aggressive court systems. The same year that New York law was accompanying Dr. Warren's patient onto his Boston operating table, it was clinging, aura-like, to an unfortunate New York resident who was struck and killed by a local car while on a visit to the state of Missouri. His survivors got a New York court to take jurisdiction over the local Missouri driver under its

insurance policy ploy, and then apply New York law to dispose of Missouri's limit on court awards. Another court used Illinois law to knock out the liability limits of the country of Mozambique in a case where American tourist Rosemary Pancotto had been struck by an attendant's swamp buggy while on safari in the African bush. By the end of the 1970s legal commentators were inching their way toward a general theory that would allow every court, once it found enough contacts with its territory to take jurisdiction over a case, to trump all opposing laws with its own. Choice of law would disappear as an independent subject and an independent barrier to the ambitions of litigators; it would be exactly as easy to shop for laws as for forums.

A whole mall's-worth of shopping choices now loomed before some kinds of plaintiffs' lawyers. Lawyers sue airline companies after midair mishaps in the state of the airline's offices or maintenance facilities, the ticket sale or takeoff or crash, the passenger's residence. After one helicopter crash, a court noted the involvement in the case of Alabama where the craft went down, California where it was designed, Virginia where it was manufactured, New York and Delaware where the manufacturers were headquartered, and Iowa and Texas where the crash victims had lived. Prescription-drug makers get sued over alleged side effects in states where the pills were manufactured or prescribed or dispensed or consumed, where the effects showed themselves, or where the drug company has its headquarters or research labs. So long as each state can apply its own law, plaintiffs can win by finding even one bullet among the six or ten chambers.

Defendants are peculiarly at risk in cases where an alleged libel or slander has been circulated nationally. A court agreed in 1986, for example, that California law could properly be applied to a New York press conference that had allegedly defamed a California complainant. In fact, it appears on current precedent that a libel plaintiff can pick among any of the fifty states' laws; no less than the U.S. Supreme Court has endorsed the idea that a plaintiff's reputation within each individual state is a distinct subject of suit that can be the proper concern of that state's government, whether or not either side of the dispute happens to live there.

Once again, formalism had fallen and guesswork reigned. The potential defendant could indeed hardly guess, as he went about his daily routine, whose laws he might be accused of violating. To drive down a Missouri road, or tend to a round of Boston hospital patients, or lead an assortment of American tourists on a safari through the African bush, was to wade through a thicket of amorphous legal obligation, exposed to one unfamiliar code of law and then another as to a succession of viruses; apt at any instant to be abducted to some distant state and made to undergo its hostile law. Having first lost their right to entrust their fate to the courts they hung out around, defendants had now lost their right to entrust their fate to the laws they hung out around. As Professor Aaron Twerski of Brooklyn Law School has observed, the courts had managed to induce by artificial means the confused sense of multiple realities that the malignity of Nature inflicts on schizophrenics. "The essence of a normal human existence is the ability to integrate one's experience," Twerski has written. "Delaware drivers driving in Delaware deserve Delaware law—for better or for worse."

Some commentators explained reassuringly that the clash and overlap of laws were all for the best: defendants were merely being obliged to seek out and obey the highest standards of conduct—and who could object to keeping up high standards? Trouble is,

the zenith of one person's responsibility always coincides with the nadir of someone else's. If South Carolina law cuts off "crashworthiness" lawsuits by drunk drivers against the makers of their automobiles, but the Charleston drunk can get Michigan law applied instead, you might as easily say a standard of conduct has been lowered as raised. In the many cases where both sides can sue, who will be held to the most demanding standard and who will get off with the least demanding will depend merely on who wins the race to the courthouse.

Where was the U.S. Supreme Court during all this? Mostly hoping the problem would go away, it would seem. In the years after 1936 it declined to provide any real content to the constitutional due process protection to which it had long acknowledged defendants to be entitled. Its major recent pronouncement, in a 1981 case, offered another count-the-contacts test for permissible choice of law that was as hopelessly vague as its *International Shoe* rule on jurisdiction. The Court noted without apparent discomfort that the same set of facts could justify the application of more than one state's law. The one welcome exception to this drift came in 1985 when the Court kept Kansas from applying its own pro-plaintiff law to a nationwide class action mostly arising out of transactions in other states.

Plaintiffs' lawyers now faced a new dilemma born of their own good fortune. They were enjoying unprecedented success in getting courts to apply their own pro-plaintiff law, in defiance of long-accepted principles as to which law it was proper to apply. But to get that favorable law the lawyers frequently had to travel to some other state; and that meant giving up the long-fought-for advantages, in travel cost and local sympathy, of being able to sue in their own home court. Wasn't there some way of combining the two advantages, of suing at home but getting the court to apply the other state's stricter law?

This required some delicate maneuvers. Up to now appeals to local chauvinism had worked well for plaintiffs' lawyers, simply because the more courts applied their own laws the wider the shopping choices for them would be. Now they needed a way to convince a home court *not* to select its own law when that would be unwelcome. Sometimes the answer was to reverse field and resuscitate some traditional rule that pointed toward invoking the other state's law. But sometimes the old rules instructed the home court to apply its own (inconvenient) law.

Before long a few of the more creative judges were being prevailed on to help local plaintiffs by picking the pro-plaintiff law of some *other* state over their own legislature's duly enacted statute on the subject, simply on the grounds that it was "better." And some legal scholars were happy to cheer on this approach too. They explained that courts should resolve conflicts in line with the "underlying policy" in a field of law—getting money to plaintiffs in accident cases was said to be one of these underlying policies—even when their own state's legislators had been benighted enough not to join the trend.

A 1972 *California Law Review* article on product liability, declaring that "'neutrality' is nothing but a euphemism for arbitrariness," unveiled the ultimate answer: "the law most favorable to the plaintiff ought to be applied." R. J. Weintraub's standard 1980 commentary on the conflict of laws seems to agree: if it would be "reasonable" to apply any of several states' injury laws in a case, none being "anachronistic" or "aberrational," Weintraub says the answer is to "apply the law that will favor the plaintiff."

Similar principles, if that is the right word for them, have been adapted to commercial disputes, "invasion of privacy" suits over bad job references, and more. Not everyone feels comfortable stating the rule as one of explicit favoritism for the plaintiff's side, but nothing else can explain what has happened across wide areas of the law in many courts.

And so, for at least some courts and commentators, conflicts law had become what for centuries it had been hoped legal process would not become: a way of manipulating rules to make cases come out however the authorities wanted. The law's policy was one of helping plaintiffs win (which sounds much nicer than making defendants lose), and it would select from the shelf whichever rule was needed for that to happen.

Most judges recoiled from that extreme, and some stoutly resisted the academic fads. But in the long run, short of intervention by the Supreme Court or Congress, this was a race only one side could win. States that favored a right to sue could export that right quite effectively; those that preferred a right not to be sued could only watch the action from the sidelines. If California threw its doors open to a new kind of suit by gardeners against seed companies, it would hear the grievances of both Wisconsin gardeners against California seed companies and California gardeners against Wisconsin seed companies, and Wisconsin could do nothing in either case. In effect it was a scheme of nullification, in which the laws of states that wished to discourage litigation could be denied effect aside from the smallish class of transactions where no link to one of the pro-litigation states could conceivably be argued even after the fact.

The collapse of the intellectual integrity of this obscure branch of the law made few headlines, but it signaled some trends of wide-ranging significance. For starters, the idea that courts should manipulate rules to pursue a "policy" of helping plaintiffs win is obviously applicable to countless other areas of legal procedure and interpretation. It has in fact been applied to countless other areas, whether openly or covertly, too often confirming defendants' suspicion that the system is stacked against them.

The acceptance of outright multiplicity and contradiction among legal standards also marked a new stage in the ongoing decline of formalism. The trouble with vagueness and guesswork in legal rules is that they bring with them a submerged, latent multiplicity based on the courts' inability to come up with consistent answers from given facts. Now the proliferation of clashing obligations was to be accepted openly. Not surprisingly, the law has steadily moved away from its once-intense aversion to "squeeze plays" that impose possible liability on someone either for taking an act or for not taking it. An employer now faces a lawsuit from victims if it lets a suspected-but-not-proven drug abuser stay in a safety-related position, and a lawsuit from the worker if it does not. A clinic counselor fears an invasion-of-privacy lawsuit if he warns a client's wife that her husband is infected with the AIDS virus, and a failure-to-warn lawsuit if he does not. Athletic doctors have been sued alike for ordering their patients not to take part in big games (interference with contractual opportunity) and for letting them play in cases where they then collapse on the playing field.

The ultimate effects of the choice-of-law revolution were felt again in the political dynamics of the state courts. Once opportunities multiplied to hand out local law to local complainants in long-distance controversies, expanding liability became more than ever a way for states to siphon money mostly to their own citizens mostly from people in other states, leaving the other states scrambling to keep up or lose out. The game is one of

beggar-thy-neighbor, rather like the development of local prosperity by dumping smokestack emissions on the residents of distant states. States have responded by making their laws more and more favorable to plaintiffs and their lawyers over the past three decades, a trend that has not really reversed itself despite modest recent efforts at liability reform.

And *that* has the most momentous implications even for lawsuits that never cross a state line. Vast tracts of the litigation landscape have by now been blighted by suits against distant moneyed defendants, and the lay of the land remains much the same even if the defendant happens to be local and of limited means. If you're in charge of a local park or swimming pool where a child hurts himself, the legal issues that will determine whether you must pay—issues like adequacy of warning, the definition of defectiveness, and the assignment of the burden of proof—will have emerged from years of lawsuits aimed at Fortune 500 corporations. If you are a motel owner sued for negligent security after a customer's room is burglarized, you will encounter laws of innkeeper's liability crafted in large part to raid the distant treasuries of Hyatt, Ramada, and Holiday Inns. If you are paying the bill to defend your own suit, you will encounter levels of expense and complication designed on the assumption that an out-of-state insurance company is around to pay. For neither the first time nor the last, rules designed to hit Wall Street have hit Main Street on the ricochet.

CHAPTER 9

Dr. Warren case: Rosenthal v. Warren, 475 F.2d 438 (2nd Cir. 1973), 374 F.Supp. 522 (1974), 342 F.Supp. 246 (S.D.N.Y. 1972).

The law and manner of the Jat community: In re Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Ct. App. 1948).

Old Rhode Island marriage: In re May's Estate, 114 N.E.2d 4 (N.Y. 1953) (marriage of uncle and half-niece). *Bigamy prosecution*: Williams v. North Carolina, 317 U.S. 287.

Baby Lenore: Cases reported at 254 So.2d 813 (Fla. Dist. Ct. App. 1971), *cert. denied*, 409 U.S. 1011 (1972); see also 269 N.E.2d 787, 321 N.Y.S.2d 65 (N.Y. 1971).

Joseph Story quote: *Conflict of Laws* (8th ed., 1883), p. 38.

Babcock v. Jackson case: 191 N.E.2d 279 (N.Y. 1963).

Met in New York: Dym v. Gordon, 209 N.E.2d 792 (N.Y. 1965).

Met elsewhere: Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969).

Only driver from N.Y.: Hepp v. Ireland, U.S. Dist. Ct., S.D.N.Y. (66 Civ. 2128, Frankel, J., 1970, unreported) (federal court applying New York law). See Willis L. M. Reese and Maurice Rosenberg, *Conflict of Laws: Cases and Materials*, 7th ed. (Foundation Press, 1978), p. 494.

New York retreat: Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. Ct. of App. 1972) (Ontario plaintiff and accident, New York driver).

Rhode Island case: Labree v. Major, 306 A.2d 808 (R.I. 1973).

Ouija board: Maurice Rosenberg, "Two Views of Kell v. Henderson," 67 *Columbia Law Review* 459, 465 (1967). Rosenberg put the comment in the mouth of a fictional character.

Massachusetts does not appear to have a strong interest: Labree v. Major, 306 A.2d 808, 816 (R.I. 1973). *Oregon case:* Fisher v. Huck, 624 P.2d 177, 178, 631 P.2d 339 (Ore. 1981).

Lord Chancellor's self-persuasion: W.S. Gilbert, *Iolanthe*, Act II.

Protecting its own residents: Neumeier v. Kuehner, 286 N.E.2d 454, 456 (N.Y. Ct. of App. 1972).

Kentucky case: Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972).

Plaintiff's move into state: Miller v. Miller, 237 N.E.2d 877 (1968); Gore v. Northeast Airlines, 373 F.2d 717 (2d Cir. 1967); Allstate v. Hague, 449 U.S. 302 (1981).

Missouri accident: Tjepkema v. Kenney, 298 N.Y.S.2d 175 (1st Dept. 1969).

Mozambique accident: Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L., 422 F.Supp. 405 (1976).

State applies its libel law although neither party lives in state: Keeton v. Hustler Magazine, Inc., 104 S.Ct. 1473 (1984).

Delaware drivers deserve Delaware law: Aaron Twerski, "Enlightened Territorialism and Professor Cavers—the

Pennsylvania Method," 9 *Duquesne Law Review* 373, 382 (1971). See Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970).

Constitutional due process constraints: Home Insurance Co. v. Dick, 281 U.S. 397 (1930); John Hancock Mutual Life Insurance Co. v. Yates, 299 U.S. 178 (1936).

Count-the-contacts: Allstate v. Hague, 449 U.S. 302 (1981). *Kansas class action:* Phillips Petroleum v. Shutts, 472 U.S. 797 (1985).

Other state's law "better": Lichter v. Fritsch, 252 N.W.2d 360 (Wise. 1977).

Neutrality as euphemism: Gunther Kuehne, "Choice of Law in Products Liability," 60 *California Law Review* 1, 30, 32 (1972).

Apply the law that will favor the plaintiff: Russell J. Weintraub, *Commentary on the Conflict of Laws* (Foundation Press, 1980), p. 346.