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CONFLICT OF LAWS—TORT CHOICE OF LAW PRINCIPLES APPLIED TO A BREACH OF WARRANTY CLAIM IN Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581 (1983)

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CONFLICT OF LAWS — TORT CHOICE OF LAW PRINCIPLES APPLIED TO A BREACH OF WARRANTY CLAIM IN *Cohen v. McDonnell Douglas Corp.*, 389 Mass. 327, 450 N.E. 2d 581 (1983).

I. INTRODUCTION

A recent Massachusetts decision has apparently given the courts of that commonwealth the option not to apply Massachusetts law to occurrences bearing an appropriate relation to the commonwealth.

In *Cohen v. McDonnell Douglas Corp.*,[1] the Supreme Judicial Court of Massachusetts accepted certification[2] of three principal questions of law from the United States District Court for the District of Massachusetts.[3] The court specifically considered the applicable law with respect to the legal sufficiency of the plaintiff's claim for breach of warranty and negligence.[4] This note focuses on the court's analysis of applicable law in a decision that treats what is essentially a tort issue as a choice-of-law problem.[5] The court's choice-of-law resolution renders future litigation less predictable than litigation of the past.

II. *COHEN*

A. *Facts*

Nellie Cohen, the deceased, had resided in Massachusetts. She

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1. 389 Mass. 327, 450 N.E.2d 581 (1983).

2. The supreme judicial court may accept questions certified to it by a federal district court pursuant to section 1 of S.J.C. Rule 1:03, which provides:

> This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

SUP. JUD. COURT RULE 1:03 § 1 (West 1981).

3. The three principal questions certified to the supreme judicial court involve breach of warranty, negligent infliction of emotional distress, and applicable law. *Cohen*, 389 Mass. at 328, 450 N.E.2d at 583.

4. *Id.* at 330, 450 N.E.2d at 583.

5. In *Cohen*, the court recognized that the plaintiff's claim for negligent infliction of emotional distress was the direct result of an alleged breach of warranty and it concluded that "it is appropriate to view the choice of law issues raised by the plaintiff's claim in light of choice of law principles applicable in tort actions." *Id.* at 333, 450 N.E.2d at 584.

had two sons: the plaintiff, Manuel Cohen, a resident of California; and Ira Cohen, deceased, who had been a resident of Illinois.[6] Ira Cohen was killed in an airplane crash near Chicago, Illinois, while flying to Los Angeles, California.[7] The airplane was manufactured by McDonnell Douglas Corporation and was operated by American Airlines Corporation, both defendants in this action.[8]

The plaintiff telephoned his mother in Massachusetts from his home in California approximately seven hours after the accident to inform her of Ira's death.[9] Upon learning of the death of her son, Nellie Cohen suffered a series of angina attacks and died of a subsequent heart attack.[10]

The plaintiff, the executor of Nellie Cohen's estate, was her only surviving heir and next of kin.[11] He instigated an action on behalf of his mother's estate against McDonnell Douglas Corporation for breach of warranty.[12] American Airlines Corporation, the first defendant, is a Delaware corporation with its principal place of business in New York.[13] McDonnell Douglas Corporation, the second defendant, is a Maryland corporation with its principal place of business in Missouri.[14]

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6. *Id.* at 329, 450 N.E.2d at 582-83.

7. *Id.* at 329, 450 N.E.2d at 583.

> On May 25, 1979, at approximately 3 p.m., CDT, while civil aircraft N110A was operating on a regularly scheduled flight, designated American Airlines Flight 191, from Chicago, Illinois, to Los Angeles, California, and as N110A was in the process of taking off from Runway 32 R at O'Hare Airport, Chicago, Illinois, the left engine of said civil aircraft separated from the airframe and fell to the ground. As the direct and proximate result thereof, civil aircraft N110A crashed.

Appendix to Brief for Defendant at 6 (citing complaint at 3), Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581 (1983).

8. *Id.* at 329, 450 N.E.2d at 582-83. This note considers the plaintiff's claim against McDonnell Douglas Corporation for breach of warranty.

9. *Id.* at 329, 450 N.E.2d at 583. "The plaintiff, Ira's brother, learned of the accident while listening to a radio broadcast and surmised that his brother had been a passenger on the aircraft involved." *Id.*

10. *Id.* at 330, 450 N.E.2d at 583. The defendant asserted that Nellie Cohen had suffered from angina attacks for twelve years prior to her death and that she had taken medication for her condition. Appellate Brief for Defendant at 5 n.3, Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581 (1983). For purposes of the motions for summary judgment, however, the trial court assumed that Nellie's heart attack and subsequent death were the direct results of her emotional response to the news of her son's death. *Cohen*, 389 Mass. at 330, 450 N.E.2d at 583.

11. 389 Mass. at 330, 450 N.E.2d at 583.

12. *Id.*

13. *Id.*

14. *Id.*

B. *Decision*

The Supreme Judicial Court of Massachusetts accepted the district court's certified questions of law and applied choice-of-law rules that govern tort claims to the plaintiff's breach of warranty claim.[15] The court then concluded that Massachusetts law[16] controlled the

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15. *Id.* at 332-33, 450 N.E.2d at 584. Rather than treat the plaintiff's claim as a contract claim, the court treated it as a tort; specifically the tort of negligent infliction of emotional distress:

> Clearly a state's interest in enforcing warranties involves not only the physical presence of a product within a State but also the injury caused within a State by that product. Thus, it is appropriate in this case to examine tort choice of law pricniples in deciding whether the law of Massachusetts applies to the plaintiff's breach of warranty claim.

389 Mass. at 333, 450 N.E.2d at 585. A claim for the wrongful death of Ira Cohen was pending in Illinois at the time of this writing. The Illinois court presumably applied Illinois law to that claim. *Id.* at 329 n.2, 450 N.E.2d at 583 n.2. Although the Supreme Judicial Court of Massachusetts had previously recognized that "a claim for breach of warranty of merchantability is in essence a tort claim," that shift of focus from contract to tort came in a contribution case which was silent on extending such application to choice-of-law resolution. Wolfe v. Ford Motor Co., 386 Mass. 95, 99, 434 N.E.2d 1008, 1011 (1982). *See infra* text accompanying notes 55-61.

16. As a practical matter the plaintiff would have benefited from the application of Massachusetts law with respect to the breach of warranty claim because the applicable statute provides for punitive damages. MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1958) provides in pertinent part:

> A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted . . . or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages. . . . (3) *punitive damages in an amount of not less than five thousand dollars.* . . .

Id. (emphasis added). *Compare* ILL. REV. STAT. ch. 70, § 1 (West 1959):

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, not withstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Id. A problem with the application of Massachusetts law to the plaintiff's claim is the inconsistent and illogical result of having the laws of different states apply to the claims of the estates of Ira and Nellie Cohen. The defendant asserted that the court should analogize this case to loss of consortium cases in which a spouse's claim is parasitic to a physical injury claim. The defendant then argued that the law of the state that governs the duty of care toward Ira Cohen should similarly govern the duty of care toward his relatives who

plaintiff's breach of warranty claim[17] and that tort choice-of-law principles must apply because the alleged breach of warranty was merely an extension of a claim for negligent infliction of emotional distress.[18]

III. ANALYSIS

The court's analysis of applicable law with respect to the plaintiff's claim converts what is labeled a "tort claim"[19] into a choice-of-law issue. The problem with the court's analysis in *Cohen* is threefold. First, the court approached the issue as a choice-of-law problem even though no conflict of laws existed. Second, the court abandoned the certainty of result available by statute.[20] Third, the court relied on an erroneous interpretation of the Restatement (Second) of Conflict of Laws.[21]

Although The *Cohen* dispute involved the potential interests of seven states,[22] the conflict of laws issue lacked substance.[23] The court

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were at most only indirectly affected by the crash. This argument was rejected by the court. 389 Mass. at 334-35, 450 N.E.2d at 585.

The net result of the application of Massachusetts law, therefore, would allow the estate of Nellie Cohen, if successful, to recover punitive damages while Illinois law would bar recovery of punitive damages for the death of Ira Cohen, the true "recipient" of the alleged wrongful conduct. Appellate Brief for Defendant at 20, Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581 (1983).

17. "On the record submitted to the court in this case, we conclude that no other State, including Illinois, appears to have a more significant interest in the plaintiff's claim than that of Massachusetts." 389 Mass. at 336, 450 N.E.2d at 586. *See also id.* at 344, 450 N.E.2d at 590. "[W]e conclude that the law of Massachusetts applies to both the plaintiff's breach of warranty and negligence claims and that, under Massachusetts law, the plaintiff is not entitled to recover damages under either of these theories." *Id.*

18. 389 Mass. at 333, 450 N.E.2d at 584. The *Cohen* court used the terms *breach of warranty* and *negligent infliction of emotional distress* interchangeably.

19. 389 Mass. at 332, 450 N.E.2d at 584.

20. MASS. GEN. LAWS ANN. ch. 106, § 1-105 (West 1958) provides:

> When a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law in either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this chapter applies to transactions bearing an appropriate relation to this state.

Id. Although the U.C.C. standard is ambiguous, its application provides a certain result because jurisdiction appears to satisfy the requisite "appropriate relation."

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

22. The seven states interested in the dispute were Massachusetts, Illinois, California, Maryland, Missouri, Delaware, and New York. *Cohen*, 389 Mass. 327, 450 N.E.2d 581 (1983).

23. *Id.* at 332 n.7, 450 N.E.2d at 583 n.7. "Rather than opine about the law of the several States, we assume, for the purpose of responding to the Federal District Court judge's certified questions, that there is indeed a conflict of laws." *Id.*

expressly considered the interests of two of those states: Massachusetts, the state in which Nellie Cohen died; and Illinois, the situs of the airplane crash that killed Ira Cohen.[24] As a practical matter, resolution as to which state's law applied to the plaintiff's negligent infliction of emotional distress claim was unnecessary because the application of general tort law principles would render an identical result regardless of which state's law was used: the plaintiff would be denied recovery.[25] In fact, upon concluding that Massachusetts law applied to the plaintiff's complaint,[26] the court maintained that recovery must be denied.[27] The plaintiff contended that recovery should be allowed because the physical injury to Nellie Cohen was reasonably foreseeable.[28] The court deduced that the plaintiff's interpretation of the Massachusetts Uniform Commercial Code, if accepted, would result in substantial expansion of liability for the negligent infliction of emo-

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24. *Id.* at 333-34, 450 N.E.2d at 585. This note examines the suit brought by Manuel Cohen as the executor of his mother's estate in Massachusetts.

25. Application of general principles of tort law of the seven interested states renders identical results. In Massachusetts, relief for negligent infliction of emotional distress is granted to a parent when he or she either witnesses an accident involving his or her child, or soon comes on the scene while the injured child is still there. Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978). In the absence of direct physical impact, relief is granted in Illinois only if there is a contemporaneous observance of the accident. Rickey v. Chicago Transit Authority, 101 Ill. App.3d 439, 428 N.E.2d 596 (1981); Kaiserman v. Bright, 61 Ill. App.3d 67, 377 N.E.2d 261 (1978). Maryland allows a parent to maintain an action for negligent infliction of emotional distress in the absence of physical impact if the defendant's negligent act or omission results in some clearly apparent and substantial physical injury. Vance v. Vance, 286 Md. 490, 408 A.2d 728 (1979); H & R Block, Inc. v. Festerman, 275 Md. 36, 338 A.2d 48 (1975); Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933). In Mississippi, such damages may be recovered when they are the natural result of an act committed intentionally or with such gross carelessness or recklessness as to show an utter indifference to the consequences. Blackwell Chevrolet Co. v. Eshee, 261 So.2d 481 (Miss. 1972). In Delaware, claims for mental suffering are of questionable validity if the plaintiff was, in fact, outside of the zone of danger. Farrall v. Armstrong Cork Co., 457 A.2d 763 (Del. Super. Ct. 1983); Mancino v. Webb, 274 A.2d 711 (Del. Super. Ct. 1971); Robb v. Pennsylvania R.R. Co., 210 A.2d 709 (Del. Super. Ct. 1965). New York extends liability in favor of those directly or intentionally harmed in Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). Finally, in California, liability is exended for the negligent infliction of emotional distress if the plaintiff establishes that the harm was reasonably foreseeable, the plaintiff was in the zone of danger or observed the occurrence contemporaneously, and the plaintiff was closely related to the victim. Dillon v. Legg, 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rept. 72 (1968). Cohen's claim failed to satisfy the requirements in all seven states.

26. *Cohen*, 389 Mass. at 337, 450 N.E.2d at 586.

27. *Id.* at 338-39, 450 N.E.2d at 587-88.

28. *Id.* Plaintiff asserted that a claim for negligent infliction of emotional distress could prevail based on the language of MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1958). *See infra* note 42.

tional distress.[29]

A. *Avoiding Choice-of-Law*

Circumstances that present no conflict of laws because the laws of the interested states are in accord permit the court to ignore the choice-of-law issue. For instance, in *In re Pioneer Ford Sales, Inc.*,[30] the court of appeals avoided consideration of a "conflicts" question in a bankruptcy case because the petitioner did not persuade it that Michigan law differed in any relevant respect from the law of Rhode Island.[31] Similarly, the second circuit concluded in *Walter E. Heller & Co. v. Video Innovations*[32] that the lower court's application of New York law rather than the law of Illinois was not a proper ground for reversal, finding that "there is no material difference between the law of New York and the law of Illinois."[33] Although *Pioneer Ford Sales* and *Video Innovations* both post-date *Cohen*, the procedure whereby a court permits itself to pass on choice-of-law pre-dates the *Cohen* decision.[34] The Supreme Judicial Court of Massachusetts, therefore, could have acceptably concluded that the district court need not have determined applicable law. Manuel Cohen could not recover against McDonnell Douglas Corporation for negligent infliction of emotional distress regardless of which state's law was applied.[35] The court could have merely denied the plaintiff recovery and omitted its analysis of applicable law.[36]

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29. 389 Mass. at 338, 450 N.E.2d at 587. The court rejected the plaintiff's argument, stating:

> We think that the Legislature . . . did not intend that recovery be allowed in all cases where a plaintiff's injury was reasonably foreseeable. Rather . . . it is consistent with legislative intent that the scope of liability extend no further than the scope of liability under the common law action for negligent infliction of emotional distress.

Id. at 339, 450 N.E.2d at 588.

30. 729 F.2d 27 (1st Cir. 1984).

31. *Id.* at 31. Specifically the court of appeals stated:

> First, Ford notes that the franchise contract says that Michigan law governs. We thus cannot be certain that Rhode Island provides the relevant non-bankruptcy law without deciding whether its 'dealer protection' policies are sufficiently strong to overcome the contract's 'choice of law' provision as applied in a diversity case brought in a Rhode Island federal court. . . . We avoid this 'conflicts' question, however. For one thing, *we have no reason to believe that Michigan law differs in any relevant respect.*

Id. (emphasis added).

32. 730 F.2d 50 (2nd Cir. 1984).

33. *Id.* at 53.

34. *E.g.*, National Equip. Rental v. Szukhent, 375 U.S. 311 (1964).

35. *See supra* note 25.

36. The laws of the seven interested states in the *Cohen* dispute are in accord with

B. *Abandoning the certainty of result under the U.C.C.*

Assuming *arguendo* that a choice-of-law question deserving the court's consideration did exist, a proper starting point for the court's analysis would have been statutory interpretation.[37] Section 1-105 of the Uniform Commercial Code represents a rare example of a legislative instruction to the courts on the law; the issue is relevant to *Cohen*.[38] Section 1-105 provides virtual certainty of result because it requires merely that a transaction or occurrence bear an appropriate relation to a state before that state's law is applied, absent a specific agreement to the contrary made by the parties involved.[39] The *Cohen* court possessed an unparalleled opportunity because Massachusetts had not previously defined "appropriate relation" in a choice-of-law case brought under the Uniform Commercial Code.[40] The court recognized that previous decisions had left the term ambiguous.[41] In its determination that Massachusetts law applied to Cohen's breach of warranty claim, however, the court failed to define the term expressly. While one can reasonably argue that the term "appropriate relation" is ambiguous, it does continue to provide virtual certainty of result because the test appears to be satisfied by minimal contact between a transaction or occurrence and the forum state.

The plaintiff based his breach of warranty claim on § 2-318 of the

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respect to liability. The application of Massachusetts law as compared to the law of Illinois, California, Maryland, Missouri, Delaware, or New York would have benefited the plaintiff to the extent that punitive damages would be included in the award only if the plaintiff were allowed to recover. *See supra* notes 16 and 25.

37. The Massachusetts Uniform Commercial Code contains a statutory directive which the courts must follow in analyzing choice of law. *See supra* note 20 and accompanying text.

38. *Id.*

39. MASS. GEN. LAWS ANN. ch. 106, § 1-105 (West 1958).

40. 389 Mass. at 331, 450 N.E.2d at 583.

41. *Id.* Although the court found the term "appropriate relation" ambiguous, it had previously encountered no problem implementing that standard. *See, e.g.*, Nevins v. Tinker, 384 Mass. 702, 704-05, 429 N.E.2d 332, 334 (1981). "Since the note in question is a negotiable instrument as defined in the Uniform Commercial Code . . . conflict of law problems pertaining to it are resolved by the Code. Where the transaction bears an 'appropriate relation' to Massachusetts . . . the laws of the Commonwealth govern." *Id.*; Industrial Bank of Rhode Island v. Leo's Used Car Exch., 362 Mass. 797, 800, 291 N.E.2d 603, 605 (1973). "Conflict of law problems arising under the Uniform Commercial Code are resolved by the Code . . . [s]ince there is no evidence that the parties agreed that a particular state's law would apply, and since the transaction bears an appropriate relation to this state, Massachusetts law applies." *Id.*; and Skinner v. Tober Foreign Motors, 345 Mass. 429, 432, 187 N.E.2d 669, 671 (1963). "There is no finding that the parties agreed that the Connecticut law should apply. The transaction bore an appropriate relation to this state. The contract of sale was executed here and the plane was delivered to the plaintiffs here." *Id.*

Uniform Commercial Code.[42] The court had decided previously that conflict of law problems arising out of the Uniform Commercial Code would be resolved by the Code[43] and that in the absence of an agreement between the parties as to which state's law would govern, "the provisions of the Massachusetts Uniform Commercial Code shall apply to 'transactions bearing an appropriate relation to this state.'"[44] As the court noted, the parties never agreed to the application of a specific state's law to a possible breach of warranty claim.[45] Therefore, the resolution of the choice-of-law issue was dependent on the interpretation of the term "appropriate relation."[46] Based on the above cited Code provisions, and assuming that a conflict of laws did exist, the airplane crash bore an appropriate relation to Massachusetts and, therefore, by the court's own analysis, Massachusetts law should have been applied under the statutory directive detailed in § 1-105.[47] Jurisdiction over the dispute appears to satisfy the appropriate relation requirement.[48] Under the legislative directive of the Uniform Commercial Code § 1-105, therefore, the court could have applied Massachusetts law. The court instead rejected the U.C.C. analysis by labelling the plaintiff's breach of warranty claim a tort.[49]

C. *Choice-of-Law under Restatement (Second) of Conflict of Laws*

Rather than conclude its analysis of applicable law with the legislative directive of § 1-105 of the Uniform Commercial Code, the *Cohen* court abandoned the virtual certainty of result available and

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42. 389 Mass. at 330, 450 N.E.2d at 583. MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1958) mandates in part:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer . . . to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer . . . might reasonably have expected to . . . be affected by the goods. The manufacturer . . . may not exclude or limit the operation of this section. . . .

Id.

43. 389 Mass. at 330-31, 450 N.E.2d at 583.

44. *Id.* at 331, 450 N.E.2d at 583.

45. *Id.* The plaintiff, in fact, had no previous contact with the defendant. Furthermore, Massachusetts had no connection to the allgedly defective product; its only relationship to the case was the fact that Nellie Cohen died there. Appellate Brief for Defendant at 11, Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581 (1983).

46. 389 Mass. at 331, 450 N.E.2d at 583.

47. MASS. GEN. LAWS ANN. ch. 106, § 1-105 (West 1958 & Supp. 1984-85).

48. *See supra* note 41 and accompanying text.

49. 389 Mass. at 333, 450 N.E.2d at 584. *See supra* note 5 and accompanying text.

turned to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS.[50] The Restatement specifically addresses situations in which tortious conduct occurs in one state and injury occurs in another.[51] The court's interpretation of and reliance on the Restatement are erroneous for two reasons: First, the court mislabelled the plaintiff's breach of warranty claim;[52] and second, the court neglected to address Restatement § 6[53] in its analysis.

The court concluded that to label the plaintiff's breach of warranty claim a tort[54] was consistent with its holding in *Wolfe v. Ford Motor Co.*[55] *Wolfe* was a contribution case in which the court concluded that a breach of warranty should be treated as a tort.[56] Although *Wolfe* was devoid of a choice-of-law issue, the *Cohen* court determined that the *Wolfe* analysis applied and that the *Cohen* conflict issue should be treated as a tort.[57] This extension of the *Wolfe* analysis unnecessarily subjected *Cohen* to the fallacy of the transplanted category,[58] described as being "much like the old argumentative trick of using a word in two different senses. But in the context of any fairly complex legal problem its spurious conclusions can be made to seem very plausible."[59] The court's error lay, therefore, in concluding that

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

51. 389 Mass. at 336, 450 N.E.2d at 586.

52. *Id.* at 333, 450 N.E.2d at 584.

53. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

54. 389 Mass. at 332-33, 450 N.E.2d at 584.

55. 386 Mass. at 95, 434 N.E.2d 1008 (1982).

56. 386 Mass. at 98, 434 N.E.2d at 1010. The court in *Wolfe* framed the issue as "whether . . . a right of contribution among joint tortfeasors, should be read to embrace liability for breach of an implied warranty of merchantability." *Id.*

57. 389 Mass. at 333, 45 N.E.2d at 585. In effect, the court concluded that the definition and analysis of breach of warranty in a contribution case must be applied in the entirely different context of a choice-of-law case.

58. The fallacy of the transplanted category is an assumption that a defined term retains its meaning regardless of the context in which it is used. Both medical and legal writing have been criticized for falling into the pattern of the fallacy. *See* Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1983). Professor Cook observes:

> The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has the tenacity of original sin and must constantly be guarded against. We find examples of it wherever we turn.

Id. at 337.

59. Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535, 536 (1959).

> The fallacy of the transplanted category is not just another erroneous theory of law (like the meeting of the minds theory of contract) which can be controverted by a demonstration that it produces undesirable results or cannot be recon-

the choice-of-law aspect of Cohen's breach of warranty claim was a tort merely because the court previously so labelled the contribution aspect of a previous case.[60] The concept that principles applicable to tort law likewise apply to the law of contribution is fairly well developed.[61] Such application to choice-of-law principles, however, is not well developed. In fact, § 1-105 appears to be at odds with principles of tort law. Although tort principles provide clarity in select contribution cases, they cloud choice-of-law analysis considered in depth by the U.C.C.

The *Cohen* court relied on RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) in its determination of applicable law:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the occurrence and the parties under the principles *stated in § 6.*
> (2) contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.[62]

It failed, however, to address RESTATEMENT (SECOND) OF CONFLICT

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ciled with the cases. It is a basic bad habit of legal thinking for which we all receive preparatory training from childhood onward. Critical writing may alleviate its influence in particular instances but the novel opportunities for its application, especially in the construction of statutes, are virtually unlimited.

Id. at 574-75.

60. Wolfe v. Ford Motor Co., 386 Mass. 95, 434 N.E.2d 1008 (1982).

61. *See id.*

62. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (emphasis added). *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 146 comment e (1971) which states:

> The local law of the state where the personal injury occurred is most likely to be applied when the injured person has a settled relationship to that state, either because he is domiciled or resides there or because he does business there. When, however, the injured person is domiciled or resides or does business in the state where the conduct occurred, there is a greater likelihood that this state is to be the state of the most significant relationship and therefore the state of the applicable law with respect to issues that would usually be determined by the local law of the state of injury.

Id.

OF LAWS § 6 (1971) which states that the court, subject to Constitutional restrictions, will follow the statutory directives of its own state.[63] The Restatement comment specifically states that "[a]n example of a statute directed to choice of law is the Uniform Commercial Code which provides in certain instances for the application of the law chosen by the parties (§ 1-105 (1)) and in other instances for the application of the law of a particular state. . . ."[64] A proper reading and application of the Restatement, therefore, directs one's attention back to the logical starting point: statutory interpretation of § 1-105.

The court did concede that "[u]nder the Restatement approach, Massachusetts law would apply in this case because Nellie Cohen, a resident of Massachusetts, was injured and died in Massachusetts."[65] The court came to this conclusion after side-stepping the ambiguous "most significant relationship" requirement imposed by § 145,[66] and ignoring the statutory directive detailed in § 6[67] which would have directed the court's attention to the U.C.C. and the "appropriate relation" standard.[68] As discussed above, the appropriate relation standard in the U.C.C. is less stringent than the "most significant relation" standard in the Restatement.[69] Apparently, a state bears an appropriate relation to a dispute merely by satisfying jurisdictional requirements.[70]

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63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

(1) A court, subject to constitutional restrictions, *will follow a statutory directive of its own state on choice of law.*

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Id. (emphasis added). Such a directive is obviously circular because it reverts attention to the U.C.C. analysis discussed *supra* notes 37-41 and accompanying text.

64. *Id.* at Comment a.

65. Although the court concluded that Massachusetts law applied to serve the interests of its injured resident (the estate of Nellie Cohen), the plaintiff was *not* entitled to recover under Massachusetts law. 389 Mass. at 336, 450 N.E.2d at 586.

66. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145.

67. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

68. *See supra* note 20 and accompanying text.

69. *See supra* text accompanying note 48.

70. *Id.*

IV. ALTERNATIVES

Assuming that a true conflict of laws existed in the *Cohen* dispute, alternative approaches to its resolution were available. The *Cohen* court recognized the modern trend in choice-of-law resolution toward an interest analysis approach,[71] deviating from the once universally accepted *lex loci delicti* (law of the place of the tort) doctrine.[72]

A. *Balance of State Interests*

One alternative available to the court was to balance the identifiable interests between the two principal states, Massachusetts and Illinois. Such a balance may have revealed that Illinois, the place of the tort, had a greater interest in the resolution of the *Cohen* dispute. While Massachusetts maintains a recognizable and legitimate interest in protecting its residents,[73] the application of Massachusetts law did little to protect the plaintiff's interests because recovery was denied.[74] Illinois appears to have borne the most substantial interest in the outcome of *Cohen* because Illinois had a more weighty nexus to the accident in that the plane crashed in that state as well as in that Ira Cohen presumably purchased his ticket and boarded the plane there.[75]

It is by no means a unique idea to apply the laws of the state in which the accident occurred. In *Schulhof v. Northeast Cellulose,*

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71. Although the *Cohen* court did not expressly adopt an interest analysis approach, it did consider the interests of both Massachusetts and Illinois. *Cohen*, 389 Mass. 327, 450 N.E.2d 581 (1983). For a discussion of interest analysis in choice-of-law see Egnal, *The "Essential" Role of Modern Renvoi in the Governmental Interest Analysis Approach to Choice of Law*, 54 TEMP. L.Q. 237 (1981). "When choice of law issues arise in a forum which uses interest analysis, the forum court must consider the interests of the 'other' state as well as those of its own state." *Id.* at 247.

72. Egnal, *supra* note 71 at 237.

73. *Cf. Id.* at 266, n.125.

> A state's interest in applying its plaintiff-protecting rule has been found in the state's desire to deter wrongful conduct either within its borders or by its citizens outside its borders. In addition, a jurisdiction's general altruistic sympathies can create an interest in protecting a plaintiff regardless of his contacts with that state.

Id.

74. 389 Mass. at 329, 450 N.E.2d at 582.

75. "[It cannot] reasonably be argued that the place of the accident in the present case was fortuitous or 'irrelevant.' . . . Indeed, if anything in this case was fortuitous, it was that the mother of one of the passengers on that flight happened to live in Massachusetts." Reply Brief for Defendant at 7, Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 450 N.E.2d 581 (1983). Furthermore, application of Illinois law would promote the interests of the public, operators, and manufacturers by the application of uniform rules to an aircrash of this nature. *Id.* at 11.

Inc.,[76] the district court applied Massachusetts law to a suit that arose out of an aircraft collision and stated, "[t]he collision between the two aircraft occurred over Gardner, Massachusetts. That fact, in itself, points strongly to Massachusetts tort law."[77] It would, therefore, have been consistent with the district court's rationale in *Schulhof* for the supreme judicial court to apply Illinois law to Cohen's claim because the accident occurred in Illinois. Massachusetts precedent strongly supports the application of the laws of the state in which the accident occurred. In *Schulhof*, for instance, the court maintained that rules of the air should ordinarily be determined by reference to the law of the state in which the air is located.[78] In *Pevoski v. Pevoski*,[79] furthermore, the court concluded that "where the place of injury is not also the place in which the accident occurred, its significance is greatly diminished. It is the place of the accident which is crucial to liability issues."[80] Upon finding it necessary to treat Cohen's "tort" claim as a choice-of-law problem, the supreme judicial court could have concluded, consistent with precedent, that the law of Illinois should have governed the plaintiff's claim.

Additional support for the application of Illinois law, in the presence of a conflict of laws, is found in *Kelley v. Kokua Sales & Supply, Ltd.*[81] The fact pattern that led to the dispute in *Kelley* is remarkably similar to that in *Cohen*. In *Kelley*, however, the court concluded that the laws of the state in which the accident occurred, rather than the laws of the state in which the plaintiff's decedent learned of the death of his daughter and suffered a fatal heart attack, controlled the plaintiff's emotional distress claim.[82] Despite the factual similarity to *Cohen*, the supreme judicial court recognized *Kelley* merely as support for its denial of the plaintiff's recovery,[83] and failed to consider the

76. 545 F. Supp. 1200 (D. Mass. 1982).

77. *Id.* at 1204.

78. *Id.* at 1205. *See also*, In re Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981), in which the Seventh Circuit concluded that Illinois had a substantial interest in preventing aircraft disasters and protecting persons and businesses within its borders. *Id.* at 615-16.

79. 371 Mass. 359, 358 N.E.2d 416 (1976).

80. *Id.* at 359, 358 N.E.2d at 417. In *Pevoski*, the court determined that another state's law should be applied only when the impact of a particular resolution clearly falls upon a state other than the accident situs and would have no real effect upon any other state's interest. *Id.* The *Cohen* court failed, however, to challenge expressly its rationale in *Pevoski*. *Cohen*, 389 Mass. at 333, 450 N.E.2d at 585.

81. 56 Hawaii 204, 532 P.2d 673 (1975).

82. *Id.* In *Kelley*, the court applied the laws of Hawaii rather than the laws of California. *Id.* at 209, 532 P.2d at 676-77.

83. The *Cohen* court stated:

choice-of-law alternative suggested and applied by the Supreme Court of Hawaii.

B. *Appropriate Relation Under the U.C.C.*

A second alternative available to the court involved the application of the Uniform Commercial Code § 1-105,[84] not previously interpreted by the courts of Massachusetts.[85] The *Cohen* court abandoned § 1-105 and the "appropriate relation" standard because it was ambiguous,[86] and instead applied the Restatement's "most significant relationship" standard.[87] The following alteration of the facts that led to the *Cohen* dispute help to illustrate that the most significant relationship standard is more ambiguous than the appropriate relation standard. Suppose that Nellie Cohen, a resident of Massachusetts, was vacationing in Maine when she received the phone call informing her of her son's death. Had she died in Maine, or even in New Hampshire while en route back to Massachusetts, Massachusetts' "most significant relation" would appear to dissolve under the *Cohen* court's rationale. Even though Nellie remained a resident of Massachusetts, her death in another state would affect the court's choice-of-law determination because the court considers the place of her death a dominant factor in its analysis.[88] The result reached by the court with the application of the Restatement,[89] therefore, would be altered. Nellie's death in Maine or New Hampshire would likely shift the "most significant relationship" away from Massachusetts. Massachusetts would, however, maintain its "appropriate relation" to the dispute because it is the forum state and the deceased's former place of residence. Even though the term "appropriate relation" in § 1-105 is ambiguous,

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> We are aware of no case where a court has imposed liability where the plaintiff was located a substantial distance from the scene of the accident and did not observe either the scene of the accident or injuries inflicted on the victim. . . . *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Hawaii 204, 206 (1975) (dismissing claim on behalf of estate of father and grandfather of decedents, for emotional distress which he suffered while in California after being informed by means of a telephone call of deaths in Hawaii).

389 Mass. at 342, 450 N.E.2d at 589.

84. MASS. GEN. LAWS ANN. ch. 16, § 1-105(1) (1958 & West Supp. 1984). *See supra* note 20 and accompanying text.

85. *Cohen*, 389 Mass. at 331, 450 N.E.2d at 583.

86. *Id.* at 332-33, 450 N.E.2d at 584.

87. *Id.* at 336, 450 N.E.2d at 586. The court determined that under the Restatement approach Massachusetts law would apply because the plaintiff, a resident of Massachusetts, was injured and died in that state. *Id.*

88. 389 Mass. at 336-37, 450 N.E.2d at 586-87.

89. RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971).

courts have traditionally had no difficulty with its application. Virtually every court previously confronted with § 1-105 has found an appropriate relation.[90] Jurisdiction over the dispute appears to satisfy the appropriate relation requirement. Therefore, all seven states[91] having a connection to the *Cohen* dispute had an appropriate relation for choice-of-law purposes. The net result of § 1-105 is the application of the law of the forum state. Assuming that a conflict of laws existed, the court could have concluded that Massachusetts bore an appropriate relation to the dispute by satisfying the requirements for jurisdiction. Because Massachusetts law was applicable via the appropriate relation standard, the court unnecessarily complicated the choice-of-law analysis with the most significant relationship standard.

V. CONCLUSION

The court's analysis in *Cohen* founders on its erroneous interpretation and application of choice-of-law principles. First, choice-of-law analysis was not necessary in *Cohen* because the interested states maintain virtually identical laws which would have rendered the same result with respect to the plaintiff's claim in any state. Second, assuming that a choice-of-law analysis was necessary, the court should have applied the Uniform Commercial Code's directive that the forum state's law applied to the complaint. The U.C.C. approach would have eliminated the legal masquerade that characterized the rationalization behind the application of the forum state's laws in *Cohen*. Third, proper interpretation of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), to which the court next turned, would have directed the court back to the certainty of result under the U.C.C.

Alternatives existed consistent with the *Cohen* court's conclusion that a conflict of laws necessitated a choice of law. Rather than concluding that Massachusetts law applied to the plaintiff's claim, however, the court could have reasonably concluded that Illinois law applied because Illinois possessed a greater interest in the settlement of the dispute. Although the *lex loci* approach does not always serve the interests of the forum state, the application of the law of the place of the accident in *Cohen* would have yielded the same result, and would

90. Despite the ambiguity of the term, the Supreme Judicial Court of Massachusetts found an "appropriate relation" when confronted with § 1-105 in Nevin v. Tinker, 384 Mass. 702, 429 N.E.2d 332 (1981); Industrial Bank of Rhode Island v. Leo's Used Car Exch., 362 Mass. 797, 729 N.E.2d 603 (1973); and Skinner v. Tober Foreign Motors, 345 Mass. 427, 187 N.E.2d 669 (1963).

91. *See supra* note 22 and accompanying text.

also have served the interests of the state possessing the most substantial connection to the accident, Illinois.

In conclusion, future litigation over choice-of-law cases in which the meaning of "appropriate relation" is an issue was made more unpredictable by *Cohen*. By abandoning the clarity of result available by the application of legislative dictum, the supreme judicial court afforded the courts of Massachusetts the option not to apply Massachusetts law to occurrences that bear an appropriate relation to the Commonwealth. Trial courts may ignore applicable law under the appropriate relation standard of the U.C.C. and turn to a more stringent test, the most significant relationship standard promulgated by the Restatement.

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