"MANNA FOR THE ENTIRE WORLD"* or "THOU SHALT LOVE THY NEIGHBOR AS THYSELF"—COMMENT ON NEUMEIER v. KUEHNER

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I. A BRIEF STATEMENT OF THE LAW-FACT PATTERN DISPLAYED BY THE CASE

A car, owned and driven by a New York resident and registered and insured in New York, collided with a train in Ontario, Canada. Both the New York host-driver and the Ontario guest-passenger were killed in the accident. The Ontario passenger's estate brought a wrongful death action in New York against the New York driver's estate. Under New York law, ordinary negligence on the part of the deceased host-driver would suffice to entitle the guest-passenger's estate to recover damages for wrongful death. Ontario, however, has a guest statute which provides that the owner or driver of a motor vehicle is not liable for damages resulting from injury to, or the death of, a guest-passenger unless he was guilty of gross negligence. This law-fact setting pits an Ontario plaintiff, who is suing in New York on the basis of New York law (the lex fori), against a New York defendant, who seeks to rely on Ontario law (the lex loci delicti) as a defense. Could any of those "learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon," i.e., Conflict of Laws teachers, ever aspire to construct a tort conflicts case better suited for classroom discussion?

II. A SUGGESTED FRAME OF ANALYSIS

As a foreigner among the participants of this symposium, I shall not strive to compete with my distinguished American colleagues in offering subtle analyses and syntheses of New York case law in the Tort Choice of Law field. Instead, I shall endeavor to review the case at hand in terms of a Draft Bill, entitled "Choice of Law in Torts," recently drafted and submitted by me to the Israeli Ministry of

* "Was the New York rule really intended to be manna for the entire world?" Reese, Choice of Law, 71 Colum. L. Rev. 548, 568 (1971).
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Justice which is currently considering the possibility of legislating in the Tort Choice of Law sphere. The Draft Bill, to be utilized hereinafter as a frame of analysis, reads as follows:

**Choice of Law In Torts**

**A Draft Bill**

1. *Prima facie applicability of local law*

   When deciding the rights and liabilities of the parties with respect to a tort committed wholly or partly abroad, a court in Israel shall apply Israeli law.

   Israeli law shall not be displaced by foreign law except as hereinafter provided in this Act.

2. *Displacement of local law by foreign law*

   a. A court entertaining an action in tort as aforesaid shall not displace Israeli law by foreign law unless convinced that, as to the issue or matter at bar, a foreign law has a closer relationship to the facts of the case and to the parties than has Israeli law.

   b. When determining whether, as to the issue or matter at bar, a foreign law has a closer relationship to the facts of the case and to the parties than has Israeli law, the court shall consider chiefly the tenor and purposes of the laws—Israeli and foreign—that are proposed to be applied, as they relate to the facts of the case and to the parties. For that purpose the court shall take into account such factors as:

   (1) the place where the injury occurred;
   (2) the place where the conduct causing the injury occurred; and
   (3) the domicil, residence, nationality, place of incorporation and place of business of the parties.
3. Foreign law referring to another law

If a court decides to apply foreign law as aforesaid, and it finds that such law would refer to the law of any other jurisdiction, the court shall not heed any such reference.

4. Pleading and proof of foreign law

a. A party seeking to displace Israeli law by foreign law as aforesaid, shall bear the onus of proving the tenor of the foreign law and of convincing the court that, as to the issue or matter at bar, the foreign law has a closer relationship to the facts of the case and to the parties than has Israeli law.

b. A plea regarding the displacement of Israeli law by foreign law shall be raised by an interested party in his pleadings, and shall be considered and resolved by the court in a preliminary hearing.

The court may allow a party to raise a plea as aforesaid even at a later stage in the proceedings, and it may also postpone its decision in that matter until a later stage in the proceedings, provided that the rights of the other party or parties are not prejudiced.

c. The tenor and purpose of foreign law shall be proved by means of oral testimony or affidavit given by an expert in that law. The court may prescribe other or additional means of proof, if it deems such means appropriate in the circumstances.

5. Application of local law in matters of procedure and evidence

The court shall always apply Israeli law in matters of procedure and evidence.

6. Foreign law not to be applied

The court shall not apply foreign law which discriminates on grounds of sex, race, religion or ethnic origin or which is repugnant to public policy in Israel.
In the comments which follow I shall focus on the first two clauses of the Draft Bill ("Prima facie applicability of local law" and "Displacement of local law by foreign law"), which are pertinent for the purposes of the present discussion.

III. PRIMA FACIE APPLICABILITY OF THE Lex Fori (NEW YORK LAW)

The Tort Choice of Law process ought to start from the premise that the lex fori applies whenever a local forum is adjudicating a tort committed wholly or partly abroad. The litigants will thus be able to calculate their steps on the assumption that the forum will invoke local tort law, the foreign elements involved notwithstanding.

Resorting to the lex fori has obvious practical advantages, it being conducive to convenience, simplicity, efficiency and economy in the judicial process. Also, local law is ordinarily bound to have a significant connection with the occurrence or the parties, if a local court has jurisdiction to adjudicate the cause. As a matter of principle, moreover, it is the prime responsibility of any forum qua forum to adjudicate the case before it according to its notions of justice and reason under law. Hence it would be unreasonable, if not inappropriate, for a local court lightly to dismiss prevailing community ideas of fairness and reason, as embodied in domestic legal standards, once foreign factors had been detected in the case at bar. To be sure, occasionally the ends of justice can best be served by resort to a foreign rule of decision. But the presumption should always be in favor of the applicability of the lex fori, unless and until a good cause is shown why a given local legal prescription is inapplicable or somehow displaced by a foreign rule.

New York's ordinary negligence rule is grounded, no doubt, in a specific socio-economic interest to secure adequate compensation to wrongfully injured New York residents. Such interest clearly extends to afford protection to New Yorkers "injured in a foreign state, against unfair or anachronistic statutes of that state," as cogently observed by Fuld, Ch. J. in Neumeier v. Kuehner.

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2. When dealing with obligations, [i.e., contracts and torts] our concern is not to search for an objective reality, but to do justice on our own responsibility, according to our own ideas—in other words: by applying our lex fori, though taking into account every circumstance (including foreign law) affecting the expectations . . . of the . . . parties.

A. V. LEVONTIN, CONFLICT OF LAWS WITH REFERENCE TO TRANSNATIONAL CONTRACTS 107 (Proceedings, the Israel Academy of Sciences and Humanities, Jerusalem 1968).

3. For a detailed elaboration of the grounds, ranging from the empirical to the philosophical, supporting the case for a lex fori threshold in Conflicts adjudication, see A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW 49-56 (1970).

time, New York law also reflects a more general interest in providing fair and reasonable compensation to accident victims, as such, in their capacity as human beings, even though they may not be blessed with New York residence. This interest, or rather principle, emanates from community shaped and shared conventions of justice and expediency, from prevailing societal conceptions as to what constitutes fair compensatory practices. As such, this principle of justice expresses a "general truth," in the sense of not being inherently restricted to domestic situations and local beneficiaries only. Hence it is relevant in all locally litigated cases, that is, whenever a New York forum is able and willing to adjudicate the cause.  

In the light of the foregoing, one cannot accept the assertion made by Fuld, Ch. J., that "[New York] has no legitimate interest... in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders." This assertion totally ignores the affirmative interest-and-obligation of a New York court, qua forum, to invoke New York's standards of reasonable care and fair compensation and to decide the case soundly and justly, on its own responsibility and irrespective of how an Ontario court might have decided a similar case. It is no wonder that so limiting a judicial conception has led Fuld, Ch. J. to an avenue of reasoning fraught with the pitfalls of narrow minded parochialism: "ignoring Ontario's policy requiring proof of gross negligence in a case which involves an Ontario-domiciled guest at the expense of a New Yorker does not further the substantive law purposes of New York." If by "the substantive law purposes" Fuld, Ch. J. wishes to refer to the above mentioned strictly utilitarian New York interest to compensate New York accident victims, then, of course, he is absolutely right. But we have already noted that "the substantive law purposes" of New York ought to be given a more comprehensive and enlightened reading.

5. "The operation of the guest statutes of other jurisdictions," writes Bergan, J. in his dissenting opinion, "worked out so... unjustly by New York standards—that in a series of... decisions... this court... applied New York law in New York litigations to motor vehicle torts occurring in other jurisdictions." Later he notes, with apparent approval "the court's preference for the local rule and a belief in its greater justice." Id. at 132, 286 N.E.2d at 460, 335 N.Y.S.2d at 73.

6. Id. at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.

7. Id. at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 70. Contrast this statement with the broad minded altruistic approach of Bergan, J., dissenting: What the court is deciding today is that although it will prevent a New York car owner from asserting the defense of a protective foreign statute when a New York resident... sues; [sic] it has no such "interest" when it accepts the suit in New York of a nonresident. This is an inadmissible distinction. Id. at 133, 286 N.E.2d at 461, 335 N.Y.S.2d at 75.
Opponents of the *lex fori* threshold idea are prone to raise the conventional outcry against "forum shopping." The possibility of a plaintiff being allowed to determine in advance the governing law, by a tactical selection of a favorable forum, has been deemed by many as unjust and improper.\(^8\) It seems, nonetheless, that the traditional concern about forum shopping has been grossly overstated. Realistically viewed, the possibility that a party may be able to compel certain legal results by means of a calculated choice of forum may not be such an inherently outrageous idea. Under current adjudicatory practices, parties can and do substantially affect the course and ultimate outcome of litigation in many different ways not conceived to be intolerable.\(^9\) Be this as it may, the effective remedy for any presumable evils of forum shopping is not to be found in the storehouse of choice of law thinking. Choice of law rules provide, at best, an awkward implement with which to combat forum shopping. The problem, wherever it exists, should be confronted head on, with the help of appropriate rules of judicial jurisdiction and rational judicial utilization of the *forum non conveniens* doctrine.\(^10\) In our case, one can hardly brand the New York court as a jurisdictionally improper or inconvenient forum. After all, suing a tortfeasor in his own home jurisdiction is nothing but fair and reasonable. No possible grounds of policy or principle appear to militate against the exercise of jurisdiction by a New York forum over a New York defendant.

With the menace of forum shopping out of the way, we may conclude this stage of the analysis by reasserting the *prima facie* applicability of New York law to the case at hand.

**IV. Possible Displacement of the *Lex Fori* (New York Law) by Foreign (Ontario) Law**

The *prima facie* applicable *lex fori* may be displaced by foreign law, if the court entertaining the action is convinced that, as to the issue at bar, a foreign law has a closer relationship to the facts of the case and to the parties. When determining whether or not to displace the *prima facie* applicable *lex fori*, the forum will consider the tenor

\(^8\) It is not at all uncommon to encounter in Conflicts writings utterances such as that of Fuld, Ch. J., who sets out to warn us against "sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicil." *Id.* at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 70-71.

\(^9\) On the facts and fancies of the forum shopping phenomenon see Shapira, *supra* note 3, at 45-46.

\(^10\) For an analysis of the correctives of jurisdictional reform and *forum non conveniens* see *id.* at 46-49.
and purposes of the local and foreign laws in question, as they relate to the facts of the case and to the parties.

The "close relationship" criterion is grounded in the view that legal prescriptions, whether statutory or judge-made in origin, are generally assumed to express social concerns or public interests, be they "public policies," "governmental interests," "principles of justice" and the like. Hence the application of the legal standards adopted by a community entails, indeed requires, a constant probe into reasons, objectives, underlying policies and principles. The proper reach of a legal standard in terms of subject-matter, time, space, and persons covered is a derivative of its underlying purpose, whether social, economic, humane or otherwise. In a case involving foreign elements, there is no magic in personal or territorial connecting-factors as such. The relevance or relative significance of any given connecting-factor is always a function of the facts of the case (including the identity of the parties) as they relate to the underlying policy or principle of the legal standards, local and foreign, in question. It goes without saying that the "close relationship" formula falls short of providing a simple, hard-and-fast rule. It establishes a flexible criterion, which calls for an essentially ad hoc process of judicial elaboration in the light of the particular law-fact pattern of each case. Such criterion, nevertheless, offers the judiciary a viable, workable judicial tool.

Returning to the Neumeier law-fact pattern, it is absolutely clear

that Ontario law has no closer relationship (or, indeed, any substantial relationship whatever) to the issue at bar. Ontario's guest statute, which makes recovery in a host-guest situation conditional upon the proof of gross negligence, may embody any one or more of the following motivating objectives: to shield automobile liability insurers against guest-host collusion,\textsuperscript{12} to protect drivers from excessive liability burdens,\textsuperscript{13} to prevent or reduce suits against host-drivers by ungrateful guest-passengers,\textsuperscript{14} and to accord to other parties possibly injured in the accident priority over the guest-passenger in the assets, including insurance coverage, of the negligent host-driver.\textsuperscript{15} None of these putative underlying policies is engaged in a case involving no Ontario insurer, host-driver, third-party victim or judicial institution. Ontario, therefore, can have no possible stake in the outcome of the controversy at hand. Applying its guest statute in the circumstances will not further any pertinent Ontario interest, while resorting to the ordinary negligence rule of New York will not adversely affect any relevant Ontario concern. Ontario, in short, is totally indifferent to whether the case is decided one way or another. In consequence, Ontario law can have no possible claim to displace the \textit{prima facie} applicable New York law.\textsuperscript{16}

\textit{Neumeier} presents what is characterized in fashionable conflicts parlance as a “false,” or non-existent, conflict between the laws of New York and Ontario. False conflicts are instances where the forum, after having examined all potentially relevant interests, arrives at the conclusion that only one jurisdiction is in truth concerned with the matter. This will occur where, as here, the legal standard subscribed to by only one concerned jurisdiction (in our case, New York) is supported by a policy or principle which would be furthered if the standard is applied to the case in question. Consequently, the interest

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\textsuperscript{14} Except for willful or wanton misconduct. A gratuitous guest, to whom a courtesy is being extended by the host-driver, should assume the risk of ordinary negligence as a matter of “social equity”—Hasbrook v. Wingate, 152 Ohio St. 50, 53, 87 N.E.2d 87, 89 (1949). See Reese, \textit{Choice of Law}, 71 Colum. L. Rev. 548, 558 (1971). As a by-product of this, passengers would become more careful in accepting rides and drivers would become more generous in offering them.
\textsuperscript{15} D. Cavers, \textit{supra} note 13, at 296.
\textsuperscript{16} In view of the foregoing functional analysis of Ontario law, one can only wonder at the admonition voiced by Fuld, Ch. J., to the effect that “New York ... has no legitimate interest in ignoring the public policy of a foreign jurisdiction ... .” 31 N.Y.2d at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68. What Ontario “public policy” is unduly encroached upon by awarding compensation to an Ontario plaintiff, under a New York legal standard more favorable to accident victims than its Ontario counterpart?
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of that particular jurisdiction can be vindicated without any impair-
ment to the policies or principles espoused by any other connected
jurisdiction (in our case, Ontario).\textsuperscript{17}

In sum, the law-fact pattern under discussion does not warrant,
let alone compel, the displacement of New York law by Ontario law.

V. A CALCULUS OF THE PRIVATE INTERESTS AT STAKE

In every case entailing foreign elements one encounters at least
two individual parties whose conflicting claims need to be justly
adjudicated. An approach strictly focusing on public policies or gov-
ernmental interests is prone to overlook or underplay a fundamental
problem present in many choice-of-law situations: the reasonableness
or fairness of a proposed appraisal of human conduct by foreign legal
norms. This dilemma, typical of conflicts contexts, emanates from a
general reluctance to engage in what may sometimes be regarded as
an unfair process of judging conduct according to the legal standards
of a foreign community. A widely recognized jurisprudential prin-
ciple calls for a rational connection between the parties to a dispute
and the legal standards by which their conduct is to be judged as a
threshold guarantee of elementary justice in the judicial process. The
criterion for the ascertainment of such a proper connection is ulti-
ately derivable from the sense of reasonableness and fairness pos-
sessed by the tribunal adjudicating the cause. Such a criterion may
invoke the overlapping concepts of, among others, “submission and
consent,” “foreseeability,” “vindication of justified expectations,”
“responsibility to ascertain foreign law,” “reasonable reliance,” and
“fair notice.”\textsuperscript{18}

The New York defendant in our case cannot present a good argu-
ment in terms of lack of rational connection with New York tort
compensation law. No injustice is worked on a New York car oper-
ator, or his insurer, if he is required to live up to the standards of
compensation prevailing in his home jurisdiction. He cannot possibly
claim that he lacked “foreseeability” or “fair notice” as to the ap-
pliability of New York negligence law, or that he “submitted” to or
“relied” on the Ontario guest statute when driving his car neglig-
gently (we presume) in Ontario. To be sure, the Ontario plaintiff
recovers due to, among other things, the New York identity of the
defendant. But do not victims always take their injurers as they find


them—rich or poor, with or without insurance coverage, ably or poorly represented by legal counsel, enjoying or lacking the support of favorable witnesses, etc.? After all, even windfalls do occur occasionally.

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In conclusion, an analysis of all public interests and private equities at stake in *Neumeier v. Kuehner* points in one direction—the New York rule of ordinary negligence ought to prevail.