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# Comment

## CHOICE OF LAW RULES IN TORT CASES— A COMING CONFLICT IN MISSOURI

### I. INTRODUCTION

The area of conflict of laws has been aptly termed "a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."<sup>1</sup> Within this swamp there has been at least one small isle of stability where the ordinary court, the practicing lawyer, and the much harrassed student could stand on firm ground and confidently proclaim unquestioned black letter law. When an action was brought in one jurisdiction for a tort which had occurred in another, any observer could with reasonable accuracy predict which state's law would be applied. In Missouri<sup>2</sup> and virtually all other jurisdictions<sup>3</sup> the substantive rights of the parties were determined by the *lex loci delicti* or the law of the place of the wrong rather than the *lex fori* or the law of the forum. Considering the status of this area, it is surprising to learn that recently many noted scholars and some of the more progressive courts have devoted much of their time and efforts toward undermining the rule of *lex loci delicti* thereby making this isle of stability as much a quaking quagmire of uncertainty as the rest of the conflicts area.

It is the purpose of this comment to review and evaluate the traditional rule; to attempt to determine whether the traditional rule should be abandoned; and if so which, if any, of the proposed new rules should replace it. An attempt will also be made to show the probable effect the adoption of certain of these new rules would have on selected areas of Missouri law.

In order to evaluate properly the existing and proposed choice of law rules it is necessary to identify the policies and values which those rules should further. Once the policies and values have been identified then they may be utilized as a type of conceptual framework against which the "rightness" of these rules may be measured, "since the ultimate success of a rule will depend upon how effective it is in furthering these policies."<sup>4</sup> It is clear that such a measurement must in part be qualitative, rather than solely quantitative, and that opinions differ as to the importance of the various policies. It must be recognized that any such measurement will be subject to certain inherent weaknesses, but it would seem to be the most accurate means of evaluating choice of law rules.

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1. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

2. *Hall Motor Freight v. Montgomery*, 357 Mo. 1188, 212 S.W.2d 748 (1948); *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490, 79 S.W. 644 (1904).

3. 16 AM. JUR. 2D *Conflict of Laws* § 71 (1964); 15 A. C.J.S. *Conflict of Laws* § 12(2) (1967).

4. Reese, *Conflict of Laws and The Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 681 (1963).

While many attempts have been made to identify and state choice of law policies, Robert A. Leflar has contributed one of the most concise, but comprehensive lists of these policies. The policies are termed by him choice-influencing considerations and include:

- A. Predictability of results;
- B. Maintenance of interstate and international order;
- C. Simplification of the judicial task;
- D. Advancement of the forum's governmental interests;
- E. Application of the better rule of law.<sup>5</sup>

Leflar did not intend the order of the above list to indicate any priority.<sup>6</sup>

## II. THE CONTENDING RULES

### A. *The Traditional Approach*

As late as 1875 the application of the *lex fori* to torts which had occurred in other states was "almost too familiar a principle for discussion or authority."<sup>7</sup> Only five years later the United States Supreme Court applied what has now become the traditional approach, the rule of *lex loci delicti*.<sup>8</sup> This rule was an outgrowth of the vested rights theory<sup>9</sup> in vogue at that time.<sup>10</sup> The rule was applied only to substantive law and courts used the forum's procedural rules.<sup>11</sup> The place where the tort occurred has normally been held to be where "the last event necessary to make an actor liable for an alleged tort takes place."<sup>12</sup> In recent years the traditional rule has come under considerable criticism by numerous writers<sup>13</sup> and courts.<sup>14</sup> At least one court has gone so far as to state that "no American court which has felt free to re-examine the matter thoroughly in the

5. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 282 (1966).

6. Compare with the lists in Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952), and Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721 (1957). For a case in which Leflar's choice-influencing considerations were applied in reaching a decision see *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

7. *Anderson v. The Milwaukee & St. Paul Ry.*, 37 Wis. 321, 322 (1875).

8. *Dennick v. Central R.R.*, 103 U.S. 11 (1880).

9. See generally Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

10. EHRENZWEIG, *CONFLICT OF LAWS* § 211 (1962).

11. *Grant v. McAuliffe*, 41 Cal. App. 2d 859, 264 P.2d 944 (1953); *Russell v. Kotsch*, 336 S.W.2d 405 (Mo. 1960); *Robinson v. Gaines*, 331 S.W.2d 653 (Mo. 1960).

12. *Gaston v. Wabash R.R.*, 322 S.W.2d 865, 867 (Mo. En Banc 1959); RESTATEMENT, *CONFLICT OF LAWS* § 377 (1934); See generally Annot., 77 A.L.R.2d 1266 (1961).

13. Ehrenzweig, *Guest Statutes in the Conflict of Laws, Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws"*, 69 YALE L.J. 595 (1960); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

14. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *Casey v. Manson Constr. and Eng'r Co.*, 428 P.2d 898 (Ore. 1967); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

last decade has chosen to retain the old rule."<sup>15</sup> In order better to determine the validity of this criticism, the rule shall be tested as to whether or not it furthers those policies or choice-influencing considerations set out by Leflar.

1. Advocates of this rule assert that one of its great virtues is that it provides predictable results and thereby discourages forum shopping.<sup>16</sup> This would seem to be the case since once it is determined where the tort occurred, the law of that state would be applied regardless of the forum selected. There are, however, students of the area who argue that even this virtue is illusory. They point out that the rule is so inflexible that courts often utilize the devices of characterization, public policy and renvoi to avoid harsh results.<sup>17</sup> While these devices may provide flexibility they weaken one's ability to predict the result when courts purport to apply the rule.

2. Leflar's main concern in his second choice-influencing consideration is that the forum state will give due deference to the laws of other states. The traditional rule would seem to give such deference since it applies the law of the state where the tort occurred rather than the law of the forum. Thus while the application of the traditional rule might not result in the law of the most interested state being applied, it would normally produce sufficiently impartial results to obviate the possibility of judicial jealousy between neighboring states.

3. The traditional rule simplifies the judicial task by making the choice of which state's law to apply relatively easy to determine. Since judges are normally more familiar with the law of the forum state it does, however, make the judicial task more difficult by often requiring that the court apply another state's substantive law.

4. The rule of *lex loci delicti* may require the application of another state's laws without regard to the forum state's governmental interests in the case. Therefore, it clearly is not a rule which furthers the forum's governmental interests.

5. The traditional rule does not take into account whether either of the laws the court might apply is superior. If the better rule of law is applied it is merely fortuitous. Thus this rule does not further the policy of applying the better rule of law.

### B. *The Restatement's Approach*

In response to the mounting criticism of the traditional rule a number of new rules were proposed as possible replacements. Probably the most widely proclaimed of the proposed new rules is the one set out in section 379 of *Restatement (Second), Conflict of Laws*, (1958). This section provides that:

15. *Clark v. Clark*, 107 N.H. 351, —, 222 A.2d 205, 207 (1966).

16. *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); Currie, *Survival of Actions: Adjudication Versus Automation In the Conflict of Law*, 10 STAN. L. REV. 205 (1958); Note, 54 Ky. L.J. 728 (1966).

17. Ehrenzweig, *op. cit. supra* note 10 at 545; Comment, 15 KAN. L. REV. 69 (1966).

(1) The local law of the state which has the most significant relationships with the occurrence and with the parties determines their rights and liabilities in tort.

(2) Important contacts that the forum will consider in determining the state of the most significant relationship include:

- (a) the place where the injury occurred,
- (b) the place where the conduct occurred,
- (c) the domicile, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.<sup>18</sup>

The most significant changes in *Restatement (Second)* involve the change from the rule of *lex loci delicti* to the law of the state with the most significant relationship and the stating of separate rules of greater precision for certain types of torts. The section quoted above states the general principle that is applicable to all torts and it is to this principle that our attention is primarily directed. The contacts listed in subsection (2) of section 379 are listed in what will normally be their order of importance. Courts may, however, utilize the factors set out in subsection (3) to determine the relative importance of these contacts. In some cases it may be found that the order of importance will be changed and in a few situations some of the contacts may be dismissed as of no importance. It can be argued that the *Restatement's* approach will not require the application of a different state's law in most cases than that required under the old rule of *lex loci delicti*. Except in rare cases the conduct causing the injury and the injury will occur in the same state, and since these are normally considered the two most important contacts "that state will usually be the state of most significant relationship with respect to most issues involving the tort."<sup>19</sup>

The first case to flatly reject the traditional approach and adopt the *Restatement's* approach was the New York case of *Babcock v. Jackson*.<sup>20</sup> Since that case a number of other courts<sup>21</sup> have rejected the traditional approach and adopted either the *Restatement's* or a modified version of that approach.

This new approach has not however, suffered a lack of critics. A number of courts<sup>22</sup> have specifically rejected it in favor of the traditional approach and

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

19. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379, comment 5. (Tent. Draft No. 9, 1964).

20. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

21. *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Casey v. Manson Construction and Engineering Co.*, 428 P.2d 898 (Ore. 1967); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

22. *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963); *Oshiek v. Oshiek*, 224 S.C. 249, 136 S.E.2d 303 (1964).

even some of the writers<sup>23</sup> most critical of the traditional approach are not ready to accept it as a suitable replacement. The next step is to determine whether the *Restatement's* approach serves to further the policies or choice-influencing considerations set out by Leflar.

1. It is generally agreed by courts<sup>24</sup> and writers<sup>25</sup> dealing with the *Restatement's* approach that it does not provide for predictability of results and that it will promote forum shopping. One court justified its refusal to abandon the traditional approach by stating that it did "not deem it wise to voyage into such an uncharted sea, leaving behind well established conflict of laws rules."<sup>26</sup>

Even the supporters of the new approach admit that it is not as certain or predictable as the traditional approach. They seek to justify or excuse this weakness by observations such as "uniformity, certainty, and predictability of result are not as important values in this area as they are in contracts;"<sup>27</sup> that this is "a workable, fair and flexible approach to choice of law which will become more certain as it is tested and further refined when applied to specific cases before our courts,"<sup>28</sup> and that "continued adherence to a bad rule is a high price to pay for predictability."<sup>29</sup>

2. The use of this approach would give due deference to the laws of other interested states and should not interfere with the maintenance of interstate and international order.

3. There can be little doubt that this approach will make the judicial task more difficult than it was under the traditional approach. In most cases, however, the law to be applied will be fairly clear. It is in cases where two or more states have contacts and are legitimately interested in the outcome of the case that the judicial task becomes most difficult. Professor Currie has even argued that where "the interests of two or more states are in conflict, a court has no means of determining which state has the most significant relationship."<sup>30</sup> While Currie overstates<sup>31</sup> the problem, there is no question that the task would be a formidable one. This criticism could perhaps best be answered by pointing out that the problem is a difficult one and simple answers to difficult problems are normally unsatisfactory. Courts have traditionally embarked on difficult tasks when justice required without ruining the judicial system. This approach would be more likely

23. Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233 (1963); Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts—Law and Reason versus The Restatement Second*, 28 LAW AND CONTEMP. PROB. 700 (1963).

24. *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966).

25. Note, 54 Ky. L.J. 728 (1966); Comment, 62 MICH. L. REV. 1358 (1964).

26. *Shaw v. Lee*, 258 N.C. 609, 616, 129 S.E.2d 288, 293 (1963).

27. Reese, *Conflict of Laws and The Restatement Second*, 28 LAW AND CONTEMP. PROB. 679, 699 (1963).

28. *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 22, 203 A.2d 796, 806 (1964).

29. Reese, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1251, 1254 (1963).

30. Currie, *supra* note 23 at 1235.

31. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 852 (1961).

to select forum law than the traditional approach and that would make the judicial task easier.

4. While the *Restatement's* approach does attach some importance to the governmental interests of the forum state, it will in some cases subordinate these interests to those of other states. Thus while this approach does more to further the forum's interests than the traditional approach it does not further them in all cases.

5. While the rule of most significant relationship does not outwardly take into account which of the available rules of law may be better, it does allow the court more freedom than under the traditional rule by suggesting that the importance of the contacts may be determined by the relevant purposes of the contending laws. As stated by Ehrenzweig this rule "is readily usable as a tool to give effect to equitable considerations."<sup>32</sup>

### C. Currie's Approach

Brainerd Currie, one of the foremost scholars in the area of conflict of laws, has observed that if he were ever called on to restate the laws of conflict of laws and if that allowed a statement of what was reasonable in present law and what could reasonably be desired in the future, he would:

volunteer the following as a substitute for all that part of the *Restatement* dealing with choice of law (for the purpose of finding the rule of decision):

Section 1. 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 process of construction and interpretation.

Section 2. 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.

Section 3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

Section 4. 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.

Section 5. 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.<sup>33</sup>

32. Ehrenzweig, *supra* note 23 at 705.

33. As suggested by the language utilized Currie's method provides no concrete solution in a case where there is a conflict between two interested states, but the forum is disinterested. This results from Currie's belief that interests may not be weighed and the fact that the forum state has no interest to prefer. Currie,

Section 6. 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.<sup>34</sup>

An analysis of Currie's approach reveals that it is no more than the rule of *lex fori*, with one exception. That exception occurs when there is only one state with a legitimate interest in having its law applied in a particular case and that state is not the forum. In that case the law of the interested state is applied. Currie's approach is a logical outgrowth of three principals he puts forth: (1) a court should as a matter of course look to the law of the forum as the source of the rule of decision;<sup>35</sup> (2) that the protection of governmental interests should be the basic goal of conflict of laws;<sup>36</sup> and (3) that where the legitimate interests of two states conflict, "a court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them."<sup>37</sup>

As Currie predicted, his concept of governmental interest has become a controversial aspect of his approach to choice of law problems.<sup>38</sup> A government is interested in having its law applied in a particular case when the application of that law to that particular set of facts would further those interests that the law was intended to further.<sup>39</sup>

Currie's belief that a court should not choose between the legitimate interests of two states has also been criticized.<sup>40</sup> Currie based this proposition on his belief that (1) this determination was a political function of a high order "which should not be committed to courts in a democracy,"<sup>41</sup> and (2) that this determination was "a function which the courts cannot perform effectively, for they lack the necessary resources."<sup>42</sup> Having set out the basic elements of Currie's approach it may now be tested to determine whether it furthers Leflar's choice-influencing considerations.

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*The Verdict of Quiescent Years: Mr. Hill and The Conflict of Laws*, 28 U. CHI. L. REV. 258 (1961). For an alternative to use of forum law in such a case, Currie has suggested the court act as a supreme legislative body. CHEATHAM, GRISWOLD, REESE & ROSENBERG, *CONFLICT OF LAWS* (5th ed. 1964) and Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 778 (1963).

34. Currie, *supra* note 23 at 1242, 1243.

35. Currie, *The Constitution and The Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

36. Currie, *supra* note 35.

37. Currie, *Notes on Methods and Objectives in The Conflict of Laws*, 1959 DUKE L.J. 171, 176 (1959).

38. Currie, *supra* note 35.

39. Comment, 55 CALIF. L. REV. 74, 80 (1967).

40. Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Traynor, *supra* note 31.

41. Currie, *supra* note 37 at 176.

42. Currie, *supra* note 37 at 176.

(1) Currie's approach is vulnerable to the argument that it does not provide for predictable results and that it will promote forum shopping. This argument is valid only where there are two or more legitimately interested states whose laws would likely give rise to different results in which the plaintiff could bring his action. In such a case the plaintiff could choose to bring his action in the state whose law would provide him the most favorable result. In defense of Currie's approach it may be argued that the "ideal of uniformity is given too high a priority,"<sup>43</sup> and that "the possibilities of forum shopping are apt to be exaggerated."<sup>44</sup>

(2) It may also be argued that Currie's approach fails to give due deference to the laws of other states. This results from Currie's belief that courts should not weigh competing interests and should always apply forum law in case of a conflict between two legitimately interested states. Currie's use of a "moderate and restrained interpretation" in determining whether a state has a legitimate interest would make his approach less vulnerable to this criticism. Nevertheless his approach would seem to be the least desirable of those discussed in reference to this choice-influencing consideration.

(3) At first blush Currie's approach would seem to make the judicial task the least difficult of any of the proposed approaches. His approach will normally result in the application of forum law with which the judge is more familiar. The judge would have to determine if the states involved had a legitimate interest in having their law applied, but he would not have to determine which interest was greater. Some scholars have attempted to utilize Currie's argument that courts are not capable of balancing the interests of two competing states in criticizing his approach.<sup>45</sup> Justice Traynor observed "that determination of the existence and scope of forum policy demands the weighing of many policies and interests,"<sup>46</sup> and Ehrenzweig wondered if the state court's task of determining whether an interest was legitimate did not "involve the very process of weighing which is to be avoided by the proposed abdication of the judiciary?"<sup>47</sup> Currie conceded that this criticism was a valid one, but asserted that there was "an important difference between a courts construing domestic law with moderation in order to avoid conflict with a foreign interest and its holding that a foreign interest is paramount."<sup>48</sup> Currie feels that the former encourages legislative correction of error and law review criticism while the latter would inhibit and confound it. It is clear that there is a significant difference in a weighing and balancing of policies by a court which on one hand determines the existence of a legitimate interest and on the other holds that one such interest is superior to another.

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43. Currie, *supra* note 16 at 244.

44. Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 *RUTGERS L. REV.* 523, 560 (1959).

45. Hill, *supra* note 40; Leflar, *Constitutional Limits on Free Choice of Law*, 28 *LAW & CONTEMP. PROB.* 706 (1963).

46. Traynor, *supra* note 31 at 855.

47. Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules,"* 49 *CALIF. L. REV.* 240, 247, 248 (1961).

48. Currie, *supra* note 33 at 759.

(4) It is obvious that Currie's approach is designed to further the forum's governmental interests and if applied it would accomplish this purpose.

(5) Currie's approach does not take into account which of the possible laws is better. His willingness to allow the courts to determine if the interest of the state is in fact a legitimate one would probably allow a court to avoid applying a capricious law by determining that the state had no legitimate interest in its application.<sup>49</sup>

### III. MISSOURI LAW

While Missouri followed the traditional approach to choice of law problems in two recent cases,<sup>50</sup> the Missouri Supreme Court has indicated that if raised in the proper case,<sup>51</sup> it would examine the new approaches taken in other jurisdictions. In order to further evaluate the choice of law approaches previously discussed an attempt will now be made to show the probable effect of the adoption of certain of these new rules on selected areas of Missouri law.

#### A. Interspousal Liability for Automobile Accidents

##### *Robinson v. Gaines*<sup>52</sup>

Plaintiff filed suit in Missouri against her deceased husband's estate for injuries received in an automobile accident in New Mexico. The domicile of the two parties had been Missouri and under Missouri law a widow could maintain an action against the administrator of her deceased husband's estate for personal injuries.<sup>53</sup> The court, following the traditional approach, applied the law of New Mexico under which plaintiff had no right of action. The court based its decision on both statutory<sup>54</sup> and case law.<sup>55</sup>

The Missouri court would have reached a different result if it had applied either the *Restatement's* or Currie's approach. The *Restatement* has determined that this situation may be governed by a more definite rule than that set out in section 379. It considers that on this issue the parties' domicile is the state with the greatest interest and that an application of section 379 will always result in a determination that "whether one member of a family is immune from tort liability to another member is determined by the local law of the state of their domicile."<sup>56</sup>

49. For a court which has applied a modified version of Currie's approach see *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964).

50. *Noe v. United States Fid. & Guar. Co.*, 406 S.W.2d 666 (Mo. 1966); *Toomes v. Continental Oil Co.*, 402 S.W.2d 321 (Mo. 1966).

51. The Supreme Court ruled the case presented no conflict of laws problem when asked to consider the new approaches in *Girth v. Beaty Grocery Co.*, 407 S.W.2d 881 (Mo. 1966).

52. 331 S.W.2d 653 (Mo. 1960).

53. *Ennis v. Truhitte*, 306 S.W.2d 549 (Mo. En Banc 1957).

54. Section 507.020, RSMo 1959.

55. *Newlin v. St. Louis & S.F.R.*, 222 Mo. 375, 121 S.W. 125 (1909).

56. RESTATEMENT (SECOND), CONFLICT OF LAWS § 390 g. at 142 (Tent. Draft No. 9, 1964).

The rule of interspousal immunity is an outgrowth of the archaic fiction that husband and wife were one person. This fiction resulted in the suspension of the legal existence of the wife during the marriage.<sup>57</sup> The rule is justified today by two rather dubious and somewhat contradictory reasons: (1) That if interspousal tort actions are allowed this will disturb domestic tranquillity. (2) That the allowance of interspousal tort actions would encourage collusive claims and thereby greatly injure insurance companies.<sup>58</sup> If the first reason is the interest which New Mexico desires to further by this law, then it was meant to benefit only couples domiciled in New Mexico. If it was the second reason it was surely meant to protect New Mexico rather than Missouri insurance companies. Since it is obvious that Missouri does have an interest in this case it is clear that if Currie's approach were used Missouri law would be applied even if New Mexico had an interest in the case.

While the *Restatement* contends that its approach "represents the trend of the modern decisions,"<sup>59</sup> a number of recent decisions have followed the old approach.<sup>60</sup> For the most part these decisions adhere to precedent rather than reason in reaching their conclusions. A number of cases<sup>61</sup> have accepted the *Restatement's* position and it appears the better approach for dealing with the issue of interspousal immunity. In deciding this question, the *Restatement's* result is more certain and predictable than the traditional approach and it applies the law of the most interested state. It is more certain since family immunities are not subject to change each time the family enters a different state.<sup>62</sup> Currie's approach would reach the same result as the *Restatement* in *Robinson*, but if the action were brought in New Mexico that state's law would have been applied if the state were found to have any legitimate interest in having its law applied. This would be the case even though Missouri's interest was more substantial.<sup>63</sup>

### B. Guest Statutes

#### *Neihardt v. Knipmeyer*<sup>64</sup>

Plaintiff sued in Missouri for injuries he suffered in an automobile accident in South Dakota. The trip was planned in plaintiff's home in Missouri and was to include a stop in Canada as well as in South Dakota. Under Missouri law guests injured in automobile accidents may recover damages for negligent conduct, but

57. Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus The Restatement*, 15 U. PITT. L. REV. 397 (1954).

58. Ford, *supra* note 57.

59. RESTATEMENT (SECOND), CONFLICT OF LAWS § 390 g., Reporters note at 145 (Tent. Draft No. 9, 1964).

60. *Wolozin v. Wolozin*, 149 Conn. 739, 182 A.2d 8 (1962); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963); *Oshiek v. Oshiek*, 136 S.E.2d 303 (S.C. 1964).

61. *Wartell v. Formusa*, 34 Ill.2d 57, 213 N.E.2d 544 (1966); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

62. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955).

63. See generally Annot., 96 A.L.R.2d 973 (1964).

64. 420 S.W.2d 27 (K.C. Mo. App. 1967).

in South Dakota willful and wanton misconduct must be shown for recovery. Despite the fact that plaintiff and apparently defendant<sup>65</sup> were citizens and residents of Missouri, the court ruled that South Dakota law applied. The court pointed out that it "had been cited to no Missouri decision indicating that tort actions tried in Missouri are not governed by the law of the state where the tort occurred,"<sup>66</sup> but no mention was made of any of the new approaches that might have been utilized.

The *Restatement* has not formulated a more specific rule than that set out in section 379 for all guest passenger cases. It has, however, stated that "the circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence will be determined by the local law of their common domicile, if at least this is the state from which they departed on their trip and that to which they intended to return, rather than by the local law of the state where the accident occurred."<sup>67</sup>

It is often difficult to determine what policies a state hopes to further by a particular law and the task is no easier in the case of guest statutes. The most comprehensive statement of policies which a guest statute might intend to further is set out in the case of *Dym v. Gordon*.<sup>68</sup> There the court stated that:

The policy underlying Colorado's law is threefold: the protection of Colorado drivers and their insurance carriers against fraudulent claims, the prevention of suits by 'ungrateful guests,' and the priority of injured parties in other cars in the assets of the negligent defendant.<sup>69</sup>

Assuming, as most courts<sup>70</sup> and scholars<sup>71</sup> do, that a state is concerned with protecting its own citizens, companies, and courts and not those of other states, it becomes apparent that the application of South Dakota law in *Neihardt* would not further the first or second policy of that state. As to the third policy there is no indication in the case that any South Dakota citizen was injured or that any other injured party would be prejudiced if *Neihardt* recovered.

Since Missouri citizens, and probably a Missouri insurance company, were involved, it is obvious that Missouri has a legitimate interest in the case. Thus had Currie's approach been utilized Missouri law would have been applied.

In dealing with the guest statute cases, no one approach seems clearly superior as was the case when the issue was interspousal immunity. While a number of

65. While the court does not state that the defendant is a citizen and resident of Missouri, this fact is implied by the courts reference to other cases to support its decision in which both parties were citizens and residents of the state.

66. *Neihardt v. Knipmeyer*, 420 S.W.2d 27, 29 (K.C. Mo. App. 1967).

67. RESTATEMENT (SECOND), CONFLICT OF LAWS § 379, comment on subsection(3) at 9 (Trent. Draft No. 9, 1964).

68. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

69. *Dym v. Gordon*, *supra* note 68 at 124, 209 N.E. at 794, 262 N.Y.S.2d at 466.

70. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

71. Currie, *supra* note 23; Trautman, *A Comment*, 67 COLUM. L. REV. 465 (1967), compare Leflar, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1247 (1963).

recent cases<sup>72</sup> have applied the *Restatement's* approach there have been differences of opinion as to which are the more important contacts and interests, and even courts in the same state have reached seemingly inconsistent results.<sup>73</sup> Thus some courts<sup>74</sup> continue to reject the *Restatement* on the ground that it remains uncertain and provides unpredictable results. This uncertainty would also attach to Currie's approach since in the difficult cases each state would have a legitimate interest and his approach would seem certain to encourage forum shopping. In *Neihardt*, however, either the *Restatement's* or Currie's approach would seem to provide a more desirable result than the traditional approach. Missouri clearly had the more substantial interest under any interpretation and its law should have been applied. It also seems likely that the *Restatement's* approach will become more certain with use since courts are likely to come to a general agreement as to which are the more significant contacts and interests.<sup>75</sup>

#### IV. CONCLUSION

The only definite conclusion that may be drawn from this analysis of the three approaches is that each of them has some good and some bad features. There can be little doubt that no one of these approaches will be satisfactory to all courts or all scholars. Nevertheless of the three approaches discussed and evaluated it would seem that the *Restatement's* approach provides the most logical alternative to those seeking a new choice of law rule. The two most significant weaknesses of this approach are its failure to provide predictable results and the difficulty involved in its application. These weaknesses are likely to be reduced as courts become more experienced in applying this approach. In the two areas of Missouri law discussed in this comment, the *Restatement* has already overcome these weaknesses in the area of interspousal immunity and has taken limited steps toward overcoming them in the guest statute cases. In contrast, the more significant weaknesses found in the traditional rule and Currie's approach seem to be an inherent result of the approach itself and they seem impossible to correct without abandonment. It is for these reasons that this writer suggests that Missouri abandon its illusory isle of stability, the traditional approach, and adopt the more flexible *Restatement* approach.

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72. *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

73. Compare *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Dym v. Gordon*, *supra* note 72; *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965).

74. *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966).

75. See generally Annot., 95 A.L.R.2d 12 (1964).