NOTE

Offshore Rental Company, Inc. v. *Continental Oil Company*: A Critical Analysis

To foster public confidence and respect, it is important that the law reach results appealing to common sense, and a person is likely to think that a result makes sense if it is one he would have anticipated had he thought about the question beforehand.

[I]t is desirable . . . that a person's rights and duties should be determined under a law whose application he had reason to expect.[1]

Willis L.M. Reese

INTRODUCTION

As predicted by Professor Albert Ehrenzweig, the California Supreme Court stubbornly continues to employ governmental "interest" analysis in the resolution of cases which involve conflict-of-law problems.[2]

The court appears to be arriving at "just" results in most conflict-of-law cases as in *Offshore Rental Co. v. Continental Oil Co.*[3] [Hereinafter referred to as *Offshore Rental*] However, the "interest analysis" approach, continues to thwart what should be major objectives for any rule of law—no less choice-of-law rules. These objectives, most of which have been summarized by Professor R. LeFlar, include: *predictability of results*, *maintenance of intrastate, interstate and international order*, *simplification of the judicial task*, as well as *advancement of the forum's governmental interest*.[4] Further, the California Supreme Court's insistence on the use of interest analysis has failed in the past to provide clear precedent for its lower courts in the resolution of choice-of-law problems, as clearly evidenced by the actions of the trial court in this case.

While all of these considerations will not be addressed specifically, it is this author's hope that the following analysis of *Offshore Rental*. will establish California's inability to adequately address these objectives by its approach.

The facts of the case are as follows:

Offshore Rental Corporation, a California corporation, brought action in California, against Continental Oil Company, a Louisiana corporation, to recover for loss of services of a key employee. The employee was negligently injured on the Louisiana corporation's premises in Louisiana. The

1. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 329 (1972).
2. Ehrenzweig, *Choice of Law In California - A "Restatement"*, 21 UCLA L. REV. 781 (1974).
3. 22 Cal. 3d 157, 148 Cal. Rptr. 867 (1978).
4. LeFlar, *Conflicts Law—More On Choice-Influence Considerations*, 54 CALIF. L. REV. 1584 (1966) [hereinafter cited as LeFlar].

Superior Court of Los Angeles County, Julius M. Title, J., employing an analysis of the "most significant contacts" which were operative in the case, entered judgment in favor of the defendant, Continental Oil.

Predicated on this analysis the trial court concluded as a matter of law that "[t]he question of whether or not a corporation may maintain an action for damages arising out of personal injuries to its employee, must be determined by application of the laws of the state of Louisiana . . .".[5] Louisiana law precluded recovery in such an action and plaintiff appealed.

The provision of the California statute which gives rise to this conflict provides that "[t]he rights of personal relations forbid . . . [¶] (C) Any injury to a servant which affects his ability to serve his master . . .".[6]

On appeal, the Supreme Court concluded, after examining the governmental policies underlying each state's law, that a "true conflict" existed, in that each state has a "legitimate but conflicting interest in applying its own law."[7]

I METHODOLOGY

According to Justice Tobriner, author of the *Offshore Rental* opinion, the resolution of conflict-of-law problems in California is accomplished by "governmental interest analysis" as announced in *Reich v. Purcell*.[8] Under this form of analysis "the forum in a conflicts situation must search to find the proper law to apply based upon the interest of the litigants and the involved states."[9]

It should be noted that this approach was announced over ten years ago; however, according to Justice Tobriner, the trial court in this case *correctly* decided this case by *incorrectly* employing the "most significant contacts theory". Essentially this approach focuses on the place that has the most substantial interest in the legal issues which arise from the factual context of a particular case. In its practical application the "contacts" theory applies the law of the place where the most significant facts in the case transpired.[10]

Considering this court's treatment of *Offshore Rental* (discussed infra) it is not difficult to understand the lower courts failure to apply the "correct" approach in the resolution of this case.

5. 22 Cal. 3d at 161, 148 Cal. Rptr. at 869.

6. CAL. CIV. CODE § 49 (Deering).

7. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 319, 128 Cal. Rptr. 215, 218 (1976).

8. 67 Cal. 2d 551, 553, 63 Cal. Rptr. 31, 33 (1967).

9. *Id.*

10. Introduced in Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1954); and served as a basis for the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). In *Auten*, the court found that the impact and effect of a separation agreement between the parties in this action must be determined by the laws of England. The court came to this result even though the agreement was made by the parties in New York. In addition, the trustee to whom the monies were in the first instance to be paid, had its office in New York. The court concluded that the agreement was between British subjects who had married in England, had children there and lived there as a family for fourteen years. Further, the agreement involved a husband who had "wilfully" deserted and abandoned his wife and children in England, and was in the United States on a temporary visa when the agreement was signed.

A. *The "True Conflict" and "Comparative Impairment"*

In determining that this case involved a true conflict the court assessed both states' interest by evaluating the underlying policies of each. First, "Louisiana's policy is to protect negligent resident tort-feasors acting within Louisiana's borders from the financial hardships caused by the assessment of excessive legal liability or exaggerated claims resulting from the loss of services of a key employee."[11] Second, the court stated that "California's policy of protection extends beyond such an injury inflicted within California, since California's economy and tax revenues are affected regardless of the situs of physical injury."[12]

Acknowledging the limitations of governmental interest analysis in resolving choice of law problems. Once a preliminary analysis reveals the existence of a true conflict, the court, as it did originally in *Bernhard v. Harrah's Club*, resorted to the theory of "comparative impairment".[13] When applying the comparative impairment theory according to Professor James A. Martin, "[w]eighing of the interest is rejected; but weighing of the *harm* that would be caused by refusing to carry out interest in particular cases is not."[14]

B. *California's Comparative Impairment*

After introducing the concept, Justice Tobriner embarks upon a prolonged discussion of comparative impairment in an apparent attempt to formulate some clear and useful guidelines for its use in the future resolution of true conflicts. Assuming this to be the objective, this author must conclude that the court has failed in that it is extremely unclear what this intellectual profuseness establishes. This failure, however, is not precipitated by the court's discourse, but rather by the amorphous nature of the concept itself. The following is a brief look at the main points that the court used in the formulation of its theory and the resultant conclusion.

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11. 22 Cal. 3d at 163-164, 148 Cal. Rptr. at 871.

12. *Id.*

13. 16 Cal. 3d at 320, 128 Cal. Rptr. at 219. *Bernhard* was initiated in a California Superior Court. The cause of action was based on a personal injury complaint against a Nevada tavern keeper, Harrah's Club, by a California resident, Richard Bernhard. Plaintiff Bernhard, while driving on a California highway, was struck by another California resident, also driving on the highway, who had been furnished alcholic beverages in defendant's drinking and gambling establishment after becoming obviously intoxicated.

The trial court entered a judgment of dismissal following an order sustaining a demurrer without leave to amend. The Supreme Court reversed and remanded the case to the trial court with directions to overrule the demurrer. The Supreme Court held that the trial court erred in failing to apply California law under which civil liability may be imposed on tavern keepers who furnish liquor to intoxicated persons rather than the Nevada rule of nonliability.

The Supreme Court reasoned, using governmental interest analysis, that each state had a *legitimate* but *conflicting* interest in applying its own law regarding the civil liability of tavern keepers. Faced with this dilemma, the court employed for the first time the "comparative impairment" of governmental interest approach. Thus, through an analysis of the policies underlying each state's law, the California court concluded that the interest of California would be significantly "impaired" if its policy were not affected, whereas the interest of Nevada would not be.

14. 22 Cal. 3d at 164-165, 148 Cal. Rptr. at 872.

1. Justification

First, the court attempts to justify the application of this doctrine to this case by stating "[a]s Professor Horowitz has explained, this analysis does not involve the court in 'weighing' the conflicting governmental interests in the sense of determining which conflicting law manifest[s] the 'better' or the 'worthier' social policy on the specific issue.[15] "An attempted balancing of conflicting state policies in that sense . . . is difficult to justify . . . ."[16]

The court would have had it believed that in true conflict weighing or balancing in order to determine which conflicting law manifests the *better* or *worthier* policy is "difficult to justify".[17] However, the court apparently finds it quite acceptable, as it did in *Bernhard*, to reexamine the policies underlying conflicting laws in order to determine which jurisdiction has the more important and the most abiding interest in applying its law.[18]

In each case, after the court has focused on one state's applicable law or policy to determine its current vitality, the individual results must still be balanced or weighed against the opposing state's law or policy. In other words, each state's interest is reduced to its lowest common denominator, but the respective value of each state's interest remains the same, and is therefore, no more or less comparable than it was to begin with.

Thus, unless the court determines that a true conflict no longer exist, it must continue to weigh and balance in a circle. This writer contends that a determination that a particular state's interest is *important* or *abiding* is no different nor is it more justifiable than a determination that one jurisdiction's interest is *better* or *worthier*.

C. *Toward The "Better Rule"*

Drawing on the concepts of Professor Freund, the court states that "the current status of a statute is an important factor to be considered in a determination of comparative impairment: the policy underlying a jurisdiction's law may be deemed 'attenuated and anachronistic' and properly . . . be limited to domestic occurrences in the event of a multistate clash of interest."[19]

This language is very significant. Although it is not explicit, the court begins to move in the direction of yet another theory of choice of law, the "better rule". Generally, the better rule approach is based upon "[j]ustice in the individual case," and the "protection of justified expectations of the parties."[20] More evidence of this trend is found in the court's summary of comparative impairment and will be discussed below.

D. *"Comparative Pertinence" - Back to the Beginning?*

Focusing on the work of Professor Baxter, the court introduces the con-

15. 22 Cal. 3d at 165, 148 Cal. Rptr. at 872.

16. Horowitz, *The Law of Choice in California - A Restatement*, 21 UCLA L. REV. 719, 753 (1974) (*quoted in* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 320 (1976)).

17. *Id.*

18. 16 Cal. 3d at 323, 128 Cal. Rptr. at 222.

19. 22 Cal. 3d at 165, 148 Cal. Rptr. at 872 (quoting Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1224 (1946)).

20. LeFlar, *supra* note 3 at 1584.

cept of "comparative pertinence".[21] The court states that this concept fulfills the "chief criterion" in the comparative impairment analysis of "maximum attainment of underlying purpose by all governmental entities." This, says the court, "necessitates identifying the focal point of concern of the contending lawmaking groups and ascertaining the comparative pertinence of that concern to the immediate case."[22]

Justice Tobriner appears to have made a complete circle; utilizing different language, the court has returned to the fundamental principles of governmental interest analysis. Professor Horowitz emphasizes in his article that the primary purpose of interest analysis is "to *understand*, *harmonize*, and *weigh competing interests* in multistate events."[23] (Emphasis added) Can these objectives be met without "identifying the focal point of concern of the contending lawmaking group" and comparing them? They are one and the same. If the court can accomplish this with "comparative pertinence" they should also be able to do it with interest analysis thereby avoiding this cumbersome methodology.

Perhaps in order to avoid this quandry, Justice Tobriner immediately focuses on the determination of what policies are "less" comparatively pertinent.[24] This has the ring of comparative impairment. Not to be caught by these similarities, the court jumps, using comparative pertinence, to language which is clearly embodied in the better rule theory, i.e. "a statute which was once intended to remedy a matter of grave public concern may since have fallen in significance . . . ."[25] But again, seemingly so as not to identify this concept explicitly with any other, Justice Tobriner indicates that comparative pertinence may also be used to ascertain if a statute's relevance has been superceded by insurance.[26] The value of this line of reasoning is questionable, in that the court is strongly implying here and in a succeeding section that availability of insurance will justify the court's refusal to apply the laws of the state without overruling them.[27]

E. *Conclusion*

This cursory review of the scholarly excerpts is only a sample of the courts interminable and tenuous discussion of comparative impairment; and it serves several purposes.

First, it demonstrates how the court choses to engage in sophisticated and complex theorizing. This would be a laudable exercise for law professors and students perhaps, but impracticable for court decisions which are to serve as clear precedent for lower courts, attorneys and perhaps most importantly, the general public.

Further, this form of decision making tends to place judges and other legal scholars above the law, in that these rules of law are formulated with no direct input from the traditional law making bodies. Support for this

21. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 11-12 (1963).
22. 22 Cal. 3d at 166, 148 Cal. Rptr. at 872.
23. Horowitz, *supra* note 10 at 719.
24. 22 Cal. 3d at 166, 148 Cal Rptr. at 872.
25. *Id. See* text accompanying note 31 *infra*.
26. *Id.*
27. *See* text accompanying note 43 *infra*.

assertion can be found in the observations of Professor Willis L.M. Reese, Reporter, *Restatement (Second), Conflict of Laws (1971)*. Professor Reese notes that one of the unfortunate consequences of the interest approach "is the opportunity it affords for judicial masquerading."[28] He states further that:

> Since there will often be uncertainty as to what policy, or policies, are embodied in a statute or judge-made rule, it is all too easy for a court to decide first on the rule that it wishes to apply and then to ascribe to that rule a purpose that makes its application appropriate while ascribing at the same time to the potentially applicable rules of other states purposes that would not be furthered by their application. *The difficulty is not that the results reached in this way are necessarily bad. Rather it is that an opinion whose reasoning is a sham may obstruct, and certainly cannot aid in the development of a more satisfactory system*.[29] (Emphasis added)

Finally, this review has served to set the stage for Justice Tobriner's summation of comparative impairment; considering the enormous effort that was put into it, the results are disappointing. One would think that more definitive guidelines would have been established. Instead, in concluding his theoretical discussion, Justice Tobriner states that "in sum" comparative impairment analysis in the resolution of true conflicts "attempts to determine the relative commitment of the respective states to the laws involved."[30] To facilitate this objective "several factors are to be considered; the history and current status of the state's laws; and the function and purpose of those laws."[31]

Apparently the court in *Reich* is announcing as it did with interest analysis that this version of comparative impairment constitutes the new approach to the resolution of cases involving true conflicts in California. However, considering the language of the court one cannot be certain. It should be noted that the appeal of this case was initiated because the trial court apparently was not aware that it was required to apply interest analysis in the resolution of conflict of law cases. In this writer's opinion, the instant case, *Offshore Rental*, leaves ample opportunity for a similar reoccurrence.

II THE EMERGENCE OF THE "BETTER RULE OF LAW"

Perhaps the most significant aspect of this entire case is the emergence of the "better rule" theory, a development that was observed earlier in this analysis.[32] However, it seems that the court has very carefully avoided labelling it as such; nevertheless, the language of Justice Tobriner's comparative impairment approach is unmistakably the same as that embodied in the better rule theory, i.e. . . . "factors for consideration: the history and current status of the state's laws; the function and purpose of those laws." Further, the language that this court employs in applying its approach to the California statute, involves the same analytical approach as the better rule. For example:

28. Reese, *Chief Judge Fuld and Choice of Law*, 71 Colum L. Rev. 548, 559 (1971).
29. *Id.* at 559-560.
30. 22 Cal. 3d at 166, 148 Cal. Rptr. at 873.
31. *Id.*
32. *See* text accompanying note 24 *supra*.

> [E]ven if injury to the master-servant relationship were at one time the basis for an action at common law the radical change in the nature of that relationship since medieval times nullifies any right by a modern corporate employer to recover for negligent injury to employees.
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> . . .
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> California has itself exhibited little concern in applying section 49 to the employer-employee relationships . . . . If, as we have assumed, section 49 does provide an action for harm to key corporate employees . . . the section constitutes a law archaic and isolated in the context of the laws of the Federal Union.[33]

The court went on to say that Louisiana's refusal to allow a cause of action for this conduct, brings them within the "main stream" of American jurisdictions.

Compare the language of this approach and its applications with the following excerpt from a section of Professor Weintraub's book entitled "The Better Law Syndrome":

> [T]he *better law* should be selected by objective standards; another state's law should not be branded as "anachronistic" unless it can be demonstrated by the objective evidence of case law and statute that, over a period of time many jurisdictions that had the rule in question have abandoned it and adopted what the forum regards as the "better rule"; or, perhaps that there is a trend, widely shared by the states, not to abandon the anachronistic rule, to modify it or to apply it in such a way as to produce results closer to those that would be reached under the better rule than to those that would be reached under a pristine form of the anachronistic rule.[34]

Similar explanations and applications of the better rule approach are found in a number of other articles and cases.[35]

Considering the language of Weintraub's book and other authorities, it is obvious that California has, at least for the time being, adopted the better rule theory as an approach to the resolution of true conflicts.

Applying this doctrine to *Offshore Rental*, the court concluded that the trial court correctly applied Louisiana law, rather than California's "since California's interest in the application of its unusual and outmoded statute is comparatively less strong than Louisiana's . . . so lately expressed in its 'prevalent and progressive' law."[36]

A. *"Better Rule" - Judicial Legislation*

The court has apparently chosen to ignore the vast criticism that this approach to choice of law problems has generated.

Professor LeFlar states that among the "choice-influencing considerations" the "better rule of law is the most controversial . . . ."[37] Professor Currie, who is generally credited with developing the theory of governmental interest analysis, states in opposition to the better rule approach that when courts are "convinced that a domestic law is archaic and unjust, they

33. 22 Cal. 3d at 167-168, 148 Cal. Rptr. at 873-874.
34. Weintraub, *Commentary on the Conflict of Laws*, P. 244 (1971).
35. Hunker v. Royal Indemnity, 57 Wis. 2d 588, 204 N.W. 2d 408 (1973): *See* also LeFlar, *Supra* note 3 at 1587.
36. 22 Cal. 3d at 167, 148 Cal. Rptr. at 874.
37. LeFlar, *supra* note 4, at 1587.

should abrogate it entirely, instead of utilizing the looseness of the system of conflict of laws as an excuse for limited abrogation.

. . .

"But if the interests of the foreign state alone are concerned, there is no reason why the court should seek abrogation of the law for any purpose."[38]

The position of this writer to the better rule approach is best expressed by Professor Cavers who states, "I have recognized the influence of the better law in choice-of-law decisions not as a desideratum but as an inevitable psychological reaction in marginal cases, a tendency . . . to be taken into account in explaining decisions."[39] Further, in a statement that seems to be directly on point with the court's behavior in *Offshore Rental*, Cavers says that "in the improbable case in which an X court expressly applies Y law because Y's rule is 'better', the X court would not be developing its own legal system whose inferior rule would remain unchanged."[40] In addition, Professor Cavers describes the better law criterion as an "escape that is not responsive to a choice-of-law problem confronting the court."[41]

Thus, in the instant case the citizens (and corporations) of the state of California remain subject to a law that the court has labeled as "unusual and outmoded" and not fit to be applied to persons and corporations outside the state.[42] It is apparent that the court is operating under the dictates of a "higher law" or at least some law other than that prescribed by the state legislature or case precedent.[43]

III CONCLUSION

Although the court has gone to considerable lengths to develop and utilize this approach, there still remains some doubt as to what degree the court is insisting on its use in the future. Evidence of this doubt is the Court's reliance on "additional support" for its decision.

Justice Tobriner, after giving the court's decision in this case, proceeds to explain that the results in this case are also supported by the traditional rule of *lex loci delicti commissi*; and for even more "additional support" he indicates again[44] that "[p]laintiff could have obtained protection against the occurence of injury . . . by purchasing key employee insurance . . . ."[45] It would seem, at least prior to this decision, that plaintiff should have been able to rely equally on the enforcement of the laws by which it is governed.

Thus, the court concluded its decision and the mystery as to exactly what conflict-of-law theory is applicable remains. It does seem fairly clear

38. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, n.82, 154 (1963).

39. Cavers, *The Value of Principled Preferences, In Symposium, Conflict of Laws Round Table*, 49 TEX. L. REV. 211, 215 (1971).

40. *Id.*

41. *Id.*

42. 22 Cal. 3d at 168, 148 Cal. Rptr. at 874.

43. *Id.*

44. *See* text accompanying note 26 *supra*.

45. 22 Cal. 3d at 168, 148 Cal. Rptr. at 874.

that the "comparative impairment" - "better rule" of law approach, despite its ambiguity and other shortcomings is an essential part of any theory to be used.

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