

# Justice and the Conflict of Laws

by Joseph William Singer\*

In *Walton v. Arabian American Oil Co.*,<sup>1</sup> an Arkansas resident was injured in Saudi Arabia by the employee of an American company incorporated in Delaware with substantial business operations in New York. Suit was brought in federal court in New York.<sup>2</sup> What law should apply to plaintiff's claim that defendant's employee negligently harmed him and that defendant is vicariously liable for the damages resulting from that harm?

The distinguished panelists who have addressed this question seem to agree that their initial intuition is that Saudi law should apply as the place of the conduct and injury if one of the parties proves what that law is. The debate revolves around the question of whether it is constitutional or otherwise permissible to apply forum law if neither party seeks to apply Saudi law. It seems to be unanimous that it would be wrong to apply Arkansas law (the law of the plaintiff's domicile) and that it would be wrong to apply New York law if defendant can prove that Saudi Arabia has a more defendant-protecting law and seeks to have it apply.

With respect, I beg to differ. The case appears to be a Saudi case only because the conduct giving rise to the claim occurred there. Brainerd Currie taught us to look at such a case in a different way. First, Currie emphasized that we should look at the policies underlying the laws of the affected jurisdictions, not merely the contacts with the case. It is not determinative that the facts seem to be centered in Saudi Arabia. Second, Currie taught us the significance of the domicile of the parties and the places where companies do business. Although the *First Restatement* gave the parties' domiciles no significance in torts cases, Currie made the domicile determinative in certain cases. Third, Currie taught us that it is proper and not a parochial or perverse exercise for

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\* Professor of Law, Harvard University.

1. 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956).  
2. 233 F.2d at 542.

the forum to apply its own law, unless it has reason not to do so. I submit that these three insights suggest a different result than those proposed by most of the panelists.

At first glance, it appears that Saudi Arabia should be able to regulate an accident occurring on its roads whether or not that accident involves a Saudi citizen. If Saudi law were more plaintiff-favoring than the law of either Arkansas or New York, providing for a higher level of damages for example, it might have a deterrent interest in applying that law. Higher damages might be intended to induce care on its roads. In addition, presumably a Saudi victim would be able to recover the higher Saudi damages against a nonresident defendant who caused harm at plaintiff's home. A Saudi court might be moved by the arguments made by the panelists that it would be discriminatory for a Saudi court to refuse such damages to a plaintiff merely because that plaintiff resided or was domiciled in another country. Nonresidents have the right to be protected by Saudi law while they are there, and it would be discrimination on the basis of citizenship to refuse to provide similar damages to the nonresident plaintiff.

Suppose, however, Saudi law is not intended to be conduct-regulating but merely loss-allocating. The courts in Saudi Arabia are persuaded by the argument that those who are not afraid to die in automobile accidents will not drive more carefully because they will fear the loss to their pocketbooks. In that case, the only interest Saudi Arabia has in extending its plaintiff-protecting law to the nonresident plaintiff is the interest in providing the nonresident the same police protection granted its own people. If the plaintiff's home state is willing to live with lower damages, why should Saudi Arabia impoverish a defendant doing business in Saudi Arabia? It has no interest in doing so, does it? It seems a perverse amount of altruism to suggest such a result.

There are two reasons Saudi Arabia would and should extend its more plaintiff-favoring law to the nonresident plaintiff whose home state would provide less compensation. The first is the nondiscrimination argument rehearsed above: if a Saudi resident would obtain higher damages, why should a Saudi court deny those same damages to a nonresident injured in Saudi Arabia? The second argument is that the courts in Saudi Arabia have an interest in making a defendant compensate a plaintiff injured in Saudi Arabia because it is the right thing to do; defendants have no right to commit harm with impunity. The place of the injury has the legitimate power and obligation to ensure that there is a remedy for the infringement of the plaintiff's right to bodily security.

Notice that both of these reasons for applying Saudi law are reasons of justice. Some scholars have misread Currie's analysis to suggest that

a state is interested in applying its law only if that application will enrich one of its domiciliaries. This suggests that the only reason states impose damages on their residents is to alter their behavior and encourage investment in safety; it presumes that choice-of-law analysis should be relentlessly *consequentialist*. But surely this is wrong. States adopt laws both because they intend to alter behavior and because they want to do justice. Rules of torts, contracts, and property can be justified by consequentialist reasons, but they can also be justified by reference to rights, fairness, and justice.

I am a Property professor and perhaps can best state this in property terms. The defendant committed a wrong to the plaintiff, and under Saudi law (by hypothesis), defendant owes plaintiff damages. The defendant has a pot of money that, by rights, belongs to the plaintiff. The place of the conduct and injury has the legitimate power to rectify a wrong committed in its territory, and it is not obligated to register indifference because the parties are noncitizens.

So far, my analysis seems to vindicate the intuition that Saudi law should apply to the case. If Saudi law is more plaintiff-favoring, it has reasons of both deterrence and fairness to apply its law to the nonresidents. Moreover, neither the plaintiff's nor the defendant's home states in the United States claim the right to immunize them from liability for their torts elsewhere. But let us assume now that Saudi law has no deterrent purpose. Is the case so easy? Although it is true a Saudi court would be likely to apply its own law if it thought that failing to do so would both constitute an injustice and be discriminatory, it is not so clear that a court in New York would or should do the same thing. Consider the following: Currie told us that it might make sense for the outcome in a case to differ, depending on which court heard the case. Unlike most choice-of-law scholars, I agree wholeheartedly with this assessment.

Remember that we have taken away the deterrent purpose from Saudi law. It is possible a New York court would find that the New York company which does substantial business in Saudi Arabia and injures an Arkansas resident need not pay the high damages authorized by Saudi Arabia if the goal is to do justice. Think about it. A Mexican company does business in the United States and injures a Mexican resident on the roads of Texas. If the plaintiff were to obtain U.S.-style damages, he might be able to retire in Mexico in luxury. Even though a Texas court might be justified in applying Texas law (because it would be discriminatory to deny the visitor the benefits of Texas law while there), a Mexican court might see it differently. Texas law has no deterrent purpose, and the plaintiff certainly did not travel to Texas in reliance on the possibility of obtaining a high damages award if he were

injured there. A Mexican court might see before it a Mexican company and a Mexican victim and remind us that Currie suggested the place where a contract is signed or an accident occurs is not necessarily the place whose law should be applied. In fact, many scholars believe the main result of Currie's analysis was to suggest that in cases of loss allocation, courts should apply the law of the common domicile, not the law of the place of the injury. In such a case, the Mexican court might feel that it was adequately compensating its resident while eschewing impoverishment of a resident defendant and that no legitimate interests of Texas were being infringed. The fact that a Texas court might be compelled to apply Texas law (to avoid the appearance or reality of discrimination) does not mean that a Mexican court need do this.

If this analogy is apt, a New York court might see before it a plaintiff and a defendant from states whose laws are identical. Although a Saudi court might award higher damages, would it be so out of place for the New York court to say that it makes no sense to impoverish a New York company to benefit an Arkansas plaintiff when the plaintiff's own state considers New York-style damages adequate and the place of the conduct has no conduct-regulating policies to suggest a different result? Given that the forum's view of the just result accords with that of plaintiff's domicile, why not apply forum law?

Now let us assume, as most of the panelists seemed to assume, that Saudi law is more defendant-protecting than the law of either Arkansas or New York. Let us assume, for example, that Saudi Arabia eschews the doctrine of vicarious liability and promotes traffic safety by regulatory laws (such as traffic signs and lights) and criminal laws (enforced by police charges imposing fines for unsafe driving), but refuses to allow negligence lawsuits of any kind in the context of automobile accidents.

If I read correctly, everyone felt that the law of the plaintiff's domicile could not be applied. But think about it. Why exclude the interests of the plaintiff's domicile so cavalierly? The plaintiff's domicile is surely *interested*, as Currie would put it, in compensating its resident. And even though New York has no interest in regulating the conduct of its residents around the world, it surely would find no injustice in making the defendant pay damages to the injured plaintiff rather than allowing defendant to get away without liability under Saudi law. This is effectively a common domicile case with both parties coming from states that impose negligence liability. A result that leaves plaintiff with nothing is, from the standpoint of the forum, an unjust result.

Here is where I differ from Larry Kramer's ingenious and seductive suggestion that we should be positivists and ask whether any state gives plaintiff a remedy. Currie taught us to view forum law as the residual

result for one good reason: forum law represents the forum's view of justice as it sees it. I am not arguing for natural law or a brooding omnipresence in the sky; I am arguing that the forum has an interest in seeing justice done in its courts between parties who are properly before it. If the case is dismissed without a remedy, it would not be as easy as Kramer might suggest to conclude that no court gave plaintiff a remedy. If this is our view, the question is why? Why does no state give plaintiff a remedy? Specifically, why does the forum not give the plaintiff a remedy? Why does the forum leave the plaintiff injured and penniless? Ordinarily, it would not do so; it would consider such a result unconscionable. Doesn't the forum have an interest in doing justice, as it sees it?

I submit that there are two reasons, and two reasons only, for eschewing what New York sees as the just result when the plaintiff's home state has an interest in seeing plaintiff compensated: justified expectations and comity. If defendant relied on Saudi Arabia's defendant-protecting law in shaping its conduct and in determining how much insurance to buy, it might be unfair to subject the New York defendant to New York or Arkansas law around the world. However, given that neither the defendant nor the court knew what Saudi law was even at the time of trial, it is impossible to conclude that there is any unfairness in holding defendant liable for its negligence. If it were determined that Saudi law provided no remedy, it would be an unexpected windfall to defendant—*analogous to winning the lottery*. Moreover, *even if* one could say that defendant knew it would not be liable for the torts of its employees committed in Saudi Arabia and relied on that knowledge, the case is still not a false conflict. If we are avoiding what the forum views as the fair result in order to protect defendant's expectations, it is important to remember that for every rights argument defendant makes, plaintiff may have a plausible rights argument of his own. Here it is simply that Saudi law is unjust. Defendant will argue that plaintiff impliedly consented to Saudi law by going there, but this argument proves too much. Although it is appropriate for a Saudi court to apply Saudi law, it is not so certain that it is appropriate for a New York court to leave an Arkansas plaintiff without a remedy for an injury committed by a New York company; defendant may have a right to rely on the law of the place where it acts, but plaintiff also has a right to minimal justice, as the forum sees it. The question is whether defendant's rights outweigh plaintiff's rights, or which right should take precedence? Given, however, that defendant seems *not* to have relied on knowledge of the immunizing Saudi law, it would be unjust and inappropriate for the New York court to promote what it sees as an unjust result in order to protect defendant's expectations when defendant had no expectations to protect.

The second possible reason for applying Saudi law is to respect the ability of Saudi Arabia to govern events centered there. This comity interest of the forum manifests itself when application of forum law would interfere with the ability of another state to enforce its regulatory policies. What interest does Saudi Arabia have in leaving plaintiff without a remedy? One possibility is that such a defendant-protecting law promotes investment in Saudi Arabia. Moreover, application of New York law to a New York company for an accident arising out of its business in Saudi Arabia would put it at a competitive advantage. However, it is difficult to believe that Saudi law concerning automobile accidents is intended to, or has the effect of, promoting foreign investment in Saudi Arabia, particularly when the defendant did not even know what that law was. If the Saudi law is not investment-promoting, application of Saudi law would infringe on the interests of plaintiff's domicile (leaving it to deal with the consequences of his injury) and would violate the forum's sense of justice. This would leave a defendant who does substantial business in New York free of a legal obligation it would otherwise incur under New York law, without in any way advancing the legitimate interests of either the defendant or of Saudi Arabia. In such a situation, why should the forum promote an unjust result?

Currie was correct to focus on state interests, to teach us about the interests of the plaintiff's domicile, and to suggest reasons for making forum law the presumptively applicable law. To those reasons, I want to add the forum's interest in seeing justice done under the standards provided by forum law, especially when plaintiff is domiciled in a state that agrees with forum standards. In such cases, the only real question is whether there are sufficient reasons of multistate policy to justify a result different from forum law. Those reasons might include protection of a defendant's justified expectations or promotion of the ability of a state to regulate events centered there to achieve important public purposes. If both of these reasons are absent, the forum has an interest in substantive justice. In such cases, it is not correct to state that no state gives the plaintiff a remedy. The domicile of the parties is a sufficient connecting factor to apply the common law of their domiciles when the rule at issue is a loss-allocating rule. The forum has an interest in promoting substantive justice in such cases, and the conflict of laws in no way prevents the forum from achieving such a result.