

OPENING STATEMENT

Most clients and many practitioners tend to overlook the importance of choice of law issues in tort cases involving residents of different states or countries, believing that the law of the State where the lawsuit is filed will apply. This is not always so. In fact, the "choice of law" question (i.e. the substantive law applied by the Court to the issue) is often crucial.

Where an accident takes place in the same state in which the plaintiff resides, the choice of law question is not difficult to answer. However, in situations where the accident occurs in one state and all of the parties reside in others, the question of which law will apply becomes very complicated. That is the subject of this issue's lead article.

NEW YORK'S APPROACH TO CHOICE OF LAW QUESTIONS IN TORT CASES INVOLVING RESIDENTS OF DIFFERENT STATES

By Michael E. Gorelick and Alexandra E. Rigney

In deciding a choice of law question, a court must first determine whether there is indeed a conflict between the laws. Matter of Allstate Ins. Co., 81 N.Y.2d 219, 223, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993). To do this, the Court must first determine the relevant jurisdictions involved. In tort cases, the relevant domiciles are the domiciles of the parties and the place of the tort.

A recent example of New York's conflict of law analysis in split domicile cases can be found in King v. Car Rentals, Inc., 2006 WL 788716 (2d Dept. 2006), where the appellate court had to determine whether New York, New Jersey, or Quebec law applied to determine what damages plaintiff could recover. The court summarized the law of each jurisdiction as follows:

New York law provides that a plaintiff who is seriously injured in an automobile accident may recover damages for non-economic loss (see Insurance Law § 5104(a)) and that the owner of a vehicle used or operated in New York that was the cause of the plaintiff's injuries is vicariously liable for such damages (see Vehicle & Traffic Law § 388). Under New Jersey law, non-economic loss may be recovered in circumstances similar, although not identical, to those in which such damages may be recovered in New York (see N.J.S.A. 39:6A-8; DiProspero v. Penn., 183 N.J. 477, 481, 488-489, 874 A.2d 1039, 1041-1042, 1046), but the vehicle owner is vicariously liable only if the driver was the employee or agent of the owner (see Haggerty v. Cedeno, 279 N.J.Super. 607, 609, 653 A.2d 1166, 1167). The Quebec Automobile Insurance Act provides for vicarious liability of the vehicle owner (see Quebec Rev Stats ch A-25, §

108), but does not permit recovery of non-economic damages (see Quebec Rev Stats ch A-25, § 83.57; Bodea v. TransNat Express, 286 A.D.2d 5, 8, 731 N.Y.S.2d 113; LaForge v. Normandin, 158 A.D.2d 990, 551 N.Y.S.2d 142; Thomas v. Hanmer, 109 A.D.2d 80, 81, 489 N.Y.S.2d 802; Jean v. Francois, 168 Misc.2d 48, 49-50, 642 N.Y.S.2d 780).

King at *1. In terms of recovery of damages, it is clear that there is a conflict between the law of New York, which allows recovery of non-economic damages and for vicarious liability of the vehicle owner, New Jersey, which allows recovery of non-economic damages and for vicarious liability but only when the driver is an agent of the owner, and Quebec, which does not allow recovery of economic damages but does allow for vicarious liability of the vehicle owner.

Having established a conflict, the next step in the analysis was to determine what type of choice of law analysis was called for under the particular facts of the case. The current scheme for conflict of laws analysis in New York is the "interests analysis" test, whereby controlling effect must be given to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.

When the laws that are in conflict pertain to loss allocation, such as the laws relating to vicarious liability and damages, courts apply one of the three rules developed by the Court of Appeals in Neumeier v. Keuhner, 31 N.Y.2d 121, (1972). The first Neumeier rule applies when the parties share a common domicile; the second rule applies when the parties have different domiciles but the situs of the tort is in a state where one of the parties is domiciled and the law favors that party; the third rule applies when the parties have different domiciles with conflicting laws.

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The third Neumeier rule effectively adopts a place of injury test unless it can be shown that applying the law of another jurisdiction will further another jurisdiction's policy goals without unduly prejudicing the parties.

The third Neumeier rule applies when parties are from different domiciles and none of them are from the state in which the tort occurred. In cases where the court applies the third Neumeier rule, New York law will serve as a tie breaker where "the interest of the States in their respective laws are equal," because New York is the only place where all the parties purposefully associated themselves.

An additional consideration in addressing the choice of law question is to determine which parties to consider in the analysis. In Schultz v. Boy Scouts of America, Inc., 54 N.Y.2d 189 (1985), the Court of Appeals conducted a separate Neumeier analysis as to each of the defendants in the case. In addressing the first defendant, the court found that the plaintiff and the defendant were from the same jurisdiction and, thus, applied the first Neumeier rule applying the law of the common jurisdiction. Id. The court then applied the third Neumeier rule to the second defendant, a domiciliary of Ohio, and again found that New Jersey law applied.

In the King case the court declined to apply the Quebec law to determine loss allocation for policy reasons. The court found that Quebec's law restricting non-economic losses is part of its national health insurance program, and since no party would be receiving health benefits from Quebec, the policy and principals behind the restrictions do not apply. Id. Additionally, the court found that the vicarious liability law in Quebec "was not an integral part of any larger governmental policy" and therefore Quebec did not have a substantial interest in the outcome of the case. Id. at *8. Thus, the Court found that under the facts of the King case, the law of New York would apply.

As a point of comparison, the Schultz case came to a different conclusion and applied New Jersey law to an Ohio defendant for injuries sustained in New York. When conducting an interest analysis on New Jersey law which would deny recovery to the plaintiffs, the Court applied New Jersey law to determine loss allocation because it felt that domiciliaries should "accept the burdens as well as the benefits" of the state's law. Schultz, 65 N.Y.2d at 201. The Court went on to say that although application of New Jersey law will not necessarily "advance the substantive law purposes of New York, it will not frustrate those interests because New York has no significant interest in applying its own law to this dispute." Id.

In conclusion, defense counsel should keep in mind that in cases where New York has no interest in the loss allocation since no party is domiciled in New York and the only reason why New York courts are involved is because by chance an accident occurred within the state, the Court will be more amenable to applying the law of another jurisdiction. This could have a major, if not a determinative, impact upon the result of the case.

Recent Decisions of Interest

• Labor Law – No Recovery Where the Plaintiff's Negligent Actions are the Sole Cause of His Injuries

In Robinson v. Heuber-Breuer Construction Co. v. Burns Bros. Contractors, Inc., (6 N.Y.3d 550), decided April 4, 2006, New York's Court of Appeals was presented with a situation where the plaintiff, a journeyman plumber, was injured while working for the third-party defendant, Burns, at a construction site.

Plaintiff's employer, Burns, was a plumbing subcontractor on the project. On the day of the accident, plaintiff intended to continue his job of installing pipe hanger systems. While working alone and using a 6 foot ladder, plaintiff moved into an area where the steel beams were 12 to 13 feet from the floor. Plaintiff, who is 5 feet 9 inches tall was standing on the top cap of the ladder, using a wrench to tighten a clamp with his right hand and holding onto a rod with his left hand. When the wrench slipped, he lost his balance and the ladder moved. As he held on to the rod, he caught the tipping ladder under its uppermost step with his left foot and straightened it into an upright position, twisting his back and injuring himself in the process.

According to plaintiff, there was a box of "community tools" used by the various workmen. He contended that sometime that morning he saw his foreman and told him "by the way, I'm going to need an 8 foot ladder". Plaintiff testified that the foreman replied "I'll see if I can get you one". Plaintiff acknowledged that his foreman did not instruct him to finish installing pipe in the high ceiling area before completing his other work, that he knew there were 8 foot ladders on the job site, and that prior to ascending the 6 foot ladder, he did not look in the garage for an 8 foot ladder, follow-up his request to the foreman or seek out fellow workers who might have been using an 8 foot ladder.

In his action against the general contractor, plaintiff moved for partial summary judgment on liability under Labor Law § 240(1), arguing that because his foreman did not deliver an 8 foot ladder to him, he "was forced to complete his work with an unsafe ladder". Defendants opposed plaintiff's motion and cross-moved for summary judgment on the Labor Law causes of action on the ground that plaintiff's own actions were the sole proximate cause of his accident.

The Court of Appeals affirmed the grant of summary judgment to the defendants by the Courts below, relying on its prior decisions [including, among others, Blake v. Neighborhood Housing Services of NY City, 1 N.Y.3d 280 (2003)]. In doing so, the Court of Appeals agreed that plaintiff's own negligent actions in choosing to use a 6 foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's toe cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries.

• Indemnification/CPLR Article 16

The question whether a tortfeasor whose fault is determined to be 50% or less, can be found responsible for total indemnification of non-economic loss, despite CPLR Article 16, was recently answered by the Court of Appeals in Frank v. Meadowlakes Development Corp., decided on March 30, 2006, [2006 WL 797678 (NY)].

Plaintiff, Frank, was working at a building site on property owned by the defendant, Meadowlakes. While attempting to carry a large bag of double insulation over his right shoulder, plaintiff lost his balance and fell over the left side of the staircase which had no railing. As a result of the fall, Frank received several serious permanent injuries to his back and spine.

Frank and his wife commenced an action for personal injury and loss of consortium against Meadowlakes and the general contractor, DJH Enterprises. Meadowlakes filed a third-party action for indemnification against Home Insulation & Supply, Inc., plaintiff's employer. After a bifurcated trial, the jury apportioned fault in the amount of 10% to Frank (for his contributory negligence), 10% to Home Insulation and 80% to DJH. The Court also directed a verdict against Meadowlakes and DJH based upon a violation of Labor Law § 240(1).

Subsequently, Frank settled with DJH for \$300,000. He then settled with Meadowlakes for \$1,424,000. The Supreme Court then

granted Meadowlake's motion for common law indemnification against Home in the sum of \$1,552,160, a sum which represented Meadowlake's settlement with Franks, plus interest.

Home Insulation appealed the judgment arguing that its motion for a directed verdict to dismiss the third-party complaint should have been granted because it was not negligent. It also argued, in the alternative, that in granting Meadowlakes complete indemnification against Home, the Court erred because it should be liable only for its proportionate share of the fault.

The Court of Appeals affirmed that portion of the decisions of the Supreme Court and Appellate Division which denied Home Insulation's motion for a directed verdict. However, the Court of Appeals, in a decision in which all of the Justices concurred, found that Home Insulation's liability for non-economic loss (conscious pain and suffering) should not exceed its share of the fault.

The Court reasoned that although CPLR Article 16 does not limit the right to indemnification, it does limit the amount that can be recovered when liability is 50% or less. Thus, in interpreting Article 16 and the Legislative intent enacting it, the Court found that under CPLR 1602(2), a party's preexisting right of indemnification is not altered or limited by the provision. The Court noted that this does not, however, entitle a party to 100% recovery. The Court found that, instead, although Meadowlakes retained its right to indemnification, Home Insulation, as a party found only 10% liable, was limited to its proportionate share with respect to non-economic damages. The Court stated that to calculate Home's share, it divided indemnity among all of the potential indemnitors and excluded Franks' (plaintiff's) 10% share of fault, since he cannot be an indemnitor. Thus the Court found that Home Insulation's total indemnity to Meadowlakes will, therefore, be all economic loss and 1/9 of non-economic loss encompassed within the settlement, with interest.

If you have any questions concerning the Frank case or indemnification issues, in general, contact Glenn Jacobson at [gjacobson@agflaw.com](mailto:gjacobs@agflaw.com) or Steven DiServi at sdiservii@agflaw.com.

• Vicarious Liability Under VTL §388

In Country Wide Ins. Co. v. National Railroad Passenger Corp. (Amtrak), 6 N.Y.3d 172 (decided February 14, 2006), New York's Court of Appeals answered a series of certified questions sent to it by the Second Circuit Court of Appeals concerning the issue of vicarious liability of a vehicle's owner (Amtrak) for injuries arising out of the use of that vehicle.

VTL § 388 provides that a vehicle owner is liable to a person injured by the vehicle as long as it was being driven with the owner's permission. The question of permissive use has been a frequent source of litigation. The Country Wide case is no exception.

There, the accident occurred when an Amtrak worker took a company car, without permission, to go home and get an Amtrak radio he forgot and on the way back, struck the plaintiff's car. The plaintiff sued Amtrak in State Court and the case was then removed to the Eastern District Federal Court. There, the Federal District Court Judge found that permission was lacking and granted summary judgment to Amtrak. Plaintiff appealed.

The Court of Appeals, finding unclear under what circumstances New York law would permit summary judgment to be granted on the permissive use, certified five questions to the New York Court of Appeals. The first question was whether the uncontradicted state-

given would suffice to grant summary judgment to the owner.

In deciding the issue, the Court of Appeals held that the answer to the question was generally, but not always, "yes".

After dealing with the following questions which had been certified and reviewing several of its prior decisions, the Court found that there was a rebuttable presumption of permissive use under the Statute. The Court held that "whether summary judgment is warranted depends on the strength and plausibility of the disavowal [of permission], and whether they leave room for doubts that are best left to the jury".

On the facts of the Country Wide case, the Court found sufficient evidence by the statements of both the owner and the driver that no permission to use the vehicle had been granted. The Court found that nothing offered by the plaintiffs could possibly counter that proof so as to pose an issue of fact for the jury.

Thus, the Court advised that it would grant Amtrak summary judgment, but noted that its obligation to the Second Circuit Court of Appeals was just to answer the questions presented.

What the Second Circuit decides remains to be seen. However, based upon the Court of Appeals' Answers to the questions, it is likely that the summary judgment granted by the District Court Judge below, will be upheld.

• Employment Law – Age Discrimination

In Stephenson v. Hotel Employees & Restaurant Employees Union Local 100, 6 N.Y.3d 265 (decided February 16, 2006), the plaintiffs commenced action against their employer, the Union, for violation of New York Human Rights Law (Executive Law § 296).

The Court of Appeals noted that the plaintiffs, who were 55 and 64 years old and who had produced proof that they were qualified for their positions, had established a *prima facie* case of age discrimination under Executive Law § 296. The burden then shifted to the defendant to come forward with a non-pretextual reason for the firing. In this case, the Court noted that the defendant did so with proof of the plaintiffs' corruption by their facilitating organized crime's infiltration of the union. Then, the burden shifted back to the plaintiffs to show that the defendant's assigned reason was merely pretextual.

In affirming the decision of the Appellate Division to set aside the jury's verdict for the plaintiffs, the Court found that the plaintiffs failed to satisfy that burden. The Court noted that while the jury verdict was for the plaintiff and the trial judge refused to set aside on defendant's motion for judgment notwithstanding the verdict, the Appellate Division correctly reversed, finding that the defendant had, indeed, proved that it had a non-discriminatory reason for the firing. Thus, the Court of Appeals agreed with the Appellate Division and found that the evidence was insufficient, as a matter of law, to support the jury's verdict in plaintiffs' favor and that the setting aside of the verdict and the dismissal of the action by the Appellate Division, was correct.

• Insurance Agent and Broker Liability

In Globalnet Financial.com, Inc. v. Frank Crystal & Co., Inc., the United States Court of Appeals, Second Circuit, was called upon to decide whether an insurance broker could be held liable under New York law for failure to transmit insurance cancellation notices to its client.

Globalnet was a provider of on-line news and financial information to private investors and to on-line trading facilities. Crystal is a commercial insurance broker which arranged for Globalnet to purchase primary and excess directors and officers liability coverage from three different insurers. Crystal also arranged for the financing of the premium payments for the D&O policies through a premium finance company (AICCO).

In August, 2001, one year after the policies had been obtained, AICCO sent a premium finance statement to Globalnet. However, Globalnet had closed and vacated its office at that address. Thus, the statement could not be delivered and was returned to AICCO. The return envelope indicated a new address for Globalnet. AICCO corrected its records to reflect Globalnet's new address and re-sent its September statement to the new address.

In October, AICCO sent an Intent to Cancel Notice to Globalnet due to its non-payment of premiums. Thereafter, AICCO mailed a cancellation notice to Globalnet, informing it that its D&O policies had been cancelled for failure to pay premiums.

Globalnet, which had been acquired by another entity, claims that it did not receive the notices because they had not been forwarded to Globalnet's new location, in London. Thus, Globalnet claimed that it was not aware of the missed premium payment or the cancellation until February, 2002 when its D&O insurers denied coverage for three claims which Globalnet had reported under its D&O policies

Globalnet brought suit against its broker, Crystal, alleging that Crystal breached its contractual and fiduciary duties and was negligent in the performance of its services, asserting that the law of Florida (Globalnet's domicile) applied.

After conducting an interests analysis and determining that the law of New York (where the policies had been negotiated and issued) applied, the Court of Appeals affirmed the dismissal of the action against Crystal. The Court held that under New York law, absent an express contractual obligation to do so, an insurance broker has no continuing duty or obligation to advise its insured as to its ongoing insurance needs. The Court also found that although an insurance broker could be held liable in negligence for failing to notify the insured of an eminent or recent cancellation, the broker's liability does not extend to circumstances in which the insured knew or should have known of the cancelled coverage. The Court found that, under the undisputed facts, Globalnet should have known of the cancellation. Thus, the dismissal of the action was affirmed.

For more information on the defense of insurance agent or broker E&O claims, contact Dan Friedman at dfriedman@agfjlaw.com or Michael Gorelick at mgorelick@agfjlaw.com

AGFJ DEVELOPMENTS

- Steven DiSiervi obtained a defendant's verdict from a Kings County jury in a products liability case involving the amputation of three of plaintiff's fingers.

In Cekic v. Royal-Pak Mfg. Co., AGF&J's client was the manufacturer of the "Econo-Krusher", a commercial garbage compactor. The plaintiff, an apartment building superintendent, was in the process of cleaning the compactor which had jammed. While

doing so, she placed one arm in the machine and pressed the activation switch with the hand of the other arm. The machine "kicked back" and caught her fingers. When she removed her black rubber glove, she saw that three fingers had been severed.

Plaintiff sued, alleging negligent design, negligent manufacture and failure to warn. At the close of plaintiff's case, the Court dismissed the claim of negligent manufacture based upon a failure of proof. The failure to warn claim was dismissed because the risk inherent in placing one's arm into a jammed compactor was open and obvious. The jury then returned a defendant's verdict on the remaining negligent design claim, agreeing that the evidence established that the compactor had not been negligently designed.

Plaintiff's settlement demand in the case, prior to verdict, had been \$1.5 million. If you have any questions about the Cekic case or products liability issues, contact Steven DiSiervi at sdisiervi@agfjlaw.com.

- Barry Jacobs was successful in defending a legal malpractice action against a law firm client. In Double E Textile Corp. v. Todtman, et al AGF&J's client was a law firm which had referred a third-party action commenced in Canada against one of its clients to Canadian counsel. Subsequently, after becoming unhappy with Canadian counsel's performance and refusing to pay its bill, Double E commenced action against its New York lawyers, alleging that they were negligent in failing to properly supervise and direct Canadian counsel and that if plaintiff was responsible for Canadian counsel's bills, its New York law firm should be required to reimburse it.

AGF&J's motion for summary judgment was granted, on all of the grounds asserted, with the Court finding that, as a matter of law: defendant did not have a duty to supervise the Canadian litigation; plaintiff failed to raise an issue of fact as to proximate cause; and, plaintiff's Complaint was insufficient because it did not allege that plaintiff had sustained any actual damages.

Should you have any questions about the Double E case or the defense of law firms in attorney malpractice cases, please contact Barry Jacobs at bjacobs@agfjlaw.com.

- AGF&J is pleased to announce that Bridget Quinn has become associated with the Firm. Bridget is a graduate of New York Law School and earned her B.A. at Iona College. She has clerked at the Firm since 2003.

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