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CONFLICT OF SPOUSAL IMMUNITY LAWS: THE LEGISLATURE TAKES A HAND

DALE A. WHITMAN*

During the 1967 session of the North Carolina General Assembly, the legislators made a novel excursion into the realm of conflict of laws,¹ modifying the state's traditional rule of *lex loci delicti* as it applies to spousal immunity.² The purpose of this comment is to explore the legal background and examine the possible effects of the new statute, and to consider its implications for existing choice-of-law doctrine.

At common law, neither spouse could bring an action against the other for negligently inflicted injury.³ Such a rule leads to a good deal of manifest injustice, and it has been abandoned by a number of states.⁴ Yet others hold to it tenaciously in personal injury cases,⁵ and in at least two recent cases interspousal immunity has been reinstated after having apparently been earlier discarded.⁶ The modern justifications usually recited for the immunity rule

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¹ N.C. GEN. STAT. § 52-5.1 (Supp. 1967); the statute was introduced as H.B. 609 by George T. Clark, Esq. of Wilmington, North Carolina, and was enacted June 21, 1967; Ch. 855 [1967] N.C. SESS. LAWS.

² *Petrea v. Ryder Tank Lines, Inc.*, 264 N.C. 230, 141 S.E.2d 278 (1965); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963); *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941); *Alberts v. Alberts*, 217 N.C. 443, 8 S.E.2d 523 (1940); *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931).

³ *Thompson v. Thompson*, 218 U.S. 611 (1910). See generally *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949); *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920); W. PROSSER, *TORTS* § 116 (3d ed. 1964); *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930); *Sanford, Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956).

⁴ These courts have usually abrogated immunity by construction of local Married Women's Acts. See *Sanford*, note 3 *supra*.

⁵ A survey of current authority discloses 32 states and the District of Columbia recognizing immunity, and 17 states rejecting it. See *Annot.*, 43 A.L.R.2d 632 (Supp. 1967). No substantial trend toward rejection is evident in the cases of the last few years. See, e.g., *Benevides v. Kelly*, 90 R.I. 113, 157 A.2d 821 (1960), refusing to abrogate immunity; cases cited note 6 *infra*.

⁶ *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965), *limiting* *Damm v. Elyria Lodge No. 465*, 158 Ohio St. 107, 107 N.E.2d 337 (1952); *Rubalcava v. Gisseman*, 14 Utah 2d 344, 384 P.2d 389 (1963), *overruling* *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696 (1954).

are that allowance of interspousal suits will result in family friction and ultimately disruption of society, and that because the financial burden of a judgment will often be borne by a liability insurer, husband and wife will be tempted to collude in defrauding the insurer.⁷ In the minds of Professor Ehrenzweig⁸ and many other commentators, these rationalizations have been "thoroughly discredited," but they continue to have viability on the high benches of a majority of states.

North Carolina has clearly forsaken the immunity rule by statute.⁹ But the North Carolina courts, like those of other non-immunity states, have not succeeded in forgetting about immunity, since nasty choice-of-law problems have continued to arise. The facts which generate these problems fall generally into two simple, archetypical classes. In the first class, H and W are domiciled in a state which does not recognize immunity, but the event (frequently an automobile accident) giving rise to one spouse's claim against the other occurs in an immunity jurisdiction. The facts of the second class are precisely the reverse: the parties are domiciled in an immunity state, but the actionable event ensues in a state which does not acknowledge the immunity doctrine. We may simply designate these described situations as Class I and Class II. The Class I case is usually brought in the state of marital domicile to take advantage of convenient access and a favorable domestic rule of non-immunity.¹⁰ The forum for the Class II case is sometimes the

⁷ See Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason versus the Restatement*, 15 U. PITT. L. REV. 397 (1954); Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962); Jayme, *Interspousal Immunity: Revolution and Counter-Revolution in American Tort Conflicts*, 40 S. CAL. L. REV. 307 (1967); commentators cited note 3 *supra*.

⁸ A. EHRENZWEIG, CONFLICT OF LAWS 581 (1962).

⁹ The wife's right to sue her husband derives from N.C. CONSOL. STAT. § 454 (1941) and N.C. GEN. STAT. § 52-4 (1966); see *Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9 (1923). The same privilege was held not to extend to plaintiff husbands in *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E.2d 350 (1949). The General Assembly effectively overruled the *Scholtens* case by the enactment of N.C. GEN. STAT. § 52-5 (1966) in 1951, which clearly allows an action by either spouse against the other. See generally *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965); 2 R. LEE, NORTH CAROLINA FAMILY LAW 473 (1963); 29 N.C.L. REV. 395 (1951); 28 N.C.L. REV. 109 (1949).

¹⁰ But see *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965), where a Class I case was brought in the locus delicti rather than the state of domicile.

domicile and sometimes the locus delicti; the quest for a favorable forum may here outweigh the convenience of home courts.¹¹ The table below will serve to illustrate our notation:

	Law of Domicile	Law of locus delicti	Forum
Class I	no immunity	immunity	domicile
Class II(d)	immunity	no immunity	domicile
Class II(f)	immunity	no immunity	locus delicti

The Class I case is well-illustrated by *Shaw v. Lee*.¹² Mr. and Mrs. Shaw, both domiciled in North Carolina, were driving in Virginia with the husband at the wheel. Mrs. Shaw was injured and her husband killed in a collision with a truck, allegedly caused in part by Mr. Shaw's negligence. The surviving wife filed suit against the decedent's estate in North Carolina. The defendant demurred on the ground that no action could be maintained under Virginia law for injuries negligently inflicted by one's spouse, and that Virginia law controlled under the doctrine of *lex loci delicti*. The North Carolina Supreme Court agreed and affirmed the sustaining of the demurrer.

The court confirmed that it had no intention of relinquishing its embrace of *lex loci*, although it recognized that several courts had rejected that traditional doctrine in the spousal immunity context.¹³ Such a rejection, the court thought, should appropriately be left in

¹¹ Moreover, either class may be brought in a disinterested forum—one which is the location neither of the domicile nor of the tort. See, e.g., *Bourestrom v. Bourestrom*, 231 Wisc. 666, 285 N.W. 426 (1939) (Class II); *LaChance v. Service Trucking Co.*, 215 F. Supp. 162 (D. Md. 1963) (Class II), discussed in Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 768 (1963). Such cases arise rarely, for obvious reasons of inconvenience.

¹² 258 N.C. 609, 129 S.E.2d 288 (1963). See also *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931), a case on all fours with *Shaw v. Lee*.

¹³ 258 N.C. at 609, 129 S.E.2d at 292; see cases cited in notes 31, 45, 46 and 54 *infra*. These cases are part of a general trend away from *lex loci* in tort cases. See, e.g., *Casey v. Manson Constr. & Eng'r Co.*, 428 P.2d 898 (Ore. 1967) and cases discussed therein; 45 N.C.L. REV. 505 (1967); commentators cited note 34 *infra*.

the hands of the General Assembly; a judicial step in that direction would be a "voyage into . . . an uncharted sea . . ." ¹⁴

If tradition is the proper test, the court's decision was surely correct; the reports contain a veritable mountain of cases in which the North Carolina Supreme Court has praised and followed *lex loci*.¹⁵ The rule was again ratified in another Class I spousal immunity case, *Petrea v. Ryder*,¹⁶ in 1965 and in a related context in *Hutchins v. Day*¹⁷ in 1967. Yet the doctrine of *Shaw v. Lee* is unsettling, and demands more penetrating analysis. Why should Mrs. Shaw's rights against her husband or his estate be extinguished because they traveled across the state boundary? Why should the Shaws' liability insurer, which doubtless expected to be bound by North Carolina law in settling its policy obligations, receive a wind-fall?

A powerful tool for further analysis is provided by the concept of governmental interest, as developed by the late Professor Brainerd Currie.¹⁸ At the risk of some oversimplification, the concept may be stated in the form of two questions:¹⁹ What is the policy or reason underlying the domestic law of each of the respective states involved in a given multistate case? Will the application of that law to the case serve to advance the underlying policy? These questions

¹⁴ 258 N.C. at 616, 129 S.E.2d at 293.

¹⁵ See, e.g., *Doss v. Sewell*, 257 N.C. 404, 125 S.E.2d 899 (1962); *Harper v. Harper*, 225 N.C. 260, 34 S.E.2d 185 (1945); *Wise v. Hollowell*, 205 N.C. 286, 171 S.E. 82 (1933); cases cited notes 16 and 17 *infra*. See Wurfel, *Conflict of Laws, Survey of North Carolina Case Law*, 44 N.C.L. Rev. 923 (1966).

¹⁶ 264 N.C. 230, 141 S.E.2d 278 (1965).

¹⁷ 269 N.C. 607, 153 S.E.2d 132 (1967) (breach of promise to marry); see also *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967); *Thames v. Nello L. Teer Co.*, 267 N.C. 565, 148 S.E.2d 527 (1966); *Young v. Baltimore & Ohio R.R.*, 266 N.C. 458, 146 S.E.2d 441 (1966).

¹⁸ Most of Currie's important works in this area are collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963), [hereinafter cited as B. CURRIE, *SELECTED ESSAYS*]; see also Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the "Rule of Validation,"* 18 OKLA. L. REV. 243 (1965); Currie, *Book Review*, 1964 DUKE L.J. 424; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963); Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233 (1963). See generally Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice of Law Process*, 46 TEXAS L. REV. 141 (1967).

¹⁹ See B. CURRIE, *SELECTED ESSAYS* 143, 188-89; Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242 (1963); Weintraub, *A Method for Solving Conflicts Problems*, 21 U. PITT. L. REV. 573, 574 (1960); Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 80 (1967).

must be asked about the relevant laws of each of the states in question; if they disclose that one of the states has *no* interest to be advanced by the application of its law, then manifestly that law should not be given further consideration in the case. Leaving aside momentarily the problem which will arise if more than one state does have an interest to be advanced by application of its law, consider the result this analysis yields in *Shaw v. Lee*.

As noted above,²⁰ the predominant policies supporting a rule of spousal immunity, such as is followed in Virginia,²¹ are the maintenance of domestic harmony and the avoidance of collusive suits. Yet a bit of reflection upon the *Shaw* facts is persuasive that these policies simply have no significance in that case. Virginia can hardly have a legitimate interest in preserving the domestic harmony of a North Carolina couple, particularly when the spouses' own home state regards the means of preservation as inappropriate. And the insurer whom immunity is said to protect can scarcely justify the protection here, since the company in all probability qualified to do business in North Carolina, sold the particular policy in question to residents of North Carolina, and thus assumed the risk of a suit of the insured by his spouse. Moreover, if the purpose of Virginia's immunity is to encourage insurance companies to do business in Virginia, this purpose is clearly not served by application of Virginia law in favor of an insurer whose relationship to Virginia is either non-existent or purely coincidental to the case at hand.²²

The same tests of governmental interest may appropriately be applied to North Carolina: what policies of that state are served by the non-immunity rule? It is fairly obvious that the paramount

²⁰ See text accompanying notes 6-8 *supra*.

²¹ *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955); *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 191 (1952); *Keister's Adm'r v. Keister's Exr's*, 123 Va. 157, 96 S.E. 315 (1918). The Virginia Supreme Court of Appeals has not been at pains to articulate a policy supporting the immunity rule, preferring instead to rest its decisions on its supposed lack of power to abrogate the common law without express authority from the legislature.

²² It is conceivable that Virginia could have an interest in application of its law to avoid the ultimate burden on the insurer, in order to prevent an increase in premiums paid by Virginia policyholders of that insurer. Such a Virginia interest is highly dubious, however, since the premiums charged in each state are probably computed solely on the basis of loss experience on policies sold within that state; the present case would thus have no impact on premiums paid by Virginia insureds. See Currie, Book Review, 1964 DUKE L.J. 424, 434-35; Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 83 n.62 (1967).

policy is that of compensating persons injured through the fault of another. Perhaps secondarily, denying immunity will assure (or at least increase the probability) that accident-connected creditors—those who provide aid for the injured party or repair the damaged property—will have access to a fund for compensation for the services they have rendered. Conceivably the North Carolina legislators also believed that, if plaintiffs are denied compensation because of spousal immunity, a statistically significant number of such plaintiffs would become wards of the state while recovering from the tort in question. If these are North Carolina's underlying policies,²³ will they be advanced by application of the non-immunity rule? Clearly so, in the *Shaw* situation. The plaintiff is domiciled there; in the typical case she is likely to receive at least part of her medical treatment there; and if she is without funds she may be forced to rely on state-provided medical services. In short, if anyone is the proper beneficiary of the state's non-immunity rule, it is Mrs. Shaw.

Shaw thus presents a classic example of the so-called "false conflict" (perhaps more aptly, "no-conflict") case.²⁴ While the respective rules of Virginia and North Carolina are *different*, they do not truly *conflict*, since the former state has no interest in the application of its law and the latter has such an interest. By allowing *lex loci* to dictate the application of Virginia law, the North Carolina court subverted its own legislature's announced policy of providing compensation to the contrary policy of Virginia, in a case which the Virginia lawmakers simply would not care about.

It is worth noting that the same conclusion here urged upon the North Carolina court may be reached by a more direct route—that of statutory construction.²⁵ The statute by which North Carolina finally put spousal immunity to rest simply states that "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmar-

²³ A further policy sometimes asserted in behalf of the tort state is that of discouraging tortious conduct by allowing recovery against the tortfeasor. But in the present context, immunity would merely prevent suit by the tortfeasor's spouse, and not suit by other possible plaintiffs. Thus, if the "deterrent" theory is valid, the deterrent is still supplied by the liability to others.

²⁴ Currie's usual term was "false problem;" a variety of other denominations have been proposed. See Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 76 (1967).

²⁵ See B. CURRIE, *SELECTED ESSAYS* 377; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 768 (1963).

ried.”²⁶ Nothing whatever appears to suggest that such a cause of action will exist only if the damages are sustained within the state’s boundaries, and but for the influence of hidebound conflicts doctrine, such a limitation would be extremely difficult to support under usual canons of construction. Yet the *Shaw* court thought it “reasonably apparent” that

The Legislature did not intend to extend its enactments beyond our borders and to create in a spouse a right of action against the other for acts done beyond the borders of North Carolina.²⁷

It is difficult to suppress the cry: “Why not?” Perhaps one may sympathize with the court’s conclusion that if the legislature desired to overrule the *lex loci* precedent, it should have employed more explicit language. Yet that body of law was of the court’s own making, and the statutory language seemed to present a singular opportunity for overruling it. The court declined to seize it.²⁸

Evidently in reaction to *Shaw v. Lee*, the General Assembly has now enacted the following:

A husband and wife shall have a cause of action against each other to recover damages for personal injury, property damage or wrongful death arising out of acts occurring outside of North Carolina, and such action may be brought in this State when both were domiciled in North Carolina at the time of such acts.²⁹

The statute appears aimed at, and precisely covers, the *Shaw* facts, for there the acts occurred outside North Carolina and the parties were domiciled in North Carolina at the time. In effect, the new statute supplies the constructional step which the court in *Shaw* refused to make from the original anti-immunity statute. The legislature’s action is to be applauded; the result is beneficial to North Carolinians without infringing the legitimate interests of her sister states or their citizens. It thus achieves a goal only rarely and fortuitously attained by traditional conflict-of-laws technology.

Although the *lex loci* doctrine of *Shaw v. Lee* has ample support

²⁶ N.C. GEN. STAT. § 52-5 (1966).

²⁷ 258 N.C. at 616, 129 S.E.2d at 293.

²⁸ Although the action against her husband’s estate failed, Mrs. Shaw satisfactorily settled her claim against the owner of the truck involved in the accident; see *Hall v. Hockaday*, 206 Va. 792, 146 S.E.2d 215 (1966).

²⁹ N.C. GEN. STAT. § 52-5.1 (Supp. 1967); see note 1 *supra*.

in other jurisdictions,³⁰ several recent cases have abandoned it in Class I cases without the necessity for a legislative "nudge" of the type described above.³¹ Most of these courts have adopted a *lex domicilii* theory, but whether *lex domicilii* or *lex fori* doctrine is used, the result in Class I cases is the same. As will be seen below, this happy congruence does not exist in Class II cases.

Although the new statute has no application to Class II cases (since by its terms it may be invoked only by spouses domiciled in North Carolina), it is worthwhile to investigate these cases here; first because the groundwork laid above will be useful in such an investigation, and second because Class II (f) cases have arisen³² and will arise in the North Carolina courts, which may be influenced by the recent enactment in disposing of them.

The Class II(d) case, however, will not occur in North Carolina, since by definition it must arise in a domicile-forum which recognizes spousal immunity. Yet the governmental interest analysis in the Class II(d) case is both more interesting and more difficult than the Class I case discussed above. Here the forum's policies of protecting marriages from disruption and insurers from collusion have clear application to the facts, since the marital domicile is the forum state and the insurance was very probably sold to the defendant-spouse there. On the other hand, the state in which the accident occurred has an interest in seeing its rule of non-immunity applied, since medical and other creditors may exist in the tort state whom that state will desire to have paid from the prospective judgment. The situation thus presents a "true" conflict: both forum-

³⁰ Dawson v. Dawson, 224 Ala. 13, 138 So. 414 (1931); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Bohenek v. Niedzwiecki, 142 Conn. 278, 113 A.2d 509 (1955); Gray v. Gray, 87 N.H. 82, 174 A. 508 (1934); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

³¹ Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Pittman v. Deiter, 10 Pa. D. & C.2d 360 (C.P. Phila. County 1957); Haumschild v. Continental Cas. Co., 7 Wisc. 2d 130, 95 N.W.2d 814 (1959). These three cases adopt a strict *lex domicilii* approach. Compare Keller v. Greyhound Corp., 41 Misc. 2d 255, 244 N.Y.S.2d 882 (1963) (*lex fori* theory), with Bodenhausen v. Farmers Mut. Ins. Co., 5 Wis. 2d 306, 92 N.W.2d 759 (1958) (applying *lex domicilii* on ground that foreign rule merely affects remedy). See also Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966) (applying *lex domicilii* in parent-child immunity context).

³² Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941); Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940).

domicile and locus delicti states have genuine policies to be advanced by application of their respective laws.

Currie's reaction to the true conflict was that forum law should always be applied to effectuate forum policy, even though the policy of another jurisdiction would be thereby defeated.³³ The defeat was the inevitable by-product of a federal system. Other commentators have suggested different approaches:³⁴ that the forum "weigh" the interests and apply the dominant interest;³⁵ that the law of the state with the "most significant relationship" (whatever that may mean) should control;³⁶ that courts should work out "rules of preference" for solving true conflicts;³⁷ that forum law should apply except when variations are necessary to accommodate the interests of the parties.³⁸ The tentative drafts of the Restatement (Second) of Conflict of Laws,³⁹ relying predominantly on the well-known case of *Haumschild v. Continental Casualty Co.*,⁴⁰ take the position that *lex domicilii* should control all spousal immunity problems, a suggestion which would not only result in application of the *lex fori* in the Class II(d) case but which also would agree with the conclusions reached above in the Class I case.

The Class II(d) cases actually decided have been virtually unanimous in their support of this *result*,⁴¹ but with a variety of

³³ B. CURRIE, *SELECTED ESSAYS* 181-87; Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242-43 (1963). See also Hancock, note 7 *supra*.

³⁴ See generally D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965); *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212 (1963); *New Trends in The Conflict of Laws*, 28 LAW & CONTEMP. PROB. 673 (1963).

³⁵ See, e.g., Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 688 (1963).

³⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

³⁷ See D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 114 (1965); Weintraub, *A Method for Solving Conflicts Problems*, 21 U. PITT. L. REV. 573, 580 (1960).

³⁸ A. EHRENZWEIG, *CONFLICT OF LAWS* § 101-20 (1962); Ehrenzweig, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1243, 1246 (1963).

³⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 390(g) (Tent. Draft No. 9, 1964). Evidently the Restatement's meaning is that the law of the state with the "most significant relationship" will control, and that the domicile will always be that state on the issue of marital immunity.

⁴⁰ 7 Wis. 2d 130, 95 N.W.2d 814 (1959); see generally 45 N.C.L. Rev. 505 (1967).

⁴¹ *But see* Franklin v. Wills, 217 F.2d 899 (6th Cir. 1954), declining to apply forum law, apparently because the court regarded the forum's immunity rule as rather weak and of doubtful value. See also Lederl v. United Services Auto Assn., 394 S.W.2d 31 (Tex. Civ. App. 1965), *vacated on other grounds*, 400 S.W.2d 749 (Tex. 1966).

rationales. The earlier cases usually relied on the familiar "strong public policy" exception to the *lex loci* rule,⁴² or on the concept that *lex fori* should always apply in questions of remedy or procedure, and that spousal immunity should be so categorized.⁴³ Not all the recent cases have abandoned such sophistry,⁴⁴ but a few courts have followed the *Haumschild* lead and applied forum law in a Class II(d) case because it was the law of the marital domicile,⁴⁵ and one court has performed an analysis of governmental interests, concluding that the forum's own interest required application of forum law.⁴⁶ This last approach is surely preferable, but there is little ground for objection to a "straight" *lex domicilii* rule in Class II(d) cases. However, a serious question may be raised whether such a blanket rule does not cut too broad a swath when applied outside the Class II(d) cases.

The external facts, and consequently the respective state interests, of the Class II(f) case are identical with those of Class II(d) discussed above. Only the forum has changed. The usual reason for selection of a court in the place of tort is unabashed forum-shopping; the probabilities of recovery seem greater in a forum whose domestic law rejects spousal immunity, and dismissal on forum non conveniens grounds is unlikely since the actionable event occurred within the forum state. Occasionally the presence of witnesses or evidence in the *locus delicti* will also influence the plaintiff to file suit there, but the advance of discovery devices in most states renders this motivation insignificant in the typical interspousal suit.

To put the problem graphically, suppose the reverse of *Shaw v. Lee*: A Virginia-domiciled couple is involved in an accident while motoring through North Carolina. In view of Virginia's indisputable position of immunity, counsel for the injured wife recommends that she file suit against her husband in the North Carolina courts. Here the forum's problem is not to discern Virginia's interest, which is obvious, but rather to assess its own interest. There is the sup-

⁴² *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939); *Kyle v. Kyle*, 210 Minn. 204, 297 N.W. 744 (1941); *Poling v. Poling*, 116 W.Va. 187, 179 S.E. 604 (1935).

⁴³ *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936).

⁴⁴ *Baker v. Gaffney*, 141 F. Supp. 602 (D.D.C. 1956); *Flogel v. Flogel*, 257 Iowa 547, 133 N.W.2d 907 (1965); *Campbell v. Campbell*, 145 W.Va. 245, 114 S.E.2d 406 (1960).

⁴⁵ *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); *Koplik v. C. P. Trucking Corp.*, 27 N.J.2d 1, 141 A.2d 34 (1958).

⁴⁶ *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

posed North Carolina interest in awarding compensation so that the plaintiff will not become a ward of the state,⁴⁷ but realistically speaking, such an eventuality is extremely improbable, particularly where, as here, the victim is a non-resident. And there is the interest in providing a fund from which North Carolina creditors, whose debts arise out of the accident, may be paid.⁴⁸

But here ugly theoretical problems arise. Is it proper for the North Carolina court to make findings as to whether such creditors exist, whether they have in fact been paid, and if not, whether some independent fund (a medical insurance policy or automobile collision policy, or perhaps simply the private means of the plaintiff) is available to satisfy them? If such findings of fact are made, may the court dismiss the case, thereby deferring to the interests of Virginia, if it is determined that there are no North Carolina interests to be advanced by applying North Carolina law to this particular case? In effect, this position would allow recovery by impecunious non-resident spouses, but deny recovery to those who are wealthy or well-insured. Such a position seems disquieting and perhaps violates the equal protection clause of the Federal Constitution as well.⁴⁹

It has been suggested⁵⁰ that the problem posed here may be solved, or at least mitigated, by "conventionalizing" the facts somewhat—that is, by treating the case, for choice-of-law analysis purposes, as though it involved the supposedly "typical" facts of such a case. Presumably this means that in our Class II(f) case the locus delicti must always be regarded as having a governmental interest in the application of its law for the protection of accident-involved creditors. Yet should not some empirical study be made to ascertain that such an assumption would in fact represent the "typical" case?

Perhaps yet another interest may be asserted by North Carolina and similarly-situated forum states, apart from the possible in-

⁴⁷ See B. CURRIE, *SELECTED ESSAYS* 143.

⁴⁸ See Cavers, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1219, 1225 (1963); CURRIE, *SELECTED ESSAYS* 369, 371; *Comment, False Conflicts*, 55 CALIF. L. REV. 74, 87 n.83 (1967).

⁴⁹ See B. CURRIE, *SELECTED ESSAYS* 549. At least one court has explicitly analyzed the facts of the case before it, determining that the tort state had no governmental interest because death was immediate and no substantial medical debts were incurred. *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

⁵⁰ B. CURRIE 205; *Carroll v. Lanza*, 349 U.S. 408, 413 (1955).

volvement of their citizens (as in the Class I and Class II(f) cases) with the accident itself and resultant damages. May it not fairly be said that North Carolina has a valid interest in compensating every plaintiff in its own state courts who has been injured through the fault of another? May not a state take the view that, quite apart from (and indeed transcending) such self-centered aims as keeping the state hospitals clear or assuring physicians and auto mechanics that their bills will be paid, one function of a judicial system is to give a plaintiff the compensation to which she is morally entitled—even if her home state would not give it to her? Perhaps our quest for the governmental interest in the past has been too mercenary—too much inclined to view as worthy of consideration only those policies which protect *economically* the state or some segment of its citizenry. If it is possible to accept the concept that a policy of awarding just compensation is a legitimate governmental interest per se, then the solution to the Class II(f) case is clear: the plaintiff recovers because forum law prevails, and forum law prevails because the forum has an interest in seeing every plaintiff justly indemnified.

It should not be supposed that acceptance of such a doctrine will result in the application of *lex fori* in every choice-of-law case. For, a great many domestic rules of law have as their aim not the dispensation of just compensation, but the achievement of some peripheral objective—one which in many cases (the spousal immunity rule is an ideal example) is actually inimical to just compensation. The suggestion here is simply that, for a state with a domestic rule providing for just compensation (as the state views justice), there is always a governmental interest in giving the benefit of that rule to substantially eligible plaintiffs, regardless of the state's connection or lack of connection with the parties or the occurrence for which compensation is sought.

The view expressed here is not intended as definitive, but rather will hopefully serve as a springboard for further comment. Whether it is ultimately accepted or not, the proper result for the Class II(f) case seems to be the application of forum law. It will be objected that this result encourages forum-shopping. That is undeniable; but precisely why the avoidance of forum-shopping should be a paramount (or even an attainable) goal of a choice-of-law system

has never been adequately explained.⁵¹ If governmental interest analysis will not do away with forum-shopping, neither has thirty-four years of operation under the Bealean views of the first Restatement.⁵²

The resolution of the Class II(f) case in favor of the *lex fori* is a result which, strangely, seems to be going out of fashion. Courts of a generation ago had no difficulty reaching this result by simple application of the *lex loci* doctrine,⁵³ since in Class II(f) cases the forum and the place of tort coincide. But the more recent decisions, influenced by *Haumschild* and the Restatement (Second) have generally applied the law of the domicile.⁵⁴ One cannot fault this trend if the participating courts recognize that they are subverting possible forum interests by the application of foreign law, and if they intelligently conclude that under the circumstances it is preferable to sacrifice a rather weak forum policy in favor of comity extended to the domiciliary state. But there is little indication in the recent opinions that forum policy has been considered, much less that it has been thoughtfully sacrificed. Even a court which has declined

⁵¹ See B. CURRIE, *SELECTED ESSAYS* 168-69. The doctrine of *forum non conveniens* acts as a brake on forum-shopping, although not to the extent one might desire. See A. EHRENZWEIG, *CONFLICTS IN A NUTSHELL* 43 (1965); H. GOODRICH, *CONFLICT OF LAWS* § 11 (4th ed. E. Scoles 1964); 45 N.C.L. REV. 717 (1967). A modification and strengthening of the doctrine seems the most fruitful line of attack upon forum-shopping.

⁵² A classic example of manipulation of traditional conflicts rules by a forum-shopping plaintiff is *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), discussed in B. CURRIE, *SELECTED ESSAYS* 690-710.

⁵³ *W. W. Clyde & Co. v. Dyess*, 126 F.2d 719 (10th Cir. 1942); *Matney v. Blue Ribbon, Inc.*, 202 La. 505, 12 So. 2d 253 (1942); *Lumberman's Mut. Cas. Co. v. Blake*, 94 N.H. 141, 47 A.2d 874 (1946); *Bradford v. Utica Mut. Ins. Co.*, 179 Misc. 919, 39 N.Y.S.2d 810 (1943); *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941); *Alberts v. Alberts*, 217 N.C. 443, 8 S.E.2d 523 (1940); *Forbes v. Forbes*, 226 Wis. 477, 277 N.W. 112 (1938).

⁵⁴ *Magid v. Decker*, 251 F. Supp. 955 (W.D. Wis. 1966); *Pirc v. Kortebein*, 186 F. Supp. 621 (E.D. Wis. 1960); *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966); *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

Although *Haumschild v. Continental Cas. Co.*, note 40 *supra*, appeared to lay down a strict *lex domicilii* rule, the Wisconsin Supreme Court, in *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), seems instead clearly to have adopted a governmental interest analysis. *Wilcox* was a guest statute case, but the form of analysis followed there should equally be the law of Wisconsin as applied in marital immunity cases. Nonetheless, the federal court in *Magid v. Decker*, *supra*, seems to have entirely misunderstood the impact of *Wilcox*: *Magid* holds merely that the *lex domicilii* rule of *Haumschild* was reduced by *Wilcox* to the status of a weak presumption in favor of the law of the domicile.

to adopt a strict *lex domicilii* approach and has substituted instead the so-called "most significant relationship" test has not adequately analyzed the forum's relationship to the case in terms of possible forum interests.⁵⁵

Although the proposal may be novel, there is no reason a state's legislature should not take the Class II(f) problem under advisement, give it careful study, and then propound a rule to govern it in that state's courts. If the legislature concludes that the state's interests in protecting accident-connected creditors and in granting just compensation to all plaintiffs are not sufficiently strong to warrant the rejection of the domicile's policies, then so be it; the legislature should speak and the courts should comply.⁵⁶

Perhaps it is not too much to expect that at some future date we will see standing committees or advisory commissions, adjunct to state legislatures, whose task is to study and recommend action on choice-of-law problems. Today's mobile society has a far greater need for such study than did the stable days gone by, and we may well expect the frequency of conflicts problems to increase so long as our federal system endures. But it seems imperative that such study be done on a case-by-case, fact-by-fact basis, with careful attention given to the respective interests of the states involved. Ideally, forum interests should be sacrificed, if at all, only after careful consideration of their importance by the bodies best able to appraise them—the legislatures. Until legislative activity in the field becomes prevalent it is to be fervently hoped that the courts will become equally cognizant of forum interests.

The experience of the first Restatement has vividly illustrated that an attempt to paint conflicts rules with a broad brush is likely to yield awkward and sometimes foolish results. An explicit approach, epitomized by the recent North Carolina statute over-ruling *Shaw v. Lee*, is far preferable; it is a legislative step in the right direction.

⁵⁵ *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966). See Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1237 (1963).

⁵⁶ B. CURRIE, *SELECTED ESSAYS* 171-72.