LEGAL DEVELOPMENTS

THE RETURN OF TERRITORIALISM TO NEW YORK'S CONFLICTS LAW: *PADULA V. LILARN PROPERTIES CORP.*

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Back in 1978, when the Court of Appeals said that "*lex loci delicti*[1] remains the general rule in tort cases to be displaced only in extraordinary circumstances,"[2] it wasn't kidding. But even the Court of Appeals of 1978 might not have anticipated the depth of New York's commitment to a territorially oriented approach to the conflict of tort laws. *Padula v. Lilarn Properties Corp.*[3] makes clear that the commitment runs deep.

In 1963, when the Court of Appeals in *Babcock v. Jackson*[4]—in what remains the most famous American conflicts decision[5]—broke from the traditional rule, it was careful to frame the question narrowly: "Shall the law of the place of the tort *invariably* govern?"[6] The court's answer to the question, of course, was negative.[7] On the

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1 "*Lex loci delicti*" is the Latin reference to the traditional rule that in cases of a conflict of laws between the tort rules of two or more states, the law of the place of the injury governs. The first conflicts restatement endorsed this rule. *See* Restatement (First) of Conflict of Laws § 378 (1934). It had a wide following in the United States until the 1960s. As of today, only a few states adhere to the traditional conflicts methodology. *See* Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 129 (1994) (reporting 13 states in the traditional camp).

2 Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914, 915 (N.Y. 1978).

3 84 N.Y.2d 519 (1994).

4 191 N.E.2d 279 (N.Y. 1963).

5 *Babcock* has twice been the subject of major symposia, once in the *Columbia Law Review*, Symposium, *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963) (contributions by Cavers, Cheatham, Currie, Ehrenzweig, Leflar, and Reese), and a second time—on its 30th birthday—in the pages of this Review, *Symposium on Conflict of Laws: Celebrating the 30th Anniversary of* Babcock v. Jackson, 56 ALB. L. REV. 693 (1993) (contributions by Siegel, Weintraub, Juenger, Maier, Solimine, McDougal, Weinberg, Sedler, Borchers, Simson, and Korn). One of the major conflicts casebooks, however, has reduced *Babcock* to a note case. ROGER C. CRAMTON ET AL., CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 165 (5th ed. 1993).

6 *Babcock*, 191 N.E.2d at 280 (footnote omitted); *see also* Harold L. Korn, *Big Cases and Little Cases:* Babcock *in Perspective*, 56 ALB. L. REV. 933, 933 (1993).

7 *Babcock*, 191 N.E.2d at 285.

facts of *Babcock* this meant that Ontario's guest statute—which absolutely barred recovery by guest-passengers of automobiles in suits against their host-drivers—did not govern despite the fact that the injury occurred in Ontario.[8] Instead, the court applied New York's rule allowing guest-passengers to recover on a showing of ordinary negligence.[9] The Court of Appeals articulated no precise reason for the result. But chief among the court's rationales were the New York domiciles of both the plaintiff and the defendant,[10] and what the court politely referred to as the "unique" nature of Ontario's absolute bar on guest-passenger recovery.[11] The joint New York domicile of the plaintiff and the defendant convinced the court that Ontario's "contacts" with, and "interest" in, the lawsuit were sufficiently minimal that New York law ought apply.[12]

But as the court's phrasing of the issue suggested, New York's high court was not prepared to eliminate the traditional rule in all circumstances.[13] The *Babcock* court made a foundational distinction between types of tort rules that has remained central to its conflicts analysis.[14] The domiciles of the parties, the "unique" nature of the rule, and all of the other ingredients in the court's potion were relevant only because of the nature of the conflict. As the *Babcock* court explained:

> It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident. Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the

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[8] *Id.* at 284-85.

[9] *Id.*

[10] *Id.* at 284.

[11] *Id.* at 285. Although guest statutes were common in 1963, most of them appeared to be of the variety that allowed a guest-passenger to recover if he or she could show that the host-driver was reckless or, perhaps, grossly negligent in the operation of the automobile. *See, e.g.*, Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969) (considering a Michigan statute allowing recovery upon a showing of gross negligence); Dym v. Gordon, 209 N.E.2d 792 (N.Y. 1965) (considering a Colorado statute allowing recovery for "willful and wanton" conduct). By the time the Court of Appeals next considered a conflict with Ontario's guest statute in Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972), the Ontario rule had been watered down to the point that it allowed recovery by passengers who could show that their hosts were grossly negligent in the operation of the car. *Id.* at 455.

[12] *Babcock*, 191 N.E.2d at 284.

[13] *Id.* at 280-81.

[14] *Id.* at 285.

> place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders.[15]

This language in *Babcock* has been understood to create an important dichotomy in New York's approach to tort conflicts. For "conduct-regulating" rules, the injury state's law still holds sway.[16] For other kinds of rules—which later came to be known as "loss-allocating" rules[17]—the more freeform analysis performed by the *Babcock* court is appropriate.

The court offered no clear definition of either type of rule. As an example of conduct-regulating rules, the court mentioned "rule[s] of the road,"[18] meaning (presumably) rules such as speed limits. On the other hand, the court viewed the conflict between Ontario's guest statute and New York's ordinary-care rule as a conflict between loss-allocating rules, because the issue implicated "recovering damages for a wrong concededly committed."[19] But a careful examination of the *Babcock* opinion reveals an internal tension in its categorization. As an issue relevant to conduct regulation, the *Babcock* court also mentioned "the defendant's exercise of due care"[20] and went on to describe as "unthinkable" the application of anything other than the injury state's tort law to this issue.[21] The implication of this language is that a conflict in rules governing the standard of care would be a conflict in rules relating to conduct regulation.

In a real sense, however, *Babcock* was a case concerning a conflict in standards of care. New York followed a rule allowing recovery on a showing of ordinary negligence; Ontario followed a rule denying recovery under any circumstance. As a purely formal matter, one might say that this conflict is not about standards of care because the standard of care is generally part of the plaintiff's case[22] while guest statutes are a matter of affirmative defense.[23] But drivers are unconcerned with the technicalities of pleading. From the standpoint of a driver, the conflict involves his duty of care. Under the New York rule the driver owes his passenger ordinary care; under Ontario's rule (as it then existed) the driver owes none.

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15 *Id.* at 284.

16 *See id.*

17 *See, e.g.*, Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 686 (N.Y. 1985).

18 *Babcock*, 191 N.E.2d at 284.

19 *Id.*

20 *Id.*

21 *Id.*

22 *See, e.g.*, Salzman v. Alan S. Rosell, D.D.S., P.C., 513 N.Y.S.2d 846, 848 (App. Div. 1987).

23 *See, e.g.*, Neumeier v. Kuehner, 286 N.E.2d 454, 455 (N.Y. 1972).

This tension becomes even clearer if one considers the conflicts faced by the Court of Appeals in the flurry of guest-statute cases decided immediately after *Babcock*. *Dym v. Gordon*,[24] *Tooker v. Lopez*,[25] and *Neumeier v. Kuehner*[26] all involved much milder guest statutes. Unlike the absolute bar imposed by the Ontario guest statute as it existed in 1963, each of these statutes simply put the plaintiff to the task of a higher showing. In *Dym* it was "willful and wanton" conduct,[27] and in *Tooker* and *Neumeier* it was "gross negligence."[28] In the most obvious sense, each of these cases involved a conflict between tort rules relating to the standard of care.

Despite the latent suggestion in *Babcock* that issues relating to the exercise of due care are matters of conduct regulation, the Court of Appeals treated each guest statute as a matter of loss allocation.[29] In fact, the court did not discuss the subject extensively beyond its treatment in *Babcock*. Presumably this was because the bulk of its conflicts cases in the decade following *Babcock* were guest-statute cases, which the court had already held to involve loss allocation. As has been well documented elsewhere, the court was having plenty of trouble sorting out the implications of *Babcock* for loss-allocation conflicts[30] without trying to relieve the latent tension on the antecedent question of whether the guest-statute cases really involved loss allocation.

The only significant non-guest statute conflicts case of that era was *Miller v. Miller*,[31] which involved a conflict between a Maine statute limiting wrongful death recovery to $20,000 and the New York rule imposing no fixed ceiling on recovery.[32] The court, however, had no difficulty classifying this conflict as one of loss allocation.[33] "The Maine statute," the majority wrote, "[which] deal[s] . . . with the nature of the remedy for concededly tortious conduct, is obviously not the kind of statute which regulates conduct and, therefore, is not the kind of statute upon which a person would rely in governing his conduct."[34] Employing the *Babcock* analysis, the

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[24] 209 N.E.2d 792 (N.Y. 1965).

[25] 249 N.E.2d 394 (N.Y. 1969).

[26] 286 N.E.2d 454 (N.Y. 1972).

[27] *Dym*, 209 N.E.2d at 793.

[28] *Neumeier*, 286 N.E.2d at 455; *Tooker*, 249 N.E.2d at 395.

[29] *Neumeier*, 286 N.E.2d at 456; *Tooker*, 249 N.E.2d at 398-99; *Dym*, 209 N.E.2d at 796.

[30] *See, e.g.*, Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 844-73 (1983).

[31] 237 N.E.2d 877 (N.Y. 1968).

[32] *Id.* at 878.

[33] *Id.* at 881.

[34] *Id.*

Miller court applied New York and not Maine law.[35] Although Maine was the injury state, the joint New York domicile of the parties, as well as the "absurd and unjust" character of wrongful death damage ceilings, persuaded the Court of Appeals to apply its own tort rule.[36]

Eventually the Court of Appeals lost its enthusiasm for grappling with these questions. In *Neumeier v. Kuehner*,[37] the court signaled its exit from the stage by deciding that " '[t]he time ha[d] come . . . to minimize [the] *ad hoc* case-by-case approach by laying down guidelines, as well as we can, for the solution of guest-host conflicts problems.' "[38] The result of the *Neumeier* court's labor was the adoption of a set of three rules explicitly phrased in terms of guest-host liability.[39] Although denominated as three different rules, *Neumeier* reduces to the proposition that the law of the injury state applies unless (as was the case in *Babcock*) the parties are domiciled in a state other than the injury state, in which case the law of their joint domicile governs.[40]

True to its word that it would end the "*ad hoc* case-by-case" extravaganza, the Court of Appeals stayed out of the field for thirteen years. But in those thirteen years trouble was abrewing. The *Neumeier* rules were designed for guest statutes, but guest statutes pretty much disappeared from American tort law over the next dec-

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[35] *Id.* at 883.

[36] *Id.* at 880.

[37] 286 N.E.2d 454 (N.Y. 1972).

[38] *Id.* at 457 (quoting Tooker v. Lopez, 249 N.E.2d 394, 403 (N.Y. 1969) (Fuld, C.J., concurring)).

[39] *Id.* at 457-58. Those rules were set out by Chief Judge Fuld as follows:

"1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

"2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

"3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants."

Id. (citation omitted) (quoting *Tooker*, 249 N.E.2d at 404 (Fuld, C.J., concurring)).

[40] Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 909 (1993); Korn, *supra* note 30, at 877-79.

ade.[41] The other sorts of conflicts faced by the court—such as those generated by wrongful death damage limitations[42]—were on their way out as well because of widespread changes in tort law. But for all of this, the distinction between loss allocation and conduct regulation apparently remained central to the New York approach.

The Court of Appeals's return to conflicts law was *Schultz v. Boy Scouts of America, Inc.*[43] At issue in *Schultz* was a conflict between a New Jersey statute immunizing charitable organizations from tort liability and the New York rule treating charitable organizations like any other defendant.[44] *Schultz* presented the conflict in the most awful, stark manner possible, for the underlying tort involved two adolescent brothers who had joined a Boy Scout troop near their New Jersey home, and then had been sexually molested by their troop leader—an experience so traumatic that the older brother eventually committed suicide.[45] A good deal of the molestation took place on a camping trip in New York, while the brothers' domicile and the principal offices of the Boy Scouts of America were in New Jersey.[46] Thus if the conflict were one of conduct-regulating rules, New York as the injury state would have the strongest claim to application of its law.[47] But if the conflict were one of loss allocation, the joint New Jersey domicile of the parties would probably counsel application of that state's tort law.[48]

Schultz's most notable holding is that the *Neumeier* rules, despite being phrased in terms of guest statutes, extend to the entire realm

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[41] As of today, only two states apparently still have guest statutes. ALA. CODE § 32-1-2 (1975); IND. CODE ANN. § 34-4-40-3 (Burns Supp. 1994). However, modern conflicts casebooks still pay a great deal of attention to them. *See, e.g.*, DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS at vii (1990).

[42] *See, e.g.*, Miller v. Miller, 237 N.E.2d 877 (N.Y. 1968); Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526 (N.Y. 1961).

[43] 480 N.E.2d 679 (N.Y. 1985).

[44] *Id.* at 681.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 683.

[48] *Id.* at 684. As I have argued elsewhere, the *Schultz* result seems wrong even under the New York approach, even if one treats the issue as one of loss allocation. Borchers, *supra* note 40, at 909-10. For one thing, the Boy Scouts had switched the situs of their offices to Texas by the time that the litigation had commenced. *Schultz*, 480 N.E.2d at 682. Until *Schultz*, the New York approach was to give significance to a party's domicile or principal offices at the time of the litigation, not the litigation-producing events. *See, e.g.*, Miller v. Miller, 237 N.E.2d 877, 880 (N.Y. 1968). Also, the other defendant in the case was an Ohio corporation. *Schultz*, 480 N.E.2d at 682. At least with respect to this defendant, application of New York law (as the law of the injury state) would be counseled—because of the absence of a joint domicile between the parties—even assuming that the conflict is one of loss allocation. Neumeier v. Kuehner, 286 N.E.2d 454, 458 (N.Y. 1972).

of loss-allocating tort rules because there is no "logical basis for distinguishing guest statutes from other loss-distributing rules."[49] Although this requires non-literal application of *Neumeier*, the central principle—apply the injury state's law unless the parties are jointly domiciled elsewhere—is certainly manageable. Again, however, the question preceding all of this was whether the conflict involved loss allocation. The majority thought it clear that charitable immunity "is a loss-distribution rule" and satisfied itself with a single-sentence assertion to this effect and a brief repeat of the *Babcock* language stating that loss-allocating rules are those applicable once there is "admittedly tortious conduct."[50]

The *Schultz* dissent, however, thought the question less clear. Judge Jasen's dissent focused both on the New Jersey rule of charitable immunity and the New York rule treating charitable and noncharitable defendants alike.[51] Although Jasen was willing to concede that the New Jersey rule was loss allocating, he discerned a significant aspect of conduct regulation in the New York rule.[52] The purposes of the New York rule, Jasen reasoned, "are preventive, protective and compensatory,"[53] and denying plaintiffs this protection because of their New Jersey domicile—in circumstances in which a New York plaintiff surely would have recovered—amounted to "injudicious discrimination."[54] "Surely," argued the dissent, "a rule deemed so archaic and anachronistic by this court ought not now to be given effect and, thereby, insulate defendants from whatever responsibility they should bear for the heinous acts of misconduct performed in this State."[55]

All of this sets the stage for New York's most recent conflicts adventure, *Padula v. Lilarn Properties Corp.*[56] The facts in *Padula* are

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[49] *Schultz*, 480 N.E.2d at 686.

[50] *Id.* at 683, 685.

[51] *Id.* at 689-95 (Jasen, J., dissenting).

[52] *Id.* at 690 (Jasen, J., dissenting).

[53] *Id.* at 691 (Jasen, J., dissenting).

[54] *Id.* (Jasen, J., dissenting).

[55] *Id.* at 693 (Jasen, J., dissenting).

[56] 84 N.Y.2d 519 (1994). The Court of Appeals decided one other tort conflicts case between *Schultz* and *Padula*. *See* Cooney v. Osgood Mach., Inc., 612 N.E.2d 277 (N.Y. 1993). *Cooney* involved a conflict between New York's (severely minority) rule allowing contribution claims in tort cases against employers despite the exclusivity of the workers' compensation and Missouri's (majority) rule that contribution claims are barred. *Id.* at 279. The court had little difficulty concluding that the conflict was one of loss distribution, *id.* at 280, and therefore analyzed the case in the framework of the *Neumeier* rules. *Id.* at 281-83. *Cooney* is discussed favorably in Patrick J. Borchers, *New York Choice of Law: Weaving the Tangled Strands*, 57 ALB. L. REV. 93 (1993); Aaron D. Twerski, *A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in* Cooney v. Osgood Machinery, Inc., 59 BROOK. L. REV. 1351 (1994).

quickly told and the conflict simple. The plaintiff (a New York domiciliary) fell from a scaffold while performing subcontracting work at a construction site (located in Massachusetts) owned by the defendant (a company with its principal offices in New York).[57] Section 240 of New York's labor law provides for strict liability of the owner of the premises in accidents involving scaffolding if the scaffolding fails to meet certain specific requirements for railing heights, load capacity, and the like.[58] The most unusual aspect of New York's rule is that it imposes this absolute liability on owners of premises and general contractors even if they do not erect or control the scaffolding, and comparative fault by the worker is neither a partial nor a complete defense.[59] Massachusetts follows the majority approach that scaffolding accidents are governed by ordinary tort rules.[60] *Padula* posed the question of whether the rules in conflict are conduct regulating or loss allocating.[61] If the rules are loss allocating, the joint New York domicile of the parties would counsel application of New York law; if the rules are conduct regulating, the Massachusetts situs of the accident would counsel application of that state's law.[62]

Although *Padula* was the first time the Court of Appeals had faced a conflict involving the scaffolding law, the lower courts had confronted the problem several times. In view of the obscure guidance provided by the Court of Appeals, it ought to come as no surprise that New York's lower courts divided on the question. Most of the lower courts to have confronted this question had recognized that there are aspects both of loss allocation and conduct regulation in New York's scaffolding law.[63] Some, focusing on the absolute liability aspect of the law, thought the statute to be primarily loss allocating and, therefore, evaluated the conflicts question under the

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It is criticized in Linda J. Silberman, Cooney v. Osgood Machinery, Inc.: *A Less than Complete "Contribution,"* 59 BROOK. L. REV. 1367 (1994). Professor Twerksi argued (correctly, I now think) that *Cooney* signaled the Court of Appeals's continuing fondness for territorial connecting factors in its conflicts analysis. Twerski, *supra*, at 1366.

57 *Padula*, 84 N.Y.2d at 520-21.

58 N.Y. LAB. LAW § 240(1) (McKinney 1986).

59 *See, e.g.*, Calla v. Shulsky, 543 N.Y.S.2d 666, 667 (App. Div. 1989).

60 *See, e.g.*, Corsetti v. Stone Co., 483 N.E.2d 793 (Mass. 1985). Some indication of the minority status of the New York rule comes from the A.L.R. annotation on scaffolding statutes. J.A. Connelly, Annotation, *What Constitutes a "Scaffold" Within Scaffold Safety Requirement Statutes*, 87 A.L.R.2d 977 (1963). That annotation cites cases after 1920 from only two states: New York and Illinois. *Id.* Even taking into account the pre-1920 cases, it appears that no more than six states *ever* had a specific statute relating to scaffolding safety. *Id.*

61 *Padula*, 84 N.Y.2d at 521.

62 *Id.*; *see supra* text accompanying notes 16, 40.

63 *See, e.g.*, Aviles v. Port Auth., 615 N.Y.S.2d 668, 669 (App. Div. 1994); Salsman v. Barden & Robeson Corp., 564 N.Y.S.2d 546, 548 (App. Div. 1990); *Calla*, 543 N.Y.S.2d at 669.

Neumeier framework.[64] The leading case in the loss-allocating camp was *Calla v. Shulsky*,[65] which analogized the scaffolding law to a rule of vicarious liability on owners and general contractors for the actions of subcontractors.[66] As a rule of "vicarious liability," the *Calla* court viewed the legislature's decision to impose liability on owners and general contractors to be one of loss allocation based upon the presumed economic superiority of these parties.[67] Other courts, focusing on the specific safety standards in the statute, thought the rule to be primarily conduct regulating as it encouraged owners and general contractors to exercise oversight over tasks involving scaffolding.[68] Those courts that thought the matter one of conduct regulation applied, of course, the tort law of the injury state.

Given the conflict in the authority and the extensive treatment given the matter by the lower courts, one might have expected a thorough exposition by the Court of Appeals. But the New York high court's discussion in *Padula* was disappointingly spartan, and does nothing to alleviate the fundamental difficulty of separating loss-allocating from conduct-regulating rules. The court defined conduct-regulating rules as those that "have the prophylactic effect of governing conduct to prevent injuries from occurring."[69] The court defined loss-allocating rules as "those which prohibit, assign, or limit liability after the tort occurs, such as charitable immunity statutes."[70] Echoing the rationale of several of the lower courts, the Court of Appeals reasoned that the scaffolding statutes "embody both conduct-regulating and loss-allocating functions requiring worksites be made safe (conduct-regulating) and failure to do so results in strict and vicarious liability of the owner of the property or the general contractor."[71] Then, without further elaboration, the court concluded simply that the scaffolding statutes "are primarily

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[64] *See, e.g.*, *Calla*, 543 N.Y.S.2d at 669; Viera v. Uniroyal, Inc., 541 N.Y.S.2d 668 (Sup. Ct. 1988), *aff'd*, 538 N.Y.S.2d 986 (App. Div. 1989); *see also Aviles*, 615 N.Y.S.2d at 672 (Rubin, J., dissenting).

[65] 543 N.Y.S.2d 666.

[66] *Id.* at 668.

[67] *Id.* at 669.

[68] *See, e.g.*, Huston v. Hayden Bldg. Maintenance Corp., 617 N.Y.S.2d 335, 337 (App. Div. 1994); *Aviles*, 615 N.Y.S.2d at 669-70; Salsman v. Barden & Robinson Corp., 564 N.Y.S.2d 546, 548 (App. Div. 1990); Brewster v. Baltimore & O.R.R., 562 N.Y.S.2d 277, 278 (App. Div. 1990).

[69] Padula v. Lilarn Properties Corp., 84 N.Y.2d 519, 522 (1994).

[70] *Id.*

[71] *Id.*

conduct-regulating" and that, therefore, Massachusetts's (the injury state's) tort law was properly applied.[72]

Some fundamental questions need sorting out. An obvious one is the utility of dividing rules into conduct regulating and loss allocating. Some commentators have suggested that this is a hopeless and worthless task,[73] and *Padula* does nothing to prove them wrong. My own view—shared by some others[74]—is that the task is not hopeless, although the Court of Appeals is doing a good job of making it appear so. Many important and fundamental legal distinctions involve large areas of overlap. The distinction between substance and procedure is one good example. Although some rules are clearly procedural (such as the required cover color of an appellant's opening brief) and some are clearly substantive (the adequacy of consideration to support a contract), others (such as statutes of limitation[75]) lie in the grey zone between the two. So it is with loss allocation and conduct regulation. The rule that drivers must stop for a red light is clearly conduct regulating. On the other hand, the New York tort

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[72] *Id.* at 523. Judge Titone's concurrence was more sweeping in its rationale. Titone argued that a provision in the labor law to the effect that the law's provisions " 'shall be applicable . . . throughout the state' " was sufficient to decide the case because such a statute "makes no provision for extraterritorial application." *Id.* (Titone, J., concurring) (quoting N.Y. LAB. LAW § 242 (McKinney 1986)). The legislature, is, of course, free to create statutory choice-of-law rules, and it does so occasionally. *See, e.g.*, N.Y. CIV. PRAC. L. & R. 202 (McKinney 1990) (borrowing statute regarding statutes of limitation); *see also* Fried v. Seippel, 599 N.E.2d 651 (N.Y. 1992) (statute on rental car agreements contains clear direction that it applies only where rental car is driven in the state). Implying a choice-of-law rule, however, from language so innocuous would be—quite frankly—a mistake. This argument would have much more force if the statute said that the labor law "applies only to job sites located in the state of New York," or something similar. As the statute reads, it seems just to make clear that no New York job site is necessarily excluded, not that all job sites anywhere else are not within the statute's coverage.

Second, Titone doubted whether even a clear statutory direction by the legislature to apply the scaffolding law "would be effective." *Padula*, 84 N.Y.2d at 524 (Titone, J., concurring). Apparently the lack of effectiveness of any such effort would, in Titone's view, potentially run afoul of the U.S. Constitution. In view of the Supreme Court precedent on this subject, it seems quite clear that New York would have the authority to impose its standards in cases in which both (or even one) of the parties are New Yorkers. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (Minnesota insurance law constitutionally applied to a Wisconsin auto accident where car registered and insured in Wisconsin; only connection with Minnesota was that the deceased worked in Minnesota and decedent's wife later moved to Minnesota). Interestingly, Congress has recently amended Title VII of the Civil Rights Act to apply to employment relationships in foreign countries if both the employee and the employer are Americans. 42 U.S.C. § 2000e(f) (Supp. III 1991).

[73] *See, e.g.*, Gary J. Simson, *The* Neumeier-Schultz *Rules: How Logical a "Next Stage in the Evolution of the Law" After* Babcock?, 56 ALB. L. REV. 913, 919 (1993).

[74] *See, e.g.*, Korn, *supra* note 6, at 934-35.

[75] *See, e.g*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

rule that joint and several liability is available without limitation only for economic damages[76] is clearly loss allocating.

Cast in these polar terms, this dichotomy expresses differing legal values. Purely conduct-regulating rules have no intrinsic moral content. If the rule were that drivers must stop on green lights, the world would not be a worse place. The important thing is that everyone agree, in advance, on the rule. The world *would* be a worse place if half of the drivers thought red meant "go" and the other half thought it meant "stop." Purely loss-allocating rules, however, have an intrinsic moral content. The intrinsic merit of joint liability rules does matter, even if the justice of them is controversial. But agreement in advance on these rules is less important. Even if we acknowledge that some tort rules have a deterrent effect, and therefore affect conduct, the ones governing contribution and indemnity between tortfeasors do little in this regard, because their deterrent value would depend substantially on the solvency of the other parties in the litigation. Parties, obviously, can do little to choose their co-tortfeasors, and thus rules like this have, at most, a minimal effect on conduct.

The Court of Appeals is clearly correct to assume that a simple, territorial choice-of-law rule is a necessity for conduct-regulating rules. To use, again, the stop-on-red rule as an example, the only rule that makes any sense is a territorial rule. It would be unworkable (and more than a little dangerous) if drivers were allowed to carry with them the driving regulations of their home states. A driver from some hypothetical state that treats red lights as an indication to proceed obviously must conform his conduct to the local rule that red means "stop."

The deficiencies of a purely territorial approach for other kinds of tort rules, however, has been demonstrated over and over again. The place of the injury may well have very little connection with the dispute. If, as seems to happen with some frequency, the plaintiff has the misfortune to have the accident in a state with an out-of-step tort rule, the inevitable result is a serious injustice.[77] *Babcock*'s reference to the place of the injury as "fortuitous" made exactly that point.[78] There was no good reason to visit the Ontario statute upon Ms. Babcock simply because she had the bad luck to have her accident on the Canadian side of the border.

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[76] N.Y. CIV. PRAC. L. & R. 1601 (McKinney Supp. 1995).

[77] *See, e.g.*, Alabama Great S.R.R. v. Carroll, 11 So. 803 (Ala. 1892).

[78] Babcock v. Jackson, 191 N.E.2d 279, 285 (N.Y. 1963).

The problem, as the *Padula* court seemed to recognize,[79] is that relatively few rules are purely conduct regulating or loss allocating. The question is how to handle this large class of tort rules that straddle the line. And here it appears that the Court of Appeals has been asking and answering the wrong question. New York's high court has, on more than one occasion, defined "loss-allocating" rules as those that come into play "after the tort occurs."[80] Taken literally, this definition is absurd. Every tort rule comes into play "after the tort occurs" in the sense that the legal consequences of it are inevitably sorted out after the injury. Alternatively, the court has referred to loss-allocating rules as those that assess the consequences of "admittedly tortious" conduct.[81] The *Schultz* court relied on this formulation in deciding to classify the availability or nonavailability of charitable immunity as a loss-allocating rule.[82]

The problem with both of these formulations is that it has led New York courts to classify rules as conduct regulating or loss allocating largely on the basis of whether they are matters of liability or affirmative defense. This is, however, a dubious methodology. For instance, if one considers the probable effect of the competing tort rules on conduct, *Padula* is extremely difficult to reconcile with *Schultz*, *Neumeier*, and *Babcock*. In *Padula*, the conflict essentially was between the New York "strict liability" rule and the Massachusetts rule applying ordinary tort standards to scaffolding accidents.[83] Under either tort rule, the landowner has an incentive to take whatever steps are cost-justified to make the scaffolding safe, although under the New York rule more efforts might well be justified because of the absolute liability. The conflicts in *Neumeier*, *Schultz*, and *Babcock* were all much more profound than the one in *Padula*. In *Neumeier*, it was the difference between a gross and an ordinary negligence standard,[84] and in *Babcock* and *Schultz* it was between ordinary tort liability and excusing liability altogether.[85] The choices between the rules competing for application in *Neumeier*, *Schultz*, and *Babcock* all would have been much more likely to change a rational defendant's calculus about the risk.

The problem, therefore, with classifying rules as loss allocating or conduct regulating based upon whether they are part of the plain-

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79 Padula v. Lilarn Properties Corp., 84 N.Y.2d 519, 522-23 (1994).

80 *See, e.g*, *id.* at 522; Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 685 (1985).

81 *Schultz*, 480 N.E.2d at 685.

82 *Id.* at 685-87.

83 *See supra* text accompanying notes 58-60.

84 Neumeier v. Kuehner, 286 N.E.2d 454, 455 (N.Y. 1972).

85 Babcock v. Jackson, 191 N.E.2d 279, 280 (N.Y. 1963); *Schultz*, 480 N.E.2d at 681.

tiff's or the defendant's case is that this scheme does not necessarily make a realistic assessment of their impact on conduct. The primary problem with the Court of Appeals's approach appears to be that it is attempting to focus upon each of the competing rules in isolation. An approach that would be truer to the values at stake would be to focus on the difference between the competing rules and ask whether applying one rule *rather than the other* is likely to affect primary conduct. Considering each rule in isolation addresses a non-existent problem, because the choice is not between applying one rule or no rule; the choice is between applying one rule or the other. Considering the matter in terms of the facts of *Padula*, the question was not whether to apply the New York rule or apply no rule of liability, the question was whether to evaluate liability under the strict or the negligence standard.

The question in *Padula* ought not have been, therefore, whether the scaffolding law makes some difference in primary conduct, because the answer to that question is obviously affirmative. Rather, the question ought to have been whether the differences between the scaffolding law and the Massachusetts rule were significant enough to generate territorially-based expectations. Recall the reason for territorial solutions to conflicts between rules that will affect primary conduct—as in the case of the stop-on-red rule. Territorial solutions are necessary because people intuitively expect them and the result of any other scheme would be chaos. It seems extremely unlikely, however, that allowing New York's scaffolding law to apply beyond the borders of the state would produce the same kind of chaos, or disrupt territorially-based expectations because under either tort regime defendants have an incentive to be careful with scaffolding on their property.

The major problem with *Padula*, therefore, is that if its principles are extended to their logical end, it will lead to an extremely expansive notion of what constitutes a conduct-regulating tort rule. The result of such an expansion would be an almost complete resurrection of the *lex loci delicti* rule in New York. The great irony would be that, more than three decades after firing the first shot in the revolution that deposed territorialism,[86] New York could well become the first state to return it to the throne.

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[86] *See supra* note 5 and accompanying text.