

CHAPTER 7

Conflict of Laws

FRANCIS J. NICHOLSON, S.J.*

A. RECENT DEVELOPMENTS

§ 7.1. **National Move from Vested Rights to Contacts Analysis.** There have been significant changes in Massachusetts in the area of conflict of laws since the *Annual Survey* last examined this subject.¹ During the past ten years the Supreme Judicial Court has made a definitive move from the venerable vested rights choice-of-law rules to a contacts resolution of choice-of-law problems.²

The vested rights approach is based upon the principle of territorial jurisdiction so pre-eminent in the common law. The territorial theory mandated that the governing law for a given transaction was that of the place where the transaction took place. Thus, the *lex loci delicti* rule, the law of the place of the injury, determines which law governs the substantive rights of the parties in a multistate tort case. Likewise, the *lex loci contractus* principle, the law of the place of the making of the contract, controls the validity of contracts involving parties from two or more states. The vested rights *lex loci* rule was adopted by the original Restatement of Conflict of Laws of the American Law Institute.³

The vested rights approach did provide uniformity and predictability to conflicts cases, a very desirable policy goal for conflicts law. All too often, however, the single factor *lex loci* rule eliminated consideration of other, important substantial contacts of the multistate transaction. As a result, the rigidity of the vested rights doctrine frequently led to absurd and unjust decisions. The past thirty years have seen an accelerating departure from the inflexible vested rights doctrine as recognition of its inadequacies increased.

The retreat from the vested rights approach has been in favor of the adoption of the contacts resolution of conflicts cases. The contacts methodology brings a more functional and less mechanical analysis to the

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§ 7.1. ¹ The Massachusetts conflict of laws doctrine was last examined by the *Survey* in the 1970 ANN. SURV. MASS. LAW §§ 3.1-3.5, at 59-68.

² See, e.g., *Choate, Hall & Stewart v. SCA Servs. Inc.*, 378 Mass. 535, 392 N.E.2d 1045 (1979); *Saharceski v. Marcure*, 373 Mass. 304, 366 N.E.2d 1245 (1977).

³ RESTATEMENT OF CONFLICT OF LAWS (1934).

cases. The following theories have been the most influential in promoting the contacts approach: (1) the late Professor Brainerd Currie's "governmental interest" analysis;⁴ (2) the Restatement (Second) of Conflict of Laws' "most significant relationship" rule;⁵ and (3) Professor Robert Lefflar's five "choice-influencing considerations" analysis.⁶ Although there are differences of emphasis among these three formulations, they agree in stressing the importance of evaluating all the substantial contacts of the conflicts situation. They reject the exclusive, one-dimensional *lex loci* rule.

The impetus given to the contacts choice-of-law analysis of cases has found support in the conflicts decisions of many state courts. Minnesota,⁷ Wisconsin,⁸ New York,⁹ California,¹⁰ and New Jersey¹¹ have been leaders in promoting the new, functional method of conflicts resolution. The change has been most marked in the tort cases, and somewhat less so in the contract cases. There has been very little movement from the traditional vested rights doctrine in the real property area. The uneven rate of change in the various topics of conflicts law has been matched by the degree of speed with which the states have abandoned the traditional vested rights doctrine. A sizeable minority of jurisdictions still follow the *lex loci* choice-of-law position in conflicts cases.¹² Massachusetts was among this minority of states until very recently.

§ 7.2. Law of Domicile of Married Woman. A decision of the Supreme Judicial Court with respect to the concept of domicile first signaled the new judicial thinking in conflicts law in Massachusetts. Domicile plays a pivotal role in many areas of conflict of laws, such as choice of law in some personal property cases, divorce jurisdiction, and the power to levy death taxes. The traditional common law of conflicts tended to reduce the subject of domicile to hard-and-fast rules. Many of these traditional rules are clearly inconsistent with attitudes and life styles in the second half of the twentieth century. Recent decisions from many jurisdictions have rejected such anachronisms.¹

The Supreme Judicial Court has brought the law of domicile in Massa-

⁴ B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

⁶ R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977).

⁷ Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957).

⁸ Haumschild v. Continental Cas. Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959).

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

¹⁰ Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967).

¹¹ Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129 (1970).

¹² See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 6.16-6.19 (2d ed. 1980).

§ 7.2. ¹ W. REESE & M. ROSENBERG, CONFLICT OF LAWS 8-27 (7th ed. 1978).

chusetts into the twentieth century as well. In *Green v. Commissioner of Corporations and Taxation*,² the Supreme Judicial Court of Massachusetts, on transfer from the Appeals Court, held that a married woman could have a domicile separate from that of her husband for tax purposes. This decision departed from the common law rule hitherto followed in Massachusetts. In the process the Court disclosed an affinity for the approach of Restatement (Second) of Conflict of Laws³ for solving conflict problems.

In *Green*, the husband and wife, at the time of the marriage, were domiciled in Massachusetts and New Hampshire, respectively.⁴ By agreement they lived apart in their previous homes until the wife wound up her business in New Hampshire.⁵ The wife realized a capital gain of some \$25,000 through the sale of stock and, thereafter, moved to Massachusetts to live with her husband.⁶ The couple filed a joint resident income tax return but did not report the wife's capital gain.⁷ The Commissioner of Corporations and Taxation (the "Commissioner") assessed an additional tax against the couple based on the income received by the wife before she moved to Massachusetts.⁸ In support of this assessment the Commissioner cited chapter 62, section 5 of the General Laws, under which income "received by any inhabitant of the commonwealth," including "net capital gain," was taxable.⁹ The sole issue before the Court was whether the wife's domicile for tax purposes became that of her husband before she moved to Massachusetts.¹⁰

The Supreme Judicial Court had previously held that the income subject to tax under section 5 was that received by persons who were inhabitants of the Commonwealth "at the time of receipt."¹¹ To be an "inhabitant" of the Commonwealth within the meaning of the tax statute is equivalent to being domiciled in Massachusetts.¹² From these premises, the Commissioner argued that the income received by the wife while she lived in New Hampshire was subject to Massachusetts tax, by virtue of

² 364 Mass. 389, 305 N.E.2d 92 (1973).

³ *Id.* at 394, 305 N.E.2d at 95 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 & comment d (1971)).

⁴ *Id.* at 390, 305 N.E.2d at 92.

⁵ *Id.*

⁶ *Id.*, at 390, 305 N.E.2d at 92-93.

⁷ *Id.*, at 390, 305 N.E.2d at 93.

⁸ *Id.*

⁹ *Id.* at 390-91, 305 N.E.2d at 93.

¹⁰ *Id.* at 389, 305 N.E.2d at 92.

¹¹ *Id.* at 391, 305 N.E.2d at 93 (citing *Kennedy v. Commissioner of Corporations and Taxation*, 256 Mass. 426, 430, 152 N.E. 747, 748 (1926)).

¹² *Id.* (citing *Ness v. Comm'r of Corps. & Taxation*, 279 Mass. 369, 373, 181 N.E. 178, 180 (1932)).

the traditional common law rule that a married woman has the same domicile as her husband.¹³

At common law a married woman had no capacity to acquire her own domicile and was assigned that of her husband by operation of law.¹⁴ The husband and wife were looked upon as one legal entity. Divorce cases made one of the earliest inroads upon this harsh common law rule. For example, it was recognized that a wife could keep or acquire a separate domicile for the purpose of bringing a divorce action if she had been wronged by her husband.¹⁵ Recent decisions in some states have recognized separate domiciles for husband and wife for purposes other than divorce jurisdiction.¹⁶ The Supreme Judicial Court of Massachusetts, however, as late as 1968, retained the established common law rule that a wife's domicile, absent some marital wrong committed by her husband, follows that of her husband.¹⁷

In the *Green* case, the Supreme Judicial Court acknowledged that the common law rule was unrealistic in the context of present-day domestic relationships.¹⁸ The Court noted that the common law rule had been subjected to severe erosion in other states.¹⁹ It cited with approbation the rule found in section 21, comment d, of the Restatement (Second) of Conflict of Laws: "A wife who lives apart from her husband can acquire a separate domicile of choice."²⁰ Recognizing important changes in popular as well as legal thinking, the Court concluded that "'ancient canards about the proper role of women' have no place in the law."²¹ The Court then rejected the Commissioner's argument that the wife had taken her husband's Massachusetts domicile before she moved to Massachusetts. The Court found little support for the Commissioner's attempt to extend the "vanishing fiction of identity of person" into the area of taxation.²² The Court decreed, therefore, that the plaintiffs were not liable for the additional tax assessed against them.²³

The *Green* decision made a long overdue change in the law of domicile of the married woman. It is true, of course, that in most situations husband and wife will live together in a single home and, therefore, will

¹³ *Id.* (citing *Anderson v. Anderson*, 354 Mass. 565, 568, 238 N.E.2d 868, 870 (1968)).

¹⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21 comment a (1971).

¹⁵ R. LEFLAR, AMERICAN CONFLICTS LAW § 11 (3d ed. 1977); E. SCOLES & P. HAY, CONFLICT OF LAWS §§ 4.33-4.34 (1982).

¹⁶ W. REESE & M. ROSENBERG, *supra* note 1, at 23.

¹⁷ *Anderson v. Anderson*, 354 Mass. 565, 568, 238 N.E.2d 868, 870 (1968).

¹⁸ 364 Mass. at 394, 305 N.E.2d at 95.

¹⁹ *Id.* at 393, 305 N.E.2d at 95.

²⁰ *Id.* at 394, 305 N.E.2d at 95.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 395, 305 N.E.2d at 96.

have the same domicile. Nevertheless, it must be recognized that legal rules regarding the husband-wife relationship should keep abreast of current social attitudes concerning the independence of women. To condition the separate domicile of the married woman upon a marital wrong committed by her husband is to disregard the habits and attitudes in the United States today. In the *Green* case the Supreme Judicial Court acknowledged the necessity for a new approach to conflicts analysis. As noted, the Court turned to the Restatement (Second) for guidance.²⁴ The Court has subsequently used a similar approach in other areas of conflicts law.

§ 7.3. Law of Domicile of Students — Freedom of Choice for Voting Purposes. Under the common law every person must have a domicile. At birth the legitimate child takes his father's domicile by operation of law. As an adult with legal capacity he may acquire a new domicile, a domicile of choice. The acquisition of the new domicile requires physical presence at a new location and the intention of regarding the new place as one's home. The presence and intention must occur together.¹ Usually, the person claiming a domicile of choice can easily prove his physical presence in the particular place. Proof of intention to make that place one's home can be a more difficult task.² It is essential that a person establish his present intention to remain in the place for a period of time, and frequently the evidence is equivocal. Proving the requisite intent has been a problem for students who attend college away from home. Most students get financial support from their parents and regard their parent's dwelling as "home." The courts, therefore, have tended to hold that a student does not acquire a domicile of choice in the place where the school or college is located.³

The problem of a student's domicile often arose in cases where a court had to decide whether a student had the capacity to choose his domicile for voting purposes. Under traditional domicile notions, many students would be prevented from voting as a resident of the locus of their college. In *Hershkoff v. Board of Registrars of Voters of Worcester*,⁴ the Supreme Judicial Court of Massachusetts ruled that college students have the capacity to choose their domicile for voting purposes despite support by parents

²⁴ *Id.* at 395, 305 N.E.2d at 95.

§ 7.3. ¹ R. LEFLAR, *AMERICAN CONFLICTS LAW* §§ 9-10 (3d ed. 1977); E. SCOLES & P. HAY, *CONFLICT OF LAWS* §§ 4.17-4.20 (1982).

² *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 18 (1971).

³ *Id.*

⁴ 366 Mass. 570, 321 N.E.2d at 656 (1974).

and dormitory residence. The Court refused to follow anachronistic common law rules with respect to domicile.⁵

In *Hershkoff* three students at colleges in Worcester, Massachusetts, sought to register to vote in Worcester.⁶ The board of registrars of voters (the "board") denied the applications on the grounds that the domiciles of two of the students were New York and that the domicile of the third was Pennsylvania.⁷ On petitions for writs of certiorari, the superior court ordered that the decisions be quashed and that the board cause the students to be registered as voters in Worcester.⁸ The board appealed.⁹ The cases were consolidated for appeal and were transferred.¹⁰ The Supreme Judicial Court affirmed the orders of the superior court.¹¹

The Court acknowledged that the words "resided" and "inhabitant" in constitutional and statutory provisions relating to voting had long been construed to require that the voter have his domicile in the appropriate city or town.¹² This statutory construction depended on the common law doctrine of domicile.¹³ The Court also conceded that earlier decisions had held that support by parents or dormitory residence limited the young voter's freedom of choice of domicile.¹⁴ In *Hershkoff*, however, the Court departed from its earlier views and held that young people who leave home to go to college are free to establish new homes in college dormitories, even if there is a showing of parental support.¹⁵ In so ruling, the Court aligned itself with courts in other jurisdictions which have recognized the capacity of college students to acquire a new domicile for voting purposes.¹⁶

The Court then addressed the issue of the duration of time required to establish a domicile.¹⁷ Traditional conflicts law found in older cases emphasized the idea of fixity.¹⁸ A domicile was the place of one's actual

⁵ The Court had similarly rejected the rigid common law formula for determining domicile in *Green v. Comm'r of Corporations and Taxation*, 364 Mass. 389, 305 N.E.2d 92 (1973), which is discussed in section 2 of this chapter.

⁶ 366 Mass. at 571, 321 N.E.2d at 659.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 573, 321 N.E.2d at 661.

¹⁰ *Id.* at 574, 321 N.E.2d at 661.

¹¹ *Id.* at 571, 321 N.E.2d at 659-60.

¹² *Id.* at 576, 321 N.E.2d at 662.

¹³ *Id.*

¹⁴ *Id.* at 578, 321 N.E.2d at 663 (citing *Opinion of the Justices*, 46 Mass. (5 Met.) 587, 589-90 (1843)).

¹⁵ *Id.* at 578, 321 N.E.2d 663-64.

¹⁶ See *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972); *Newburger v. Peterson*, 344 F. Supp. 559 (D.N.H. 1972).

¹⁷ 366 Mass. at 578-79, 321 N.E.2d at 664.

¹⁸ See *Opinion of the Justices*, 365 Mass. 661-63, 312 N.E.2d 208-09 (1974).

residence where one intended to remain permanently or for an indefinite time.¹⁹ The court rejected this venerable common law doctrine and endorsed the rule of section 18 of Restatement (Second) of Conflict of Laws: "To acquire a domicile of choice in a place, a person must intend to make that place his home for the time at least."²⁰ If there is an intention to make a home here and now, that intention is sufficient, even though the person whose domicile is in question intends to change his home at some time in the future.²¹ The Court found, on the evidence presented in *Hershkoff*, that each student plaintiff actually resided in Worcester with intention to make Worcester his home for the time at least.²² Each was therefore domiciled in Worcester and was not disqualified from voting by reason of domicile elsewhere.²³ The Court concluded by stating that the decisions of the board were erroneous and that the superior court properly ordered them quashed.²⁴

In *Hershkoff* the Supreme Judicial Court gave further evidence of its intention to update Massachusetts conflicts law. In this era of widespread planning for change of residence and occupation, a requirement of intention to stay permanently or indefinitely in one place makes no sense. The Court's acceptance of the test set out in Restatement (Second),²⁵ is much more responsive to the interests and expectations of today's society, where separation from home and hearth by young people is a way of life. The reliance on the Restatement (Second) is worth noting because it is indicative of the Court's current approach to conflicts problems in general.²⁶

¹⁹ *Id.*

²⁰ 366 Mass. at 578-79, 321 N.E.2d at 664 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 18 (1971)).

²¹ *Id.* (citing *Putnam v. Johnson*, 10 Mass. 488, 501 (1813)).

²² *Id.* at 580, 321 N.E.2d at 665.

²³ *Id.*

²⁴ *Id.* at 580-81, 321 N.E.2d at 665.

²⁵ *Id.* at 578-79, 321 N.E.2d at 664 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 18 (1971)).

²⁶ It should be noted, however, that the Supreme Judicial Court carried its approach in *Hershkoff* beyond even the Restatement (Second) position in a later domicile case. *Dane v. Bd. of Registrars of Voters of Concord*, 374 Mass. 152, 371 N.E.2d 1358 (1978). In *Dane* the principal issue was whether approximately 300 inmates imprisoned at the Massachusetts Correctional Institution at Concord could register to vote. Plaintiff's complaint alleged that, because the inmates did not reside voluntarily at Concord, they lacked the intent necessary to establish legal domicile in the town, and therefore were not entitled to register as voters in the town. It has been the general rule that inmates of penal institutions cannot acquire a domicile of choice in the place of their imprisonment because there is no freedom of choice. The Restatement (Second) provides: "A person does not acquire a domicile of choice by his presence in a place under physical or legal compulsion." RESTATEMENT (SECOND) OF

§ 7.4. **Tort Choice-of-law Rule — Law of Jurisdiction With Most Contacts Controls.** In *Pevoski v. Pevoski*,¹ the Supreme Judicial Court held that Massachusetts law, rather than New York law, governed the issue of interspousal immunity in a suit arising out of an automobile accident which occurred in New York. This holding represents a definitive rejection of the vested rights *lex loci delicti* rule, which previously had been firmly established as the general tort conflicts rule in Massachusetts. The *Pevoski* decision is a logical continuation of the changed conflicts analysis used by the Court in earlier cases.²

In *Pevoski*, the plaintiff and the defendant were a married couple.³ In August, 1971, their automobile was involved in a three-car collision in New York.⁴ All of the cars were registered, insured, and garaged in Massachusetts, and all three vehicles were operated by residents of the Commonwealth.⁵ The plaintiff wife, a passenger in the car driven by her husband, brought an action against him seeking damages for injuries sustained in the accident.⁶ The superior court granted the husband's motion for summary judgment on the ground of interspousal tort immunity.⁷ The wife appealed to the Supreme Judicial Court.⁸

CONFLICT OF LAWS § 17 (1971). "Under the rule of this section, it is impossible for a person to acquire domicile in the jail in which he is incarcerated. To enter jail, one must first be legally committed and thereby lose all power of choice over the place of one's abode." *Id.* at § 17 comment c. In *Dane* the Court refused to follow the inflexible rule of the common law and the Restatement (Second). Citing its decision in *Hershkoff* the Court stated:

We think that prisoners, like . . . students, should be able to "rebut" the presumption that by reason of their involuntary presence at the place of incarceration they have retained their former domicile. We here recognize the capability of those imprisoned in Massachusetts correctional institutions to form the requisite intent to make the place of their incarceration their domicile for voting purposes.

374 Mass. at 165-66, 371 N.E.2d at 1367. It is difficult to imagine that any inmate in a prison would consider the prison his "home," and be judged to have his domicile there. A person's domicile is usually the place where he has his home. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971). The ruling in *Dane* indicates very clearly that the Supreme Judicial Court is moving away from the rigid concepts of the common law of conflicts toward a more flexible attitude.

§ 7.4. ¹ 371 Mass. 358, 358 N.E.2d 416 (1976).

² See *Green v. Comm'r of Corporations and Taxation*, 364 Mass. 389, 305 N.E.2d 92 (1973); *Hershkoff v. Board of Registrars of Voters of Worcester*, 366 Mass. 570, 321 N.E.2d 656 (1974). Those cases are discussed in sections 1 and 2 of this chapter.

³ 371 Mass. at 358, 358 N.E.2d at 417.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 358-59, 358 N.E.2d at 417.

⁸ *Id.* at 359, 358 N.E.2d at 417.

The first question presented by the appeal was the conflicts problem.⁹ Because an interspousal tort action such as Mrs. Pevoski's was clearly a viable claim under New York law, but was uncertain under Massachusetts law, the issue of which law to apply to the wife's action was material.¹⁰ The Court recognized that the Massachusetts courts had always followed the *lex loci delicti* rule.¹¹ It added that this rule would continue to provide a reasonable procedure for selecting the law governing many of the issues in multistate tort cases.¹² For example, in motor vehicle torts, the Court explained, standards of negligence would be provided by the law of the jurisdiction in which the accident occurred.¹³ Rules of the road are appropriately determined by the state having the greatest interest in regulating the conduct of drivers on its highways.¹⁴

The Court then made its break from the traditional law of the place of the tort rule by quoting from *Babcock v. Jackson*,¹⁵ the trend-setting decision of the New York Court of Appeals.¹⁶ In *Babcock*, the New York court repudiated the *lex loci delicti* doctrine, rejecting a rule which would require that *all* issues in a tort case automatically be resolved by the law of the jurisdiction where the tort occurred.¹⁷ The *Babcock* court held instead that disposition of issues "must turn. . . on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented."¹⁸ The Supreme Judicial Court expressed its agreement with the conflicts approach taken by the *Babcock* case, and found that New York had no legitimate interest in regulating the interspousal relationships of Massachusetts domiciliaries who happened to be injured within its borders.¹⁹ The financial and social impact of the suit fell only on Massachusetts domiciliaries and a Massachusetts insurer.²⁰ Therefore, the Court concluded, the law of Massachusetts governed the issue of interspousal immunity.²¹

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (citing *Brogie v. Vogel*, 348 Mass. 619, 205 N.E.2d 234 (1965)); *Goodale v. Morrison*, 343 Mass. 607, 180 N.E.2d 67 (1962); *Murphy v. Smith*, 307 Mass. 64, 29 N.E.2d 726 (1940).

¹² 371 Mass. at 359, 358 N.E.2d at 417.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

¹⁶ 371 Mass. at 359-60, 358 N.E.2d at 417 (quoting *Babcock v. Jackson*, 12 N.Y.2d 473, 484, 240 N.Y.S.2d 743, 752, 191 N.E.2d 279, 285 (1963)).

¹⁷ *Babcock v. Jackson*, 12 N.Y.2d 473, 484, 240 N.Y.S.2d 743, 752, 191 N.E.2d 279, 285 (1963).

¹⁸ *Id.*

¹⁹ *Id.* at 360, 358 N.E.2d at 417.

²⁰ *Id.*

²¹ *Id.* at 361, 358 N.E.2d at 418.

The Court then turned to the second issue in *Pevoski*, concerning the substantive law of the Commonwealth regarding interspousal tort actions.²² The Court had recently eliminated the anachronistic, common law rule of interspousal immunity in *Lewis v. Lewis*.²³ The accident giving rise to the cause of action in *Pevoski*, however, occurred in 1971, prior to the *Lewis* decision. Thus, the Court was faced with the question of whether the principle of the *Lewis* case should be applied retroactively to the wife's claim in *Pevoski*.²⁴ The Court answered the question in the affirmative.²⁵ The Court reasoned that because of the availability of insurance coverage, retroactive application of the *Lewis* rule would not have a substantial impact on the expectations of the insured or their insurers.²⁶ The Court then reversed the order of the superior court granting the defendant's motion for summary judgment.²⁷

In *Pevoski*, the Supreme Judicial Court accepts the change in thinking which characterizes much of the recent development in the field of conflict of laws. This change has been especially striking in the torts area. Fundamentally, this departure from traditional doctrine represents the gradual discrediting of the vested rights theory, which demands the recognition and enforcement of rights which are judged to have "vested" by virtue of their creation by the law of the place where the activities occurred. The vested rights approach in the torts field, concomitantly with the customary substance-procedure characterization, inculcates the traditional place-of-wrong rule which states that the substantive law of the place where the act occurs determines whether there is a cause of action sounding in tort. In addition, all substantive questions relating to the existence of a tort claim are governed by the same law.²⁸

The old vested rights theory emphasizes the value of predictability and discouragement of forum shopping. The automatic application of the law of the place of the wrong promotes these goals but, in the process, this one-dimensional test makes no provision for the law of the state which has the most significant relationship to the occurrence and the parties. Such relationships must be recognized if oppressiveness to legitimate and lawful state interests is to be avoided.

The decision of the Supreme Judicial Court in *Pevoski* was a correct one. Massachusetts, the domiciliary state, clearly had more concern with the issue of interspousal immunity than New York.²⁹ The adoption by the

²² *Id.*

²³ 370 Mass. 619, 351 N.E.2d 526 (1976).

²⁴ 371 Mass. at 361, 358 N.E.2d at 418.

²⁵ *Id.*

²⁶ *Id.* at 361-62, 358 N.E.2d at 418.

²⁷ *Id.* at 362, 358 N.E.2d at 418.

²⁸ RESTATEMENT OF CONFLICT OF LAWS §§ 377-83 (1934).

²⁹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1971).

Court of the significant contacts approach to tort conflicts cases was overdue.

§ 7.5. Workmen's Compensation — Tort Suit Against Fellow Employee — Choice-of-law Rule — Renvoi. In *Saharceski v. Marcure*,¹ the Supreme Judicial Court resolved a choice-of-law problem in a workmen's compensation case. Following the rationale established in *Pevoski v. Pevoski*,² the Court applied the law of Massachusetts to bar the plaintiff from recovering from his fellow worker for an injury suffered in Connecticut.

The plaintiff and the defendant were residents of Massachusetts and employees of a Massachusetts corporation.³ The corporation had no place of business in Connecticut and had no employees residing or working there.⁴ It had purchased workmen's compensation insurance covering its employees.⁵ In June of 1970, the plaintiff and the defendant traveled by motor vehicle on their employer's business from Massachusetts into Connecticut, intending to pass through that state without stopping.⁶ The vehicle was owned by the corporation and was registered in Massachusetts.⁷ The defendant was driving the vehicle when he negligently struck another car in Connecticut.⁸ The plaintiff, who sustained injuries in the accident, collected workmen's compensation from the company's insurance carrier.⁹ The plaintiff then brought suit for damages against the defendant.¹⁰ The superior court, after a jury verdict for the plaintiff, ordered judgment for the defendant notwithstanding the verdict.¹¹ On direct appeal the Supreme Judicial Court affirmed.¹²

Saharceski is an interesting decision because of the scope of the Court's opinion. In addition to resolving the conflict of laws problem, the Court addressed two questions pervasive in conflicts law: the limiting effect of the United States Constitution on state choice of conflicts rules;¹³ and the renvoi doctrine.¹⁴ First, however, the Court acknowledged that the laws of

§ 7.5. ¹ 373 Mass. 304, 366 N.E.2d 1245 (1977).

² 371 Mass. 358, 358 N.E.2d 416 (1976). The *Pevoski* decision is discussed in section 4 of this chapter.

³ 373 Mass. at 305, 366 N.E.2d at 1246.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 305-06, 366 N.E.2d at 1246.

⁹ *Id.* at 306, 366 N.E.2d at 1246.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 308-09, 366 N.E.2d at 1248.

¹⁴ *Id.* at 312, 366 N.E.2d at 1250.

Massachusetts and Connecticut were in conflict regarding an employee's tort suit against a fellow employee.¹⁵ In the Commonwealth, where compensation benefits are available under chapter 152 of the General Laws, an employee injured in the course of his employment by the negligence of a fellow employee cannot recover from that fellow employee if the fellow employee was also acting in the course of his employment.¹⁶ It is clear, on the other hand, that an employee injured in Connecticut in the course of his employment by the negligent operation of a motor vehicle by a fellow employee may recover from that fellow employee under Connecticut law.¹⁷

The Court began its analysis by considering the effect of the United States Constitution on the choice-of-law question involved in the case.¹⁸ The Court recognized that the states have exercised a great deal of latitude in formulating their own conflicts rules. Nevertheless, the Court noted, the due process¹⁹ and full faith and credit²⁰ clauses of the Constitution act as a limitation on the freedom of a state to develop its conflicts law without reference to the demands of federalism.²¹ The United States Supreme Court has indicated that, under the due process clause, the application of the law of a state will be nullified if its relation to the parties or transaction is so insignificant as to make choice of its law arbitrary.²² Furthermore, even if a state has sufficient contacts under due process to justify application of its own law, in certain circumstances it may nevertheless be required by the full faith and credit clause to give effect to the law of a sister state.²³ The problem is striking the proper balance between the demands of the unifying principle found in the full faith and credit clause and the power of a state to apply its own law to persons and transactions bearing a substantial relation to its jurisdictional ambit. This basic conflict has thus far been resolved in favor of the forum and its law in such fields as insurance²⁴ and workmen's compensation.²⁵ In these areas a state may choose its own law without violating the full faith and credit clause, if it has sufficient contacts to satisfy the due process clause.

¹⁵ 373 Mass. at 306-08, 366 N.E.2d at 1246-48.

¹⁶ *Murphy v. Miettinen*, 317 Mass. 633, 59 N.E.2d 252 (1945).

¹⁷ *Stulginski v. Cizauskas*, 125 Conn. 293, 5 A.2d 10 (1939). Many states allow a suit against a fellow employee in such circumstances. See Annot., 21 A.L.R.3d 845, 850 (1968).

¹⁸ 373 Mass. at 308-09, 366 N.E.2d at 1248.

¹⁹ U.S. CONST., amend. XIV, § 1.

²⁰ U.S. CONST., art. IV, § 1.

²¹ 372 Mass. at 309, 366 N.E.2d at 1248.

²² See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

²³ See *Hughes v. Fetter*, 341 U.S. 609 (1951); *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947).

²⁴ See *Hoopston Canning Co. v. Cullen*, 318 U.S. 313 (1943).

²⁵ See *Carroll v. Lanza*, 349 U.S. 408 (1955); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 183 (1971).

The Supreme Judicial Court concluded that the conflicts question in *Saharceski* was not of constitutional dimensions.²⁶ “We are free to apply Connecticut law or Massachusetts law, just as Connecticut would have been free to apply the law of either state if this action had been brought there.”²⁷ This judgment by the Court on the constitutional question is certainly correct. Both Connecticut and Massachusetts had sufficient contacts with the parties and the transaction to satisfy the due process and full faith and credit clauses of the United States Constitution under the United States Supreme Court guidelines.

The Court then turned to the conflict of laws concerning the fellow employee’s exemption from liability.²⁸ Citing its decision in *Pevoski v. Pevoski*,²⁹ the Court found that there were substantial reasons for looking to the law of Massachusetts to determine whether the plaintiff should be allowed to maintain an action against his fellow employee.³⁰ Most significant were the reasonable expectations of the parties, each of whom lived and was hired in Massachusetts.³¹ The workmen’s compensation law of the Commonwealth bars an employee from recovering from a negligent fellow employee where common law rights are not reserved.³² The plaintiff had no reasonable basis for expecting to recover in this situation, and the defendant had no reason to expect that he would be liable.³³ The Court added that application of the law of the state of common employment provided a certain basis for the resolution of the issue and knowledge that the maintenance of a tort suit will not depend solely on the fortuitous place of the accident.³⁴ The Court concluded its consideration of the conflicts problem by stating:

The elimination of happenstance, a sort of unknowing geographical Russian roulette, as the controlling factor is particularly significant in a case where no business was to be transacted in the jurisdiction where the injury took place. As a matter of choice of law, we conclude that the substantive law of the Commonwealth should apply to bar recovery by the plaintiff in this case.³⁵

The *Saharceski* Court’s resolution of the choice-of-law question, rejecting the mechanical application of the law of the place of the tort, follows

²⁶ 373 Mass. at 308-09, 366 N.E.2d at 1248.

²⁷ *Id.* at 309, 366 N.E.2d at 1248.

²⁸ 373 Mass. at 310, 366 N.E.2d at 1248.

²⁹ 371 Mass. 358, 358 N.E.2d 416 (1976).

³⁰ 373 Mass. at 311, 366 N.E.2d at 1249.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 311-12, 366 N.E.2d at 1249 (citing R. LEFLAR, AMERICAN CONFLICTS LAW §§ 104-05 (rev. ed. 1968)).

the approach taken in more recent workmen's compensation cases.³⁶ Given the social justice goals of the institution of workmen's compensation insurance, it makes eminent sense to choose the law of the state with the substantial connection with the employment relationship. As the Supreme Judicial Court's analysis clearly indicates, only Massachusetts had a significant interest in the rights of the parties in this case. It should be noted, too, that the Court's reliance on *Pevoski* underscores its disavowal of the inflexible *lex loci delicti* rule in tort actions.

The final issue considered by the Court in *Saharceski* is the possibility of determining that Massachusetts law applies through a different analytical approach.³⁷ Assuming, *arguendo*, that the law of the place of the injury does determine substantive rights, "one might analyze this case in terms of the result which would be reached if this action had been brought in Connecticut. In such a case, one should look to the entire law of the State of Connecticut, *including its conflict of laws rules*.'" ³⁸ Here, by way of dictum, the Court is suggesting the use of the *renvoi* doctrine. When a forum court decides that an issue should be governed by the law of another state, the question arises whether the forum court should apply the internal law of the other state or the latter's conflicts rules. If it applies the conflicts law of the second state, it is using the *renvoi* technique. The justification for the *renvoi* method is the guarantee of identical result, no matter where the suit is brought. American courts usually reject the *renvoi* approach except in cases involving title to land and the recognition of foreign divorces.³⁹ The Court's suggestion that Connecticut's conflicts law be looked at regarding the defendant's tort liability is very unusual.

The Court's discussion of the *renvoi* technique is also puzzling. It is true that the *renvoi* has been used occasionally by American courts as an "escape device" to avoid unpalatable results dictated by a particular conflict of laws rule. The "escape device" approach usually surfaced when a state was making the transition from the vested rights to the contacts analysis.⁴⁰ Conflicts law in Massachusetts, however, has gone beyond the transitional stage. Perhaps the dictum further evidences the Supreme Judicial Court's rejection of the mechanical place of the tort rule.

³⁶ See *Wilson v. Faull*, 27 N.J. 105, 141 A.2d 768 (1958); R. LEFLAR, *AMERICAN CONFLICTS LAW* § 160 (3d ed. 1977).

³⁷ 373 Mass. at 312, 366 N.E.2d at 1250.

³⁸ *Id.* (emphasis added).

³⁹ See R. LEFLAR, *supra* note 36, at § 7; W. REESE & M. ROSENBERG, *CONFLICT OF LAWS* 28-37 (7th ed. 1978).

⁴⁰ See W. REESE & M. ROSENBERG, *supra* note 39, at 450-53.

§ 7.6. **Contract Choice-of-law Rule — Law of Jurisdiction with Most Contacts Controls.** In *Choate, Hall & Stewart v. SCA Services, Inc.*,¹ the Supreme Judicial Court re-examined the Massachusetts choice-of-law rule regarding contracts. Traditionally the Court had applied *lex loci contractus*, the law of the place where the contract was made, as the conflicts rule in suits to enforce contractual rights. While the facts in *Choate, Hall & Stewart* prevented the Court from explicitly disavowing the *lex loci contractus* rule, the Court's disapproval of that conflicts principle is clear.

The plaintiff law partnership of Choate, Hall & Stewart brought this action against the defendant corporation to recover fees for legal services performed for one Steir, a director of the corporation.² The claim was based on a provision of an agreement between the defendant and Steir by which the defendant undertook to pay legal fees incurred by Steir.³ This agreement was a settlement contract entered into on the occasion of Steir's resignation from the corporation under less than amicable circumstances.⁴ The pertinent provision of the settlement contract provided that Steir could select his own counsel whose fees would be paid by the defendant corporation, "all to the maximum extent permissible under Delaware law."⁵

The plaintiff law firm had represented Steir in matters connected with his termination and submitted statements of fees.⁶ The defendant corporation refused payment.⁷ The plaintiff brought an action for a declaratory judgment that it was entitled to the amount of fees stated.⁸ The superior court entered summary judgment for the defendant on the ground, *inter alia*, that under governing Massachusetts law the plaintiff had no standing to sue on the contract as a third-party beneficiary.⁹ The plaintiff appealed.¹⁰ The Supreme Judicial Court ordered direct appellate review and reversed.¹¹

The significance of the *Choate, Hall & Stewart* decision can best be explained against the general background of the contracts problem in the area of conflict of laws. Conflicts law as a whole is marked by ambiguity, but conflicts doctrine pertaining to the validity of contracts has been

§ 7.6. ¹ 378 Mass. 535, 392 N.E.2d 1045 (1979).

² *Id.* at 536, 537, 392 N.E.2d at 1046.

³ *Id.* at 537, 392 N.E.2d at 1047.

⁴ *Id.*

⁵ *Id.* at 537-38, 392 N.E.2d at 1047.

⁶ *Id.*

⁷ *Id.* at 539, 392 N.E.2d at 1047.

⁸ *Id.* at 539, 392 N.E.2d at 1048.

⁹ *Id.* at 540, 392 N.E.2d at 1048.

¹⁰ *Id.*

¹¹ *Id.* at 540, 548, 392 N.E.2d at 1048, 1052.

singularly characterized by confusion. Three distinct conflicts rules have been applied by American courts as controlling the validity of contracts without much concern for the fact that the rules in question are often inconsistent with each other. These three rules provide a choice among the following in selecting the law to govern contract issues: (1) the law of the place of the making of the contract; (2) the law of the place of performance and; (3) the law intended by the parties.¹² In an attempt to end the confusion the original Restatement of Conflict of Laws adopted the rule that the law of the place of making determines the validity of a contract.¹³ General acceptance of the *Restatement* position did not follow, however, as courts logically rejected any mechanical application of *lex loci contractus*. Accordingly, the indiscriminate use of the three traditional rules has continued, although to a lessening degree in recent years.¹⁴

One new approach to the validity-of-contract problem, which is receiving increasing approbation by courts and publicists, is the "center of gravity" or "grouping of contacts" theory. A lucid exposition of the theory can be found in the New York Court of Appeals decision in *Auten v. Auten*.¹⁵ This new rule emphasizes the law of the place which has the most significant contacts with the transaction. Although it is obvious that the "center of gravity" theory affords less certainty and predictability than the original *Restatement's* rigid place-of-making rule, it has the advantage of allowing a court to focus its attention upon the law of the jurisdiction which has the paramount interest in the multi-state transaction. The new rule realistically stresses the law which courts generally have applied in any case, even though they continued to pay lip service to one or more of the traditional rules.¹⁶ The Restatement (Second) of Conflict of Laws has aligned itself with the "contacts" standard enunciated in the *Auten* case.¹⁷ In rejecting the dogma of *lex loci contractus*, it states that the validity of a contract is governed by the law of the state with which the transaction has "its most significant relationship."¹⁸

The Supreme Judicial Court, in its *Choate, Hall & Stewart* decision, agreed that the trial judge had made the proper choice of law.¹⁹ The law of

¹² See R. LEFLAR, AMERICAN CONFLICTS LAW §§ 144-47 (3d ed. 1977); E. SCOLES & P. HAY, CONFLICT OF LAWS §§ 18.13-18.15 (1982).

¹³ RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).

¹⁴ See R. LEFLAR, *supra* note 12, at § 145; E. SCOLES & P. HAY, *supra* note 12, at § 18.14.

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

¹⁶ See R. LEFLAR, *supra* note 12, at § 149; E. SCOLES & P. HAY, *supra* note 12, at § 18.17.

¹⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

¹⁸ *Id.*

¹⁹ 378 Mass. at 540, 392 N.E.2d at 1048.

Massachusetts did govern with respect to plaintiff's contractual rights as a beneficiary.²⁰ The Court stated, however, that the status of contract conflicts law in the Commonwealth needed further discussion.²¹ The Court acknowledged that it had traditionally held that actions to enforce contracts were controlled by the law of the place where the contract was made.²² Nevertheless, the Court noted authority recognizing that reference to the law of the place of the making or to any other one-factor test can produce unfair results.²³ The Court referred to Currie's "interest" analysis, Restatement (Second) of Conflict of Laws' "most significant relationship" test, and Leflar's "choice-influencing considerations" as evidence of this attitudinal change.²⁴ It also cited its decision in *Pevoski v. Pevoski*²⁵ which transformed the conflicts rule for tort cases.²⁶ The Court was not provided with an opportunity to select among these current theories, however, because of the fact pattern in the case.²⁷ The Court stated:

[N]ot only was the contract executed in Massachusetts, but the plaintiff is a Boston partnership, the defendant's principal place of business is in Massachusetts, Steir resides in Massachusetts, and all but the early negotiations of settlement took place here. It is true the defendant was incorporated in Delaware but it has no other substantial contact with that State.²⁸

The vested rights *lex loci contractus* rule is no longer conflicts law for contract cases in Massachusetts despite the inopportuneness of *Choate, Hall & Stewart* for a definitive rejection of that doctrine. It is clear that the Supreme Judicial Court wishes to endorse the functional approach to contract conflicts issues already adopted by a large number of states. The Court will certainly take the first opportunity in an appropriate contract case to parallel its tort conflicts decision in *Pevoski* which abandoned the *lex loci delicti* rule.²⁹

²⁰ *Id.*

²¹ *Id.*

²² See *Cameron v. Gonstock Acres, Inc.*, 370 Mass. 378, 381-82, 348 N.E.2d 791, 793 (1976); *Milliken v. Pratt*, 125 Mass. 374 (1878).

²³ 378 Mass. at 541, 392 N.E.2d at 1048-49.

²⁴ *Id.* at 541, 392 N.E.2d at 1048-49.

²⁵ 371 Mass. 368, 358 N.E.2d 416 (1976). The *Pevoski* decision is discussed in section 4 of this chapter.

²⁶ 378 Mass. at 541, 392 N.E.2d at 1049.

²⁷ *Id.*

²⁸ *Id.*

²⁹ There was argument that the reference in the contract to "the maximum extent permissible under Delaware law" meant that the parties intended Delaware law should govern all issues arising under the settlement agreement. The Supreme Judicial Court agreed with the trial judge that there was no such intention expressed in the quoted words which are read "most plausibly as a reference to the Delaware corporation law to fix the permissible extent of a corporation's indemnification of its employees." *Id.* at 541-42, 392 N.E.2d at 1049.

§ 7.7. **Constructive Trust of Real Property — Law of the State with Dominant Contacts Controls.** The movement away from vested rights single-test conflicts rules, so pervasive in the areas of torts and contracts,¹ has not yet had much impact with respect to real property questions. The venerable law of the situs rule is still rather firmly entrenched in matters involving legal or beneficial interests in land.² It is a bit unusual when a court finds *lex situs* inappropriate to resolve a choice-of-law problem in a real property controversy. The Appeals Court of Massachusetts used such an unconventional approach in the decision of *Rudow v. Fogel*.³

The dispute in *Rudow* involved a parcel of real property located in Massachusetts and owned by the plaintiff's mother.⁴ Before her death the mother conveyed the property to the defendant, her brother.⁵ The transfer was without consideration.⁶ At the time of transfer the defendant orally agreed that he would hold the property for the benefit of the plaintiff and "would turn it over to the plaintiff when [he] reached maturity."⁷ When the defendant refused to transfer the real property the plaintiff, by his father and next friend, brought an action asserting that the defendant held the property in constructive trust for the plaintiff. All parties to this action were residents of New York.⁸

The trial judge applied Massachusetts law and ruled that there was no constructive trust.⁹ In choosing Massachusetts law the judge followed the traditional conflicts rule which looks to the law of situs to determine all questions relating to land.¹⁰ Although he refused to decree specific performance, he entered judgment for the plaintiff in the amount of the fair

The final issue in the case was the plaintiff law partnership's standing to sue as a third-party beneficiary of the settlement contract. The superior court held that Massachusetts law prohibited the plaintiff from bringing suit. The Supreme Judicial Court held that the superior court's position on this question was incorrect. The settlement agreement provided that the defendant corporation would make payments directly to Steir's counsel, the plaintiff law partnership. The plaintiff, therefore, was not an "incidental beneficiary" of the contract but, rather, was a "creditor beneficiary" entitled to sue on the contract. *Id.* at 542-49, 392 N.E.2d at 1049-53.

§ 7.7. ¹ See, e.g., *Choate, Hall & Stewart v. SCA Services, Inc.*, 378 Mass. 535, 392 N.E.2d 1045 (1979); *Pevoski v. Pevoski*, 371 Mass. 358, 358 N.E.2d 416 (1976). See sections 4-6 of this chapter.

² R. LEFLAR, *AMERICAN CONFLICTS LAW* § 165 (3d ed. 1977); W. REESE & M. ROSENBERG, *CONFLICT OF LAWS* 736-55 (7th ed. 1978).

³ 1981 Mass. App. Ct. Adv. Sh. 1621, 426 N.E.2d 155.

⁴ *Id.* at 1621, 426 N.E.2d at 156.

⁵ *Id.* at 1522, 426 N.E.2d at 156.

⁶ *Id.* at 1622, 426 N.E.2d at 157.

⁷ *Id.* at 1622-23, 426 N.E.2d at 157.

⁸ *Id.* at 1621-22, 426 N.E.2d at 156.

⁹ *Id.* at 1624, 426 N.E.2d at 158.

¹⁰ *Id.*

value of the property less expenses incurred by the defendant.¹¹ The Appeals Court held that New York law applied and remanded the case to the superior court for a determination whether there had been a confidential relationship between the plaintiff's mother and the defendant.¹² If such a determination were made, a new judgment was to be entered ordering transfer of the property to the plaintiff.¹³

The Appeals Court recognized the difference between Massachusetts law and New York law as to whether the conveyance of land between family members imposes a constructive trust upon the transferee.¹⁴ New York imposes a constructive trust in these circumstances,¹⁵ whereas Massachusetts does not.¹⁶ In resolving this conflict of laws the trial judge, following the traditional *lex situs* rule, applied the law of Massachusetts since it was the locus of the land.¹⁷ The Appeals Court refused to follow the *lex situs* doctrine in *Rudow*.¹⁸ Taking its direction from recent Supreme Judicial Court cases which rejected one-dimensional conflicts rules,¹⁹ the Appeals Court stated that the trial court should have considered the interests of both New York and Massachusetts in the transaction before deciding upon the appropriate law to be applied.²⁰

The Appeals Court noted that Massachusetts had an important contact with the case because it was the situs of the land in question.²¹ The principal interest of the situs state in real estate transactions is the protection of purchasers and other persons who depend on the record title.²² As the court observed, it is more convenient for a purchaser and his title searchers to consult only the law of one jurisdiction.²³ It was apparent, however, that no such persons were involved in the instant case.²⁴ New York's interest, the court continued, was in the rights and obligations of its domiciliaries.²⁵ The plaintiff, his mother, and the defendant were all domiciled in New York at the time the property was transferred to the

¹¹ *Id.*

¹² *Id.* at 1622, 1631, 426 N.E.2d at 156, 161.

¹³ *Id.* at 1631, 426 N.E.2d at 161.

¹⁴ *Id.* at 1623, 426 N.E.2d at 157.

¹⁵ *Sinclair v. Purdy*, 235 N.Y. 245, 139 N.E. 255 (1923).

¹⁶ *Meskeil v. Meskeil*, 355 Mass. 148, 243 N.E.2d 804 (1969).

¹⁷ 1981 Mass. App. Ct. Adv. Sh. at 1624, 426 N.E.2d at 158.

¹⁸ *Id.* at 1624-27, 426 N.E.2d at 158-59.

¹⁹ See *Choate, Hall & Stewart v. SCA Services, Inc.*, 378 Mass. 535, 392 N.E.2d 1045 (1979); *Pevoski v. Pevoski*, 371 Mass. 358, 358 N.E.2d 416 (1976). See *supra* note 1 and accompanying text.

²⁰ 1981 Mass. App. Ct. Adv. Sh. at 1627, 426 N.E.2d at 159.

²¹ *Id.*

²² *Id.*

²³ *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 comment b (1971)).

²⁴ *Id.*

²⁵ *Id.* at 1628, 426 N.E.2d at 160.

defendant in that state.²⁶ The mother's expectation, enforceable under New York law, was that her brother would hold the property for her son.²⁷ Since the concern at stake was not related to the situs of the land, but rather to regulating family obligations, the Appeals Court concluded that New York "has the dominant contacts and the superior claim for application of its law."²⁸

The *lex situs* citadel has been virtually impregnable in American courts with respect to all issues involving real property. A few, however, have pointed out the need to challenge the mechanical use of the situs law to settle all questions pertaining to land.²⁹ In *Rudow* the Appeals Court made a significant advance against the monolithic law of the situs rule. Land transactions have different issues as do tort and contract cases. The analysis which applies the laws of different states to various phases of a tort or contract pertains with equal logic to real property cases. The *Rudow* decision further emphasizes the rapidity with which Massachusetts is making the transition from the vested rights to the contacts approach in its conflicts law.

B. THE SURVEY YEAR

§ 7.8. Prejudgment Interest on Damages for Breach of Contract — Law of the State Chosen by the Parties to Govern the Contract Controls. When transactions cross state borders, it is not uncommon for contracting parties to include in the agreement which state's law will govern the rights and obligations of the parties under the contract. In the instance of litigation, whether the parties' choice of law will in fact be controlling is a question of state conflict of laws doctrine. In *Morris v. Watsco, Inc.*,¹ the Supreme Judicial Court clarified the Massachusetts conflict laws rule relating to the contracting parties' choice of law and the issue of interest payable as damages for breach of contract. The Court's decision comports with the principles set forth in the Restatement (Second) of Conflict of Laws.

The defendant Watsco was a Florida corporation engaged in the business of manufacturing and selling professional hair spray systems and products.² The plaintiff Morris entered into a distributorship agreement with Watsco by which Morris became the exclusive distributor of Watsco

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1627-28, 426 N.E.2d at 159-60.

²⁹ See Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1 (1967).

§ 7.8. ¹ 385 Mass. 672, 433 N.E.2d 886 (1982).

² *Id.* at 673, 433 N.E.2d at 887.

products in parts of Massachusetts.³ The contract provided that it was to be construed and enforced according to the laws of Florida.⁴ Watsco subsequently terminated Morris' distributorship.⁵ Morris brought an action in the United States District Court for the District of Massachusetts, alleging breach of contract and unfair and deceptive trade practices.⁶ Jurisdiction was based on diversity of citizenship.⁷ The court entered judgment for the plaintiff in accordance with the jury's verdict awarding damages, and then added prejudgment interest calculated pursuant to Massachusetts law.⁸

The defendant appealed to the United States Court of Appeals for the First Circuit and challenged the computation of prejudgment interest in accordance with Massachusetts law.⁹ Watsco contended that the cases cited as authority for the application of Massachusetts law to the interest question were outmoded and no longer stated the controlling law of the Commonwealth.¹⁰ The court of appeals then certified the following question of law to the Supreme Judicial Court: "Under Massachusetts law, what law is to be applied in determining whether, and at what rate, pre-judgment interest should be awarded on the recovery for an unliquidated contract claim when the underlying contract provides that it is to be construed and enforced according to the law of a foreign jurisdiction (Florida law in this instance)?"¹¹

Because the case was before the federal court under diversity jurisdiction, the Supreme Judicial Court first considered the *Erie* problem. Under the Rules of Decision Act,¹² the federal diversity court must apply the substantive law of the state in which it sits.¹³ The substantive state law includes its conflict of laws rules.¹⁴ The Court concluded properly that the federal court of appeals was correct when it recognized that the prejudgment interest question was to be determined by Massachusetts conflicts law.¹⁵

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 673-74, 433 N.E.2d at 887-88.

¹⁰ *Id.* at 674, 433 N.E.2d at 888.

¹¹ *Id.* at 672-73, 433 N.E.2d at 887.

¹² 28 U.S.C. § 1652 (1970).

¹³ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁴ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). The United States Supreme Court has recently reaffirmed its *Klaxon* ruling in *Day & Zimmerman v. Challoner*, 423 U.S. 3 (1975).

¹⁵ 385 Mass. at 674, 433 N.E.2d at 888.

The next question addressed by the Supreme Judicial Court was whether Massachusetts conflicts law would recognize the right of the parties to select the law governing their contract.¹⁶ The original Restatement of Conflict of Laws, with its *lex loci contractus* rule,¹⁷ denied effect to a choice of law by the parties to a contract. The rationale behind this approach was that, because it was for the law and the courts to determine the validity of a contract, such power of selection would be an impermissible derogation from judicial authority.¹⁸ This view is now obsolete, and the Restatement (Second) gives the parties to the contract the power to choose the governing law.¹⁹ It is now generally recognized that the prime objectives of contract law are to protect the expectations of the parties and to make it possible for them to predict their rights and liabilities under the agreement.²⁰ In multi-state transactions these objectives can best be attained by allowing the parties to choose the law which will govern the validity of the contract and the rights which it creates. Certainty and predictability of result are thereby most likely to be secured.²¹

Massachusetts law, the Court stated, recognizes the right of the parties to a contract to select the governing law.²² The Court referred to the choice-of-law section of the Uniform Commercial Code where, in transactions bearing a reasonable relation both to the Commonwealth and to another jurisdiction, "the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."²³ The Court also cited its decision in *Maxwell Shapiro Woolen Company v. Amerotron Corporation*,²⁴ where it acknowledged that permitting parties to stipulate the governing law added certainty to the agreement.²⁵ Clearly, the Court noted, the rule of party autonomy in contracts is conflicts doctrine in Massachusetts as it is in most other states.²⁶ Massachusetts conflicts law, therefore, would call for the application of Florida law to all substantive questions arising under the contract in *Morris*.²⁷

The Supreme Judicial Court then turned to the matter of the law governing pre-judgment interest.²⁸ The Court's analysis to this point

¹⁶ *Id.* at 674-75, 433 N.E.2d at 888.

¹⁷ RESTATEMENT OF CONFLICT OF LAWS § 332 (1934).

¹⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment e (1971).

¹⁹ *Id.* at § 187.

²⁰ *Id.* at comment e.

²¹ *Id.*

²² 385 Mass. at 674, 433 N.E.2d at 888.

²³ *Id.* (quoting G.L. c. 106, § 1-105(1)).

²⁴ 339 Mass. 252, 158 N.E.2d 875 (1959).

²⁵ *Id.* at 257 n.3, 158 N.E.2d at 878-79 n.3.

²⁶ 385 Mass. at 674-75, 433 N.E.2d at 888.

²⁷ *Id.*

²⁸ *Id.* at 675, 433 N.E.2d at 888.

indicated that since the parties had chosen Florida to govern the contract, Florida law should govern the determination of pre-judgment interest under Massachusetts conflicts doctrine.²⁹ The federal district court, however, had applied Massachusetts rather than Florida law in determining pre-judgment interest. The Supreme Court explained that the confusion arose from early Massachusetts cases which treated pre-judgment interest as payable for delay, a “procedural” question controlled by the law of the forum.³⁰ This accounted for the federal district court’s choice of Massachusetts law, because Massachusetts was the forum state.³¹ In *Morris*, the Court rejected the “procedural” characterization of interest payments, and stated that pre-judgment interest is a “substantive” right flowing from the breach of contract.³² It found that the only remaining justification for the use of Massachusetts law in these circumstances was the longevity of the old rule.³³ The Court concluded as follows:

We have no hesitancy in concluding that the parties to the contract involved in this case intended that their rights should be determined by Florida law and that those rights include the determination of damages, including interest, to be paid as a consequence of a breach of contract. . . . Their agreement should be given effect.³⁴

The Court found that its decision in favor of Florida law was in agreement with the principles of Restatement (Second) of Conflict of Laws.³⁵ Under the Restatement view, “[t]he law of the state chosen by the parties to govern their contractual rights and duties”³⁶ will be applied to determine the measure of recovery for breach of contract, including “whether plaintiff can recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment.”³⁷ In answering the conflicts question certified to it by the federal court of appeals, the Supreme Judicial Court has again demonstrated its reliance upon the Restatement (Second). The position of the Restatement (Second) that interest is part of the substantive right to damages for breach of contract is clearly the better rule of law.

²⁹ See *supra* notes 22-27 and accompanying text.

³⁰ 385 Mass. at 675, 433 N.E.2d at 888-89; see *Ayer v. Tilden*, 81 Mass. (15 Gray) 178 (1860).

³¹ 385 Mass. at 675, 433 N.E.2d at 889.

³² *Id.* at 675-76, 433 N.E.2d at 889.

³³ *Id.* at 675-76, 433 N.E.2d at 888-89.

³⁴ *Id.* at 676-77, 433 N.E.2d at 889. The Court indicated that the law of Massachusetts and the law of Florida might differ with respect to the rate of interest (perhaps less in Florida), the date from which it is determined, and the entity (jury, clerk, or judge) which makes the interest determination. *Id.* at 677 n.7, 433 N.E.2d at 890 n.7.

³⁵ *Id.* at 677, 433 N.E.2d at 889.

³⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971).

³⁷ *Id.* at § 207 comment e.

§ 7.9. Recognition of Foreign Country Custody Decree — Requirements.

The effect to be given to the decision of a foreign court can be an interesting issue when the matter litigated before the foreign court is subsequently placed before an American court. There is some debate over whether principles of *res judicata* should apply with foreign judgments.¹ In *Schiereck v. Schiereck*,² the Appeals Court of Massachusetts enforced a West German divorce decree which granted custody of the parties' minor daughter to the husband. The court was satisfied that the law applied by the West German courts was reasonably similar to the law and practice of the Commonwealth in child custody cases.³

The parties were married in West Germany.⁴ The husband was a West German citizen and the wife was a citizen of the United States.⁵ Shortly after the birth of their daughter the couple separated and divorce and custody proceedings were commenced in a West German court.⁶ After a full hearing with counsel on both sides, the West German court issued a judgment dissolving the marriage and awarding custody of the child to the husband.⁷ The court, after a careful evaluation of the evidence as to the family situation, concluded that living with the father would serve the best interests of the child.⁸ The wife appealed from the judgment and, while her appeal was pending, removed the child from West Germany to Massachusetts.⁹ Subsequently, the Supreme Judicial Court of Bavaria affirmed the judgment of the lower court.¹⁰

After the husband located his missing daughter in Massachusetts, he brought an action in a Massachusetts probate court seeking enforcement of the West German judgment.¹¹ The probate judge ordered enforcement but modified the West German decree to allow visitation rights to the wife.¹² Both parties appealed.¹³ The wife contended that the judge should have held an evidentiary hearing to determine if the custody award was in the best interests of the child.¹⁴ The husband argued that the judge abused his discretion by granting periodic visitation rights to the wife and requir-

§ 7.9. ¹ See *Hilton v. Guyot*, 159 U.S. 113 (1895).

² 14 Mass. App. Ct. 378, 439 N.E.2d 859 (1982).

³ *Id.* at 381-82, 439 N.E.2d at 862.

⁴ *Id.* at 379, 439 N.E.2d at 860.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 379, 439 N.E.2d at 861.

⁸ *Id.* at 379-80, 439 N.E.2d at 861.

⁹ *Id.* at 380, 439 N.E.2d at 861.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 378, 439 N.E.2d at 860.

¹³ *Id.*

¹⁴ *Id.* at 378-79, 439 N.E.2d at 860.

ing him to pay the daughter's transportation costs to and from the wife's home.¹⁵ The Appeals Court affirmed.¹⁶

Judgments rendered in a foreign country are not entitled to the protection of the full faith and credit clause of the Federal Constitution.¹⁷ In many states, however, the doctrine of comity is invoked whereby foreign country judgments, provided they comply with due process requirements, will be accorded the same degree of recognition to which sister state judgments are entitled.¹⁸ The Appeals Court stated that Massachusetts, by comity, generally will recognize the judgment of a foreign country court.¹⁹ The court then listed the conditions for recognizing a foreign court child custody order: (1) the foreign court had jurisdiction over the persons whose rights were to be determined and the subject matter; (2) the foreign court applied procedural and substantive law comparable to that of Massachusetts, and; (3) the custody decree promoted the best interests of the child.²⁰

The Appeals Court found that all three conditions were satisfied in the *Schiereck* case.²¹ The wife conceded that the West German courts had jurisdiction over the parties and the subject matter.²² An examination of the documentary record of the proceedings in the West German courts established that the wife received a full and fair hearing.²³ With respect to custody the apposite West German law required the court to reach "a decision which most closely corresponds to the well-being of the child."²⁴ In response to that statutory command the West German judge specifically stated that "[t]he court, therefore, had to reach a decision which was in the best interest of the child."²⁵ To make that determination the West German court reviewed welfare agency reports and psychological data from interviews with the parents.²⁶ The Massachusetts Appeals Court concluded that the law applied by the West German courts was similar to Massachusetts law and that the West German custody decree followed the best interests of the child. The probate judge, therefore, in the absence of any allegation of changed circumstances, acted correctly in

¹⁵ *Id.* at 379, 439 N.E.2d at 860.

¹⁶ *Id.*

¹⁷ U.S. CONST., art. IV, § 1. See *Hilton v. Guyot*, 159 U.S. 113 (1895).

¹⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

¹⁹ 14 Mass. App. Ct. at 380, 439 N.E.2d at 861 (citing *Kapigian v. Minassian*, 212 Mass. 412, 99 N.E.2d 264 (1912) (recognizing dissolution of Turkish marriage under Turkish law)).

²⁰ *Id.*

²¹ *Id.* at 380-82, 439 N.E.2d at 861-62.

²² *Id.* at 380, 439 N.E.2d at 861.

²³ *Id.* at 381, 439 N.E.2d at 861.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 381, 439 N.E.2d at 862.

not holding a hearing.²⁷ The Appeals Court held, finally, that the probate judge had acted properly in modifying the West German decree with respect to the wife's visitation rights.²⁸ She was financially unable to travel to Germany to visit her daughter.²⁹

The Appeal Court's recognition and enforcement of the decree of the West German court in *Schiereck* follows the usual practice in American courts with respect to foreign country divorce and custody decrees. As the Supreme Judicial Court has stated: "The principle of international law being that the law of the country of domicile of the spouses affords the guide for deciding upon the commencement, continuance and ending of marriage, in reason it must govern divorce as well as every other incident of matrimony."³⁰ The Appeals Court did not discuss the question of domicile in *Schiereck*, but it must have assumed that the husband and wife were domiciled in West Germany at the time of the divorce proceedings.

It should be noted, however, that the comity doctrine does not require a Massachusetts court to enforce the judgment of a foreign country court in areas outside family law. In *Hilton v. Guyot*³¹ the United States Supreme Court held that a judgment of a court of a foreign country would be given conclusive effect only if the courts of that nation would give similar effect to judgments rendered in the United States.³² Where such reciprocity does not exist, the foreign judgment is only prima facie evidence of the correctness of the underlying claim.³³ Early Massachusetts decisions had anticipated the prima facie evidence rule of *Hilton*.³⁴

The reciprocity doctrine of the *Hilton* case has not received much approbation from the commentators³⁵ and has been rejected by many state courts.³⁶ It is submitted that the rule which applies the principles of res judicata to judgments rendered in foreign countries is more in accord with the public interest in seeing a timely end to litigation. It seems likely that Massachusetts courts in the future will disregard the venerable prima

²⁷ *Id.* at 381-82, 439 N.E.2d at 862. In deciding custody cases Massachusetts courts, and American courts generally, will give primary consideration to protecting the best interests of the child. See *Rolde v. Rolde*, 1981 Mass. App. Ct. Adv. Sh. 1567, 425 N.E.2d 388.

²⁸ *Id.* at 382, 439 N.E.2d at 862.

²⁹ *Id.*

³⁰ *Kapigian v. Minassian*, 212 Mass. 412, 415, 99 N.E.2d 264, 265 (1912).

³¹ 159 U.S. 113 (1895).

³² *Id.* at 210.

³³ *Id.* at 228.

³⁴ See, e.g., *Bissell v. Briggs*, 9 Mass. 462 (1813); *Buttrick v. Allen*, 8 Mass. 273 (1811).

³⁵ See R. LEFLAR, *AMERICAN CONFLICTS LAW* § 84 (3d ed. 1977); E. SCOLES & P. HAY, *CONFLICT OF LAWS* §§ 24.33-24.37 (1982).

³⁶ See e.g., *Feuchter v. Bazurto*, 22 Ariz. App. 178, 528 P.2d 178 (1974); *Coburn v. Joseph*, 195 Ga. 723, 25 S.E.2d 576 (1943); *Johnson v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926).

facie evidence doctrine when considering the recognition and enforcement of foreign country *in personam* judgments.

§ 7.10. Diversity Jurisdiction — Tort Conflicts Rule — Charitable Immunity. In *Mason v. Southern New England Conference Association of Seventh-Day Adventists*,¹ the plaintiff sought damages in federal court for injuries she received on the defendant's negligently maintained premises.² Jurisdiction was based upon diversity of citizenship.³ The United States Court of Appeals for the First Circuit was faced with two issues on appeal. The first was a conflict of laws question, and the second pertained to the scope of the Massachusetts charitable immunity statute.⁴

The defendant Association was a charitable, non-profit organization incorporated under the laws of Massachusetts.⁵ It operated a private religious school in Massachusetts.⁶ In the school building was a multipurpose room containing a motion picture screen used to show educational films.⁷ The plaintiff Mason, a resident of Maine, attended a family Christmas party at the school.⁸ The plaintiff and other family members were Seventh-Day Adventists and had been students at the school.⁹ Because of this relationship the school had made the building available to the family free of charge.¹⁰ During the party the motion picture screen fell and injured the plaintiff.¹¹

Mason and her husband brought suit against the Association in the United States District Court for the District of Maine.¹² Judgment was entered on jury verdicts awarding \$149,881.80 to the plaintiff for her injuries and \$6,000 to her husband for loss of consortium.¹³ The Association moved to amend the judgment on the strength of the Massachusetts limited charitable immunity statute.¹⁴ The district court reduced the

§ 7.10. ¹ 696 F.2d 135 (1st Cir. 1982).

² *Id.* at 135-36.

³ *Id.* at 135.

⁴ *Id.*

⁵ *Id.* at 135-36.

⁶ *Id.* at 136.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* See G.L. c. 231, § 85K. Section 85K abrogated the tort immunity granted charitable institutions by the common law. It goes on to provide "that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs."

amount of the personal injury damages to \$20,000 plus interest and costs, the parties having settled the husband's loss of consortium claim.¹⁵ The plaintiff Mason appealed to the United States Court of Appeals for the First Circuit.¹⁶ She contended first that the district court should have applied Maine law whereby she might have recovered full damages,¹⁷ and second that Massachusetts law, if applicable, did not limit recovery because the Association's activities in question were not "directly charitable."¹⁸ The federal court of appeals affirmed the judgment of the district court.¹⁹

Because it was a diversity jurisdiction case the appeals court initially addressed the *Erie/Klaxon* doctrine²⁰ and its requirements.²¹ Under this doctrine federal court exercising diversity jurisdiction must apply the substantive law of the state in which it sits²² including that state's conflict of laws rules.²³ The court of appeals therefore concluded correctly that the federal district court was bound to apply Maine conflicts law.²⁴

The court of appeals then turned to an analysis of the current Maine conflicts doctrine in the tort area.²⁵ The *Mason* court first considered *Beaulieu v. Beaulieu*,²⁶ a case where the Maine Supreme Court held that Maine law, not that of Massachusetts, governed in a suit arising out of an automobile accident in Massachusetts.²⁷ The *Mason* court recognized that the *Beaulieu* decision definitively rejected the vested rights *lex loci delicti* rule which had formerly been the established tort conflicts rule in Maine.²⁸ According to the court in *Mason*, the *Beaulieu* court refused to apply the Massachusetts' guest statute because Maine contacts²⁹ were clearly superior to those of Massachusetts.³⁰ The court of appeals also looked at *Adams v. Buffalo Forge Company*,³¹ a case where the Maine

¹⁵ 696 F.2d at 136.

¹⁶ *Id.*

¹⁷ *Id.* See ME. REV. STAT. ANN. tit. 14, § 158. The Maine statute abolished the common law tort immunity defense for charitable organizations, but it limits the tort liability of the charitable institution to the coverage specified in the insurance policy.

¹⁸ 696 F.2d at 136.

¹⁹ *Id.* at 140.

²⁰ *Id.* at 136.

²¹ "In diversity cases a federal court must apply the choice of law rules of the state in which it sits." *Id.* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

²² See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

²³ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

²⁴ 696 F.2d at 136.

²⁵ *Id.*

²⁶ 265 A.2d 610 (Me. 1970).

²⁷ *Id.* at 615.

²⁸ 696 F.2d at 136.

²⁹ *Id.* at 137.

³⁰ *Id.*

³¹ 443 A.2d 932 (Me. 1982).

Supreme Judicial Court further clarified its new conflicts law by expressly adopting the “most significant relationship” test of the Restatement (Second).³² After reviewing these Maine cases, the federal court of appeals concluded that it had to consider the Restatement (Second) to determine what law a Maine court would apply.³³

In accordance with its evaluation of Maine conflicts doctrine, the court of appeals next examined the approach of the Restatement (Second) of Conflicts.³⁴ In tort cases, the court noted, the Restatement (Second) recommends the application of the law of the state with the most significant relationship to the parties and the event, enumerating various contacts³⁵ to be considered in determining the law.³⁶ The Restatement further specifies, observed the court, that in personal injury cases the law of the state of the injury generally governs the rights and liabilities of the parties unless another state has a more significant relationship to the injury.³⁷ Therefore, the court of appeals determined, the Restatement, and presumably a Maine court, would favor the law of Massachusetts, the state of the injury, in the case at hand unless Maine somehow had superior contacts.³⁸ The only contact with Maine was the residence of the plaintiff Mason. Massachusetts was the place of injury, the place where the injury-causing conduct occurred, and the place of the defendant’s incorporation.³⁹ Clearly, the court of appeals concluded, the contacts pointed toward Massachusetts.⁴⁰

Nor did policy considerations, which the Restatement (Second) makes relevant to all conflicts cases,⁴¹ swing the balance away from Massachusetts law, according to the court of appeals.⁴² The court found that the policy in favor of upholding the expectations of the parties, of particular importance in contractual relationships, has no applicability in tort cases.⁴³ Persons usually do not plan personal injury situations. Furthermore, the policies expressed in the Maine and Massachusetts charitable immunity statutes did not provide the court of appeals with a rule of

³² *Id.* at 934 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-46 (1971)).

³³ 696 F.2d at 137.

³⁴ *Id.*

³⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). The Restatement (Second) lists the place of injury, the place where the injury-causing conduct occurred, and the domicile and place of incorporation of the parties as relevant contacts. *Id.*

³⁶ *Id.*

³⁷ *Id.* at § 146.

³⁸ 696 F.2d at 137.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

⁴² 696 F.2d at 137.

⁴³ *Id.*

decision.⁴⁴ It was not possible, the court noted, to judge that the inherent merits of one statute were better than the other.⁴⁵ The court found no cogent reason to subordinate the law of Massachusetts to that of Maine.⁴⁶ The federal court of appeals therefore upheld the district court's choice of Massachusetts law.⁴⁷

The decision of the Court of Appeals for the First Circuit in *Mason* shows an admirable understanding and use of the "most significant relationship" test of the Restatement (Second) of Conflict of Laws. It therefore is a decision worth noting because the Massachusetts courts have demonstrated a predilection for the Restatement (Second) in conflicts cases. As the *Mason* court explains in its opinion, the determination of the state of "most significant relationship" is not merely a mechanical task of adding up contacts.⁴⁸ A court must also examine relevant policy considerations along with the connecting factors.⁴⁹ This makes the contact-weighting process a qualitative analysis, and leads to a more rational result than the *lex loci delicti* approach.⁵⁰ The result reached by the federal court of appeals was indeed the correct one. A balancing of contacts and policy criteria clearly pointed to Massachusetts and its law.

§ 7.11. Diversity Jurisdiction — Wrongful Death Actions — Conflicts Rules Regarding Tort Liability, Damages, and Breach of Contract of Carriage. During the *Survey* year, Judge Garrity of the United States District Court for the District of Massachusetts issued a memorandum opinion in

⁴⁴ *Id.* at 138.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* The court of appeals then turned to the question of the interpretation of the Massachusetts charitable immunity statute. The statute distinguished between the "directly charitable" and "primarily commercial" activities of an institution. G.L. c. 231, § 85K. In the former case the \$20,000 limitation was applicable; in the latter, it was not. *Id.* The plaintiff *Mason* conceded that the defendant Association's activity was not commercial but she argued that its action involved in the cases was not "directly charitable," and therefore was not protected by the charitable immunity statute. 696 F.2d at 138. The court of appeals rejected the plaintiff's argument. The court examined the cases explaining the old Massachusetts common law immunity doctrine and the legislative history of the charitable immunity statute. This inquiry made it clear that the statute's "directly charitable" and "primarily commercial" categories were exclusive. The court then addressed the determinative question: was the Association's loan of its facility to some of its members within its corporate powers and was it "directly charitable?" The court of appeals answered in the affirmative to both parts of the question, given the wide scope of the Association's charter and its broad interest in its membership. Therefore, the court of appeals concluded, the district court had correctly determined that the statutory \$20,000 limitation of liability applied. 696 F.2d at 138-41.

⁴⁸ *Id.* at 137.

⁴⁹ *Id.*

⁵⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

*Schulhof v. Northeast Cellulose, Inc.*¹ which considered several conflict of laws issues. Since it was a diversity case, the court was required to apply the conflicts law of Massachusetts.² In particular the court examined and adopted the approach taken by the Supreme Judicial Court of Massachusetts in *Pevoski v. Pevoski*,³ *Choate, Hall & Stewart v. SCA Services, Inc.*,⁴ and *Morris v. Watsco, Inc.*⁵ As a result, the *Schulhof* decision has further clarified Massachusetts conflicts law.

Schulhof involved consolidated wrongful death actions arising out of a midair collision of two aircraft over Massachusetts which resulted in the deaths of all five persons aboard the planes.⁶ The collision occurred over Gardner, Massachusetts, between a Piper Aerostar and a Piper Navajo.⁷ The Aerostar was owned by the defendant Northeast Cellulose, a Massachusetts corporation, and carried the decedent Slivers as its passenger.⁸ Slivers, a New York domiciliary, had been in Massachusetts on business.⁹ The Aerostar was flying him from Boston to Syracuse, New York.¹⁰ His personal representative, the plaintiff Slivers, was also a domiciliary of New York.¹¹

The Navajo was owned by the defendant Nash-Tamposi Flight Operation, a New Hampshire partnership, and carried the decedent Schulhof as its passenger.¹² Schulhof, a domiciliary of New York, had contracted with the defendant Whitcomb Construction Co., a New Hampshire corporation, for a round trip passage from White Plains, New York to Concord, New Hampshire.¹³ Whitcomb transported Schulhof to New Hampshire but then subcontracted with Nash-Tamposi to bring Schulhof back to White Plains.¹⁴ It was not clear whether the Navajo was operated by an employee of Nash-Tamposi or by an employee of Whitcomb on the return trip to White Plains.¹⁵ The plaintiff Schulhof, the personal representative

§ 7.11. ¹ 545 F. Supp. 1200 (1982).

² *Id.* at 1202.

³ 371 Mass. 358, 358 N.E.2d 416 (1976). The *Pevoski* decision is discussed in section 4 of this chapter.

⁴ 378 Mass. 535, 392 N.E.2d 1045 (1979). The *Choate, Hall & Stewart* decision is discussed in section 6 of this chapter.

⁵ 385 Mass. 672, 433 N.E.2d 886 (1982). The *Morris* decision is discussed in section 8 of this chapter.

⁶ 545 F. Supp. at 1202.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

of the decedent Schulhof, was domiciled in New York.¹⁶

The plaintiffs brought wrongful death actions against the defendants.¹⁷ In addition, the plaintiff Schulhof brought a suit for breach of a contract of carriage against the defendants Nash-Tamposi and Whitcomb.¹⁸ Nash-Tamposi and Whitcomb filed cross claims against each other for indemnity or contribution.¹⁹ Because the case involved the interests of Massachusetts, New Hampshire, and New York, the district court decided to consider the choice-of-law issues before the trial.²⁰ Judge Garrity identified the following issues for resolution by the law apposite under conflicts principles: tort liability, compensatory damages, punitive damages, contract liability, contribution between tortfeasors, and pre-judgment interest.²¹ In his memorandum opinion Judge Garrity stated tentatively that Massachusetts law governed most of the issues he had enumerated.²² The judge indicated that New Hampshire law controlled the rest of the questions.²³

Jurisdiction in these cases before the federal district court was based upon diversity of citizenship.²⁴ The court was therefore required to follow the substantive law a Massachusetts state court would apply,²⁵ including the conflict of laws rules of Massachusetts.²⁶ The first task for the court was to ascertain the Massachusetts conflicts law.²⁷

The federal district court began by addressing the issue of tort liability.²⁸ The court turned to *Pevoski v. Pevoski*,²⁹ a case where the Supreme Judicial Court of Massachusetts abandoned the use of the vested rights *lex loci delicti* rule in tort conflicts cases.³⁰ The *Pevoski* court held that Massachusetts law, not that of New York, governed the issue of interspousal immunity between spouses domiciled in Massachusetts, even though the suit for damages arose out of an automobile accident in New York.³¹ The Supreme Judicial Court stated that the disposition of issues "must turn. . .

¹⁶ *Id.*

¹⁷ *Id.* at 1200.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 1202.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Erie Railroad Co. v. Tompkins*, 304 U.S. 65 (1938).

²⁶ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

²⁷ 545 F. Supp. at 1202.

²⁸ *Id.*

²⁹ 371 Mass. 358, 358 N.E.2d 416 (1976).

³⁰ *Id.* at 360, 358 N.E.2d at 417.

³¹ *Id.*

on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.”³² Judge Garrity noted that the Supreme Judicial Court did not explicitly adopt the “most significant relationship” standard of Restatement (Second)³³ in *Pevoski*.³⁴ He ruled, however, that the *Pevoski* test was substantially the same as the Restatement (Second) standard, and he construed this choice-of-law language in *Pevoski* as an endorsement by the Supreme Judicial Court of the tort approach of Restatement (Second).³⁵ Judge Garrity’s conclusion that the significant contacts approach in *Pevoski* was tantamount to the adoption of the “most significant relationship” criterion of Restatement (Second) seems correct. Both approaches reject the automatic use of the *lex loci delicti* rule in favor of a more flexible rule, which prefers the law of the jurisdiction which has the strongest interest in a particular issue.

Turning to the interests of Massachusetts, New Hampshire, and New York in the issue of tort liability, the district court held that Massachusetts law applied to determine the rights and liabilities of the parties.³⁶ The collision between the two aircraft occurred in the air above Massachusetts.³⁷ Massachusetts clearly had a strong interest in deterring tortious conduct in its airspace as it did in preventing negligence on its highways.³⁸ Tortious behavior in the air above Massachusetts was likely to injure persons and property in the Commonwealth.³⁹ According to the court, neither New Hampshire nor New York had a more significant relationship to this rules of the road question to justify applying its law to the issue of liability.⁴⁰ Therefore the court held that Massachusetts tort law would be used to judge the conduct of the parties.⁴¹

It is worth noting that the “most significant relationship” test of Restatement (Second) does not reject the *lex loci delicti* principle in all cases. It takes the position that in personal injury actions “the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship. . . .”⁴² The Restatement (Second)

³² *Id.*

³³ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-146 (1971).

³⁴ 545 F. Supp. at 1203.

³⁵ *Id.*

³⁶ *Id.* at 1204.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1205.

⁴⁰ *Id.*

⁴¹ *Id.* at 1204-05.

⁴² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971). The court relied on § 146 in *Schulhof*. It also cited § 175 which specifically pertains to wrongful death actions and applies the same test as § 146. 545 F. Supp. at 1204 & n.3.

recognizes that in many personal injury cases the injury factor will be the most important in determining liability.⁴³ When conduct and injury occur in the same state, as usually happens, the choice of the law of that state furthers the values of certainty, predictability, and uniformity of result.⁴⁴ It is generally the policy of Restatement (Second) to identify the connecting factor which presumptively has the "most significant relationship." In this way it attempts to strike a proper balance between the outmoded *a priori* vested rights approach and a totally subjective analysis of contacts.

The federal district court turned next to the issue of damages.⁴⁵ The Restatement (Second) provides that the question of damages in wrongful death actions should be governed by the law of the state of the injury unless another state has a more significant relationship to the transaction and the parties.⁴⁶ After identifying the contacts of the three states with the occurrence, the court decided to apply the Massachusetts wrongful death statute to compensatory as well as punitive damages.⁴⁷ With respect to both kinds of damages the court emphasized the deterrent purpose.⁴⁸ Massachusetts, as the place of the wrong, the court reasoned, had the greatest interest in deterring behavior which causes injury and death within its borders.⁴⁹

The district court acknowledged that the matter of compensatory damages raised a difficult question as to the governing law.⁵⁰ The purpose of compensatory damages is to reimburse plaintiffs for their financial loss.⁵¹ Since the plaintiffs were domiciliaries of New York, the court noted, New York arguably had a greater interest in the damages issue than Massachusetts.⁵² The court examined the New York and Massachusetts wrongful death statutes and found no difference between them.⁵³ Like the New York statute, the Massachusetts act awards "the fair monetary value of the decedent to the persons entitled to receive the damages recovered" and identifies certain types of damages.⁵⁴ The deterrent effect of the Massachusetts statute called for the application of its law with respect to accidents in Massachusetts.⁵⁵ The choice of Massachusetts law by the

⁴³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

⁴⁴ *Id.* at comments c and d.

⁴⁵ 545 F. Supp. at 1205.

⁴⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178 (1971).

⁴⁷ 545 F. Supp. at 1206.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1205-08.

⁵⁰ *Id.* at 1207.

⁵¹ See R. LEFLAR, AMERICAN CONFLICTS LAW § 126 (3d ed. 1977).

⁵² 545 F. Supp. at 1207.

⁵³ *Id.*

⁵⁴ G.L. c. 229, § 2.

⁵⁵ 545 F. Supp. at 1207-08. The federal district court also ruled that pre-judgment interest for the tort claims was a substantive matter to be determined by state law. *Id.* (citing

court follows usual practice in this kind of situation. Since there was no difference between the New York and Massachusetts statutes, there was no conflict of laws problem regarding compensatory damages. Therefore the federal district court, sitting as a Massachusetts state court in this diversity action, applied the law of the forum.

The plaintiff Schulhof brought additional causes of action against the defendants Nash-Tamposi and Whitcomb for breach of a contract of carriage.⁵⁶ The plaintiff's position was that the decedent Schulhof contracted with the defendants to transport him safely from New Hampshire to New York, that the defendants breached their contractual duties as a common carrier, and that this breach was the proximate cause of Schulhof's death.⁵⁷ The defendants argued that New Hampshire law should control the contract issue, contending that a Massachusetts court would apply New Hampshire law under the "most significant relationship" test of the Restatement (Second).⁵⁸ The plaintiff maintained that the breach of contract claim essentially sounded in tort and should be governed by Massachusetts law which applied to the tort issues.⁵⁹

The district court turned to *Choate, Hall & Stewart v. SCA Services, Inc.*⁶⁰ for guidance in this contract conflicts question.⁶¹ In that decision the Supreme Judicial Court rejected the traditional *lex loci contractus* principle as well as any other one-factor test in favor of a contacts approach.⁶² It chose not to articulate its new rule with further specificity.⁶³ Judge Garrity concluded, however, that the *Choate, Hall & Stewart* opinion indicated that the Supreme Judicial Court would adopt the Restatement (Second) of Conflict of Laws.⁶⁴

The district court found that sections 188 and 197 of the Restatement (Second) were relevant to the contract issue in *Schulhof*.⁶⁵ The two defendants were New Hampshire entities, and the contract was made and primarily performed in New Hampshire.⁶⁶ In the absence of a choice of

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171, comment c (1971); *Morris v. Watsco, Inc.*, 385 Mass. 672, 433 N.E.2d 886 (1982)). The court held that because Massachusetts law governs tort damage issues, Massachusetts law would also govern the awarding of pre-judgment interest for the tort claims. 545 F. Supp. at 1211.

⁵⁶ 545 F. Supp. at 1208-09.

⁵⁷ *Id.* at 1208.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 378 Mass. 535, 392 N.E.2d 1045 (1979).

⁶¹ 545 F. Supp. at 1209.

⁶² 378 Mass. at 540-41, 392 N.E.2d at 1048-49.

⁶³ *Id.*

⁶⁴ 545 F. Supp. at 1209.

⁶⁵ *Id.* at 1209-10.

⁶⁶ *Id.*

law by the parties to the contract these contacts established that New Hampshire was the state with the greatest interest in the parties' contractual rights and duties.⁶⁷ Moreover, the court stated, the rights created by a contract for the transportation of passengers, absent a stipulated choice of law by the parties, are determined by the law of the state of departure.⁶⁸ The court found that New Hampshire was the place of departure.⁶⁹ The court concluded, therefore, that New Hampshire governed the contract causes of action.⁷⁰ The choice of New Hampshire law contributed to the certainty and predictability so important in contract cases.⁷¹

The final conflicts question in *Schulhof* concerned the cross claims between Nash-Tamposi and Whitcomb for indemnity or contribution.⁷² The district court could not find any Massachusetts case dealing with this conflicts issue.⁷³ It looked to the apposite section of Restatement (Second) which designates the domiciliary state of the tortfeasors as the jurisdiction with the greatest interest in the issues of contribution and indemnity.⁷⁴ Accordingly, the court concluded that New Hampshire law governed since the two interested parties were domiciled there.⁷⁵

The opinion of the federal district court in *Schulhof* does not have the same authority as an opinion of the Supreme Judicial Court of Massachusetts. The latter tribunal is the ultimate arbiter of conflict of law rules in Massachusetts, subject, of course, to the limitations of the federal constitution. The district court, however, was acting in this instance as a surrogate for the Supreme Judicial Court since *Schulhof* was a diversity case. It cited, analyzed, and applied the relevant decisions of the Supreme Judicial Court to the conflicts issues before it. Judge Garrity's opinion therefore represents important evidence of the conflicts law of Massachusetts. Without question, Massachusetts courts are committed to a contacts approach to conflicts problems, more specifically, to the "most significant relationship" test of the Restatement (Second) of Conflict of Laws.

⁶⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

⁶⁸ *Id.* at § 197.

⁶⁹ 545 F. Supp. at 1209-10.

⁷⁰ *Id.*

⁷¹ *Id.* The federal district court did not accept the plaintiff Schulhof's argument that her contract claim was essentially a tort claim and should, therefore, be governed by Massachusetts law. *Id.* at 1210. Contract and tort claims have different purposes. A breach of contract action is designed to place the wronged party in *status quo ante*. Damages in a tort claim have a much stronger deterrent aim. Consequently, these differences justify applying the law of different states to contract and tort actions. Massachusetts had the greater interest in the tortious conduct within its borders. It had no comparable interest in the New Hampshire contract in *Schulhof*. *Id.*

⁷² *Id.* at 1208.

⁷³ *Id.*

⁷⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 173, comments a and b (1971).

⁷⁵ 545 F. Supp. at 1208.