Predictability Versus Flexibility: The Conflict in Conflict of Laws

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Conflict of laws abounds with great complexity, uncertainty, and confusion.\(^1\) The myriad problems that can arise have proliferated in recent decades as a direct result of the interstate mobility that man has achieved through modern transportation. This has caused a corresponding increase in the legal consequences flowing from the transactions and occurrences in which persons participate. The purpose of this Note is to focus upon the legal significance of interstate activities as they affect tort liability. In particular, the question sought to be answered relates to the choice of which law a forum should apply when faced with a multi-state occurrence resulting in injury.

The policies and principles employed to justify the application of foreign law have been the object of scholarly attention for many years.\(^2\) The essential purpose of applying the law of another jurisdiction rather than the forum's own law stems from the forum's desire to attain a uniformity of decision no matter where the cause of action is maintained.\(^3\) This result, if achieved, will prevent the

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\(^2\) Story explained the application of foreign law as based on the "comity" theory:

\textit{A state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories. It may prohibit some foreign laws, and it may admit the operation of others. It may recognize, and modify, and qualify some foreign laws; it may enlarge, or give universal effect to others. It may interdict the administration of some foreign laws; it may favor the introduction of others. \textit{Story, Conflict of Laws} 34 (4th ed. 1852).}

Mr. Justice Holmes, in Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904), advocated the "vested rights" theory:

\textit{The theory \ldots is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation \ldots which, like other obligations, follows the person, and may be enforced wherever the person may be found. \ldots But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation \ldots but equally determines its extent. \textit{Id.} at 126.}

The "local law" theory was expressed by Learned Hand, District Judge, in Direction Der Discont o-Gesellschaft v. United States Steel Corp., 300 Fed. 741 (S.D.N.Y. 1924):

\textit{It is indeed commonly said that, when a court must consider the legal effect of events happening elsewhere, it enforces foreign law. That I conceive is a compressed statement, which it is at times useful to expand. Of necessity no court can enforce the law of another place. It is, however, the general law of all civilized peoples that, in adjusting the rights of suitors, courts will impute to them rights and duties similar to those which arose in the place where the relevant transactions occurred. \textit{Id.} at 744.}

\(^3\) See Cheatham, \textit{American Theories of Conflicts of Laws: Their Role and Utility},
litigants from "forum shopping" for a jurisdiction most favorable to their position.\textsuperscript{4} Once a determination is made that a state other than the forum is involved in a transaction or occurrence, then the question presented is whether or not this fact requires the application of foreign law.\textsuperscript{5}

I. THE PREVAILING VIEW:
THE PLACE OF INJURY GOVERNS

A. \textit{Lex Loci Delicti: Rationale}

Whenever a tort is committed and contacts with a state other than the forum are present, a possibility of conflict arises.\textsuperscript{6} Traditionally, the courts have held that the law of the place of injury will govern the liability of the parties concerned.\textsuperscript{7} This application of law is based upon the vested rights theory of a cause of action: that the right to recover for a foreign tort is created by and dependent upon the law of the jurisdiction where the tort occurred.\textsuperscript{8} Those who espouse the vested rights approach consider it best to determine the legal effects of a foreign occurrence in this manner since it affords certainty and ease in application.\textsuperscript{9} If the place of


\textsuperscript{5} See Goodrich, \textit{Yielding Place to New: Rest Versus Motion in the Conflict of Laws}, 50 COLUM. L. REV. 881 (1950), in which he suggests the criteria which should be employed in the choice of law problems. He stresses the necessity of vigilance in conflict of laws to keep abreast of the complex changes occurring in the modern world.


\textsuperscript{7} This view is in accord with \textit{RESTATEMENT, CONFLICT OF LAWS \S 377 (1934)} which states: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Moreover, the subsequent section states: "The law of the place of wrong determines whether a person has sustained a legal injury." \textit{Id. \S 378 (1934)}.

\textsuperscript{8} As early as 1923, the rejection of the vested rights theory was suggested by Judge Learned Hand:

\textit{[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only evoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. Guinness v. Miller, 291 Fed. 769, 770 (S.D.N.Y. 1923), aff'd sub nom. Hicks v. Guinness, 269 U.S. 71 (1925).}

\textsuperscript{9} See Cavers, \textit{Comment: The Two "Local Law" Theories}, 63 HARV. L. REV. 822, 823-24 (1950) for an explanation of the "vested rights" approach and the criticism by Judge Hand and Professor Cook which led to its rejection.

\textsuperscript{10} \textit{CARDozo, THE GROWTH OF THE LAw (1924)} states that judicial development
injury is a foreign jurisdiction, the forum will look only to the substantive law of that state to determine the rights of the parties, all procedural determinations being made by the forum.\footnote{See, e.g., Otey v. Midland Valley R.R., 108 Kan. 755, 197 Pac. 203 (1921); Kaufman v. American Youth Hostels, Inc., 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).}

It appears upon initial consideration that this technique presents a reasonable basis upon which a choice of applicable law can be made due to its inherent predictability and certainty.\footnote{See Cheatham & Reese, \textit{Choice of the Applicable Law}, 52 \textit{COLUM. L. REV.} 959, 969 (1952); Comment, \textit{61 COLUM. L. REV.} 1497 (1961).} This is true, however, only if all elements of the occurrence originate in one state and the applicable foreign law presents no conflict with the public policy of the forum state. If there is a multi-state occurrence, the rigid application of the place of injury loses its effectiveness,\footnote{Yntema, \textit{The Hornbook Method and the Conflict of Laws}, 37 \textit{YALE L.J.} 468 (1928). The author states: "The vice of the vested rights theory is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved . . . ." \textit{Id.} at 482-83.} for pragmatically, where a number of jurisdictions have contact with the occurrence, each will have some degree of interest in the outcome of the litigation, and therefore a predetermined reference to the place of injury can and most often will produce an unfair and harsh result.\footnote{257 S.W.2d 465 (Tex. Civ. App. 1953).}

\subsection*{B. Unjust Results by Use of the Place of Injury}

A leading case illustrating the inequities flowing from the prevailing "place of injury" test is \textit{Carter v. Tillery}.\footnote{Id. at 466.} All the parties were residents of Texas, and the accident occurred during an airplane flight from New Mexico to Texas. The plane deviated from its course and was forced to land on a dirt road in Mexico. In attempting to take off, the plane crashed, causing physical injury to one of its passengers. A suit alleging negligence was brought in Texas. The court held that it did not have jurisdiction, finding that the law of Mexico applied since it was the place of injury.\footnote{Id.} However, since the remedies provided by Mexican law were so dissimilar, the court lacked jurisdiction, refused to hear the case, and the plaintiff was without a remedy.\footnote{Ibid.}
Similarly, in *Walton v. Arabian Am. Oil Co.*, the plaintiff, a citizen and resident of Arkansas, was injured in Saudi Arabia by the defendant's truck. The defendant was incorporated in Delaware, licensed to do business in New York, and engaged in business in Saudi Arabia. Evidence was presented from which it was inferable that under New York law, the defendant was negligent. However, the plaintiff did not allege Saudi Arabian law nor did he offer to prove it. The court held that since the place of injury was Saudi Arabia, it was incumbent upon the plaintiff to plead and prove the foreign law, and since he had failed to do either, the directed verdict of the trial court was affirmed.

In both *Carter* and *Walton*, the reference to foreign law involved the determination of the law of a foreign country. Nevertheless, the problem of inequitable results can arise where there are interstate contacts and the arbitrary choice of law is the place of injury. For example, in *Alabama Great So. R.R. v. Carroll*, the plaintiff, a resident of Alabama, was employed by the defendant railroad, an Alabama corporation operating a line from Chattanooga, Tennessee, through Alabama to Meridian, Mississippi. The plaintiff, a brakeman on a train running from Birmingham, Alabama, to Meridian, was injured in Mississippi when a link between two cars broke. The defendant's inspector had failed to examine the links at the journey's starting point in Alabama. Mississippi permitted no recovery due to their acceptance of the common law fellow-servant doctrine, but by statute in Alabama such recovery was permissible. The court concluded that there could be no re-

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18 233 F.2d 541 (2d Cir. 1956).
20 In Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940), an action for wrongful death was brought in a federal district court in New York. The deceased died in Ohio as a result of eating unwholesome canned meat which he had purchased in Ohio. The defendant, a New York distributor, had secured the meat from a concern which had processed and canned it in South America. The defendant sold the product to a wholesaler in Ohio who in turn sold it to the grocer from whom the deceased had purchased the item. An Ohio statute made it negligence per se to sell unwholesome food without disclosure of that fact to the buyer. Held: Plaintiff may recover by showing a violation of the statute and need not prove lack of due care. Thus, in many cases the place of injury rule works quite well.
21 97 Ala. 126 (1892).
22 Id. at 134. The present statute, under the state's workmen's compensation plan, also abrogates the common law fellow-servant defense unless the employer elects to come under the plan and the employee does not. See ALA. CODE, tit. 26, §§ 254, 256 (1958).
covery since the injuries were sustained in Mississippi even though the negligent act occurred in Alabama. 23

The hardship embodied in this type of result is more apparent when the practicalities of such a decision are examined. For example, if the accident in the Alabama case had occurred at a different point along the track, perhaps only a few minutes prior, the plaintiff could have recovered, assuming he was fortunate enough to be present in a state permitting recovery at the moment of injury. This fact alone does not seem sufficient to justify use of the vested rights theory as a basis for the determination of rights and liabilities. 24

C. Vagueness of the Substantive-Procedural Characterization

The possibility of an unjust result is not the only weakness inherent in the prevailing view. The determination of what is substantive and what is procedural presents numerous inconsistencies. 25 If uniformity of result is the main justification for adhering to the place of injury rule, this dichotomy has not proven an effective means of attaining uniformity. 26 The characterization as substantive or procedural is always made by the forum in its own terms and according to its own standards. 27 However, the diversity of opinion as to what is substantive or procedural indicates that the courts will manipulate this device most often to avoid the "place of injury" rule where its application would be unreasonable. 28

28 97 Ala. at 140.
25 See text accompanying note 31 infra.
26 For a clarification of this assertion, see text accompanying notes 60-74 infra.
27 See RESTATEMENT, CONFLICT OF LAWS §§ 584, 585 (1934). See also Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 344 (1933) in which he suggests the following test to determine whether a given rule of law is to be considered substantive or procedural: "How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?" Cf. Comment, 47 HARV. L. REV. 315 (1934).
28 This was apparent in Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), where the plaintiff and others were injured in Arizona when their car collided with the automobile of the deceased. The subsequent negligence action, brought in California, sought damages from the administrator of the deceased's estate. Under Arizona law, the survival of the action would not be permitted; however, California law is to the contrary. Judge Traynor spoke for the court and asserted that the characterization as substance or procedure is made according to the nature of the problem for which the characterization must be made. Id. at 865, 264 P.2d at 948. Though there was contrary authority which characterized "survival of actions" as substantive, Judge Tray-
The New York courts became the leaders in what might be called the decline of the *lex loci delicti* test. What had been done in *Grant v. McAuliffe* was furthered and expanded by the New York Court of Appeals in *Kilberg v. Northeast Airlines, Inc.* However, like the California court in *Grant*, the New York court merely undermined the place of injury rule without rejecting it completely. The court rejected holdings asserting that the measure of damages was a question of substantive law and expressed its desire to promote the interests of its state in spite of demands for uniformity and predictability.

Immediately following *Kilberg*, a federal court was faced with the same problem in a diversity case, and on rehearing the court adopted the *Kilberg* approach, stating that the question for decision was whether a federal court sitting in New York could constitutionally "apply" a Massachusetts statute creating a right of action nor implied that each case must turn on its own peculiar facts. See Traynor, *Is This Conflict Really Necessary?,* 37 Texas L. Rev. 657, 670 (1959), where he says his decision in *Grant* was based on the impressive contacts with California.


It is usually assumed that in connection with the tort of interfering with advantageous contract relations, as in connection with torts generally, the governing law is supplied by the law of the place where the tort occurs. . . . But the grounds of logic, history, convenience and policy which support the doctrine in many cases, particularly cases of physical injury, are not appropriately invoked in every type of case. Different torts may be governed by different principles of conflict of laws . . . . And the conflict of laws rules governing even the particular tort of interference with advantageous contractual relations may depend upon what type of contract relationship is said to have been impeded. *Id.* at 324.

This type of reasoning cannot be considered a rejection of the place of injury test; rather it constitutes a weak attempt to retain the rule in form yet circumvent its substantive rigidity.

29 41 Cal. 2d 859, 264 P.2d 944 (1953). See also authorities cited note 28 supra.


31 In *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962), the court retracted the "procedural" basis of the *Kilberg* decision. The cited case concerned an action for the wrongful death of New York domiciliaries who were involved in an automobile collision in Maryland. A New York statute (N.Y. DECED. EST. LAW § 132) provides that a judgment for the plaintiff in a wrongful death action shall include interest from the date of death. Maryland law does not authorize pre-judgment interest. The court of appeals held that the New York statute could not properly be applied to provide for the inclusion of interest in the judgment and that the *Kilberg* decision "must be held merely to express this state's strong public policy with respect to limitations in wrongful death actions." *Id.* at 395, 183 N.E.2d at 904, 230 N.Y.S.2d at 20.

32 *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131 (2d Cir.), rev'd on rehearing, 309 F.2d 553 (2d Cir. 1962). The action concerned the same airplane crash involved in *Kilberg* and again the claim was made that the Massachusetts limitation on recovery should govern since it was the place of injury.

for wrongful death and yet refuse, because of New York state policy, to follow a provision of the statute which would limit the amount of recovery. The court held that New York had sufficient interests in the multi-state transaction so that the state could exercise the power to develop a conflict of laws doctrine, and it was further held that the failure to recognize the Massachusetts limitation was not a violation of the full-faith-and-credit clause of the United States Constitution. In support of its position, the court cited Supreme Court decisions holding that either the state in which the impact occurs — usually considered the locus of the tort — or (where different) the state in which the wrongful act or omission occurs, may constitutionally apply its wrongful death law to the transaction.

A number of other cases have resolved similar problems by employing the technique utilized in Kilberg and Pearson v. Northeast Airlines, Inc. These decisions have upset the "desired uni-

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34 Id. at 555.
35 Ibid. The forum state's interest in the multistate transaction may be relevant not only to the state's constitutional right to apply its own law but also to its choice of law, if it follows the significant contacts theory rather than mechanical choice of law rules.
36 Id. at 563, citing Richards v. United States, 369 U.S. 1 (1962).
37 Id. at 15.
38 See Gore v. Northeast Airlines, Inc., 222 F. Supp. 50 (S.D.N.Y. 1963) which also involved a suit for wrongful death resulting from the same plane crash. In this case the decedent, his widow, and their infant children had been domiciled in New York. One month after the accident the widow and children moved to Maryland, where they acquired a domicile. The district court found that if the suit had been brought in Maryland, the Maryland courts would have applied the Massachusetts measure of damages. The court applied the Massachusetts, rather than the New York, measure of damages, stating that the New York courts would not have afforded the widow and children better treatment than they would receive from the courts of their own state, which was freely chosen as their domicile long before this suit was commenced. Id. at 54. In Turner v. Capitol Motors Transp. Co., 214 F. Supp. 545 (D. Me. 1963), an action for wrongful death arose out of an automobile accident in Massachusetts. Both decedents were Maine residents, and the defendant was a Massachusetts corporation. Since the time of Kilberg, the Massachusetts wrongful death statute had been amended to limit recovery to twenty thousand dollars. The court did not directly pass upon the merits of Kilberg. It held that Massachusetts law should be applied since the Massachusetts limitation upon the amount of recovery in wrongful death could not be considered contrary to the policy of Maine which limited recovery in wrongful death actions to thirty thousand dollars.
39 As a footnote to the Pearson decision, Judge Kaufman in his dissent discussed Kilberg and said:
It may still be argued that in Kilberg, by striking one of the Massachusetts rules governing liability, the court left a vacuum on the question of limitation which could not prevent a plaintiff from recovering in excess of the missing $15,000 limit. A more attractive explanation is that once the court struck the limitation provision, it filled the resulting void with a rule of law allowing unlimited recovery, created by the court on the model of the New York
formity” which the vested rights theory is supposed to generate.\(^\text{40}\) This departure was not made without purpose, and it is obvious that the courts were merely seeking to avoid the consequences envisioned in situations similar to Carter and Walton.\(^\text{41}\) The substance-procedure device therefore became a handy tool to engraft a legal fiction or exception upon the lex loci delicti concept while still claiming adherence to its basic principle.

D. Various Interpretations of the “Place of Injury”

The prevailing view has another weakness which the courts exploit, when necessary, to apply the law of a jurisdiction other than the actual situs of the injury. This is accomplished by treating the place of “conduct” as the situs of the wrong and then applying that jurisdiction’s law.\(^\text{42}\) A recent Minnesota decision refused to follow the Restatement view\(^\text{43}\) and instead applied the law of the place of the tortious conduct, stating that this “would be more in conformity with principles of equity and justice.”\(^\text{44}\) The court considered Minnesota’s interests in the transaction and concluded that the defendant was not burdened by any greater responsibility than was intended by the statute.\(^\text{45}\) A Massachusetts alienation of affec-

wrongful death statute. Although this may be a matter of semantics, since the result is the same under either analysis, I have chosen the latter theory because it is more conducive to the constitutional analysis. Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 141 (2d Cir.) rev’d on rehearing, 309 F.2d 553 (2d Cir. 1962).

\(^{40}\) See text accompanying notes 15-18 supra. It is evident from the diversity of opinions that the courts recognize the pitfalls of the traditional place of injury rules.

\(^{41}\) Ibid.

\(^{42}\) See Burkett v. Globe Indem. Co., 182 Miss. 423, 181 So. 316 (1938), which was overruled by McArthur v. Maryland Cas. Co., 184 Miss. 663, 186 So. 305 (1939). A direct action statute controlled, based on where the negligent conduct occurred rather than the place of injury, which did not recognize the right. A fairly recent action, Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957), involved the proprietor of a Minnesota establishment who had sold alcohol to a person whose intoxicated condition was alleged to have been the proximate cause of the injuries the plaintiff sustained in a Wisconsin automobile accident. Minnesota has a dram shop act, MINN. STAT. ANN. § 340.45 (1957), permitting a civil action against an innkeeper, although Wisconsin does not; therefore, the defendant claimed that since Wisconsin was the place of injury, its law should govern the substantive rights and liabilities of the parties. Schmidt v. Driscoll Hotel, Inc., supra at 379, 82 N.W.2d at 367.

\(^{43}\) See note 7 supra.

\(^{44}\) Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 380, 82 N.W.2d 365, 368 (1957).

\(^{45}\) Id. at 381, 82 N.W.2d at 368. Here all the parties were residents of Minnesota, and the defendant was licensed under its laws and required to operate its establishment in compliance with those laws. The violation of the Minnesota statute occurred in Minnesota, and the wrongful conduct was complete within this state when the individual became intoxicated before leaving the establishment.
tion action, Gordon v. Parker, was cited by the court to support its decision. There the plaintiff and his wife were domiciled in Pennsylvania; the alleged wrongful conduct occurred in Massachusetts. The court applied its own law by characterizing the "wrong" as occurring in Massachusetts. As dictum the court identified the policies of each state, asserting that Pennsylvania, the domicile of the parties, had an interest, but it was outweighed by the interests sought to be furthered in Massachusetts, the place of the wrongful conduct.

Thus, like Kilberg, the court in Gordon recognized that policy considerations should enter into the resolution of conflicts of laws. The two cases differed in the manner of avoiding the place of injury concept, but their rationales were identical. Thus, by considering the wrong as having occurred in a place other than the actual situs of the tort, a fair and equitable result was achieved.

E. Reclassification

As the courts gradually engrafted exception after exception upon the traditional rule so as to justify the use of a jurisdiction other than the place of injury for choice of law purposes, a more subtle approach was devised to accomplish the same result. Denominated reclassification, this approach is in fact merely another method of characterization but not of the same type as employed in Kilberg, for it involves the characterization of a given problem as one not arising out of tort. As a result, a new conflicts principle is brought forward using law other than that of the place of the injury.

One of the early cases to use this technique involved a collision in Massachusetts caused by the alleged negligence of the Connecticut defendant who had leased the car to the driver. If the place of injury rule were applied, there could be no recovery. However, the Connecticut forum characterized the problem as a "contract of leasing" entered into in Connecticut. Further, the Connecticut

47 Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 381-82, 82 N.W.2d 365, 368-69 (1957).
48 83 F. Supp. at 42.
50 There is perhaps more validity to this analysis than is found in the "substance-procedure" type of characterization. The wide diversity of opinion with respect to the latter is much more obvious.
51 See, e.g., Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).
statute permitting recovery from the automobile’s owner for its negligent operation by another was said to have become part of the contract when executed.

Other cases have reclassified the basic problem from tort to family law in determining the question of intra-family immunity. In *Haumshild v. Continental Cas. Co.*, the Wisconsin court rejected the view of the first *Restatement* and applied the law of the domicile, thus overruling a long line of cases. Wisconsin permitted one spouse to sue the other, whereas California, the place of injury, prohibited such suits. Therefore, the court characterized the problem as one of family law and applied the standard rule that the law of the domicile governs such matters.

II. THE INCEPTION OF THE NEW RULE: GROUPING OF CONTACTS THEORY

It is apparent that the decisions invoking legal niceties to avoid the place of injury rule leave the traditional approach devoid of any real effect. The various means employed to circumvent the rule evidence the need for a radical departure. The substance-procedure device merely skirts the issue by seemingly retaining the lex loci delicti but avoiding its application through the forum’s inherent right to make the characterization as it sees fit. Similarly, the public policy defense utilized by a forum adds confusion and perpetuates legal fictions. As these same inadequacies are present in the reclassification method, it is not surprising that dissatisfaction with the place of injury as the sole reference in tort conflict questions has been under serious attack.

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56 7 Wis. 2d 130, 95 N.W.2d 814 (1959). A Wisconsin wife sued her husband for injuries sustained in a California motor truck accident.
57 See note 7 supra.
58 7 Wis. 2d at 138-39, 95 N.W.2d at 818. The court in Shaw v. Lee, 258 N.C. 698, 129 S.E.2d 303 (1964) asserted that the *Haumshild* decision did not overrule *Buckeye v. Buckeye*, 203 Wis. 248, 234 N.W. 342 (1931) because the former dealt with the capacity to sue rather than with the existence of a cause of action. The language of *Haumshild* seems to indicate otherwise. Both cases involved the right of the wife to sue her husband.
A. Rejection of Lex Loci Delicti

It was not until 1963 that a clear rejection of the prevailing view emerged. A New York court in *Babcock v. Jackson*\(^6^0\) announced the "grouping of contacts" theory. The significance of this decision lies in its express refusal to follow the traditional approach to conflict of laws or to compromise with the approach by invoking further exceptions to the outdated rule.\(^6^1\) In *Babcock* the plaintiff and defendant, both residents of Rochester, New York, left Rochester in the defendant's car for a trip to Canada. While driving in Ontario the defendant lost control of the vehicle and it subsequently careened into a wall, injuring the plaintiff. Ontario law provided that the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers, is not liable for any loss or damage resulting from injury to, or the death of, any person being transported in the motor vehicle.\(^6^2\) The court rejected the *lex loci delicti* rule for its failure to consider the implications arising from relevant policy considerations.\(^6^3\) The court found support for this concept in *Kilberg* which stressed public policy\(^6^4\) and also in *Auten v. Auten*\(^6^5\) wherein the court had rejected the traditional conflicts rule for contracts and adopted instead a grouping of contacts test.\(^6^6\) Further support was afforded by the *Restatement*\(^6^7\) which now rejects the *lex loci delicti*

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\(^6^1\) Id. at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751-52.

\(^6^2\) ONT. REV. STAT. c. 172, § 105(2) (1960).

\(^6^3\) 12 N.Y.2d at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746-47.

\(^6^4\) The use of public policy to determine the conflict of laws is particularly evident in *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935), where Mr. Justice Stone stated:

> The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and there was the danger that they might become public charges, both matters of grave public concern to the state.

> California, therefore, had a legitimate public interest in controlling and regulating this employer-employee relationship . . . . [T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight. . . . [O]nly if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California the right to apply the laws of their own state. *Id.* at 542-49.


\(^6^6\) *Id.* at 160-61, 124 N.E.2d at 101-02.

\(^6^7\) *Restatement* (Second), *Conflict of Laws* § 371 (Tent. Draft No. 8, 1963).
rule and adopts instead the general rule that the "local law of the state which has the most significant relationship with the occurrence and the parties determines their rights and liabilities in tort."^{68}

Relying primarily on these authorities, the court in *Babcock* held that the law to be applied in resolving a particular issue in a tort action with numerous jurisdictional contacts is "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."^{69} Arriving at its conclusion as to which jurisdiction had the greatest concern with the issue of a driver's liability to his passenger for ordinary negligence, the court examined the contacts and relationships of the parties with New York and Ontario. It was pointed out that while the accident did occur in Ontario, both the parties were New York residents, the host-guest relationship arose in New York, the car was registered and insured in New York, and the trip was to begin and end in New York.

The court then evaluated these contacts in light of the underlying policies of New York and Ontario with regard to their respective tort rules concerning the liability of a driver to his passengers. The policy behind the Ontario statute was stated to be the protection of Ontario insurers against fraudulent claims.\(^71\) Since neither an Ontario insurer nor an Ontario resident was involved, the court reasoned that Ontario had no concern with that issue.\(^72\) The court asserted that New York, on the other hand, had a policy requiring a negligent driver to compensate his injured guest.\(^78\) On the basis of the contacts and policies, the court held that New York had the greatest concern and that its law applied to the issue of the driver's liability to his injured guest for ordinary negligence.\(^74\) This decision shifted the primary focus away from the place of injury test, although it remains one of the relevant factors to be

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^{68} Ibid.

^{69} 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

^{70} Defining "contacts" for purposes of applying the test has apparently produced few real problems. Traditionally, contact points have been defined as the factual elements of a transaction that connect it with various jurisdictions. See *Von Mehren & Trautman, The Law of Multistate Problems* 103 (1965).

^{71} 12 N.Y.2d at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

^{72} The court stated, however, that because of a jurisdiction's interest in regulating conduct within its borders, Ontario law would determine the issue of whether or not the defendant's conduct was negligent. *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

^{78} Ibid.

^{74} *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.
considered in determining the choice of law. A close reading of the Babcock opinion underscores the necessity for a fundamental and exhaustive policy analysis. This is evident from the court's determination that a distinction is necessary when considering the question of host liability as opposed to his duty of care.

With respect to the rights and liabilities which spring from the host-guest relationship, the court asserted that such a relationship should remain constant rather than change as the parties enter or leave a particular jurisdiction. A practical consideration underlying this thesis involves the question of insurance and assumes the host will obtain insurance protection that will be adequate under the non-changing law where his insurer can calculate the premium commensurate with the risk.

The Babcock concept elicits a rationale which on the surface seems almost mechanical and quantitative but which is in fact an excellent tool designed for flexibility. The initial step in its use involves a determination of the contacts which a particular state may have with the transaction. Such factors as the place of injury, the domicile of the parties, and the place of the negligent conduct will all be considered.

Second, the court must determine the policy underlying the law of each state to determine whether there is truly a conflict of laws or whether only one state is affected. If this policy determination focuses only upon one party, then the law with that contact would be applied. If the focus is upon more than one, the court must then weigh each accordingly. If it should occur that both states' interests are equal, then a reversion to a jurisdictional-selecting rule can be utilized; for example, the law of the forum or the law of the place of injury may be used.

B. A Source of Concern

The main criticism of the new approach is the charge that it

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76 See note 72 supra.
77 In Kilberg the court asserted that "modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move." 9 N.Y.2d at 39, 172 N.E.2d at 527, 211 N.Y.S. 2d at 135.
79 See material cited note 88 infra.
lacks certainty and predictability. It is said that the courts will not be consistent in analyzing the various state interests and will lead this already complex problem down the path to the swamp of further confusion. Ironically, New York, the first state to give impetus to the new theory, was the first to be subjected to this accusation as a result of its decision in *Dym v. Gordon.* The case was almost identical to *Babcock* in its operational facts. The plaintiff and defendant were New York domiciliaries temporarily residing in Colorado as summer students at the University of Colorado. They had traveled to Colorado separately and had made no prior arrangement that the plaintiff would ride in the defendant’s automobile, which like the vehicle in *Babcock* was registered and insured in New York. The plaintiff, accepting a ride with the defendant, was injured when the defendant failed to observe a stop sign and collided with a Kansas driver.

Under Colorado law an automobile guest injured in an accident is precluded from recovering damages from his driver unless the accident is due to an intentional act on the part of the driver or is caused by his negligence or wilful and wanton misconduct. Under the applicable New York law, the passenger can recover if not contributorily negligent. The court, citing *Babcock,* held that Colorado law applied, thus precluding recovery.

The majority opinion evaluated the underlying policies as was done in *Babcock* and concluded that Colorado had three which deserved recognition: the protection of Colorado drivers and insurance carriers against fraudulent claims; the granting of injured parties in other cars priority in the assets of a negligent driver; and the prevention of suits by ungrateful guests. They asserted that in light of these policies, the contacts gave Colorado the “greatest concern” with the issue of the driver’s liability for ordinary neglig-

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80 See Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963), where the court refused to depart from the old rule and asserted: “We do not deem it wise to voyage into such an uncharted sea, leaving behind well established conflict of laws rules.” *Id.* at 616, 129 S.E.2d at 293.


85 16 N.Y.2d at 124, 209 N.E.2d at 797, 262 N.Y.S.2d at 466.

Therefore, despite the common domicile of the parties, the registration and insurance of the car, and despite New York's policy of requiring a negligent driver to compensate his injured passengers, the result opposite from that in Babcock was reached. The label of inconsistency has been applied to these two decisions and is a source of much gratification to the critics of the grouping of contacts method. On the surface there does appear to be a direct conflict, and this argument has been made. However, the two cases can be distinguished on the operational fact of

87 Id. at 128, 209 N.E.2d at 796, 262 N.Y.S.2d at 469.
88 Id. at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 470. While the "most significant relationship" rule of the Restatement (Second) is similar to the "greatest concern" rule of Babcock, the two rules are not identical. Restatement (Second), Conflict of Laws § 379-79a (Tent. Draft No. 8, 1963), which was cited in Babcock, states:

§ 379. The General Principle

(1) The local law of the state which has the most significant relationship 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 most significant relationships 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 involved.

§ 379a. Personal Injuries.

(1) When the actor's conduct and the personal injury occur in the same state, the local law of this state determines, almost invariably, the rights and liabilities of the parties.

Under Babcock's facts, the "important contacts" would be split 2-2. Although the comments to § 379 state that the courts will consider the importance of the contacts in the order listed, it still would be possible to apply New York law under the Tent. Draft No. 8 rule by stressing § 379(3) and deemphasizing the comments and § 379a(1). The result reached by the court of appeals in Dym could easily be reached under Tent. Draft No. 8 since the contacts would be split 3-1 in favor of Colorado. Reaching this result, however, would involve stressing the very parts (the comments and § 379a(1)) which would have to be deemphasized to reach the Babcock result. Under Tent. Draft No. 9, promulgated after Babcock, it is easier to reach the Babcock result and more difficult to reach the Dym result than it is under Tent. Draft No. 8. This is true because § 379a is liberalized so that it provides only that the law of the place of the wrong governs "unless some other state has a more significant relationship."

89 Judge Fuld, the author of the Babcock opinion, dissented in Dym, stating that he could see no material factual distinction between the two cases. He contended that nothing turned on the place of formation of the host-guest relationship or upon the fact that the parties were temporarily living in the foreign jurisdiction instead of simply traveling through it as in Babcock. 16 N.Y.2d at 129-30, 209 N.E.2d at 797, 262 N.Y.S.2d at 471. Chief Judge Desmond's separate dissenting opinion stressed the need to apply the New York public policy requiring a negligent driver to compensate his injured passengers. Id. at 134, 209 N.E.2d at 800, 262 N.Y.S.2d at 475-76. Judge Bergan concurred with both dissenting opinions.
residence. In *Babcock* the plaintiff and defendant left the state together with the intent to return immediately to New York. This in no way weakened the domicile state's interest. However, in *Dym*, they left the permanent residence of New York separately and established a temporary residence in Colorado while attending school, thus giving Colorado a primary interest in the protection of its temporary residents. The fact that the plaintiff and defendant were residing in Colorado is easily distinguished from the fortuitous presence of the parties in *Babcock*.

C. Extension of Babcock

Subsequent to *Dym*, New York extended the *Babcock* doctrine to a wrongful death action in *Long v. Pan Am. World Airways*.

The defendant New York corporation operated an air route between San Juan, Puerto Rico, and Philadelphia, Pennsylvania. The plaintiffs were the executors and administrators of the estate of two passengers killed when the defendant's plane crashed in Maryland. Both passengers were residents of Pennsylvania and had purchased round-trip tickets there. Applying the *Babcock* principle, the court found that Pennsylvania had the most significant contacts with the decedent since the tickets were purchased there and the trip began and was to have ended in Pennsylvania.

The court considered the place of injury, Maryland, as being merely fortuitous and not sufficient of itself to justify the application of that state's law to determine the existence of a cause of action. In addition, the court asserted that the fact that the defendant was incorporated in New York was also insufficient to warrant either the application of New York substantive law or the imposition of New York public policy. The court's rationale for using Pennsylvania law in a wrongful death action was stated to be consistent with its prior decisions in that “it would be highly incongruous and unreal to have the flexible principle of *Babcock* apply in a case where the victim is injured but not where he is killed.”

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90 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 751.
92 Id. at 341, 213 N.E.2d at 798, 266 N.Y.S.2d at 516.
93 Id. at 342, 213 N.E.2d at 799, 266 N.Y.S.2d at 516.
94 Id. at 342-43, 213 N.E.2d at 799, 266 N.Y.S.2d at 517.
95 Id. at 343, 213 N.E.2d at 799, 266 N.Y.S.2d at 518.
III. THE AFTERMATH OF BABCOCK: RECENT IMPACT IN OTHER JURISDICTIONS

As a result of the New York decisions, other jurisdictions have become vitally aware of the impact created by the new rationale. The basic considerations expressed in these recent decisions are parallel in that they overwhelmingly approve the evaluation of all relevant factors in making a decision. The extent to which this method will become feasible can only be determined after a case-by-case analysis. However, even at this early stage, the most recent cases illustrate that not only is this approach capable of consistent application but also, and of even greater importance, it can be employed in almost any fact situation. The following discussion focuses primarily upon a number of these current cases from various jurisdictions which have either heeded the Babcock mandate or have considered it and have refused to employ its method. From this it will be possible to project with some degree of accuracy the far-reaching effect of this significant departure.

A. Delaware's Rejection

Now that the courts will be forced to give some consideration to the grouping of contacts theory it will be interesting to see what devices they utilize in making the decision to adopt or reject the method. For example, in *Friday v. Smoot,* the Delaware Supreme Court decided it was *not* within their discretion to make an abrupt break with the past. The court indicated that its earlier decisions had evidenced a strong public policy favoring the application of the place of injury rule. In addition, the court asserted that the application of the Babcock test with a slight variation in the facts would lead to utter confusion, thus implying that using

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80 211 A.2d 594 (Del. 1965). The case involved an action by a Delaware guest against a Delaware host arising from an accident occurring in New Jersey. The plaintiff brought the action in Delaware, and the defendant invoked the Delaware guest statute, Del. Code Ann. tit. 21, § 6101 (1953), as a defense. New Jersey, the place of the accident, had no guest statute.


82 The court considered a number of possibilities which it believed could not be solved with any rational consistency: (1) If the parties were Delaware residents, but the defendant had met the plaintiff in Pennsylvania and invited him to go to New Jersey (the place of injury); (2) if the defendant were a Delaware resident and invited a New Jersey resident by telephone to take the trip and then proceed to cross the Delaware River, pick up the plaintiff in New Jersey where the accident occurs; and (3) if in the instant case, other passengers were present from Maryland and were picked up in Maryland. 211 A.2d at 596-97.
the grouping of contacts in this setting would result in a justifiable
decision, but future problems encountered might be of greater com-
plexity and their resolutions not as simple.\(^9\)

\[B. \text{ Grouping of Contacts: Damages and Immunity}\]

The adherence to the rule of stare decisis is perhaps the greatest
obstacle to the advancement of the grouping of contacts theory.\(^{10}\)
However, the gradual momentum which this theory has gained in
recent years illustrates that the barrier is not insurmountable. In-
nvariably, opinions which favor its adoption make an express state-
ment recognizing that their rejection of the prevailing view is an
abrupt departure from precedent. Pennsylvania, one of the first
jurisdictions to follow New York's rejection of the old view, an-
nounced its adoption of the grouping of contacts theory in *Griff-
ith v. United Airlines, Inc.*\(^{101}\) It is significant to note that this
case differed from both *Babcock* and *Dym* in that it involved the
question of damages, whereas the two former cases involved the
applicability of guest statutes. The cause of action in *Griffith* arose
from an airplane crash which occurred in the course of a scheduled
landing in Denver, Colorado. Colorado law limits the amount of
recovery in wrongful death actions, whereas Pennsylvania, the resi-
dence of the deceased, placed no ceiling on recoverable damages.
The court considered the various contacts and evaluated the policies
of both Pennsylvania and Colorado, concluding that Colorado, the
place of injury, had no real interest in the outcome of the litiga-
tion.\(^{102}\) The court felt that Pennsylvania's interests were far su-
perior since the relationship arose in Pennsylvania and that state
was vitally concerned with the administration of decedent's estates
and the subsequent well-being of its dependents.\(^{103}\) For these rea-
sons the court held that the Colorado limitation should not apply
and permitted the issue of damages to go to the jury. A vigorous

\(^9\) The court concluded that a departure from the place of injury rule would re-
sult in the judicial encouragement of litigation not now open to litigants and that
such a change must be made by the legislature. *Id.* at 597.

\(^{10}\) See *Cardozo, The Growth of the Law* (1924).

\(^{101}\) 416 Pa. 1, 203 A.2d 796 (1964).

\(^{102}\) The interest Colorado might have had with respect to its creditors was minimal
since the death was instantaneous. Similarly, Colorado's policy of limiting damages
to prevent a jury from speculating would not be affected if a Pennsylvania court per-
mitted speculation. *Id.* at 24, 203 A.2d at 807. In addition, the limitation seeks to
protect a Colorado defendant, but such protection is not applicable here since the air-
line was not a Colorado domiciliary. *Ibid.*

\(^{103}\) *Id.* at 24-25, 203 A.2d at 807.
dissent objected to the determination, stating that it would not have changed the existing law.\footnote{Id. at 25, 203 A.2d at 807.}

In a very recent case,\footnote{McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966).} this same court was faced with a separate and distinct question which centered about the right of one spouse to sue another. The defendant husband was driving his family from the West Coast to their Pennsylvania domicile, and while in Colorado an accident occurred in which their child was killed. The wife brought suit in a Pennsylvania forum under the Colorado wrongful death act.\footnote{COLO. REV. STAT. ANN. § 41-1-2 (1963).} Pennsylvania prohibited suits between spouses, however, such suits are permitted in Colorado. The court examined the prohibition and considered it to be expressive of Pennsylvania's interest in foreclosing litigation which tends to engender friction between spouses.\footnote{420 Pa. at 95, 215 A.2d at 682. See Johnson v. Peoples First Nat'l Bank & Trust Co., 394 Pa. 116, 145 A.2d 716 (1958).} However, Colorado, by permitting these suits, expressed an interest in providing redress for an injured spouse even if obtained at the expense of marital harmony. As in \textit{Griffith},\footnote{Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.-2d 17 (1962).} Pennsylvania rather than Colorado domiciliaries were to be affected, and therefore the issue relevant to marital status was of concern only to Pennsylvania.\footnote{Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).}

C. Other Applications: Flexibility

In addition to New York and Pennsylvania, several other states have incorporated grouping of contacts in their conflict of laws principles. It is interesting to note the rationale employed by these jurisdictions in seeking to implement the new approach, for their patterns are similar and surprisingly consistent. Wisconsin has emerged from its prior adherence to the traditional view by a gradual process much the same as that of New York. Like the \textit{Kilberg} decision in New York which employed a substantive-procedural characterization device to avoid the place of injury rule,\footnote{The recent Pennsylvania case of Kuchinic v. McGorry, 422 Pa. 620, 222 A.2d 897 (1966) applied Pennsylvania law to permit recovery based upon simple negligence, as opposed to Georgia law, the place of the injury, which required a showing of gross negligence before recovery would be permitted. It is interesting to note that the trial court had initially applied Georgia law but reversed itself subsequent to the \textit{Griffith} decision, thus rejecting the inflexible place of injury test.}
the decision of Haumsfield v. Continental Cas. Co.\textsuperscript{111} in Wisconsin utilized the characterization process to circumvent the rigid rule. Later, the same court made reference to the recent trend toward a less mechanical application of the choice of law rule.\textsuperscript{112} Then in Brunke v. Popp,\textsuperscript{113} the same court for the first time referred to Babcock, although holding that it would not apply since both parties were not residents of Wisconsin.\textsuperscript{114} These cases foreshadowed the future adoption of the grouping of contacts theory which soon followed in Wilcox v. Wilcox\textsuperscript{115} — the Wisconsin parallel to New York's Babcock decision. Wilcox added impetus to the concepts embodied in the new theory and proved consistent with the Babcock analysis, since the two cases involved similar fact situations.\textsuperscript{116}

\textsuperscript{111} 7 Wis. 2d 130, 95 N.W.2d 814 (1959).
\textsuperscript{112} Wojdak v. United States Rubber Co., 19 Wis. 2d 224, 120 N.W.2d 47, rev'd on other grounds on rehearing, 19 Wis. 2d 224, 122 N.W.2d 737 (1963).
\textsuperscript{113} 21 Wis. 2d 458, 124 N.W.2d 642 (1963).
\textsuperscript{114} Id. at 462 n.1, 124 N.W.2d at 644 n.1. See Parchia v. Parchia, 24 Wis. 2d 659, 130 N.W.2d 205 (1964), refusing to follow the "grouping of contacts" theory due to procedural technicalities.
\textsuperscript{115} 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
\textsuperscript{116} The plaintiff and defendant, residents of Wisconsin, were involved in an accident in Nebraska while returning from a vacation. The plaintiff brought suit in Wisconsin, alleging negligence; the defendant claimed immunity, asserting that the Nebraska guest statute, Neb. Rev. Stat. § 39-740 (1943), should apply. Wisconsin permits a suit by a guest against his host driver for ordinary negligence. Wilcox v. Wilcox, 26 Wis. 2d 617, 631, 133 N.W.2d 408, 415 (1965). The court reasoned that the forum should not apply law repugnant to its own policy, id. at 634, 133 N.W.2d at 416, and then analyzed the policy of each state concerned to determine which had the most significant concern with the outcome of the litigation. Id. at 634, 133 N.W.2d at 417. The issue basically focused on the liability of a Wisconsin host for injuries to his Wisconsin guest. The plaintiffs were both residents of Wisconsin; their trip commenced and was to end in Wisconsin; the insurance coverage was issued and delivered in Wisconsin by a Wisconsin carrier which covered an automobile licensed, garaged, and operated in Wisconsin. Ibid. By contrast, Nebraska's sole contact with the case was the fact that the accident occurred there. The contacts were then evaluated in the light of the host-guest policies of the two states. The policy of Wisconsin is to permit recovery against the host, whereas the purpose of the Nebraska statute was the prevention of suits by ungrateful guests and the prevention of collusive suits. Id. at 632, 133 N.W.2d at 416. Therefore, only Wisconsin law would be affected due to the presence of the Wisconsin guest. The court went on to say that this weighing of interests approach could be utilized with every issue before the court, and thus the law of several jurisdictions could apply in any one case involving multi-state contacts.

There have been two unreported decisions applying the Wilcox analysis. In Cas- tonzo v. General Cas. Co., Civil No. 5556, W.D. Wis., March 15, 1966, an Illinois host and an Illinois guest were involved in a Wisconsin accident with a Wisconsin driver. The host and guest sued the Wisconsin driver, and the driver counterclaimed for damages from the Illinois host. The host moved for summary judgment, dismissing the counterclaim for contribution.

The court held that it was necessary to determine whether the host could be held liable to the guest, that is, whether the Illinois or Wisconsin host-guest rule applied. Following the Wilcox analysis, the court found two policies underlying the Illinois
Wilcox illustrates a consistency with the Babcock approach which is significant in the light of the often-stated criticism that the New York theory will lead to confusion. Furthermore, if it can be assumed that Babcock is consistent with Dym, it is apparent that the New Hampshire decisions have also followed the New York courts.

In Dow v. Larrabee, the New Hampshire court was faced with the same situation found in the prior Dym decision arising in New York. The court asserted that traditionally New Hampshire has applied the law of the place of injury to determine the liability of a defendant, in this case the place of injury would be Massachusetts. The court then referred to its 1966 decision in Johnson v. Johnson which had adopted the "grouping of con-

rule. The first, to protect the courts from collusive host-guest suits, was held not applicable, since Wisconsin was the forum. The second, to insulate a generous host from claims by his guests, was held to apply, since "the protection should continue through the relatively brief Wisconsin ... trip." Ibid. Underlying the Wisconsin rule, the court held, were two factors. First, was a conclusion (contrary to that of Illinois) that a guest should be able to rely on his host's care. Since an Illinois host and guest were concerned, Illinois policy was held to prevail. Second, medical services rendered to an injured guest should not be borne by the public or by those who furnish them. Since the injured party was domiciled in Illinois, the risk to Wisconsin medical facilities and public funds was limited, and the Wisconsin interest was held not entitled to recognition. The court thus concluded, "there is a true conflict between ... one or more Illinois policies and one or more Wisconsin policies."

A subsequent case, Magid v. Decker, Civil No. C 65-88, W.D. Wis., March 18, 1966, considered the issue of interspousal immunity. Wisconsin permits a wife to sue her husband; Illinois does not. Rejecting the assertion that any policy of deterrence was involved, the court held that the underlying policy of the Wisconsin rule was to emancipate married women. The policies of both the Wisconsin and Illinois rules, the court observed, "stem from considerations involving the family, the marriage relationship, and the dignity of a married woman." Ibid. Consequently, the law of the state of domicile was applied.

117 See White v. Motor Vehicle Acc. Indem. Corp., 39 Misc. 2d 678, 241 N.Y.S.2d 566 (Sup. Ct. 1963), in which the exact reverse of the situation in Babcock was present and the court reached a consistent result.


120 The action was brought by a minor guest for injuries sustained when he fell from the back seat of the host's automobile onto the highway while the car was still in motion. The injuries were sustained in Massachusetts as the child was being returned from a visit with friends in that state. The defendant driver had offered to transport the mother from New Hampshire to Massachusetts to pick up the child and then return.

121 Id. at 507. This view was expressed in Beacham v. Proprietors of Portsmouth Bridge, 68 N.H. 382, 40 Atl. 1066 (1895).

122 See McAllister v. Maltais, 102 N.H. 245, 154 A.2d 456 (1959), decided in a jurisdiction in which a driver can be held liable to a guest for gross negligence only.

tacts” theory to apply the law of the domicile in determining the question of the suability of spouses.\(^ {124} \)

The majority in *Dow* went on to say that domicile is important where intra-family relations are involved but distinguished that relationship from the host-guest situation.\(^ {125} \) It concluded that the interest Massachusetts had in regulating the standards of behavior of persons traveling upon its highways and the consequent liability which shall result from injuries suffered there is more significantly related to the instant case. The parties were traveling on a Massachusetts highway and had entered into the host-guest relationship in Massachusetts.\(^ {126} \) Therefore, like *Dym* in New York, the New Hampshire court found significance in the fact that the relationship arose apart from the place of residence, therefore lessening that state’s interest.\(^ {127} \)

In a slightly different context, the Minnesota Supreme Court in *Baltz v. Baltz*\(^ {128} \) applied the grouping of contacts theory to another phase of family immunity. The question involved the right of a parent to sue his child for the alleged negligence of that child. The court found support in *McSwain v. McSwain*\(^ {129} \) which had applied the law of the domicile to the essentially family law problem of the suability of spouses. This same court\(^ {130} \) when faced with a conflict between a foreign guest statute\(^ {131} \) and its own law permitting recovery based on ordinary negligence, followed the

\(^ {124} \) Ibid.

\(^ {125} \) The court in *Dow* stated: “The relationship of host and guest however is usually temporary and fleeting, and its incidents of minor consequence as compared with those of marriage or parenthood.” 217 A.2d at 508.

\(^ {126} \) Ibid.

\(^ {127} \) Ibid. See also Clark v. Clark, 222 A.2d 205 (N.H. 1966).

\(^ {128} \) 142 N.W.2d 66 (Minn. 1966). The injury occurred while the parties were traveling in Wisconsin, and the action was commenced in a Minnesota forum. Wisconsin law would not permit the suit, Schwenkhofer v. Farmers Mut. Auto. Ins. Co., 11 Wis. 2d 97, 104 N.W.2d 154 (1960) (by analogy) (unemancipated minor cannot sue parent for negligence); Fiduciary Sav. Bank v. Aulik, 232 Wis. 602, 32 N.W.2d 613 (1948), but this case established that such suits are permissible. Therefore, the conflict arose as to which law should be applied to the facts after a consideration of the relevant policies and interests of the respective states. All the parties lived in Minnesota and resided in the same household. The trip started and was to end in Wisconsin, and the car was registered, insured, and garaged in Minnesota. Whatever impact the litigation had would only affect the Minnesota family and the Minnesota insurer. By contrast, Wisconsin’s interest was said to be merely to enforce its traffic laws and to promote highway safety. The court considered this last factor and felt that such interest would indeed be promoted, not hampered, by applying Minnesota law which would impose civil liability on the negligent driver in Wisconsin. 142 N.W.2d at 70.


\(^ {130} \) Kopp v. Rechtzigel, 141 N.W.2d 526 (Minn. 1966).

\(^ {131} \) S.D. Code § 44.0362 (1939).
Babcock line of reasoning. Stressing reliance on the Balts decision, the court enumerated the contacts which centered in Minnesota and said that it would be fair to assume that the owner of the car sought to protect his passengers against negligent injury in whatever state an accident might arise. In addition, the application of the Minnesota law would insure the collection of whatever medical bills had arisen in South Dakota, the place of injury.

IV. OTHER CRITERIA FOR CHOICE OF LAW

It is apparent from the discussion of the cases above that the flexibility of the new theory introduced by New York courts permits its application in many diverse areas of multi-state conflicts. In addition to the cases already analyzed, the grouping of contacts has been applied to establish the liability of an insurer for breach of a duty to the insured, the applicability of a statute of limitations, and in the area of defamation. Such adoption indicates a judicial acceptance of a rule which should prove equitable and just.

As can be readily seen, the subject of conflict of laws is broad enough to permit varying criteria for the choice of law. The place of injury is still the prevailing view, although the grouping of contacts theory has acquired recognition in several jurisdictions and the support of many experts in the field. In addition, a number of commentators who do not themselves espouse the grouping of contacts theory would substitute the place of injury rule for one closer to the flexible Babcock rule. Professor Brainard Currie, for instance, advocates a governmental interest theory.

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132 141 N.W.2d at 523.
133 Id. at 528.
134 See Tepeyac v. Bostrom, 347 F.2d 168, 175-76 (5th Cir. 1965) (suit against insurer for breach of duty to defend or settle).
137 At the time this article went to press, the highest courts in Illinois, Iowa, Minnesota, New Hampshire, New York, Pennsylvania, and Wisconsin had rejected the lex loci delicti approach and had adopted the grouping of contacts theory.
139 See Babcock v. Jackson, supra note 138.
which requires the forum to apply its own law if it has any legitimate interest. The *lex loci* should thus be applied only if the forum has no interest at all. He urges that if the forum state has no legitimate interest and if other states have competing interests then the law of the forum should govern.\textsuperscript{141} Professor Ehrenzweig,\textsuperscript{142} like Professor Currie, stresses the application of the law of the forum\textsuperscript{143} but emphasizes the interests of the parties as opposed to governmental interests. With this premise he looks in each situation to the development of a common law of conflicts based on "consistent judicial practice" to provide exceptions to the basic rule. He envisages that this approach will actually promote application of foreign law and relegate the *lex fori* to mere "analytical primacy"\textsuperscript{144} because deviations will not occur, in his view, except where "compelling reasons"\textsuperscript{145} for such deviations exist.

Professor Russell Weintraub\textsuperscript{146} suggests that the first determination by the court must be whether the conflict is in fact real or spurious.\textsuperscript{147} If no conflict is found, then the law of the forum should be applied. Once a conflict is found, he suggests that the actor be found liable for his conduct under the laws of any state whose interests would be advanced significantly by imposing liability unless its imposition would unfairly surprise the actor.\textsuperscript{148} His final suggestion is that when the policies of the interested or contact states are not applicable to the case before the court, then the forum state should consider arriving at a result that would insulate the outcome from the selection of the forum so as to prevent future actions from being decided merely by the choice of the forum.\textsuperscript{149} This final step would answer the forum-shopping criti-

\textsuperscript{141} Id. at 1243.
\textsuperscript{143} Ibid.
\textsuperscript{145} Ibid.
\textsuperscript{147} Id. at 216. A real conflict concerns a situation which, when analyzed in terms of policy, shows that the policies of more than one state are affected by the outcome; a spurious conflict concerns a situation which may appear to create a conflict but which, after analysis of the policies of the states involved, demonstrates that only the policy of one state is affected.
\textsuperscript{148} Id. at 249.
\textsuperscript{149} Id. at 249-50.
cism leveled at the recent trend.\textsuperscript{150} Professor Morris\textsuperscript{151} believes that a tort action should be governed by its "proper law," that is, the law or laws by which the parties intended or may fairly be presumed to have intended the action to be governed. Professor Cook\textsuperscript{152} states that where the negligent act occurs in one state and the injury takes place in another state, the forum should choose the law of the state where the decisive portion of the events have occurred.

V. A Final Consideration

An examination of the grouping of contacts approach should illuminate some of the problems which might cast doubt upon the overwhelming approval given this departure. For example, in Babcock it might be assumed that the court actually made a predetermined subjective judgment that its laws and policies were far superior to that of any other state, and the fact that the court referred to liability insurance raises the question of whether this factor should ever be relevant with respect to the substantive rights of the parties.

Again, the question of flexibility, as opposed to predictability, must await further determination. It can be seen that when many variables enter the picture, an infinite number of permutations are possible. As a result, the human mechanism may easily arrive at a different result when given a similar pattern of circumstances; however, with the vested rights approach, this problem is avoided. Thus, two judges sitting in separate jurisdictions and faced with the same facts will be guided by the same process.

Yet, there is reason and logic to support the grouping of contacts theory which should dispel the fears of uncertainty and unpredictability. The vested rights approach is merely a mechanical device employed to establish the initial guidelines for the court. This immediate determination requires the court to automatically look to the place of injury and apply that law, leaving the somewhat academic question as to the content of that law. Once this step is taken, substantive rights become fixed, unyielding, and perhaps unjust in the light of the circumstances of the individual case. The

\textsuperscript{152} COOK, \textit{THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS} 310-46 (1942).
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parties are thus deprived of the benefit of the court's discretion as to whether it is advisable to follow the dictates of the predetermined law. The grouping of contacts theory does not reject the place of injury as a possible source for determining the substantive rights involved, for it remains one of the considerations which must be taken into account.

The lack of certainty argument in opposition to the grouping of contacts theory is not persuasive since it focuses merely on the predictability of a lawsuit. This reasoning ignores the fact that the purpose of litigation is to weigh the contesting views of the parties. A court must seek to establish a just result with all the facts before it. An approach which stresses the geography of the situation involves the danger of having a fortuitous event become the sole criterion in the determination of liability. This risk is considerably reduced if the approach encompasses all significant contacts which are then evaluated in conjunction with the fortuitous event.

Any possible uncertainty that is inherent in this new theory of conflicts, as opposed to the mechanical rule of lex loci delicti, should be outweighed by the judicial flexibility and the concomitant promotion of justice which the grouping of contacts theory has introduced.

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