Conflicts Lect 13

1. Unprovided for Case
   1. Use simple example
      1. variation on Grant v McAuliffe
      2. Assume that Arizonan and Californian get in accident in Arizona
         1. Californian dies
         2. AZ has no survivorship of actions
         3. Cal does (common law rule abrogated by statute)
         4. Purposes? Cal wants to allow Ps to prevail at expense of beneficiaries of estate
            1. In favor of loss compensation to Ps (even if it harms estates)
            2. But not interested in AZ Ps to prevail against Cal estates
         5. Deterrence? Probably minimal, since dying is pretty good deterrence on its own
            1. In any event, not relevant bc wrongdoing is in AZ
         6. AZ wants to protect beneficiaries of estates at expense of Ps
            1. they did nothing wrong
            2. But not interested in protecting Cal beneficiaries at expense of AZ P’s
         7. unprovided for case
      3. Neumeier also an unprovided for case
         1. Ontario guest riding in NYer’s car
         2. accident in Ontario
         3. Ontario has guest statute, NY doesn’t
         4. reason behind Ont guest statute
            1. worries about fraud
            2. worry about fraud that would harm NY?

No

* + - 1. NY’s policy
         1. Want P to get compensation

Non NY Ps? - No

* + - * 1. Wants deterrence of negligent hosts

Outside NY? - No

* + - 1. neither applies
      2. unprovided-for case generally exists when
         1. P’s domicile’s loss-allocating law benefits D (by prohibiting action)
         2. D’s domicile’s loss-allocating law benefits P (by allowing action)
         3. and harm is in P's domicile, so no deterrence interest
    1. what to do?
       - 1. Currie

apply forum law

but forum is not interested

sometimes suggests use law that is most humane and enlightened

* + 1. one solution is to read loss allocating rules more broadly
       1. burden as well as benefit domiciliaries
       2. the limit of a loss-allocating law’s scope to benefitting domiciliaries can be understood as a presumption. When the question is the burden on a domiciliary, the presumption is that the other jurisdiction whose domiciliary would benefit has the greater interest
       3. no need to read loss-allocating rules broadly, generating countless true conflicts, and then resolving the true conflicts by weighing interests. It is better to limit the scope of loss allocating laws to begin with
       4. The presumption is not intended to disadvantage non domiciliaries, but exists in the interest of comity with other jurisdictions
       5. But in the unprovided-for case the presumption doesn’t work
       6. The solution, one might argue, is for each jurisdiction to read in its loss-allocating law as burdening its domiciliaries
       7. So in the Grant variation, Arizona will be understood as wanting to keep Arizona plaintiffs from making unjustified demands against the blameless beneficiaries of non-Arizona estates. And California will be understood as wanting to ensure that the beneficiaries of California estates make non Californians harmed by the decedent whole
       8. The case turns out to be a true conflict, with each jurisdiction having a relatively small interest in its law applying
    2. Kramer’s solution is different
       1. He points to stronger interests that one particular jurisdiction has in the case
       2. The unprovided-for case turns out to be a false conflict, without having to give up the pro domiciliary presumption
       3. In Neumeier, Kramer would point to Ontario’s interest in compensation to an Ontario guest and Ontario’s interest in deterring the negligence of hosts in Ontario
       4. It seems reasonable to say that Ontario has these interests. But is there an Ontario law to apply? Kramer says yes.
          1. No such thing as unprovided for case

Ontario negligence law – without guest statute applies

* + - * 1. heart of Kramer’s argument…
        2. if a law is read in the light of its purposes, then a law that limits another law (like an affirmative defense) should also be read in the light of its purposes
        3. guest statute is an affirmative defense that limits Ont negl law. But it should only limit negligence law when Ont. has an interest in its doing so.
        4. in Neumeier the guest statute is inapplicable bc the D-host is from NY
        5. But normal Ont tort law is applicable bc

Ontario P-guest to be compensated

Ontario accident to be deterred

* + - 1. Is the same thing true of our changed Grant v McAuliffe
         1. P was from AZ, D was from Cal, accident was in AZ
         2. Kramer would say Cal law does not apply

But AZ law does

NOT the survivorship rule

BUT Arizona negligence law, minus the rule concerning survivorship

1. Problem with Currie’s approach according to Kramer –
   1. He assumes that Ontario’s guest statute completely excludes negligence actions by guests against hosts
      1. Even in cases where host is not from Ontario
   2. But that assumes a guest statute has a scope that’s not determined by its purposes
   3. Which is contrary to the fundamental premise of interest analysis

Now for Green’s criticism:

Kramer assumes that there really is an Ontario negligence law that allows Ontario guests to sue hosts concerning accidents in Ontario when the host is not from Ontario.

Let us assume that there really is such a law on the books in Ontario. Absurdity results.

Assume facts of Neumeier (Ont. Guest, NY host, Ont. Acc.) *except* NY has a guest statute too  
what is the result….?

The case would turn out to be a true conflict. New York’s guest statute would apply, because the host is from New York. And Ontario’s negligence law, minus the guest statute, would apply for the same reasons that it applied in Neumeier

* The point is that if Ontario has negligence law allowing guest host suits for the facts of Neumeier, that it has such law no matter what the competing jurisdiction’s law is
* But that’s crazy. No one would expect Ontario negligence law to apply in such a case.
* It would completely violate the expectations of the parties.
  + Since both jurisdictions have guest statutes.

The way we should understand Kramer’s argument is that it points to interests that Ontario has *independently of Ontario law*. Ontario legislators would want negligence law to apply given the facts of Neumeier. But they don’t actually have such a law.

Another problem with Kramer’s argument is that if the way that affirmative defenses limit other laws should be read in the light of their purposes, then the way that repeals limit other laws should likewise be read in the light of their purposes. And that also leads to absurdity.

Ontario eventually repealed its guest statute. The guest statute applied, as we have seen, whenever the host is from Ontario. Presumably the purposes of the repeal of the guest statute are those of negligence law: compensation to harmed Ontario guests, and deterrence of negligence by hosts in Ontario. But under Kramer’s argument that means that the guest statute has not been repealed in cases where the purposes of the repeal are not implicated. The guest statute would still exist when there is a non Ontario guest, non Ontario accident, and Ontario host.

My argument is that we cannot understand Kramer to be pointing to genuine laws – he is pointing to interests that exist independently of laws

But if that’s so then the scope of possible interests expands beyond those Kramer points to

* Neumeier v. Kuehner (NY 1972)
* Ontario guest riding in NYer’s car
* accident in Ontario
* Ontario has guest statute
* NY doesn’t

Interests Kramer points to:

Ont. interest in compensation to Ont. guest

Ont. interest in deterrence of negligent hosts in Ont.

But there is also:

NY interest in avoiding fraud

Once those interests are introduced, all choice of law cases are transformed

e.g.

*Babcock*  
NY guest riding in NY host’s car   
accident in Ontario  
Ontario has guest statute   
NY doesn’t  
  
Ontario interest? – deterrence (which recommends liability)  
NY interests? – compensation (which recommends liability) and avoiding fraud (which recommends immunity)

It could be that the best rule to satisfy aggregate governmental interests is a rule barring liability

Ontario interests in all-Ontario case:  
Comp.Ont (3) + Deter.Ont (1) < FraudOnt (5)  
  
NY interests in all-NY case:  
Comp.NY (3) + Deter.NY (3) > FraudNY (5)  
  
Babcock? NY guest, NY host, Ont accident  
Comp.NY (3) + Deter.Ont (1) < FraudNY (5)

That would mean that in Babcock the first restatement does a better job satisfying governmental interests than interest analysis does!

But what is kramer’s solution to the no cause of action unprovided-for case?

1. Erwin v. Thomas
   1. P (married woman) (Wash) suing D (Ore) in Ore Ct for injury in Wash
   2. Suit is for loss of consortium
   3. Wash does not allow such suits by women (only men)
   4. Ore does
   5. How does Ct analyze case?
      1. Wash thinks rights of married women are not sufficiently important to disadvantage Ds
         1. Protects Ds
         2. but no Wash D here
         3. Washington has decided that the rights of a married woman whose husband is injured are not sufficiently important to cause the negligent defendant who is responsible for the injury to pay the wife for her loss. It has weighed the matter in favor of protection of defendants. No Washington defendant is going to have to respond for damages in the present case, since the defendant is an Oregonian.
      2. Ore is protective of married women as against Ds
         1. But no Ore married woman here
         2. On the other hand, what is Oregon's interest? Oregon, obviously, is protective of the rights of married women and believes that they should be allowed to recover for negligently inflicted loss of consortium. However, it is stretching the imagination more than a trifle to conceive that the Oregon Legislature was concerned about the rights of all the nonresident married women in the nation whose husbands would be injured outside of the state of Oregon.
      3. Neither state has vital interest in case
      4. So used forum law
      5. Is this incompatible with Casey v Mason
         1. Ore wife brings loss of consortium action against Wash D for accident in Wash
         2. Ore ct held that wash law applies
         3. No, not incompatible because this is a true conflict
            1. Both the Oregon and Washington law apply
         4. and Oregon court concluded that wash’s interest paramount

does the court’s of reading of washington’s interest make sense?

* + 1. Is it really true that having no cause of action for loss of consortium for married women is about protecting Ds (Wash Ds)?
    2. Isn’t it based on a theory that married women do not have the right is the sexual services of their husbands? So in losing the sexual services they lose nothing to which they were legally entitled?
       1. If that’s so wouldn’t Washington be primarily interested in its law disadvantaging Washington married women?
  1. Really a case where Ore is not interested and Wash is

Consider this case:

OR married woman sues WA D for loss of consortium concerning accident in OR.

This now turns out to be a false conflict. Washington is not interested in protecting Washington defendants, but only interested in burdening Washington married women with its view about who has the right to sexual services from whom in a Washington marriage

This is how Kramer reads Erwin

Kramer suggests that all no cause of action unprovided for cases can be solved this way

They turn out to be false conflicts too – the plaintiff simply fails to state a claim under his own law

But Erwin is a special case

there is a particular reason in Erwin why Wash law would disadvantage a Wash P

* look at a more normal no cause of action unprovided-for case
* A variation on *Hurtado v. Superior Court*. A family from the Mexican state of Zacatecas sues a Californian for wrongful death due to an accident in Zacatecas in which a Zacatecan was killed.Zacatecan law had a limit on the amount of damages for wrongful death (which was apparently part of the cause of action, not an affirmative defense); California law had no such limit.
* apparent unprovided for case concerning the amount above the limit
* how is that solved for Kramer?
* He would apparently say that the plaintiffs fail to state a claim for the amount above the limit under Zacatecan law
* but if Zacatecan loss-allocating law can be understood to burden Zacatecan plaintiffs, why can’t California loss-allocating law be understood to burden California defendants?

In the end, Kramer turns these cases into true conflicts. Furthermore his solution to no cause of action unprovided-for cases is not original. It has long been suggested that one way of solving the unprovided-for case is to read loss-allocating rules as both burdening as well as benefitting domiciliaries.