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COMMENTS

CHOICE OF LAW: THE ABANDONMENT OF LEX LOCI DELICTI—SHOULD VIRGINIA FOLLOW THE TREND?

One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Dean Pound posed the problem admirably in his *Interpretations of Legal History* (1922) when he stated, "Law must be stable, and yet it cannot stand still."¹

I. INTRODUCTION

No choice of law rule has enjoyed wider acceptance² nor more mechanical application³ by United States courts than *lex loci delicti*, the rule governing liability for tort by the "law of the place of the wrong." Written into the First Restatement⁴ by the reporter, Professor Beale, *lex loci delicti* could be characterized as of 1962, as the rule followed in the vast majority of the states.⁵ In the fifteen years that have intervened since then, that which was once rock has become fluid, and today it can no longer be said that *lex loci delicti* is the majority view in the United States.⁶ This comment will exam-

1. *State v. Culver*, 23 N.J. 495, 505, 129 A.2d 715, 721 (1957), quoted with approval in *Surratt v. Thompson*, 212 Va. 191, 193, 183 S.E.2d 200, 202 (1971).

2. Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963).

3. See, e.g., *Atlantic Coast Line R.R. v. Withers*, 192 Va. 493, 65 S.E.2d 654 (1951); *Sutton v. Bland*, 166 Va. 132, 184 S.E. 231 (1936).

4. RESTATEMENT OF CONFLICT OF LAWS §§ 377-97 (1934).

5. See *Richards v. United States*, 369 U.S. 1, 11 (1962).

6. At least half the jurisdictions have rejected *lex loci delicti* as the invariable rule, preferring instead modern approaches which require an analysis of the factors involved in the case to determine what law should be applied to the particular issues of the case. Alaska: *Armstrong v. Armstrong*, 441 P.2d 699 (Alas. 1968); Arizona: *Schwartz v. Schwartz*, 103 Ariz. 562,

ine Virginia's choice of law rule, *lex loci delicti*, and will explore some of the situations which have led other jurisdictions to abandon the place of the wrong rule in favor of alternative conflict of law principles.

447 P.2d 254 (1968); Arkansas: Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453 (1977); California: Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Colorado: First Nat'l Bank v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973); District of Columbia: Myers v. Gaither, 232 A.2d 577 (D.C. App. 1967), *aff'd*, 404 F.2d 216 (D.C. Cir. 1968); Idaho: Rungee v. Allied Van Lines, Inc., 92 Idaho 718, 449 P.2d 378 (1968); Illinois: Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); Indiana: Witherspoon v. Salm, 142 Ind. App. 655, 237 N.E.2d 116 (1968); Iowa: Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Kentucky: Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Louisiana: Jagers v. Royal Indem. Co., 276 So.2d 309 (La. 1973); Maine: Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Massachusetts: Pevoski v. Pevoski, 358 N.E.2d 416 (1976); Michigan: Sweeny v. Sweeny, 402 Mich. 234, 262 N.W.2d 625 (1978); Minnesota: Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Mississippi: Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Missouri: Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); New Hampshire: Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); New Jersey: Melk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); New York: Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); North Dakota: Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Ohio: Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971); Oklahoma: Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Oregon: Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967); Pennsylvania: Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Rhode Island: Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968), *cert. denied*, 393 U.S. 957 (1969); Washington: Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wash. 2d 806, 459 P.2d 32 (1969); Wisconsin: Heath v. Zellmer, 35 Wis.2d 578, 151 N.W.2d 664 (1967). Many other courts have not had recent occasion to reexamine prior decisions relying on *lex loci delicti*. However, the highest courts of some states have retained *lex loci* even after hearing arguments based on modern alternatives to the place-of-the-wrong rule. *See, e.g.*, Connecticut: Menczer v. Menczer, 160 Conn. 563, 280 A.2d 875 (1971); (per curiam); St. Pierre v. St. Pierre, 158 Conn. 620, 262 A.2d 185 (1969) (per curiam); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Delaware: Folk v. York-Shipley, Inc., 239 A.2d 236 (Del. 1968); Florida: Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967), *rev'd on rehearing* 201 So. 2d 749 (Fla. 1967); Kansas: McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); Maryland: White v. King, 244 Md. 348, 223 A.2d 763 (1966); North Carolina: Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976); South Carolina: Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964); Algie v. Algie, 261 S.C. 103, 198 S.E.2d 529 (1973); South Dakota: Heideman v. Rohl, 86 S.D. 250, 194 N.W.2d 164 (1972); Tennessee: Winters v. Maxey, 481 S.W.2d 755 (Tenn. 1972); Great Am. Ins. Co. v. Hartford Acc. and Indem. Co., 519 S.W.2d 579 (Tenn. 1975); Texas: Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. 1967), *aff'd* 430 S.W.2d 182 (Tex. 1968); Click v. Thuron Indus., Inc., 475 S.W.2d 715 (Tex. 1972).

Even in these remaining hold-out states, the use of *lex loci delicti* as an invariable rule is an uneasy proposition. In Connecticut, the legislature has ruled out resort to *lex loci* where a Connecticut domiciled spouse sues his spouse for injury resulting from negligent operation of a motor vehicle in a foreign jurisdiction. CONN. GEN. STAT. ANN. § 52-572d (West Supp. 1978). In dicta, the Supreme Court of Kansas has suggested that it will be receptive to further argument as to which conflicts approach should prevail in that state. Brown v. Wichita State Univ., 219 Kan. 2, 547 P.2d 1015, 1031 (1976).

II. LEX LOCI DELICTI

Lex loci delicti is rooted in the vested rights doctrine espoused primarily by Professor Beale.⁷ It is a concept of territorial law, in that: "a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law."⁸ It is upon this single factor—the place where the injury occurred⁹—that lex loci determines choice of law; all matters of substantive law must necessarily be decided according to the law obtaining in that single jurisdiction.

Where the point at issue is "was a tort committed?," lex loci delicti is a logical and rational rule. Where this is the concern, the law of the place of injury would control even under modern choice of law rules.¹⁰ But with issues at the periphery of tort law,¹¹ lex loci delicti shows its over-breadth and it is here that the place of the wrong rule has often produced irrational and unjust results.

The case of *Victor v. Sperry*¹² provides an example of the harsh results which lex loci can produce. *Victor* concerned an action for injuries sustained by an automobile passenger against his driver and another as a result of a collision which occurred in Mexico. The parties in the action were all California residents and, presumably, it was there that their automobiles were licensed, registered and insured. The plaintiff's injury resulted in permanent paralysis of his left arm and permanent partial paralysis of his left leg.¹³ The trial

7. See R. LEFLAR, *AMERICAN CONFLICTS LAW*, 205 (rev. ed. 1968) [hereinafter cited as LEFLAR]; *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*, Introductory Note for §§ 145-185 at 412 (1971). See also, *Babcock v. Jackson*, 12 N.Y.2d 473, 478, 191 N.E.2d 279, 281, 240 N.Y.2d 743, 746 (1963).

8. *Babcock v. Jackson*, 12 N.Y.2d 473, 478, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746 (1963).

9. For a discussion of occasional problems in ascertaining the place where the injury occurred see LEFLAR, *supra* note 7 at 333-344.

10. 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 place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.

Babcock v. Jackson, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 751 (1963).

11. *E.g.*, capacity to sue, immunity from suit and limitations on recovery for wrongful death.

12. 163 Cal. App.2d 518, 329 P.2d 728 (1958).

13. Until the time of the accident plaintiff had been employed as a house mover at a weekly

court found that plaintiff suffered \$40,462.05 in actual damages but applying *lex loci delicti*, turned to Mexican law for the measure of damages. The appellate court noted that Mexican law permitted the plaintiff to recover hospital and medical expenses, but that

For a temporary total disability he could recover only 75 percent of his lost wages for a period not to exceed one year. Wages in *excess of 25 pesos, or \$2 per day*, could not be taken into account in computing the amount allowed. If he suffered a permanent and total disability, he could recover lost earnings for only 918 days and, even though he earned more than 25 pesos per day, only that amount could be taken into account in computing the amount of the recovery.¹⁴

The appellate court then upheld the trial court's award of \$6,135.96.

Kaufman v. American Youth Hostels, Inc.,¹⁵ provides another illustration of the disturbing results that can occur under *lex loci delicti*. In *Kaufman*, the defendant was an eleemosynary institution engaged in conducting groups of youths on tours. The defendant corporation was incorporated in New York and presumably was insured against liability there, since New York does not grant charitable immunity.

Plaintiff's 15-year-old daughter was one of a group of children which the defendant institution led on a climb of Mount Hood in Oregon. The children fell down the mountain and plaintiff's daughter died as a result of the injuries caused by the fall. Although the plaintiff and his decedent were New York residents suing a New York corporation, the court (applying *lex loci delicti*) ruled that Oregon law, under which a charitable institution was¹⁶ then exempt from liability for its acts of negligence, was controlling and held for the defendant.

Dissatisfied with an inflexible rule making the often completely fortuitous place of the wrong the only point of consideration for

wage of \$99. It was determined that he would not be able to engage in that occupation or in any occupation requiring substantial physical activity.

14. *Victor v. Sperry*, 163 Cal. App.2d 518, 520, 329 P.2d 728, 730 (1958)(emphasis added).

15. 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (1958), *modified in other respects*, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

16. Oregon no longer grants charitable immunity from liability for negligence. See *Hungerford v. Portland Sanitarium & Benevolent Assn.*, 235 Or. 412, 384 P.2d 1009 (1963).

choice of law; recognizing the significant interests that the domicile of the parties has; and, unwilling to allow harsh results for no better reason than ease of administration, the great majority of courts having an opportunity to examine their conflict of law rules for tort have rejected *lex loci delicti*.¹⁷

III. ALTERNATIVE APPROACHES

The unprecedented unanimity reached by scholars in their opposition to *lex loci delicti*¹⁸ would seem to indicate fertile ground for consensus on a replacement, but a single alternative to *lex loci* has not yet emerged. To be sure, alternate approaches share the common premise that the preferred objective in choice of law is to decide a case according to the law of the state having the greatest interest in its resolution. It is in the methodology to be used in determining which state has the controlling interest that disagreement arises.¹⁹

17. See cases cited in note 6 *supra*.

18. See, e.g., RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945); Cook, *Tort Liability and the Conflicts of Laws*, 35 COLUM. L. REV. 202 (1935); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1251 (1963); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 165 (1944); Stumberg, *"The Place of the Wrong": Torts and the Conflict of Laws*, 34 WASH. L. REV. 388 (1959); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

19. More heat than light is generated in the disagreement:

Against every rule applied and every proposal made great clouds of criticism have been raised, and each commentator appears to have a different "best" solution for the difficulty. The applicable rules for a conflicts law of torts have constantly changed in the ceaseless search for a just and fair resolution of the problem.

Lowe's North Wilkesboro Hdwre., Inc. v. Fidelity Mut. Ins. Co., 319 F.2d 469, 473 (4th Cir. 1963) (footnotes omitted). Ehrenzweig criticizes the case for its reliance on the significant contacts approach of the Second Restatement. See Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963). The several modern methodologies reflect common elements and overlap each other, so that courts will often combine individual approaches for a method which utilizes the language of a theory with a disregard of its theoretical basis. See, e.g., *Fox v. Morrison Motor Freight, Inc.*, 25 Ohio St.2d 193, 267 N.E.2d 405 (1971); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *Jagers v. Royal Indem. Co.*, 276 So.2d 309 (La. 1973). This is not to criticize the courts employing

Limitations of space make it impossible to even briefly cover all the major theories²⁰ suggested in replacement of *lex loci delicti*. It is believed that three—the Choice-Influencing Considerations approach, the Second Restatement's Most Significant Relationship formula and the Governmental Interest Analysis—not only command the widest following in the courts but also cover the broad spectrum in tort choice of laws.

A. Choice-Influencing Considerations

Under the choice-influencing approach²¹ the relevant factors in determining the choice of law applicable to individual issues are the following five, listed without regard to priority:²²

- (A) Predictability of Results;
- (B) Maintenance of interstate and international order;
- (C) Simplification of the judicial task;

the modern methods, for they generally reach excellent results; it is rather a recognition of the fact that in applying approaches, as opposed to rules, the courts must give flesh to guidelines while knowing that the next case may not fit within those lines. One writer finds the difficulty faced by the courts in working with the approaches to yield a decision akin to that of Lewis Carroll's Alice: "It sounded an excellent plan, no doubt, and very neatly and simply arranged; the only difficulty was, that she had not the smallest idea how to set about it." Shapira, "*Grasp All, Lose All*": *On Restraint and Moderation in the Reformation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 251 (1977), citing L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 61.

20. Compare the various methodologies and approaches suggested by the following: RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); A. EHRENZWEIG, CONFLICT OF LAWS (1962); LEFLAR, *supra*, note 7; G. STUMBERG, CONFLICT OF LAWS (3d ed. 1963); Cavers, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1219 (1963); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963); Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762 (1963).

21. The theory is associated primarily with Professor Robert Leflar. Professor Leflar is quick to point out that he did not pioneer the concept of policy valuations as a decisional basis in choice of law. Among the first to analyze such factors were Professors Cheatham and Reese who listed nine. See Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). Covering essentially the same matters are seventeen "policy considerations" identified by Professor Yntema. See Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721 (1957). It is Leflar who has distilled the varying considerations to five.

22. LEFLAR, *supra* note 6, at 245.

- (D) Advancement of the Forum's governmental interests; and
- (E) Application of the better rule of law.²³

The courts of several jurisdictions have utilized the choice-influencing considerations theory as a basis for decision²⁴ and have found in it a combination of "workable brevity" and "reasoned analysis."²⁵ Because it is the least structured of the modern approaches, choice influencing considerations is also the most flexible.²⁶ But this flexibility, and in particular the concept of a "better rule of law," make it the most subjective and result-selective of the suggested methods. It has been suggested that the better rule of law idea candidly reflects what has been judicial practice all along and that by utilizing the framework of choice of laws a judge can clear a path for domestic reform.²⁷ However, we would do well to question whether conflicts cases ought to be purposely treated as "a playground for timid judicial reformers."²⁸

23. *Id.*

24. See *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Brown v. Church of the Holy Name of Jesus*, 105 R.I. 322, 252 A.2d 176 (1969); *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917, *cert. denied*, 393 U.S. 957 (1968); *Zelinger v. State Sand and Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968).

25. *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917, 923, *cert. denied*, 393 U.S. 957 (1968).

26. *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968) is illustrative of the approach. The issue was whether Mississippi's comparative negligence rule, or Louisiana's contributory negligence rule, should apply to a wrongful death suit in which the parties, litigants and decedents, were domiciled in Mississippi and Louisiana's sole contact was that the accident occurred there. The Mississippi court found that predictability was irrelevant under these facts since accidents are not planned and predictability is not a factor with reference to liability. Also, maintenance of interstate order was irrelevant since neither state would be affected however the court decided. As to simplicity, Mississippi found its comparative negligence rule simple and easy to apply. Mississippi found that its interests would be significantly advanced by application of Mississippi law and lastly, the court found its rule the "better" rule. *Id.* at 514.

27. Ehrenzweig, "False Conflicts" and the "Better Rule": *Threat and Promise in Multi-state Tort Law*, 53 VA. L. REV. 847, 855 (1967).

28. B. CURRIE, *The Verdict of the Quiescent Years*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 144 (1963). See also Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 TULANE L. REV. 1 (1974).

[T]he notion that a court, in a conflicts case, should choose that which it deems the better rule strikes me as a wholly inappropriate judicial function and foreign to a rational body of choice-of-law rules. That kind of license is tantamount to no rule. *Id.* at 18.

B. *Second Restatement*

The Second Restatement of Conflict of Laws²⁹ takes the position that in deciding a particular issue in tort, a court should decide the rights and liabilities of the parties according to the local law of the state which has the most significant relationship to the occurrence and the parties with respect to that issue.³⁰ That determination is to be made with reference to contacts³¹ which include the place where the injury occurred,³² the place where the conduct causing the injury occurred,³³ the domicile, residence, nationality, place of incorporation and place of business of the parties,³⁴ and the place where the relationship, if any, between the parties is centered.³⁵ Evaluation of these contacts should be made in light of their importance with respect to the particular issue and with reference to certain principles³⁶ which are generally relevant in any conflicts of law process.

The Second Restatement's view has generally not met with the applause of scholars. They attack its subjectivity³⁷ and fear that it will degenerate into mere contact counting.³⁸ It has, however, been

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

30. *Id.* § 145(1).

31. *Id.* § 145(2).

32. *Id.* § 145(2)(a).

33. *Id.* § 145(2)(b).

34. *Id.* § 145(2)(c).

35. *Id.* § 145(2)(d).

36. In the absence of a statutory directive of its own state on choice of law—which a court, subject to constitutional restriction, will follow—a court should consider the needs of the interstate and international systems; the relevant policies of the forum, and those of other interested states; the relative interest which other states have in the determination of a particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; as well as ease in determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

37. See Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict in Laws*, 63 COLUM. L. REV. 1233 (1963); Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965). Any interest analyzing method is by definition subjective. The Second Restatement approach, which features a highly structured analysis, is among the least subjective.

38. See Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Leflar, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1247 (1963); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963). As was noted earlier, this is a difference over methodology only; the commentators are united in their criticism of *lex loci delicti*.

employed, to a greater or lesser extent by a number of courts³⁹ who see in it elements of all the major theories.⁴⁰

C. Governmental Interest Analysis

The "governmental interest" approach⁴¹ to choice of law is keyed on the policy bases underlying the domestic laws in putative conflict.⁴² The hallmark of the governmental interest approach is the

39. Typical of cases using the Second Restatement approach is *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969): in a suit by an injured passenger against the estate of the deceased driver, both residents of Missouri, for personal injuries arising out of an automobile collision in Indiana, Indiana's guest statute was raised by the defense. Missouri does not have a guest statute. The Missouri Supreme Court found that the parties were Missouri residents, had made their trip arrangements in Missouri, and traveled in a car licensed and garaged in Missouri. The court reasoned that while Indiana had a real interest in requiring Missouri residents to comply with its standards of care for operation of motor vehicles on Indiana highways, that interest did not extend to the relationship between two Missouri citizens. Missouri did have such an interest and Missouri law would govern. *Id.* at 184-185.

40. Compare, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(1971) with Leflar's choice-influencing considerations, LEFLAR, *supra* note 7.

41. The late Professor Brainerd Currie was the leading proponent of governmental interest analysis. Currie's suggested approach was set out in Currie, *Comments on Babcock v. Jackson*, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963):

When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

. . . If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

. . . If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

. . . If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

. . . If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum—until someone comes along with a better idea.

. . . The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.

42. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 4 (1971).

concept of a "false conflict."⁴³ A false conflict is presented when, after analysis of the content and objectives of competing laws, it is found that only one state has a real interest in the application of its law. It is the law of that state⁴⁴ which is then applied. Since the vast majority of conflicts cases present situations wherein only one state has a real interest, and because it is with false conflicts that *lex loci* has produced its least defensible results, the governmental interest methodology has considerable appeal in the typical conflicts case.

Under interest analysis, the *Victor*⁴⁵ case shows what is clearly a false conflict. The only point at issue is whether Mexico's limitation on damages is to apply. California, which does not limit damages, clearly has an interest in properly compensating the injured party so he will not become a ward of the state⁴⁶ and so that there is an adequate pool from which local medical and other creditors, having furnished services to the victim as a result of his injury, may be compensated. Mexico, on the other hand, has no interest in applying its limitation on damages—there are no defendant Mexican residents to protect from the imposition of excessive financial burdens and Mexico can have no interest in denying full recovery to a non-resident injured by non-Mexican defendants.⁴⁷ California law, then, would be applied.⁴⁸

43. Professor Weintraub favors the term "spurious conflict" over "false conflict." R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 201 (1971). Neither term has achieved exclusive dominance, and "spurious" and "false" can be used rather interchangeably.

44. *But see* Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 VA. L. REV. 847 (1967).

45. *See* note 12 *supra*.

46. *Cf. Hurtado v. Superior Ct. of Sacramento County*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (Mexican limitation on damages for wrongful death not applied in suit by a Mexican plaintiff against a California resident defendant).

47. *Id.*

48. *Kaufman v. American Youth Hostels*, *supra*, note 15, is similarly shown to present a spurious conflict. Both New York and Oregon have policies of indemnity and protection for the victim of tortious conduct. Oregon's policy was overridden by a policy of fostering and conserving the funds of charitable institutions. *See* note 16 *supra*. But under the facts of this case, all the parties are domiciled in New York; Oregon has no interest in shielding the assets of a New York corporation where New York would not, absent the fact of beneficial activities by the institution in Oregon, a factor not presented here. *Accord*, *Blum v. Am. Youth Hostels, Inc.*, 40 Misc. 2d 1056, 244 N.Y.S.2d 351 (S. Ct., Special Term, 1963), *aff'd on other grounds*, 21 App. Div. 2d 683, 250 N.Y.S.2d 522 (1964). *See* *Brown v. Church of Holy Name of Jesus*, 105 R.I. 322, 252 A.2d 176 (1969). *See also* B. CURRIE, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, 526, 557-

More troublesome is the problem where the policies of competing states conflict even after a court has made a "moderate and restrained interpretation" of those policies. Under the governmental interest approach, where a court finds a conflict unavoidable it should apply the forum's law regardless of any other state's interest: the forum yields only where it is disinterested and there is a foreign interest.⁴⁹

In this, the governmental interest approach asks too much. In the area of false conflicts, governmental interest analysis proves itself eminently workable and logical. To concede defeat when the conflict is true and to apply mechanically the law of the forum would serve no rational end, would encourage forum shopping,⁵⁰ and in some cases, would prove unfair to the defendant.⁵¹

What, then, is a practical and workable alternative to the invariable application of *lex loci delicti*?

IV. THE SUGGESTED APPROACH: INTEREST UP TO A POINT

Conflict of laws in tort has been dominated in recent years by two types of cases: those involving the doctrine of interspousal immunity and those which concern automobile guest statutes. Examination of hypotheticals from these two areas, it is hoped, will both reveal that change in Virginia's choice of law rules is desirable and suggest the methodology best designed to replace the traditional view.

A Virginia conflicts case involving an inter-spousal immunity problem might develop along these lines: a married couple, both Virginia domiciliaries, travel to West Virginia for an evening out.

568 (1963); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 220-221 (1971).

Application of New York law advances the interests of New York without defeating any interest of Oregon. Under governmental interest analysis the law of New York, the only interested state, would be applied. B. CURRIE, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 526, 557-559 (1963).

49. M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 847 (1961).

50. Cf. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1243 (1963) (Professor Currie states: "The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought . . .").

51. See page 147, *infra*.

While still in West Virginia, a state which adheres to the immunity doctrine,⁵² the wife is injured in an accident caused by the husband's negligence. The wife brings suit against the husband in Virginia, which has abolished the inter-spousal immunity doctrine in actions for personal injuries resulting from motor vehicle accidents.⁵³

The only issue raised is whether the wife has capacity to sue the husband in tort. Virginia clearly has a real interest in permitting the suit. Compensation to the wife will ease her and the family's financial burden and prevent her from becoming a public charge.⁵⁴ Moreover, with the high incidence of insurance, *denial* of recovery will likely be disruptive of marital harmony and will run counter to expectations.⁵⁵ What interest might West Virginia advance for Virginia's not permitting this suit by Virginia domiciliaries in a Virginia court? The rationale for West Virginia's retention of inter-spousal immunity is preservation of harmony in the marital relation.⁵⁶ We need not ponder whether adherence to the doctrine still

52. *Campbell v. Campbell*, 145 W. Va. 245, 114 S.E.2d 406 (1960); *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604 (1935).

53. *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971).

54. Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 217 (1963).

55. [R]ealistically, it must be remembered when dealing with the question of conjugal harmony that today virtually every owner of a motor vehicle with a sense of responsibility carries liability insurance coverage. The presence of insurance militates against the possibility that the interspousal relationship will be disrupted since a recovery will in most cases be paid by the insurance carrier rather than by the defendant spouse. In fact, it is ironic that the presence of insurance has spawned the second rationale, *i.e.*, that of protecting the insurance carriers against fraud and collusion. That rationale belies the possibility that domestic harmony will be disturbed since its very premise is that the interspousal relationship is so harmonious that fraud and collusion will result. Domestic harmony may be more threatened by denying a cause of action than by permitting one where there is insurance coverage. The cost of making the injured spouse whole would necessarily come out of the family coffers, yet a tortfeasor spouse surely anticipates that he will be covered in the event that his negligence causes his spouse injuries. This unexpected drain on the family's financial resources could likely lead to an interference with the normal family life. And it is doubtful that this void in insurance coverage would comport with the reasonable expectations of the insured that this Court has so often sought to protect. . . . In short, the immunity doctrine cannot be fairly sustained on the basis that negligence suits between husbands and wives will disrupt the harmony of the family. *Immer v. Risko*, 56 N.J. 482, 489-90, 267 A.2d 481, 484-85 (1970)(footnote omitted), quoted with approval in *Smith v. Kaufman*, 212 Va. 181, 185-186, 183 S.E.2d 190, 194 (1971)(abrogating parental immunity in automobile accident litigation).

See *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971).

56. Authority cited note 52 *supra*.

serves that goal, for while West Virginia's policy would be significant were our parties West Virginians, that state has no interest in shielding Virginia marriages from the strain of litigation where Virginia would not. Faced with this situation a Virginia court should apply the law of the only interested state—Virginia.

In the obverse situation—a married couple from West Virginia having an accident in Virginia, with injuries to the wife again resulting from the husband's negligence—interest analysis yields the opposite result. It does not matter that Virginia finds the West Virginia policy ill-advised and anachronistic, since West Virginia is the best judge of how marital harmony can be maintained in that state. Indeed, Virginia's interests will be advanced by the application of West Virginia law, since the forum, *qua* forum, has an interest in preventing forum shopping.

The two situations above indicate the strong significance of domicile in an interest analysis approach. This is as it should be, for when the issue is not "has a tort been committed?" but capacity to sue, immunity from suit, or the possibility or limitation of recovery for wrongful death,⁵⁷ the domicile of the parties will generally have a real, if not the only, interest.

Interest analysis is not *lex loci domicilii* in mufti, however, as a variation on the facts in the second hypothetical will demonstrate. Again assume we have West Virginia spouses involved in a Virginia accident, but this time the husband is joined in his negligence by a Virginian in another car. The wife now makes the Virginian the defendant in her suit. The defendant, by a third-party motion for judgment,⁵⁸ seeks contribution from the plaintiff's husband and, more importantly, from his insurer. At the nub of the problem is inter-spousal immunity: if West Virginia law is applied there will be no underlying liability in the husband on which a claim for contribution from the husband's insurer can be based. Virginia, the domicile of the defendant, has no interest in preventing contribution and does have an admonitory interest, albeit a weak one, since the tortious conduct occurred in Virginia. West Virginia, on the other hand, has no real interest at all. Since this is not spouse suing spouse, the case falls outside the purview of the West Virginia doc-

57. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 228 (1971).

58. See Va. Sup. Ct. Rule 3:10, Va. Code Ann. (Repl. Vol. 1977).

trine.⁵⁹ Here, as in the two previous examples, there is only one interested state. Virginia law should apply.

All of the above examples have at their heart a false conflict, the usual by-product of the inter-spousal immunity doctrine in conflict of laws. Automobile Guest Statute cases are also big generators of the specious conflict, but in addition, the guest-host relationship will, on rare occasion, yield the far more troublesome true conflict.

Consider briefly a final false conflict. Two Virginia domiciliaries, *H* and *G* set out on a trip to Philadelphia. The host, *H*, is driving through Delaware when, through ordinary negligence on his part, an accident occurs which injures his guest, *G*. Delaware, the purely fortuitous place of the accident will not permit a guest to recover from his host without a showing of "willful or wanton disregard for the rights of others."⁶⁰ The guest, *G*, brings suit in Virginia. Beyond a knee-jerk application of *lex loci delicti*, what rationale is there for applying Delaware law? Virginia has two real interests in the compensation of an injured Virginia domiciliary: to prevent him from becoming a public charge and to ensure that there is a pool from which medical creditors may be compensated. Delaware's stated policies for its guest statute⁶¹ are to shield, from an ungrateful guest, the host who transports another in his automobile without any benefit to himself⁶² and, paradoxically, to prevent collusion between these same parties in a suit where the real defendant is the host's liability insurer.⁶³ Delaware may be concerned with insulating Delaware hosts and their insurers from liability, but it has no interest

59. Even if an unarticulated reason for West Virginia's adherence to the doctrine were one commonly advanced—prevention of collusion between the spouses to defraud the insurer—there is no room for advancement of that policy here. Any collusion that might take place would be to keep the husband's insurer out, not put it in, since this would tend to increase rates.

60. DEL. CODE tit. 21, § 6101(a)(1974), provides:

No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his willful or wanton disregard of the rights of others.

61. DEL. CODE tit. 21, § 6101. See note 60 *supra*.

62. *Fields v. Synthetic Ropes, Inc.*, 219 A.2d 374 (Del. Super. Ct. 1966); *Robb v. Ramey Assoc., Inc.*, 14 A.2d 394 (Del. Super. Ct. 1940); *Truitt v. Gaines*, 199 F. Supp. 143 (1961).

63. *Justice v. Gatchell*, 325 A.2d 97 (Del. 1974); *McHugh v. Brown*, 50 Del. 154, 125 A.2d 583 (1956); *Truitt v. Gaines*, 199 F. Supp. 143 (1961).

in extending such protection to the world. Application of Virginia law, on the other hand, advances Virginia's compensation interest without impinging on any legitimate concern of Delaware, and will in fact advance Delaware's interest in promoting highway safety within her borders by imposing a higher standard of care.

Suppose that the parties to the suit are not conveniently domiciled in one state. Suppose, for instance, that a Virginia domiciliary, who attends the University of Delaware, accepts a ride to class with a Delaware domiciled friend and is injured through the ordinary negligence of the Delaware driver. Since we are concerned with Virginia courts, we will have the Delawarian pass through Virginia where personal service of process is obtained on him. Our Virginia court finds a true conflict: Virginia's interest in compensating the injured Virginian is at loggerheads with Delaware's interest in insulating Delaware hosts and their insurers from liability. Under pure interest analysis the court would be directed to apply Virginia law, the law of the forum.⁶⁴ The plaintiff would be pleased, but this is personal law⁶⁵ carried to an extreme; it encourages forum shopping and invites retaliation against Virginia defendants. The reason that the result would be so disconcerting is that the territorial framework under which the cause arose is wholly in Delaware. Although both states are interested, Virginia's only nexus with the case is a Virginia plaintiff. Said in another way, the Delaware defendant has no contacts with Virginia, and he would rightly be shocked if told that Virginia law would control on the effect of his host-guest relationship with the plaintiff. This suggests the one limitation that must be placed on governmental interest analysis to make its application meet the test of substantial justice: a state may not apply its law on the sole ground that the plaintiff is its domiciliary. In all other cases involving a true conflict, it will apply the law of the forum.

In the hypothetical case above, the suggested approach would require application of the Delaware guest statute; if the accident occurred in Virginia, Virginia law would control. This is a great deal like *lex loci delicti*, because the territorial framework in most true conflicts will center at the place of the wrong, but stops short of it

64. See note 41 *supra*.

65. Couch, *Louisiana Adopts Interest Analysis: Applause and Some Observations*, 49 *TUL. L. REV.* 1, 9 (1974).

for a good reason. That reason is brought to light by a hypothetical loosely based on the Kentucky case of *Foster v. Leggett*.⁶⁶

Our case has a Delaware domiciled industrialist who manufactures goods in Virginia. Like Leggett, our Delawarian spends all of his working hours and some of his leisure time in Virginia, where he rents an apartment. He invites a Virginia domiciled friend for a weekend visit at his Delaware home. They fly up in the Delawarian's plane, and, due to ordinary negligence on the part of the industrialist, the plane crash lands, injuring the Virginian. It is clear that the Virginian has no relationship with Delaware, but the industrialist, while domiciled in that state, also has a real and substantial relationship with Virginia. Application of Virginia law on these facts cannot surprise the defendant and accords well with the territorial configuration under which the cause arose.

V. CONCLUSION

The suggested methodology, governmental interest analysis tempered by territorialism, lays no claim to perfection. A commentator, writing in a vacuum, has an advantage over a court. A commentator can choose the situations he wishes to explore; a court must decide issues on the facts presented. At the very least it will permit avoidance of the occasional grotesqueries spawned by blind application of *lex loci delicti*, while retaining enough definition to yield decisions with precedential value. *Lex loci delicti* grew up in a horse and buggy age; if the just and final solution to choice of law problems in tort is farther down the road, a modern approach, whether this one or another, is the better vehicle to take to that goal.

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66. 484 S.W.2d 827 (Ky. 1972). The case concerned a conflict between Ohio having a guest statute and Kentucky, which did not. The defendant was domiciled in Ohio where he had a house, but he worked in Kentucky, rented a room there and spent two to five nights a week there. The defendant had been dating plaintiff's decedent, a Kentucky domiciliary. The couple made plans to spend a day in Ohio. While travelling in Ohio, the accident occurred. While the defendant was an Ohioan, he could also be described as a Kentuckian. The fatal trip had been planned in Kentucky, began there and would have ended there. Kentucky law was applied.