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CONFLICT OF LAWS AND THE INTEREST ANALYSIS — AN EXAMPLE FOR ILLINOIS

by DAVID P. EARLE III*

“Bad law makes hard cases.”

— Professor Brainerd Currie¹

The automobile and the airplane. In our highly mobile society it is no surprise that accidents involving the automobile and the airplane occur under circumstances which are multi-state or multi-country in nature. One troublesome result of this fact is that courts have found it difficult to frame rational rules to determine which state's or which country's law applies to such accidents. The traditional common law approach, *lex loci delicti*, was strictly geographical in nature and applied the law of the state in which the accident occurred. This rule provides that all substantive rights and liabilities of the parties arising out of tortious conduct are determined by the law of the place of the wrong.² Although the rule has the advantage of guaranteeing certainty as to which jurisdiction's law to apply in most situations, it was widely criticized by most authorities as entirely too mechanical, unjust in result, and subject to a proliferating number of escape devices and manipulation by the courts in actual practice.³

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¹ B. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, 25 U. CHI. L. REV. 227, 245 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON CONFLICT OF LAWS* ch. 2 (1963) [hereinafter cited as *Currie*].

This author had the privilege of studying conflicts under the late Professor Brainerd Currie while a student at The University of Chicago Law School. This author also elected to use the casebook prepared by Professors Cramton and Currie, *CONFLICT OF LAWS: CASES — COMMENTS — QUESTIONS* (1968) [hereinafter cited as *Cramton & Currie*] in a conflicts course at The John Marshall Law School. This latter Currie is, of course, the earlier Currie's son. Although neither this author nor the casebook Currie are necessarily acolytes at the altar of the pure Currie non-balancing, non-weighting interest analysis (see, e.g., D. Currie, in *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 595 (1968)), it is probably preferable to isolate one's prejudice at the outset. All the more so, I suppose, in light of a muffled comment from the back of the John Marshall classroom — “Currie, the Father, Currie, the Son, and now Currie the Holy Ghost.”

² See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §384 (1934) [hereinafter cited as RESTATEMENT (FIRST)].

³ The most recent compendia of the critical literature, as well as the

Seven years ago, the New York Court of Appeals decided in a seminal case to discard the *lex loci delicti* rule previously applied in word, if not in deed, by virtually every court in the United States. In *Babcock v. Jackson*⁴ the court held that a New York auto passenger could recover from a New York driver under New York law, although both the negligent act and the injury occurred in Ontario, where a guest statute would have barred recovery. Since *Babcock* in New York, no fewer than fifteen states, including Illinois,⁵ have also abandoned the *lex loci delicti* rule, at least in part, and endorsed new solutions of tort choice-of-law problems in one form or another.⁶

A substantial number of the cases that have spawned the "revolution" in conflicts law involved automobile and airplane accidents,⁷ an area which is increasingly controversial even when no conflicts question is presented. The problems of congested courts, compensation-without-fault schemes, fluctuating awards and Warsaw Convention damage limitations in international flights have also resulted in a questioning of the application of traditional tort rules and procedures. The thought of superimposing additional complexity over already vexing problems by adopting new rules or a more "flexible approach" may have been lurking behind the announced fears of those courts which have refused outright to utilize the new conflicts learning. Out of respect for certainty and *stare decisis*, these courts still feel bound to look exclusively to the state of injury for the substantive rules governing multi-state torts.⁸

current methodologies, may be found in two representative articles, Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969), and Peterson, *Developments in American Conflict of Laws: Torts*, 1969 U. ILL. L.F. 289. A useful recent annotation is Rystrom, *Modern Status of Rule that Substantive Rights of Parties to a Tort Action Are Governed by the Law of the Place of the Wrong*, ANNOT., 29 A.L.R.3d 603 (1970).

⁴ 12 N.Y.2d 473, 191 N.E.2d 279, 140 N.Y.S.2d 743 (1963).

⁵ *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

⁶ *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968); *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Fabricus v. Horgen*, 257 Iowa 268, 132 N.W.2d 410 (1965); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Mitchell v. Craft*, 211 So.2d 509 (Miss. 1968); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967); *Casey v. Manson Constr. & Eng'r Co.*, 247 Ore. 274, 428 P.2d 898 (1967); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Woodward v. Stewart*, 243 A.2d 917 (R.I. 1968), *petition for cert. dismissed*, 393 U.S. 957 (1969); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

⁷ Of the fifteen cases cited in notes 4, 5 and 6 *supra*, fourteen involved automobile accidents and one involved an airplane crash.

⁸ See, e.g., *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966); *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969); *Marmon v. Mustang Aviation, Inc.*, 416 S.W.2d 58 (Tex. Civ. App. 1967), *aff'd*, 430 S.W.2d 182 (1968). For a case which continues to follow *lex loci delicti*, but reserves further consideration in

Perhaps as significant as the counter-list of decisions rejecting the new approach are the growing pains of those states which have attempted to make a break with traditional learning by considering contacts other than the *lex loci*, thrusting some consideration of policy to the forefront. After referring to the experience in New York and Wisconsin, then, this paper will turn to the situation in Illinois and attempt to essay the direction in which this state is heading. Some prefatory remarks about what is meant by the "interest analysis," however, would seem to be in order.

I. The "Interest Analysis"

At least for the purposes of this paper, the phrase "interest analysis" means some focus upon the interpretation of the substantive rules of law competing for application in a case with multi-state elements, in light of the purpose of such rules. The inquiry therefore begins with a consideration of the content and purpose of a possibly applicable law.

Admittedly, the analysis and tests used by the courts vary in depth and phraseology and may be considered to differ in result. Nor can it be denied that there are considerable terminological differences among those scholars who, in common with Professors Cavers⁹ and Currie, favor an interest analysis as the first step in a choice-of-law case. Indeed, there are others, like Professor Leflar, who isolate the advancement of the forum's governmental interest as only one of five considerations.¹⁰ Nevertheless, "interest analysis or something very much like it has been employed by quite a number of courts"¹¹ and promulgated by a significant group of commentators — though by no means all of them — in the last decade.

Professor Currie spoke of "interests," "policies," and the "ordinary processes of construction and interpretation," Cavers prefers to speak of "purposes," while Leflar opts for "choice-influencing considerations," and Professors von Mehren and Trautman denominate their approach a "functional analysis."¹² Courts rely on "forum policy," use the terms "governmental interest,"

a different factual setting, *see* *Browing v. Shackelford*, 196 So.2d 365 (Miss. 1967).

⁹ D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965).

¹⁰ R. LEFLAR, *AMERICAN CONFLICTS LAW* (rev. ed. 1968) [hereinafter cited as *Leflar*]. The five considerations are as follows:

- (A) Predictability of results;
- (B) Maintenance of interstate and international order;
- (C) Simplification of the judicial task;
- (D) Advancement of the forum's governmental interest;
- (E) Application of the better rule of law.

¹¹ *Cramton & Currie* 256.

¹² VON MEHREN & TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

"concern," "false conflict," and determine which state has the "most significant relationship" with the litigated matters, which is the test of the *Second Restatement*.¹³ Whatever the choice in terminology or approach, whenever a court deems itself free to make a reasoned choice among potentially applicable rules of decisions, with some consideration of substantive policy or at least an abandonment of mechanical rules, it should be considered to be exercising an "interest analysis."¹⁴

One caveat is important here. Most of the modern opinions combine references to significant contacts or relationships with discussions of the scope of policy, much as the New York Court of Appeals did in *Babcock*. As that case illustrates, the significant-contacts or significant-relationship test of the *Second Restatement* tends to become an interest analysis when the significance of a contact is assessed in terms of the policies underlying each state's law. In the absence of consideration of the content and purpose of the law, however, the significant-contacts test becomes a jurisdiction-selecting rule with little in common with the interest approach. The former approach is just as mechanical and subject to the same difficulties and criticism as is the sterile systematics of the vested-rights or *lex loci* approach of the traditional learning and the *First Restatement of Conflicts*.

II. *Growing Pains in New York and Wisconsin*

The experience of other state courts is instructive not only as a reflection of how the theories behind the new approaches work out in practice, but also because Illinois attorneys and Illinois courts thereby have reference poles to which they can point in advocating acceptance or rejection of, or deciding for or against adoption of, an interest analysis.

The Wisconsin Supreme Court, on the one hand, seems to have settled down and now expressly invokes Professor Leflar's choice-influencing considerations,¹⁵ after running the gamut of most of the theories. New York, as the other example, appears to have finally embraced a strict interest analysis, including weighing the policies underlying competing rules of laws,¹⁶ yet

¹³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (Proposed Official Draft, part II, 1968) [hereinafter cited as RESTATEMENT (SECOND)].

¹⁴ The most articulate of the early exponents of the interest analysis, Professor Currie, concluded that given a legitimate interest in its application, forum law *must* be applied irrespective of any countervailing interest of some other jurisdiction, without any weighing or balancing to find one more substantial or predominant than the other. *Currie* ch 4. He also urged courts to exercise restraint and moderation in determining the forum's interest and a modicum of altruism in recognizing other states' competing interests. The use of the phrase "interest analysis" in this paper, however, is *not* meant to subsume the non-balancing aspect of pristine Currie theory.

¹⁵ Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

¹⁶ Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

along the way "the Court of Appeals has hopped frenetically from one theory to another like an overheated jumping bean."¹⁷

In New York, uncertainty as to the proper approach was not limited to the classic series of guest-statute cases, more fully described below.¹⁸ In other kinds of tort cases, the bewildered reader starts in 1961 with *Kilberg v. Northeast Airlines*,¹⁹ where it was held that Massachusetts law governs liability for a New Yorker's death in an airplane crash in Massachusetts, but the Massachusetts death damage limitation was not applied on the grounds that it was procedural and contrary to New York public policy. A year later in *Davenport v. Webb*,²⁰ the "procedural" basis for *Kilberg* was abandoned, but the court found that the foreign law respecting pre-judgment interest in a wrongful death case was substantive and not contrary to New York public policy. In 1965 in *Long v. Pan American World Airways*,²¹ the death act and survival statute of Pennsylvania rather than Maryland were applied to the death of Pennsylvania passengers killed when a plane disintegrated in flight near the Delaware-Maryland border, the wreckage being found in the vicinity of Elkton, Maryland. The "fortuitousness" of the place of the accident was stressed, citing *Kilberg*, the "significant contacts" pointed to Pennsylvania (place where tickets purchased, survivors resident, flight origin and termination), and New York, although the state where the defendant airline was incorporated, was found to be a "neutral forum," which circumstance did not warrant the application of its substantive law or the interposition of its public policy. *Farber v. Smolack*,²² a 1967 decision, seemed to apply a hybrid doctrine, cross-breeding the "fortuity" concept of *Kilberg* and *Long* with *Babcock's* analysis of contacts in terms of policy. The court applied a New York statute, rather than a statute of North Carolina, attributing the negligent operation of an automobile to its owner in an action arising out of a North Carolina accident, where all the persons involved were domiciliaries of New York. The court took this action even though the New York statute used the term "operation and use in this state." This hybrid approach — variously known as the "center of gravity" or the "grouping of contacts" theory of conflicts — was apparently rejected a year later, when in 1968 in *Miller v. Miller*,²³ a Maine limitation on death damages was ignored in an action arising

¹⁷ *Cramton & Currie* 258-59. A chronological index of selected New York cases through early 1968 may be found in this work on pages 259-60.

¹⁸ See text *infra* at notes 30 to 39.

¹⁹ 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

²⁰ 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

²¹ 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

²² 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967).

²³ 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

from the death of a New York passenger in a car driven by a Maine resident in Maine. Because the defendant had moved to New York after the accident, Maine had no concern with protecting him from excessive liability, and therefore, no interest of Maine would be infringed upon by allowing full recovery. Party expectations were no obstacle either because the damage limitation was not the kind of statute upon which a person would rely in governing his conduct. New York, the court found, had the "predominant interest."²⁴

The treatment of the "public policy"²⁵ defense during this period is no more enlightening. In 1964, for example, in *Intercontinental Hotels Corp. v. Golden*,²⁶ a government-licensed gambling casino in Puerto Rico advanced \$12,000 in credit to a New York customer, with the result that it was promptly lost at the gambling tables. When he failed to pay, the casino sought to recover the debt in New York, which not only forbids enforcement of gambling contracts, gambling being a criminal offense there, but also allows a loser to recover from the winner in a civil action. With two judges dissenting, the court held that enforcement of a gambling debt, valid where incurred, did not so offend justice or menace the public welfare of New York that its courts must withhold aid. In a case decided a year later, another New Yorker, also on a visit to Puerto Rico, was injured when she slipped and

²⁴ Other related cases might be cited. For example, in *Thomas v. United Air Lines, Inc.*, 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973 (1969), the Court of Appeals held that actions for the wrongful death of passengers killed when a United Air Lines Boeing 727 crashed into Lake Michigan within the territorial boundary of Illinois were not restricted by the then existing Illinois \$30,000 limitation. *Thomas* is as interesting for the court's reversion to stressing the "fortuitous locality" of the accident (now possibly taken for granted in at least all airplane cases, as opposed to automobile injuries), as it is for a kind of *renvoi* reference to Illinois and federal law, indicating to the court that neither Illinois nor federal law would apply the Illinois limitation either. The *Thomas* court cited the leading "modern" Illinois conflicts case, *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966), which rejected *lex loci delicti* in the interspousal immunity context, discussed in the text at note 68 *infra*.

²⁵ It should be kept in mind that the interest analysis differs in substance and approach from the traditional doctrine permitting a court to disregard a foreign law that is contrary to local public policy. It differs since the public policy defense is just that — a "second-line defense" which the forum court generally uses as a reason to refuse to apply what it has already decided would otherwise be the applicable law. It also differs in approach, since an analysis of the "policies" of competing rules assesses in the first instance the scope and content of *all* contending rules of law, while the public policy argument is applied only to justify the application of forum law, therefore becoming an amorphous substitute for analysis of whether in fact the purpose of the contending foreign law actually does conflict with the forum law in the factual framework presented for decision. To the degree that the public policy defense is really used by the court as an "escape device" to avoid the traditional rules, it resembles the interest analysis, but only to the extent that the new approach reaches the same result in the choice of law made. Any other similarity ends there. See generally, Paulsen & Sovern, 'Public Policy' in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

²⁶ 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964).

fell in a building insured by the defendant insurance company. A unanimous court held in *Oltarsh v. Aetna Casualty Ins. Co.*,²⁷ a suit based on Puerto Rico's "direct action" statute, that Puerto Rico's contacts and interests were predominant, the issue substantive and not procedural, and the statute not contrary to New York Public policy.²⁸ New York does not allow direct action against insurance companies, and it has been held to be reversible error in a personal injury case to reveal the fact of insurance to the jury.²⁹ These two decisions, *Golden* and *Oltarsh*, should be contrasted with the *Kilberg* rejection of the Massachusetts death damage limitation, and earlier New York cases refusing to apply a foreign state's abolition of interspousal immunity,³⁰ on the grounds of forum public policy.

The classic clash of theories in New York occurred in the guest statute series of cases, beginning in 1963 with that pioneer of policy analysis, *Babcock v. Jackson*.³¹ It should be recalled that the court there rejected the *lex loci delicti* rule, and analyzed contacts in terms of policy, holding that the Ontario guest statute was inapplicable to a weekend accident in Ontario involving only New Yorkers, New York having no guest statute. The test announced, two judges dissenting, was to give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."³² In deciding to apply New York law, the court concluded that the concern of that state was unquestionably the greater and more direct than that of Ontario.

Two years later in *Dym v. Gordon*,³³ a case similar to *Babcock*, the Court of Appeals resolved what it viewed as a true conflict between New York and Colorado law in favor of the latter's guest statute, still analyzing the interests and the contacts but coming to the opposite result. The distinguishing differences seemed to be that the relationship between the New York host and guest arose in Colorado, where both were attending summer school, so that the accident, in the majority view, was not adventitious as in *Babcock*, and that because a third car was involved,

²⁷ 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

²⁸ *Contra*, *Lieberthal v. Glens Falls Indemnity Co.*, 316 Mich. 37, 24 N.W.2d 547 (1946), and *Marchlik v. Coronet Insurance Co.*, 40 Ill. 2d 327, 239 N.E.2d 799 (1968), discussed in the text at note 89 *infra*.

²⁹ *Kelly v. Yannotte*, 4 N.Y.2d 603, 152 N.E.2d 69, 176 N.Y.S.2d 637 (1958).

³⁰ *E.g.*, *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936).

³¹ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Comments on *Babcock* by Cavers, Cheatham, B. Currie, Ehrenzweig, Leflar and Reese may be found in the symposium on that case in 63 COLUM. L. REV. 1212 (1963).

³² 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

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

a policy interest in Colorado's law to provide a fund for third parties was found to exist,³⁴ although such a policy was not found to be present when Ontario's law was examined in the earlier case. The author of the *Babcock* decision dissented and was joined by two other judges.

In *Macey v. Rozbicki*,³⁵ the third major guest statute case, *Babcock* and *Dym* were "reconciled" by a sterile counting of contacts divorced from any consideration of policy. New York law was applied instead of Ontario, where the accident took place, because, the court said, the relationship between the plaintiff and defendant, both New York domiciliaries, had arisen in New York. Unlike the situation in *Babcock*, however, the automobile trip in question took place entirely within Ontario. Although this time there was only one dissent, Judge Keating's concurrence in a separate opinion was nothing less than prophetic. He argued that where the relationship arose, where the trip was to begin and end, and how short or long the visit, were irrelevant.

The only facts having any significant bearing on the applicable choice of law in guest statute cases are the residence of the parties and the place in which the automobile is insured and registered . . . since only these facts have any relation to the policies sought to be vindicated by the *ostensibly* conflicting laws. And here as in *Babcock* neither the policies of New York nor Ontario will be furthered by denying recovery.³⁶

He then discussed *Dym v. Gordon* and concluded that that case should be overruled.

In 1969 Judge Keating got his wish, for in what appears to be, at least for the time being, the penultimate foreign guest statute case in New York, he authored the opinion which in effect did overrule *Dym v. Gordon*. In *Tooker v. Lopez*,³⁷ the plaintiff's daughter and two Michigan State classmates were en route to Detroit when the car in which they were riding overturned. Both the plaintiff's daughter-guest and the defendant's daughter-driver were killed, while the other guest, a Michigan resident, was seriously injured. Plaintiff, defendant and their two daughters all resided in New York, where the automobile was registered and insured by a New York insurance company. In a wrongful death action, an affirmative defense based on the Michigan guest statute was rejected by the Court of Appeals in a 4-3 decision, holding instead that New York law should control.

³⁴ The other automobile in *Dym* was driven by a resident of Kansas, however, not Colorado.

³⁵ 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

³⁶ 221 N.E.2d at 383, 274 N.Y.S.2d at 595. (Emphasis in original.)

³⁷ 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). A useful and lengthy analysis of the *Tooker* case may be found in Comment, *Conflict of Laws — Guest Statutes — Round 4, Foreign Guest Statutes in the New York Courts*, 45 N.Y.U. L. REV. 146 (1970).

The court concluded that New York had the only real interest in deciding whether a recovery should be granted and that the application of Michigan law would defeat a legitimate interest of the forum state without serving a legitimate interest of any other state. The reasoning in *Dym* was rejected since the court now felt that guest statutes were designed to prevent fraudulent claims against local insurers and to protect local automobile owners by requiring plaintiffs to show gross negligence — which goals were not furthered under the facts either in *Dym* or the instant case.³⁸ Turning to New York policy, the court looked to that state's Compulsory Insurance Law, which makes no distinction between guests, pedestrians or other injured parties, and provides for extraterritorial coverage. Having determined the relevant purposes of the ostensibly conflicting laws, the court decided that New York not only had a stronger interest in having its law applied, but since the car was not owned by a Michigan domiciliary or insured there, the only interest.³⁹ Thus, a strict governmental interest analysis appears to have reasserted itself in New York as the governing approach to decision.⁴⁰

Nor is this approach limited in New York to guest statute or other tort cases. Trusts, decedent estate and contract cases

³⁸ The court determined that the policy of preserving the defendant's assets as a third party fund was incorrectly relied on in *Dym* since it was not supported by the statutory history and since such assets could be collected by a guest on a showing of gross negligence. 249 N.E.2d at 397, 301 N.Y.S.2d at 524. In *Babcock*, however, the Ontario guest statute then in effect was absolute — that is, no recovery was allowed in Ontario no matter how grave, gross, wilful or wanton the negligence. Presumably the *Tooker* court did not feel it necessary to consider this point, since the *Babcock* court had not yet thought of the preservation of assets purpose, possibly because no third party was involved in that accident.

³⁹ The case was considered by the majority as "one of the simplest in the choice-of-law area." 249 N.E.2d at 398, 301 N.Y.S.2d at 525. This conclusion is justified because under the interest analysis the case is considered to be a "false conflict," since the purposes and policies of only one state's law are furthered by being applied to the facts.

⁴⁰ Judge Burke, concurring in *Tooker*, pointed out that for the first time in a guest statute case the law of the place where the relationship was centered was not applied, which meant to him that the result differs according to which choice-of-law theory or approach is utilized. 249 N.E.2d at 407, 301 N.Y.S.2d at 537. If the "grouping of the contacts" theory was used, *Dym* would have to be followed, and Michigan law applied; the interest analysis is different since the resulting law is that of New York. There was, however, an appellate division case in New York where the facts were substantially the reverse of *Babcock*. Two Ontario domiciliaries had an accident while riding through New York, but the court applied New York law, denying the guest statute defense! *Kell v. Henderson*, 26 App. Div. 2d 595, 263 N.Y.S.2d 647 (3d Dep't 1966). See, Rosenberg & Trautman, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 459, 465 (1967). Unlike the *Babcock* and *Tooker* cases, the *Kell* factual situation presents in interest analysis terms a "true conflict." That is, it would not be irrational for New York to impose liability on an Ontario host for negligent conduct on its highways which involves the safety of third parties, motorists or pedestrians. New York arguably has admonitory and deterrent policies which could be applicable here. Furthermore, its compensatory policy is obviously regarded as an important one, so that an even-handed, non-discriminatory treatment of all persons injured in New York could justify

now seem to fall under the same approach. The trust and decedent estate cases got off to a shaky start, primarily because of problems in characterization and application of the varying traditional rules governing questions concerning real property, personal property and intangible personal property.⁴¹ The *Second Restatement's* emphasis on the law chosen by the parties added another interrelated element⁴² to considerations of "situs" and "domicile." Nevertheless, the governmental interest analysis adopted by a precarious 4-3 *Tooker* majority in a tort case eventually gained unanimous acceptance in non-tort cases, leading one commentator to opine that Judge Keating's approach was nothing short of "revolutionary" in that field.⁴³

The development in Wisconsin, like that of New York, dem-

an extension of compensation to Ontario people, assuming an injured New York guest or third-party New Yorker would recover there against the Ontario driver and his Ontario insurer. With an Ontario defendant, however, such a result obviously impairs Ontario's interest.

Other difficult problems for an interest analysis are suggested by the *Tooker* case. The dissent argued that the majority holding created an inconsistency, for if the other guest, a Michigan resident, were suing she would be denied recovery, while her fellow passenger in the same case is allowed recovery. The majority disagreed, indicating she might indeed be entitled to recover, at least in New York. 249 N.E.2d at 400-01, 301 N.Y.S.2d at 528. It is clear, however, that she would *not* be able to recover in Michigan, since its supreme court recently reconfirmed its across-the-board adherence to *lex loci* in *Abendschien v. Farrell*, 382 Mich. 501, 170 N.W.2d 137 (1969).

The *Babcock* majority opinion author, not surprisingly, concurred in *Tooker*, but in so doing, Judge Fuld pleaded for the Court of Appeals to establish firm guidelines in guest cases in light of their six years of experience. In order to avoid producing even more uncertainty for litigants, their lawyers and the courts, he set out some guidelines. 249 N.E.2d at 404 (N.Y. App. 1969).

Nevertheless, the majority approach in *Tooker* apparently is now being happily followed for other tort issues in the lower New York courts. *See, e.g.,* *Frummer v. Hilton Hotels International, Inc.*, 60 Misc.2d 840, 304 N.Y.S.2d 335, 340 (Sup. Ct. 1969), where the court said: "In searching for new tools for resolving conflict problems, the court has now adopted an interest analysis, as Judge Keating's recent opinion in *Tooker v. Lopez* . . . makes demonstrably clear." In *Hilton Hotels*, the English comparative negligence doctrine was selected rather than the New York contributory negligence rule in a suit by a New York tourist injured in the London Hilton.

⁴¹The 1934 Restatement refers all questions regarding immovables to the "situs" of the land. *E.g.*, RESTATEMENT (FIRST) §250. Most questions pertaining to title to or interest in movables are also referred to the situs law. *Id.* at §§255-310. Major exceptions are made for succession to movables (law of decedent's domicile) (*Id.* at §§284, 285, 303, 306), and rights of spouses in each other's property (marital domicile) (*Id.* at §§289, 290).

⁴²*See, e.g.*, RESTATEMENT (SECOND) §332 *et seq.* (law chosen by parties governs most contractual questions subject to some safeguards) and §1003 (validity of inter vivos trust of movables governed by law designated by settlor).

⁴³Baade, *Judge Keating and the Conflict of Laws*, 36 BROOKLYN L. REV. (1969).

The story starts with *Matter of Bauer*, 14 N.Y.2d 272, 200 N.E.2d 207, 251 N.Y.S.2d 23 (1964), where an Englishwoman's English exercise of a power of appointment created by a New York trust was held invalid because "the law to be applied here is the law of New York which was the donor's domicile and where there was executed the trust agreement . . ." *Matter of*

onstrates the evolutionary process in conflicts thinking. But unlike the present New York determination to use a governmental interest analysis, Wisconsin, when faced with a "true conflict," has explicitly adopted an approach whereby the court considers the five "choice-influencing considerations" of Professor Leflar, only one of which is the advancement of the forum's governmental interest.⁴⁴ In its openness and directness, and in its refusal to adopt mechanical rules, the Wisconsin approach is properly considered an interest analysis.

Wisconsin began with the *lex fori* in tort actions, which was treated as part of the law of remedies whether or not the facts

Utassi, 15 N.Y.2d 436, 209 N.E.2d 65, 261 N.Y.S.2d 4 (1965), a year later, held that Swiss law governed the right of a Swiss governmental body to the New York assets of a Swiss resident dying intestate and without heirs, because the Swiss law was one of succession, not of escheat. Then in *Wyatt v. Fulrath*, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965), a New York trust was held valid despite the law of the Spanish duke and duchess' domicile, because of the New York situs and the parties' intention that New York law govern. In *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S. 2d 10 (1967), the law of the situs determined whether the transfer by the celebrated New York congressman, Adam Clayton Powell, of Puerto Rican land defrauded a holder of a New York judgment, but New York has the "strongest interest" in the question of punitive damages.

In 1967, Judge Keating's analysis of the governmental interests went to work, with the result that the 1965 blandishments of *Wyatt v. Fulrath* were emended by his decision in *Matter of Crichton*, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967), where Louisiana's policy underlying community property law was found to be inapplicable to Louisiana personality owned by New Yorkers; therefore New York law governed the wife's testamentary interest. ("Contacts obtain significance only to the extent they relate to the policies and purposes sought to be vindicated by the conflicting laws." 281 N.Y.S.2d at 820, note 8.) The tale ends with Judge Fuld's opinion in *In re Estate of Clark*, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968), where the validity and effect of a widow's right to take against her husband's will was held to be a question governed by the law of their common domicile in Virginia, rather than the law of the situs of the bulk of the \$23,000,000 involved, which was New York. The decedent could not, by providing in his will that New York law was to govern the disposition of property there, cut off his widow's rights under Virginia law, for the reason that the forced share is a rule designed to defeat intention. *Wyatt* was found to be inapplicable since it involved *inter vivos* transactions between the husband and wife.

With regard to contracts, the extremely conceptualistic *lex loci* rules, which were supplanted in New York as early as in 1954 by one of the very first opinions to make a clean break with traditional learning by considering all relevant contacts rather than just the place of making or performance, (*Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954)), has in turn been replaced by the governmental interest analysis. *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969) (action against a New Jersey corporation to recover a finder's fee for services with respect to a corporate acquisition; the oral contract was made in New Jersey and was valid and enforceable there, but New York's statute of frauds, unlike New Jersey's, stood as a defense to the action; New York law applied on the basis of its "paramount interest" after analyzing respective interests and finding New Jersey had none; query as to result if suit brought in a New Jersey court rather than in New York.)

⁴⁴ See note 10 *supra*. Professor Leflar's approach was first set out in his article, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966). The result-selective approach inherent in the "better rule of law" consideration has engendered the most controversy in contemporary choice-of-law approaches. See, e.g., Juenger, note 3 *supra* at 213 *et seq.*

of a particular case were multi-state in nature or involved substantive or procedural issues.⁴⁵ The shift to *lex loci delicti* was made as early as 1904.⁴⁶ This mechanical rule of thumb was applied in *Buckeye v. Buckeye*,⁴⁷ an action arising from an accident in Illinois involving Wisconsin residents, with the result that the Illinois interspousal immunity law was applied. In 1959, the *lex loci* rule was rejected and *Buckeye* overruled in a case involving the same interspousal immunity issue, the celebrated *Haumschild* decision,⁴⁸ where the court evaded the undesirable result by characterizing the question as one of family law, not of tort law. As the court realized later, *Haumschild* merely substituted another mechanical rule, the law of domicile, for the equally mechanical *lex loci* approach. One case⁴⁹ overruled by *Haumschild*, for example, involving an immunity state (Illinois) couple's accident in Wisconsin, could be justified under an interest analysis. Thus, it would not be unreasonable for Wisconsin in such a case to apply its own law in light of the Wisconsin policy and interest in promoting the spread of risk, fastening liability on a moral basis of fault, and allowing the creation of a fund to repay Wisconsin creditors and medical bills, at least when the accident occurs on the state's highways.⁵⁰

Lex loci delicti was then abandoned completely in the 1965 *Wilcox v. Wilcox* decision,⁵¹ where the court opted for the law of the state with "the most significant relationship." Two years later in *Heath v. Zellmer*,⁵² the court adopted an approach based on the relative interests of the states involved, with an exhaustive analysis of the five choice-influencing considerations.⁵³ The next case after *Heath* indicated that the court had in fact actually switched to Leflar's list,⁵⁴ and shortly thereafter the same court decided *Conklin v. Horner*,⁵⁵ a true or "serious" conflict situation,

⁴⁵ The Wisconsin history through 1967 is reviewed by their supreme court in *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968), a "choice-influencing consideration" case.

⁴⁶ *Bain v. Northern Pac. R.R.*, 120 Wis. 412, 98 N.W. 241 (1904).

⁴⁷ 203 Wis. 248, 234 N.W. 342 (1931).

⁴⁸ *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). See 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). In *Haumschild*, the accident occurred in California, a community property state, injuring a Wisconsin spouse.

⁴⁹ *Forbes v. Forbes*, 226 Wis. 477, 277 N.W. 112 (1938).

⁵⁰ Such a result would accord with Wisconsin's interests as identified in the *Zelinger* case, note 45 *supra* and is argued for by Hancock in his article, note 48 *supra*.

⁵¹ 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

⁵² 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

⁵³ See note 10 *supra*.

⁵⁴ *Zelinger v. State Sand & Gravel Co.*, note 45 *supra*.

⁵⁵ 38 Wis. 2d 468, 157 N.W.2d 579 (1968). *Conklin* and the choice-influencing considerations are discussed in Juenger, note 3 *supra*, at 230 *et seq.*

in which it appeared to emphasize the "better law" rule.⁵⁶ *Conklin* is important, for prior to deciding what the "better law" is, the court made it clear that the first step was to examine the force of the relevant policies underlying the competing laws.

In *Conklin*, relief was afforded to an Illinois guest injured in Wisconsin by his Illinois host in a trip which began and was to end in Illinois and where the host's automobile was licensed and garaged in Illinois, the state where the insurance policy was issued and the insurer licensed. A "serious" conflict was presented since Wisconsin law requires only simple negligence in host-guest situations, whereas Illinois had a guest statute. Predictability and simplification of the judicial task, the court said, were of no significance in such a case, and it was obvious to the court that "the imposition of liability upon an Illinois host is not likely to reduce the likelihood that Illinois hosts will continue to drive into Wisconsin with their guests,"⁵⁷ so that maintaining interstate order is no problem, nor is Illinois likely to retaliate. The purpose of Wisconsin law was found to be compensation for those injured by negligent acts and it was the duty of the court to further the legitimate governmental policy of the forum.⁵⁸ Finally, Wisconsin's law was found to be the "better law" to apply under the circumstances because guest statutes were seen to be anachronistic vestiges of the early days of enterprise liability development and, the court felt, do not represent present-day socio-economic conditions.⁵⁹

The experience in other states could be examined. For example, a development similar to that in Wisconsin occurred in New Hampshire, where that supreme court, in expressly invoking Professor Leflar's choice-influencing considerations, emphasized the "sounder rule of law."⁶⁰ California's progress under the

⁵⁶ The court quoted from the *Zelinger* case, note 45 *supra*, which indicated that Wisconsin "would apply the law of a non forum state if it were the better law." 38 Wis. 2d at 484, 157 N.W.2d at 587.

⁵⁷ 38 Wis. 2d at 481, 157 N.W.2d at 585.

⁵⁸ By applying the Wisconsin law in *Conklin*, the court openly recognized that the Illinois policy of protecting the host and his insurer was being defeated and that its decision meant that those whom Illinois would shield would be answerable in damages. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

⁵⁹ Two justices dissented, concluding that Wisconsin had given paramount if not controlling emphasis to the fifth consideration, the better law, contrary to earlier cases in the same court which, they thought, made it clear that none of the considerations standing alone would be considered controlling. 38 Wis. 2d at 486, 157 N.W.2d at 588. Professor Leflar, himself, intended no priority from the order of listing. See note 44 *supra*.

A "significant relationship" and "grouping of the contacts" approach was formally adopted by Wisconsin in resolving a *contract* issue, no examination being made of the choice-influencing considerations. *Urhammer v. Olson*, 39 Wis. 2d 447, 159 N.W.2d 688 (1968).

⁶⁰ *Clark v. Clark*, 107 N.H. 351, 355, 222 A.2d 205, 209-10 (1966) (a guest-statute case, considered "easy" under the interest analysis, since it presented a *Babcock* fact situation — parties residing at the forum which had no guest statute, injured in an accident in a guest-statute state). For

steady and realistic guidance of Justice Traynor is also worthy of note.⁶¹ Illinois is also *allegedly* an interest analysis state,⁶² an assertion which will now be examined.

III. The "Revolution" Comes to Illinois

The most that can be said from a close reading of the three "modern" Illinois Supreme Court cases through late 1970 is that the vested rights, *lex loci* theory has been rejected outright *only* in the interspousal immunity area.⁶³ Whether it is the "significant relationship," "center of gravity" approach of the *Second Restatement* or the state with the "predominant interest" standard which has replaced *lex loci* in interspousal tort actions is less clear. Whether *lex loci* and the traditional learning has been abandoned in *any other kind* of action, tortious or otherwise, has not yet been decided, at least not by the Illinois Supreme Court. The two subsequent conflicts type cases reaching the highest state court resulted in the employment of disparate techniques in resolving the issues presented for decision. The rejection of a suit based on the Wisconsin direct action resurrected the old shibboleth of the second line public policy defense,⁶⁴ while one of the law professor's favorite hypotheticals — the out-of-state accident, forum-state dram shop act — utilized nothing more complex than statutory construction.⁶⁵

The lower courts in Illinois have therefore been in a state

the earlier New Hampshire evolution paralleling Wisconsin, *see* Gray v. Gray, 87 N.H. 82, 174 A. 508 (1934); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Dow v. Larrabee, 107 N.H. 70, 217 A.2d 506 (1966).

⁶¹ Leading Traynor conflict opinions include Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (a "surprise characterization" of survival statutes in order to apply California law); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (emphasizing party expectations and statutory construction to avoid a conflict); Reich v. Percell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (analyzing interests to find no true conflict). *See, generally,* the justice himself in *Is this Conflict Really Necessary?* 37 TEX. L. REV. 657 (1959), and the symposium on the Reich case in 15 U.C.L.A. REV. 551, note 1 *supra*.

⁶² Comment, 45 N.Y.U. L. REV., note 37 *supra*, at 153, note 49; Thomas v. United Air Lines, Inc., 24 N.Y.2d 724, 249 N.E.2d 755, 301 N.Y.S.2d 973, 979 (1969); Manos v. Trans World Airlines, 295, F. Supp. 1170, 1173 (N.D. Ill. 1969).

One writer, however, apparently, assumes that Illinois is still a *lex loci delicti* state, and after examining the recent Illinois tort cases urges the Illinois Supreme Court to resist any change in light of the New York experience. Waxman, *Conflict in Illinois Courts on Choice of Law Theory in Torts — Is It Lex Loci Delictus or Substantial Interest?* 59 ILL. B.J. 212 (1970).

⁶³ Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966), discussed *infra*.

⁶⁴ Marchlik v. Coronet Ins. Co., 40 Ill. 2d 327, 239 N.E.2d 799 (1968), discussed *infra*.

⁶⁵ Graham v. General U.S. Grant Post No. 2665, V.F.W., 43 Ill. 2d 1, 248 N.E.2d 657, *reversing in part*, 97 Ill. App. 2d 139, 239 N.E.2d 856 (1968), discussed *infra*.

somewhere between mild and considerable confusion.⁶⁶ The federal district courts, on the other hand, have a tendency to oversell the interest analysis when they are making an *Erie*-type guess.⁶⁷ The result, then, is that like many other kinds of revolutions, the conflict, one which began in 1966 in Illinois, bubbles along mainly at a level somewhere below the establishment.

Ironically enough, the case that started it, and, at least at this writing ended it, did not as a matter of actual fact involve a conflict with a sister state's law at all. *Wartell v. Formusa*⁶⁸ was an action brought by an Illinois wife against her deceased Illinois husband's estate for injuries incurred by his allegedly wilful and wanton misconduct⁶⁹ which resulted in an automobile collision while they were "passing through" Florida. Illinois law provides for interspousal immunity by statute,⁷⁰ while Florida prohibits such actions by common law.⁷¹ Nevertheless, the court found that it was necessary to determine which state's law was applicable because of a claim that both were unconstitutional. Illinois law was selected:

We can think of no reason why Florida law should control the question whether a husband and wife domiciled in Illinois should be able to maintain an action against each other for a tort committed during coverture. The fact that the alleged tortious act took place in Florida is of no significance in determining which law should govern the determination of this issue. The law of the place of the wrong should of course determine whether or not a tort has in fact been committed, but the distinct question of whether one spouse can maintain an action in tort against the other spouse is clearly a matter which should be governed by the law of the domicile of the persons involved Illinois has the *predominant interest* in the preservation of the husband-wife relationship of its citizens, and to apply the laws of Florida to the question of whether

⁶⁶ See, e.g., the Second District's opinion in *Graham*, note 65, *supra*, and in *Ingersoll v. Klein*, 106 Ill. App. 2d 330, 245 N.E.2d 288 (1969); and the First District's opinion in *Kabak v. Thor Power Tool Co.*, 106 Ill. App. 2d 190, 245 N.E.2d 596 (1969), *appeal dismissed* by the Illinois Supreme Court.

⁶⁷ A federal court in a diversity action is required to apply the law, including the conflict of law rules, of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). In this connection, then, see the incorrect *Erie* guess in *Swanson v. Badger Mut. Ins. Co.*, 275 F. Supp. 544 (E.D. Ill. 1967), and query as to the judgment in *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1166 (N.D. Ill. 1968) [hereinafter cited as *Manos I*], and *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170 (N.D. Ill. 1969) [hereinafter cited as *Manos II*], both cases discussed at note 110 *infra*.

⁶⁸ 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

⁶⁹ No doubt Mrs. Wartell alleged wilful and wanton misconduct to cover herself in the eventuality she was successful in first overcoming the interspousal immunity defense. Illinois statutory law requires in a guest-host situation that "wilful and wanton misconduct" be proved in order to collect. ILL. REV. STAT. ch. 95½, §9-201 (1969).

⁷⁰ ILL. REV. STAT. ch. 68, §1 (1969) (" . . . neither husband nor wife may sue the other for a tort to the person committed during coverture.").

⁷¹ *Amendola v. Amendola*, 121 So.2d 805 (Fla. App. 1960); *Corren v. Corren*, 47 So.2d 774 (Fla. 1950).

interspousal tort suits may be permitted between residents would be illogical and without sound basis. This position has been adopted by the Restatement Second of Conflict of Laws, Tentative Draft No. 9, par. 390g, which provides in part that "whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicile." An increasing number of courts have also held this to be the better reasoned view [citing among other leading cases, *Babcock* and *Haumschild*]. We also adopt this view⁷²

It should be immediately obvious that the court's choice of Illinois rather than Florida law is sound and can hardly be faulted. The rejection of *lex loci delicti* in an intra-family tort situation where the accident occurs outside the family domiciliary state is to be applauded in *Wartell's* factual context. The domicile of the parties is at least a relevant "contact" with reference to the purposes and policies of a state law regulating the rights of family members *inter sese*, while an interspousal rule at the place of accident can hardly be said to be one which indicates an interest in regulating conduct on its highways. Thus, the *Wartell* resolution is good law, not bad, and sound in result.

But contrast the technique used in achieving such a result. The law of the domicile is now said to govern the capacity to sue in husband-wife and probably other intra-family tort actions. *Lex loci* may have been replaced by a rule which is just as mechanical in application and just as "jurisdiction-selecting" in approach. The interspousal question is referred to the domicile as the state with the "predominant interest" without discussion of the content or the policy of that law. This is not an interest analysis and it is likely to result in hard cases. It is suggested that some guidance for the hard cases should have been given. Three examples should suffice.

The determination of domicile is not always easy for it is an extremely elusive concept,⁷³ yet the Illinois courts will henceforth be required to determine it in many cases where it was theretofore considered immaterial.⁷⁴ Will the elusiveness objection be met by substituting a factual concept of "settled residence,"⁷⁵ to cover the large number of married couples who may have a technical domicile in Illinois but are in other states for extended

⁷² 34 Ill. 2d at 59-60, 213 N.E.2d at 545-46. (Emphasis added.)

⁷³ The elaborate systematics of the RESTATEMENT (FIRST) took thirty-three sections to define it. *Id.* at §§9-41.

⁷⁴ This was a complaint leveled at the majority opinion by a concurring judge in the Wisconsin Supreme Court's opinion in *Haumschild*, which applied the domicile law in a parallel interspousal immunity case. 7 Wis. 2d 130 at 142, 95 N.W.2d 814 at 820. See note 48 *supra*.

The statement in the text should not be taken to mean that domicile should not become more relevant than it was under the traditional approach. In the interest analysis, it is clearly one of the most potentially relevant contacts there is.

⁷⁵ See *Currie* ch. 3.

periods, when accidents occur and that state has abolished interspousal immunity? Some marrieds, for example, are students at colleges and universities, some stationed in Illinois or elsewhere for military duty, some on temporary job assignment and, as in *Wartell*, some on vacation. And what about married couples who are separated, and live in different states? What, in *Wartell's* terms, is "the law of the domicile of the persons involved."⁷⁶

A serious problem arises in this context when the question presented is whether the domicile law forbidding suits between spouses applies to a third party defendant in a non-immunity state seeking a right to contribution against the negligent husband whose wife has been injured by them both. An early case arising shortly after Wisconsin adopted the domicile rule in *Haumschild*, is instructive since the Wisconsin Supreme Court felt constrained to follow *Haumschild* and applied the Illinois law to the interspousal phase of a complaint against the Illinois husband. Thus, the Wisconsin defendant and his insurance company were deprived of a right to contribution from the husband, while the Illinois wife was permitted to sue the Wisconsin joint tortfeasor for damages arising out of an accident in that state.⁷⁷ Recognizing that such a decision undermined the Wisconsin policy allowing contribution between joint tortfeasors, while the opposite result would not impair any interest of Illinois in forbidding suits between married couples, since the Illinois wife is not in court against her husband, the Wisconsin court in a later choice-influencing case, and on an interest analysis basis, in effect reversed itself.⁷⁸

It was long the general rule that the right of one tortfeasor was governed by the law of the place of the tort.⁷⁹ Interestingly enough, analysis of the facts and factors on this issue, by applying the modern conflicts approach, effectuates the same result, but only if a mechanical domicile rule is rejected, as the latter Wisconsin decision did.⁸⁰ The point is that the contribution case

⁷⁶ 34 Ill. 2d at 59, 213 N.E.2d at 545.

⁷⁷ *Haynie v. Hanson*, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

⁷⁸ *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968). See note 80 *infra*. The result was foreshadowed in a guest statute contribution case, *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967), which also applied the law of the forum state where the accident occurred.

⁷⁹ Annot., 95 A.L.R. 2d 1096 (1964).

⁸⁰ In *Zelinger*, the plaintiffs, a husband and his minor daughter who were riding in the family car which the mother was driving at the time it collided with a truck in Wisconsin, were Illinois residents. In their action against the Wisconsin truck owner and his insurer, the latter sought contribution from the wife and her insurer. Wisconsin law was found to be applicable to the contribution cause of action, by reference to the five choice-influencing considerations: the Wisconsin defendants were entitled to the benefits of the Wisconsin law of contribution and the subsidiary rules upon which it rested, that is, the questions of interspousal-parental immunity and host-guest limitations, which were available defenses in Illinois but not Wisconsin, were subsidiary issues upon which contribution stood or fell, since

introduces entirely different considerations since the risk of husband and wife collusion against a liability insurer is not present in an action for contribution.⁸¹

A third problem for the Illinois courts in particular and the system in general can be seen by reference to a post-*Wartell* possibility in light of the Wisconsin court's recent decision in *Conklin v. Horner*.⁸² It will be recalled that the *Conklin* court resolved what it found to be a "serious" conflict in favor of Wisconsin's simple negligence law, as opposed to the Illinois "wilful and wanton" guest statute, where an accident in Wisconsin involved an Illinois host and guest. If the *Wartell* rejection of *lex loci* is extended to an issue other than interspousal actions, it certainly would not be surprising to see such an extension of the domicile principle to a host-guest case where two Illinois domiciliaries cross one of the state lines for an afternoon's spin and are involved in an accident there.⁸³ Nor would this be an undesirable result if an Illinois registered automobile insured by an Illinois insurance company were involved in an accident involving no out-of-state parties or residents. Such a result would surely coincide with the *Babcock-Tooker* development in New York and be applauded by the *Second Restatement*, which opts for the local law of the "common domicile."⁸⁴

Conversely, it is not difficult to imagine Wisconsin extending

in Wisconsin contribution must be based on joint or common liability; Illinois interest in preservation of family integrity was not seen to be in jeopardy and its guest statute and immunity policies would not be infringed upon by applying Wisconsin law; Wisconsin interests, however, are advanced; forum shopping was not a problem since the accident took place in Wisconsin, a logical place to sue in light of convenience to witnesses and the existence of the forum's direct action statute.

⁸¹ For an early case not purporting to follow the modern rule, but holding that the purposes of interspousal immunity are not relevant to a third-party complaint, emphasizing the accident-state's interest in its residents and their insurers, see *LaChance v. Service Trucking Co.*, 215 F. Supp. 162 (D.C. Md. 1963).

⁸² The case is discussed in the text at note 55 *supra*.

⁸³ *Cf.* the reasoning of the Illinois appellate court in a post-*Wartell* case involving an accident on the Iowa side of the Mississippi River, the only Iowa "contact" in the case. *Ingersoll v. Klein*, 106 Ill. App. 2d 330, 245 N.E.2d 288 (1969), *motion for leave of appeal granted* (No. 42152). The Illinois and not the Iowa Wrongful Death act was found to supply the governing law, *lex loci delicti* being rejected as too mechanical a rule when all the parties to the law suit were Illinois residents, no citizen of Iowa was involved, and Illinois as the forum state and domicile of the potential beneficiaries advances its "more significant interest" and policy with no harm to Iowa interests. The choice-influencing considerations were alluded to, but the opinion also has elements of a sterile and quantitative rather than qualitative contact counting reminiscent of the *RESTATEMENT (SECOND)* formulas (*i.e.*, sole eye witness an Illinois citizen, people arriving on the scene all from Illinois, photographer an Illinois resident, the places where Illinois defendant drank prior to the accident were Illinois establishments). 106 Ill. App. 2d at 337, 245 N.E.2d at 292.

⁸⁴ Likewise, 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 may be determined by the local law of their common domicile, if at least this is the state from

Conklin v. Horner to an accident on its highways involving an Illinois married couple, since it has already applied Wisconsin law to afford relief to the Illinois guest injured there by his Illinois host. This result is all the more likely in light of the Wisconsin view that guest statutes are anachronistic vestiges of the early days. It is difficult to believe that the same "better law" concept would not be utilized to prefer the Wisconsin law allowing recovery to spouses injured on Wisconsin highways rather than the Illinois immunity law, especially in light of the almost universal existence of liability insurance.⁸⁵

If either of the above-positated cases comes to pass, it is clear that the system would be caught in a log jam. The result in either case then depends on whether the suit is brought in Wisconsin or neighboring Illinois. Uniformity, predictability of results, and certainty are down the drain, and forum shopping probably the inevitable result. Faced with such a dilemma, one forum court must defer to the other potential forum, or reinterpret the policies and interests underlying its law. It is therefore suggested that the domiciliary principle not be fashioned in such a way so as to become too universally applicable.

One solution for such an arguably intractable problem, for example, would be for Illinois to construe its guest statute as not applying to accidents which occur outside the state. On the other hand, a Wisconsin court could find that its dual policy favoring compensation for parties injured on its highways and deterrence of negligent conduct there would not be seriously impaired by adopting the domicile rule for the Illinois couple only visiting within its borders. Better yet, Illinois, as one of the few remaining states with the interspousal prohibition, could revoke the statute, just as it did when it recently phased out the death damage limitation applicable to accidents occurring within the state.⁸⁶ Finally, the forum court might well be in a position to dismiss such a case on the basis of *forum non conveniens* if

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 injury occurred.

RESTATEMENT (SECOND), Part II §145, Comment d.

⁸⁵ Ironically, a Wisconsin court squarely faced with such a situation, would, in order to apply its own law, have to retract its overruling of the *Forbes* case discussed at note 49 *supra*. *Haumschild*, in its "lump-sum" adoption of the new domicile rule in interspousal cases, expressly overruled the earlier *Forbes* decision, which had applied Wisconsin law as the *lex loci delicti* to allow an Illinois wife to recover against her Illinois husband. *Haumschild*, however, involved Wisconsin domiciliaries injured in an immunity state, so that in light of the post-*Haumschild* approach to conflict cases now in effect in Wisconsin, it would not be difficult for a Wisconsin court to reinstate *Forbes*, but for different reasons than *lex loci delicti*.

⁸⁶ Wrongful Death Act, ILL. REV. STAT. ch. 70, §§1-2 (1969).

the accident occurred out of state and witnesses were more readily available in the other interested locale.⁸⁷

The foregoing remarks should not be read as a criticism of the Illinois Supreme Court's action in the *Wartell* case. Obviously the result reached, as indicated, is to be applauded, and it is true that in slightly unchartered seas as well as in well-known ones, a court is only deciding one case at a time, the one before it. The *Wartell* court did not indicate in fact that it was doing anything more. But therein lies the rub, as well as the fun, for the next court, the commentators, and the litigants and their lawyers.

By citing the *Second Restatement* with approval, by mentioning *Babcock* (which after all was a guest statute case and not an interspousal one like the other cases listed), and by finding Illinois as the state with the "predominant interest" in the issue presented, the court in *Wartell* was soon viewed by others as adopting an interest analysis approach,⁸⁸ or at least a "dominant interest" test, rather than as only making an exception to the otherwise applicable dictates of *lex loci delicti*. It is not at all clear whether the sign posts were being misread or not. Two years later, however, the Illinois Supreme Court, without so much as mentioning *Wartell*, raised the spectre of the public policy defense in a case involving the Wisconsin direct action statute.

The 1968 reversion to *lex loci* occurred in *Marchlik v. Coro-*

⁸⁷ Such a procedure was the preference of two of the Illinois justices who concurred in the result reached by the court in the context of a direct action statute. *Marchlik v. Coronet Ins. Co.*, 40 Ill. 2d 327, 334, 239 N.E.2d 799, 803 (1968).

⁸⁸ The *Wartell* case, it should be pointed out, soon developed a certain notoriety as a leading case in the choice-of-law field, as a review of the cases citing it in the digests indicates. Nor did the law reviews or scholars fail to notice it. See Comment, note 37 *supra*; Juenger, at 202 n. 8 and 203 n. 9, note 3 *supra*; *Crampton & Currie* 254; Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV., 377 (1966).

Important cases sometimes categorizing and sometimes discussing *Wartell* outside of Illinois, adopting an interest analysis approach unless otherwise noted, include *Reich v. Purcell*, 69 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (death damages); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966) (parental immunity); *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968) (interspousal immunity); *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968) (interspousal immunity); *Abendschein v. Farrell*, 11 Mich. App. 662, 162 N.W.2d 165 (1968), *aff'd on different grounds*, 382 Mich. 510, 170 N.W.2d 137 (1969) (guest statute, rejecting new learning at least in automobile cases); *Mitchell v. Craft*, 211 So.2d 509 (Miss. 1968) (contributory or comparative negligence in a wrongful death action); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969) (guest statute); *Thomas v. United Airlines*, 24 N.Y.2d 714, 249 N.E.2d 755, 301 N.Y.S.2d 973 (1969), *cert. denied*, 396 U.S. 991 (1969) (death damages); *Brendle v. General Tire & Rubber Co.*, 408 F.2d 116 (4th Cir. 1969) (survival statute and death damages, following rejection of new learning in application of North Carolina law).

net Insurance Co.,⁸⁹ where the court refused to apply to an automobile accident occurring in Wisconsin a Wisconsin direct action statute, which permits suit to be brought against an insurer without first obtaining a judgment against the insured notwithstanding a clause in the insurance policy specifically forbidding such an action. Here, both the plaintiff-rider and the driver of the other automobile were Wisconsin residents,⁹⁰ the plaintiff's host a Michigan resident, and the insurance policies, both containing "no action" clauses, issued in Illinois by Illinois insurance companies. Illinois has no specific legislation either allowing or prohibiting such direct actions against insurance companies. The Illinois Supreme Court's framing of the issue and its approach was nothing short of antediluvian in interest analysis terms.

For the court, the issue to be considered was whether the public policy of Illinois precluded a direct action against an insurer where the policy sued on had a "no action" clause and when the "statutory law of the place where the tort occurs"⁹¹ allowed such an action. In order to pursue this issue, the court first characterized the Wisconsin statute as "substantive" rather than "procedural" by primarily examining Wisconsin decisional law, an approach contrary to the general rule prevailing in Illinois that a forum will use its own internal law to determine such a question.⁹² The court then apparently characterized the liability under the Wisconsin statute as a matter of tort, rather than that of contract.⁹³ The court indicated, however, that even

⁸⁹ 40 Ill. 2d 327, 239 N.E.2d 799 (1968). The case was included in a symposium reviewing the Illinois Supreme Court work in that year's term, *Conflict of Laws: Illinois Tort Choice-of-Law Problems Move Toward Further Confusion*, 64 Nw. U. L. Rev. 841 (1970).

⁹⁰ The insured's automobile was registered in Wisconsin and the injured party also received hospital and medical care there. Neither drivers were named as defendants in the suit against the insurance companies.

⁹¹ 40 Ill. 2d at 329, 239 N.E.2d at 801. The court indicated this was the issue "as stated by the parties." *Id.* Having answered the question in the affirmative, it then decided that such a result was not precluded by the full-faith-and-credit clause of the United States Constitution. A post-*Marchlik* decision involving a Louisiana judgment obtained against one of the same Illinois insurers involved in *Marchlik*, under Louisiana's direct action statute, was sued upon in Illinois and enforced pursuant to the full-faith-and-credit clause mandate. *Employer's Liability Assurance Corp. v. Coronet Ins. Co.*, 106 Ill. App. 2d 24, 245 N.E.2d 629 (1969).

⁹² *Millsap v. Central Wisconsin Motor Transp. Co.*, 41 Ill. App. 2d 1, 189 N.E.2d 783 (1963); *Wetzel v. Hart*, 41 Ill. App. 2d 371, 190 N.E.2d 619 (1963); *cf.* *Jackson v. Shuttleworth*, 42 Ill. App. 2d 257, 192 N.E.2d 217 (1963).

⁹³ Characterization of an issue as being one in tort rather than contract, or contract rather than tort, is a classic escape or manipulative device under the traditional system. Vicarious liability is the usual casebook example. See, e.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928). One of the "characterization" cases discussed by the *Marchlik* court — Justice Traynor's opinion for the California court in *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953) — was misread in intention and spirit, as Professor Currie's analysis of *Grant* would have made clear to the Illinois judges. *Currie* ch. 6.

The characterization process, it should be pointed out, cannot, and in-

this was an oversimplification, for if entertaining the cause required application of the substantive Wisconsin law, in accordance with the traditional *lex loci* doctrine, contrary Illinois public policy might still forbid enforcement of the action.⁹⁴ After examining Illinois statutory and decisional law, the court found that in fact this was the case, so that Illinois courts could not be used as the forum for cases under the Wisconsin direct action statute.⁹⁵

As suggested earlier,⁹⁶ the public policy defense bears very little resemblance to an analysis of a state's "policies" and "interests" under the modern approach. *Marchlik* is a good example of how they differ. If, for example, the court were relying on the Illinois ban against informing a jury of insurance, its reasoning is probably questionable in light of the almost universal knowledge of the existence of automobile liability insurance, a point made by the New York Court of Appeals in *Oltarsh v. Aetna Ins. Co.*,⁹⁷ where the opposite result on the public policy point was reached in a Puerto Rico direct action statute case. Other relevant Illinois policies and interests could have been cited, however, which would have justified the *Marchlik* result. Illinois, for example, might have an interest in protecting domestic and foreign insurance companies doing business in the state, an interest which would be contravened by applying Wisconsin law, thus removing the protection of no action clauses in the

deed should not, be avoided in any approach to choice-of-law questions. The process has a close parallel in another important result of the interest analysis approach — the separation of issues. Such a separation was appropriately made by the Illinois Appellate Court in *Kabak v. Thor Power Tool Co.*, 106 Ill. App. 2d 190, 245 N.E.2d 596 (1969), one of the "modern" Illinois cases, albeit not in the state's highest court. In *Kabak*, the court applied Ohio law to the issue of an Illinois defendant manufacturer's right of contribution against the injured plaintiff's Ohio employer. This issue, taken in the abstract, seemed to bear a close relationship, in terms of policy, to the more protective Illinois rule. However, the court in reaching its decision referred to the Ohio rule, on the theory that the indemnity-contribution issue was in effect subsidiary to the underlying issue of tort liability between the Ohio plaintiff and Ohio employer, which, since the accident took place in Ohio, was obviously referenced to Ohio law.

The *Kabak* court's opinion, however, was somewhat confused in its attempt to determine the appropriate guidelines for decision in the case before it. Thus, the Court combined *Marchlik's* public policy pronouncements with the wide-open interest analysis, choice-influencing considerations approach of the *Graham* dram shop act appellate court opinion (later reversed on appeal and discussed in the text at note 102 *infra*) in concluding that "in Illinois the *lex loci delicti*, or law of the place of the wrong, generally governs where the substantive rights of the parties will be affected, provided there is no compelling public policy of this state to the contrary." 106 Ill. App. 2d at 179, 245 N.E.2d at 601. The substantive discussion which preceded and followed this announcement, however, mechanically counted contacts, citing the SECOND RESTATEMENT'S "most significant relationship" test.

⁹⁴ 40 Ill. 2d at 330, 239 N.E.2d at 801.

⁹⁵ 40 Ill. 2d at 333-34, 239 N.E.2d at 803.

⁹⁶ See note 25 *supra*.

⁹⁷ 15 N.Y.2d 111, 256 N.Y.S.2d 577 (1965), discussed at note 27 *supra*.

large number of insurance policies issued here.⁹⁸ The point is, if the court had framed its decision in terms of modern conflicts analysis, it might well have decided *Marchlik* the same way, but for sounder reasons.

Even if *Marchlik* is deemed to be an illustration of "the difficulties inherent in a broad application of the public policy concept in conflict of laws cases,"⁹⁹ at least the Illinois Supreme Court clarified its position as to suits based on out-of-state direct action statutes. A subsequent diversity action involving an *Illinois resident* injured in a Wisconsin collision, for example, received the same even-handed treatment in the Seventh Circuit.¹⁰⁰ The question is whether in so clarifying its position, the court further confused the choice-of-law problem in Illinois.

In a model interest analysis opinion rejecting the strict *lex loci* rule, an appellate court applied the Illinois Dram Shop Act¹⁰¹ extraterritorially so as to afford relief to an Illinois resident against Illinois tavern owners, the injury being inflicted by an Illinois drunken driver a short distance within the Wisconsin state boundaries. The appellate court opinion in *Graham v. General U.S. Grant Post No. 2665*,¹⁰² which was decided at about the same time as *Marchlik*, thereby employed a favorite technique in the modern arsenal of conflicts analysis — statutory construction. Having determined that the Dram Shop Act should be so applied to the precise factual circumstances before it, the court found that this result conflicted with the traditional *lex loci* choice of law rule followed in earlier Illinois dram shop cases.¹⁰³ Consequently, an exhaustive analysis of the applicable learning led the appellate court to conclude that:

. . . an identification of the choice-influencing considerations will aid in the ultimate achievement of predictability for some type of

⁹⁸ See *Nw. U. L. Rev.* at 843, note 89 *supra*.

⁹⁹ The quote is from a pre-*Wartell lex loci* decision applying Wisconsin law. *Millsap v. Central Wisconsin Motor Transp. Co.*, 41 Ill. App. 2d 1, 22, 189 N.E.2d 783, 793, 803 (1963), where the court in effect rejected the view that the Wisconsin comparative negligence law was contrary to Illinois public policy as expressed by its contributory negligence rule.

¹⁰⁰ *Reichus v. Maryland Cas. Co.*, 411 F.2d 776 (7th Cir. 1969). One year prior to *Marchlik*, however, a federal district court reached the opposite result, making an *Erie* guess that Illinois would enforce the Wisconsin direct statute in favor of an Illinois resident injured in Wisconsin suing two Wisconsin insurers. *Swanson v. Badger Mut. Ins. Co.*, 275 F. Supp. 544 (1967). See note 67 *supra*.

¹⁰¹ ILL. REV. STAT. ch. 43, §135 (1969). The situs state, Wisconsin, does not have a dram shop act, nor is there any equivalent common-law liability under that state's law.

¹⁰² 97 Ill. App. 2d 330, 239 N.E.2d 856 (1968).

¹⁰³ See, e.g., *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); *Butler v. Wittland*, 18 Ill. App. 2d 578, 153 N.E.2d 106 (1958). A useful analysis of 90 years of Illinois experience in dram shop act cases may be found in a comment urging the extraterritorial application of the Illinois statute. *Conflicts of Law Problems and the Extraterritorial Operation of the Illinois Dram Shop Act*, 1958 ILL. L. FOR. 287.

transactions. Thus, it would seem advisable for each decision to forthrightly assert the basic factors underlying its rationale.

In the case at bar, Illinois is the state having the dominant interest

Illinois has such an interest in the welfare and protection of its citizens and those dependent upon them, and has such an interest in regulating the evils attendant with the liquor traffic and the redress of injury or loss of support arising therefrom, that its courts should, under the circumstances of this case, give extraterritorial effect to the Illinois Dram Shop Act. Such action would give protection to justified expectations, enforce the fundamental policy underlying the Dram Shop Act, and would render justice in the case.¹⁰⁴

Nor did the court stop there, for it announced the guidelines it would follow and why:

Future determinations of the choice of law rule to be applied in kindred cases should therefore be governed by the choice-influencing considerations suggested herein and by other similar and pertinent factors, which permit analysis of the policies and interests underlying the particular issue before the court.

Our fast changing and moving era with its attendant new social and economic problems, requires a re-evaluation of the choice of law rule in multistate tort situations, to the end that such rule will be made for the people and problems of today. The nice tidy perfection of uniformity and simplicity should not prevail over elementary choice-influencing considerations, public policy, decency and justice.¹⁰⁵

On appeal, a unanimous Illinois Supreme Court reversed.¹⁰⁶

To the higher court, the problem presented was not one of conflict or choice of law in the usual sense at all. In effect, the court felt there was no conflict between Illinois and Wisconsin law since both rejected liability under the facts presented. The Supreme Court, like the appellate court, thus used the same technique — statutory construction — but reached a different result, finding that the Illinois act was not intended by the legislature to apply to any accident occurring outside the state. Almost as an aside, the Court did admit that a number of courts, including its own, had approved and adopted the “center of gravity” or “significant relationship” rule “in common law tort actions brought by one member of a family against another, where the injury occurred in a state other than the family’s domicile.”¹⁰⁷ *Graham*, however, presented a different situation than that present in *Wartell*, the dispositive question for the court being the extraterritorial effect of the Illinois Dram Shop Act.

¹⁰⁴ 97 Ill. App. 2d at 153-54, 239 N.E.2d at 863. *Accord*, *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957).

¹⁰⁵ 97 Ill. App. 2d at 154-55, 239 N.E.2d at 863-64.

¹⁰⁶ 43 Ill. 2d 1, 248 N.E.2d 657 (1969).

¹⁰⁷ 43 Ill. 2d at 4, 248 N.E.2d at 659, citing and quoting from the *Wartell* opinion.

Although both *Graham* opinions utilize statutory construction in resolving the issue presented,¹⁰⁸ obviously, the considerations differ according to whether a conflict is found or not. To the appellate court, the "conflict" was not with another state's conflicting law or policy, but with the *lex loci* doctrine. To the Illinois Supreme Court, there was no conflict between competing rules of law, nor, in such a view of the case, was it therefore necessary to specify how it would resolve such a conflict if there were one, or to indicate how a court should choose between conflicting approaches where in fact a real choice-of-law question is presented.¹⁰⁹

It may well be, therefore, that the apparent reluctance of the Illinois Supreme Court to indicate more openly where it stands will result in further confusion here. None the less, by focusing on the "predominant interest" language of *Wartell*, the United States District Court for the Northern District of Illinois has made it clear that it not only knows where Illinois law has been, and therefore what doctrine to apply sitting in diversity cases, but also is willing to establish interest analysis "guidelines," at least for determination of the issues arising from one of those multi-state disasters. Two extremely interesting opinions emanated from essentially the same proceedings in five consolidated cases.¹¹⁰ All of the cases arose out of the crash, on November 23, 1964, in Rome, Italy, of a Boeing 707 jet airliner operated by TWA. Widows, minors, administrators, executors and an injured passenger who survived were involved on one side and defendant TWA and the manufacturer, Boeing Company, on the

¹⁰⁸ In holding the Dram Shop Act without extraterritorial effect, the Illinois Supreme Court emphasized two canons of statutory construction: the presumption that when a statute is silent as to extraterritorial effect, it has none (*e.g.*, *Union Bridge & Constr. Co. v. Industrial Comm.*, 287 Ill. 396, 122 N.E. 609 (1919)), and that subsequent inaction by the legislature confirms the correctness of prior judicial interpretation (*e.g.*, *Republic Steel Co. v. Industrial Comm.*, 26 Ill. 2d 32, 185 N.E.2d 877 (1962)).

¹⁰⁹ Troublesome questions might arise if the *Graham* facts are changed only in that the accident occurs across the Iowa state line instead of Wisconsin, since Iowa does have a dram shop act. Iowa Dram Shop Act §129.2. The effect of the Iowa statute and its common law rule was an issue in *Liff v. Haezbroeck*, 51 Ill. App. 2d 71, 200 N.E.2d 525 (1964). If both acts are interpreted as not having any extraterritorial application (Illinois — when the accident is out-of-state; Iowa — because the tavern owner is out-of-state), the result is striking. No recovery is allowed in a situation where if the two mentioned factors are attributable to one or the other state, the injured plaintiff collects. In *Waynick v. Chicago's Last Dep't Store*, 269 F.2d 322 (7th Cir. 1959), the court apparently ruled out any application of the Michigan Liquor Control Act or the Illinois statute on non-extraterritorial effect grounds, but allowed recovery since the place of accident provided for a common law cause of action. *Cf.* the dubious reasoning on the common law count in a related case where the accident state was Indiana. *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963).

¹¹⁰ *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1166 (N.D. Ill. 1969) (*Manos I*); *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170 (1969) (*Manos II*).

other. Probate in California and Arizona, releases executed in Kansas and California, and Greek and Canadian residents and heirs were also factors. In *Manos I*, it was found that if an Illinois court had been called on to determine the effect of releases executed in various states, the law of the heirs' or injured party's domiciliary state, as the case might be, would be selected, despite the fact that the release was executed in some other state.¹¹¹ In *Manos II*, the court held in effect that where Illinois nonresidents were suing the airplane manufacturer, the law of Italy applies on the issue of whether a tort occurred. The law of Italy also applied on the issue of the applicable statute of limitation; the law of those states "most interested" will be applied on the damage issue in "true conflicts," which the court indicated would generally be the state where probate was pending or, for injured plaintiffs, their domiciliary state. Finally, the law of the state of Washington (*i.e.*, where Boeing delivered the plane under contract to TWA) applied on the alleged claim of breach of express or implied warranty.¹¹²

The proliferation of issues and potentially applicable state laws in the multi-nation disaster case like *Manos I* and *Manos II* should not dishearten either the reader or the Illinois courts. After all, as a close reading of these two opinions will reveal, it appears that the district court seems to be on the right track here, even if some reservations could be made.¹¹³ Other cases could be posed — instead of TWA, it could just as well have been an Alitalia flight¹¹⁴ — which are not easily resolved. Nevertheless, it is the hard cases that the courts are called upon to resolve in some rational manner, and hopefully Illinois will not for too long forego the opportunity.

IV. Conclusion¹¹⁵

We appear to have come a little more than a full circle, at least in one sense. Starting with the automobile accidents in *Bab-*

¹¹¹ Under traditional Illinois contract conflicts law, the law of the state of the place of execution applies to govern the question of the effect of such a release on a joint tort-feasor. See, *e.g.*, *Woodbury v. United States Cas. Co.*, 284 Ill. 227, 120 N.E. 8 (1918).

¹¹² The warranty point follows a well-established Illinois conflict principle announced in an important product liability case. *Hardman v. Helene Curtis Indus., Inc.*, 48 Ill. App. 2d 42, 58-63, 198 N.E.2d 681 (1964).

¹¹³ For example, in *Manos II* at 1173-74 n. 2, one of the suits involved two next of kin from California, while the decedents' mother, father, and half-sister were Washington residents. On the death damage issue, then, the fact that the probate is in Arizona is arguably irrelevant under an interest analysis. How, then, if that is what is required, can a court decide between California and Washington, assuming the laws are in conflict?

¹¹⁴ See, for example, *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandeuse*, 350 F.2d 468 (D.C. Cir. 1965) (Brazilian death damage limitation of 100,000 cruzeiros (\$170.00!), D.C. forum and deceased's domicile in Maryland no limitation).

¹¹⁵ Credit is again due here to *Cramton & Currie*.

cock and *Wartell v. Formusa*, and the Nantucket, Massachusetts airplane crash in *Kilberg*, this paper ends with the complications of the multi-state, multi-nation *Manos* disaster in Rome, where of necessity the court was faced with not only tort issues but those of contract as well. I would think the implications of this excursion for at least Illinois litigants and their attorneys are clear: since judicial acceptance of the new learning is by no means certain, the careful lawyer must be prepared to argue all the various theories, traditional and modern, in support of his case.

On the other hand, no one has abandoned the teaching of the traditional theory, nor should they. Quite apart from jurisprudential considerations, as far as a personal preference is concerned, one must first admit that the interest analysis is not perfect. Like other methods of approaching choice-of-law questions, it has its flaws. But it has the cardinal virtue of recognizing that to the extent laws are adopted and rules of decision laid down in order to accomplish social goals, they should be applied so as to carry out their purpose, whether the case is multi-state in nature or not. Once this much is recognized openly, it is hoped that rational solutions to cases of true conflict may then become possible.