

CONFLICT OF LAWS: NORTH CAROLINA RETAINS TRADITIONAL SYSTEM: A CRITICAL ANALYSIS

THE conflict of laws system has traditionally consisted of a body of choice of law rules together with ancillary principles dictating the manner of their application. For more than a generation, this method of solving conflicts problems has been subject to increasing criticism.¹ In the recent case of *Shaw v. Lee*,² the North Carolina Supreme Court applied the orthodox conflicts rule that the law of the place of injury governs in a tort case, and reached a result which clearly demonstrates the necessity for a reexamination and perhaps an outright abolition of the traditional system.

Plaintiff was injured and her husband killed in an automobile collision occurring as a result of the husband's negligence. Although the event took place in Virginia, suit was instituted in North Carolina, the residence of plaintiff, her husband, and the defendant administrator. While a North Carolina statute allows interspousal suits,³ Virginia forbids a wife to sue either her husband or his personal representative for personal injuries negligently inflicted.⁴ The North Carolina Supreme Court, adhering to the traditional system and following a numerically impressive list of precedents,⁵ applied the law of the place of the wrong to this tort action and affirmed the trial court's dismissal of the complaint. Plaintiff argued that, since North Carolina is concerned with incidents of the marital relationship between a husband and wife living in the state, the law of the domicile should be applied.⁶ In rejecting this argument, the

¹ See generally, COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1; Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1 (1951); Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215 (1963); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

² 258 N.C. 609, 129 S.E.2d 288 (1963).

³ N.C. GEN. STAT. § 52-10.1 (1951).

⁴ The law of Virginia in this field emanated from *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 96 S.E. 315 (1918). As evidenced by recent decisions, this still represents the law of that state. See, e.g., *Midkiff v. Midkiff*, 201 Va. 829, 113 S.E.2d 875 (1960); *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

⁵ E.g., *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941); *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931) (factually identical with *Shaw v. Lee*).

⁶ Brief for Plaintiff, p. 3.

court noted that the application of this choice-of-law rule could not be justified by either the law of Virginia or the law as declared by the North Carolina General Assembly and the applicable North Carolina decisions. Refusing to depart from well established conflict rules, the court, without examining the policies involved, applied the law of the place of injury, thus rendering the defendant immune from suit.

The system adopted by the Restatement of the Conflict of Laws,⁷ was designed primarily to secure uniformity.⁸ Under the Restatement approach, a conflicts problem is first characterized, for example as one of contract. After this has been done, the choice-of-law rule which governs that particular area is applied.⁹ The *lex loci*, or law of the place of injury, governs in those situations where a case has been characterized as a tort action.¹⁰ In 1931, the highest courts of three states, one of which was North Carolina, independently decided three cases factually similar to *Shaw v. Lee* by applying this traditional rule.¹¹ Although criticized by commentators,¹² this de-

⁷ RESTATEMENT, CONFLICT OF LAWS (1934).

⁸ See, e.g., Cheatham, *American Theories of Conflict of Laws; Their Role and Utility*, 58 HARV. L. REV. 361 (1945). But see Currie, *supra* note 1, at 38 asserting that "simplicity and uniformity come too high when the effect on state policies and interests is totally disregarded."

⁹ See generally, Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743 (1941).

Professor Hancock, speaking of the characterization of a case similar to *Shaw v. Lee* both factually and in result, stated: "Having adopted . . . basic (conflicts) principles, the court was confronted with the familiar task of classifying or characterizing the domestic rules of . . . law. Were they rules concerning the effect of marriage on property rights, rules of tort liability, or rules relating to remedy? In other words, the court defined . . . its problem . . . as one of fitting the domestic rules into the categories of the choice-of-law principles." 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, 246 (1962).

¹⁰ RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

For a discussion of the possible origins of this rule, see Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397, 404 (1954). The attractiveness of selecting the place of injury as the proper reference point for tort liability lies perhaps in the fact that it is usually not difficult to ascertain. Stumberg, "The Place of the Wrong" *Torts and the Conflict of Laws*, 34 WASH. L. REV. 388, 390 (1959).

¹¹ *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931); *Dawson v. Dawson*, 224 Ala. 13, 138 So. 414 (1931); *Buckeye v. Buckeye*, 203 Wis. 248, 234 N.W. 342 (1931).

¹² COOK, *supra* note 1, at 250 (policy dictates application of the law of the domicile); STUMBERG, CONFLICT OF LAWS 187 (1st ed. 1937) (domiciliary law should be applied in such domestic relation situations); Rheinstein, *Michigan Legal Studies: A Review*, 41 MICH. L. REV. 83, 97 (1942) (irrespective of place of injury, domestic relation cases should be determined by the same law).

cisional triumvirate has been followed by New Hampshire,¹³ New York,¹⁴ Connecticut,¹⁵ and Missouri.¹⁶

However, various methods exist to avoid the *lex loci* when its application would produce an undesired result. Even in interspousal immunity cases characterized as tort actions, some courts have held that applying the law of the place of injury would be contrary to local public policy, and thus have applied the law of the forum. In several cases, for example, one spouse attempted to recover from the other in the state of domicile where interspousal immunity existed, after an accident occurred in a state which had abolished such immunity.¹⁷ In each instance, the existence of the forum state's interspousal immunity caused the court to apply its own law and dismiss the complaint.

In addition to avoiding an undesirable result by disregarding the *lex loci* in deference to local public policy, the conflicts system itself may be manipulated to avoid such a result by characterizing the problem in such a way that application of a different choice-of-law rule is demanded. Several such rules are available in the factual situation presented by *Shaw v. Lee*.¹⁸ Two of these would have prevented the North Carolina court from reaching a decision which rejected its state policy of allowing interspousal suits between resident spouses, denied recovery to a widow protected by local statute, and entrusted the remedy of this situation to a state whose only connection with the action was having been the scene of the accident.¹⁹

First, the problem of interspousal immunity could have been characterized as procedural, necessitating application of the law of

¹³ *Gray v. Gray*, 87 N.H. 82, 174 Atl. 508 (1934).

¹⁴ *Coster v. Coster*, 289 N.Y. 438, 46 N.E.2d 509 (1943).

¹⁵ *Bohenek v. Niedzwiecki*, 142 Conn. 278, 113 A.2d 509 (1955).

¹⁶ *Robinson v. Gaines*, 331 S.W.2d 653 (Mo. 1960).

¹⁷ *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939); *Kyle v. Kyle*, 210 Minn. 204, 297 N.W. 744 (1941); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936); *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604 (1935).

¹⁸ The doctrine of *renvoi* is another method that could be used in some cases to reach a desirable result. However, "American scholars, almost without exception, rejected the doctrine as having no place in our law." BEALE, *CONFLICT OF LAWS*, 1886-1936 889 (1937). Aside from this fact, this rule that the law of the place of injury governs is a reference to the whole law of that state, including its choice-of-law rules, would not change the result in *Shaw v. Lee* even if it were applied. No Virginia decision supports an application of the law of the domicile.

¹⁹ In effect, the North Carolina court left the determination of what was essentially a North Carolina matter to the courts or legislature of Virginia. 258 N.C. at 616, 129 S.E.2d at 292.

the forum.²⁰ In refusing to allow interspousal suits, it could be argued that Virginia is not implying that the wife has no cause of action for her husband's wrongful conduct, but rather is saying that procedurally she has no capacity to sue.²¹ The law of the forum determines capacity to sue, the remedies available, and the procedure of the courts.²² However, the court in *Shaw v. Lee*, rejecting a procedural characterization which would have demanded application of its own law allowing interspousal suits, said the question was not a procedural one of the wife's capacity to sue, but rather a substantive one of whether there was ever any cause of action.²³ In these metaphysical terms, the North Carolina court frustrated its state policy.

Although a procedural characterization would have produced a desirable result in *Shaw v. Lee*, the resulting application of the law of the forum is not advocated for all cases involving a question of interspousal immunity. Had the parties in *Shaw v. Lee* been domiciled in Virginia, for example, the North Carolina court, having no interest in the parties involved, would have no reason to apply its law and disregard the common law immunity adhered to by Virginia. Virginia, on the other hand, has a policy of disallowing suits between resident spouses.

Secondly, there is the rule upon which plaintiff in *Shaw v. Lee* principally relied, that the immunities from suit because of a family relationship should be determined by the law of the domicile.²⁴ In

²⁰ RESTATEMENT, CONFLICT OF LAWS §§ 584, 585 (1934). See generally, McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. PA. L. REV. 933 (1930).

Several courts have characterized a problem as procedural in order to reach a desired result. For example, in *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895), the later Mr. Justice Holmes effectuated a Massachusetts state policy of preventing fraud and perjury by a procedural characterization which demanded application of the law of the forum. See also, *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), where Justice Traynor determined that survival of a cause of action is governed by the law of the forum.

²¹ See, e.g., *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936).

This is based upon the common law fiction of unity of the person, where a wife could not sue unless joined by her husband. *Phillips v. Barnet*, [1876] 1 Q.B.D. 436. In effect, to allow an interspousal suit would be to allow a husband to recover from himself. A state which has abolished interspousal immunity faces no such procedural problem.

²² RESTATEMENT, CONFLICT OF LAWS §§ 584, 585 (1934).

See, e.g., *Mertz v. Mertz*, *supra* note 21. Cf. *Fowlkes v. Ray-O-Vac Co.*, 52 Ga. App. 338, 340, 183 S.E. 210, 212 (1935). The court here stated that "under the general rule, the law of the forum governs as to parties and the right to sue . . ."

²³ 258 N.C. at 615, 129 S.E.2d at 292.

²⁴ Brief for Plaintiff, p. 3.

Haumschild v. Continental Cas. Co.,²⁵ the Wisconsin Supreme Court overruled its counterpart to *Shaw v. Lee*²⁶ and held that since the decision of whether interspousal immunity is grounded on considerations of family harmony, the law of the state most concerned with the domestic relations of the spouses involved should govern. The court envisaged no more justifiable situation in which to depart from *stare decisis*, noting that there are strong policy reasons for supplanting the rule of *lex loci*, and its contingency upon a fortuitous event, with one which does not potentially discriminate against the forum state's citizens. The North Carolina court discussed *Haumschild* but refused to follow it.²⁷

However, as is the case with all traditional choice-of-law rules, reliance on the law of the domicile may be satisfactory in one case but not in another. For example, in *Bogen v. Bogen*,²⁸ a tort action was instituted in North Carolina for injuries occurring there in an automobile accident. Parties to the suit were residents of Ohio, a state having interspousal immunity. Personal injuries within the state are of concern to North Carolina, for the injured party may financially burden the state or its inhabitants who have provided medical and other services for which they should be compensated. The court, in allowing recovery in this case, properly rejected the interspousal immunity of the state of the domicile.

In *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), Justice Traynor stated that in family relationships and the disabilities to sue arising therefrom, the law of the domicile should govern. "[I]t is undesirable that the . . . immunities . . . imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home." *Id.* at 428, 289 P.2d at 223.

Accord, *Koplik v. C.P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958) (application of *lex loci* interferes with policy of domicile); *Johnson v. Peoples First Nat'l Bank*, 394 Pa. 116, 145 A.2d 716 (1958) (wife's cause of action determined by the law of domicile); *Pittman v. Deiter*, 10 Pa. D. & C.2d 360 (1957); *Jaeger v. Jaeger*, 262 Wis. 14, 53 N.W.2d 740 (1952).

²⁵ 7 Wis. 2d 130, 95 N.W.2d 814 (1959), 73 HARV. L. REV. 785 (1960).

²⁶ *Buckeye v. Buckeye*, 203 Wis. 248, 234 N.W. 342 (1931) (*lex loci* applied). For an explanation of the judicial processes and the policy that led to the overruling of this leading case, see *Hancock*, *supra* note 9.

²⁷ 258 N.C. at 614, 129 S.E.2d at 291.

²⁸ 219 N.C. 51, 12 S.E.2d 649 (1941). The court in this case reached a just result by applying the law of the place of injury. However, had *Shaw v. Lee* overruled *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931), and reached a just result on the basis of applying the law of the domicile, it would have also had to overrule this case. It is another flaw in the system when a court, in order to reach a desired result, must overrule another case which was rationally decided. See *Hancock*, *supra* note 9, at 267. In two separate cases, if the facts decisive to judgment are diametrically opposed, it is impossible to formulate one positive rule of law capable of working satisfactory

There is merit to the Wisconsin court's approach of applying the choice-of-law rule which effectuates the interest of the state in protecting itself and its citizens. In fact, there seems to be an increasing desire on the part of the courts to seek out policies to guide their decisions even though they are still channelled through traditional choice-of-law rules.²⁹ However, even if a particular conflict rule is applied to reach a just result, the real reason for decision may not be articulated. The legislature, unsure of the particular policy used to decide a given case, has no basis upon which to react. A court may not have correctly interpreted legislative policy,³⁰ or have refused to apply it in the face of heavy precedent.³¹ Moreover, there is no way to insure a satisfactory result in a later case, even if the legislature subsequently changes its policies. Furthermore, if a court is free to reach a desired result by manipulating choice-of-law rules, the uniformity valued so highly by defenders of the orthodox system will not be present.

This artificial system which ignores the content of the laws involved should give way to an approach which will deal directly with the problem involved in the particular case. Various replacements have been suggested,³² one of which is the governmental-interest

results in both cases. See, e.g., Cavers, *A Critique of the Choice-of-Law Problems*, 47 HARV. L. REV. 173, 178-82, 189-91 (1933).

²⁹ See generally, Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959). The California Supreme Court, speaking through Justice Traynor, was the leader in the departure from the Restatement. In *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), the court held immunity from suit because of a family relationship was properly determined by the law of the domicile. Prior to that, the court had looked to its policies before characterization in *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

³⁰ This is probably the case in *Shaw v. Lee*, where the court stated that in abolishing interspousal immunity, the General Assembly did not intend to create a right of action in a spouse for acts occurring beyond the North Carolina border. The statute did not contain any express territorial limitations. N.C. GEN. STAT. §52-10.1 (1951). By so limiting a law, a state sacrifices its policies without gaining the benefits of greater uniformity. See Lorenzen, *supra* note 1, at 751.

³¹ Before considering plaintiff's argument, the court in *Shaw v. Lee* illustrated this point. "Notwithstanding the enormous preponderance of authority supporting the conclusions reached in *Howard v. Howard*, plaintiff seeks a different result." 258 N.C. at 614, 129 S.E.2d at 291.

³² Professor Ehrenzweig has called for a more rational basis for determining which law to apply than the fortuitous place of injury. He proposes using the basic law of the forum, subject to certain settled exceptions. See, e.g., Ehrenzweig, *The Lex Fori-Basic Rule in Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Ehrenzweig, *The Lex Fori in the Conflict of Laws—Exception or Rule?*, 32 ROCKY MT. L. REV. 13 (1959).

Cheatham has formulated three guiding policies as bases for the choice of law to be applied: (1) the policies of local law, (2) the policies of interstate-international

analysis.³³ This process of interest analysis treats conflicts within the normal methods of statutory construction and interpretation of common law rules.³⁴ A court would therefore decide a conflicts question in the same manner that it would decide any other legal question, rather than be forced to invoke artificial and unrelated rules. This analysis is concerned with ways in which respective states are related to the parties, the events, and the litigation. It asks whether the circumstances surrounding these relationships furnish a reasonable basis for the forum state's assertion of an interest in applying an economic, social, or administrative policy embodied in its law. A forum should apply its own law if analysis reveals that it has a legitimate interest in the effectuation of the policy embodied in its law.³⁵

Such an approach would demand an application of the law of the forum in *Shaw v. Lee*. Since the North Carolina statute permits interspousal suits, the state has a policy of compensating one spouse injured through the negligence of another. A spouse without remedy may become a charge upon the state. Virginia, in adhering to the common law fiction of interspousal immunity, has a policy of protecting family harmony and preventing trumped up claims against

systems, and (3) the competing policies of definiteness through rules as contrasted with justice in the particular case. CHEATHAM, GOODRICH, GRISWOLD & REESE, *CASES ON CONFLICT OF LAWS* (Supp. 1961, at 69).

Another modern view is laying emphasis upon the law of the place which has the most significant contacts with the matter in dispute. See, e.g., *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961). These contacts are weighed and the "center of gravity" is ascertained. For a critical comparison of this view with the governmental-interest analysis, see Currie, *supra* note 1, 39-52.

³³ See, e.g., Currie, *supra* note 1; Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

Several cases have used such an approach. See, e.g., *Watson v. Employer's Liab. Assur. Corp.*, 348 U.S. 66 (1954); *Alaska Packers Ass'n v. Industrial Acc. Comm's*, 294 U.S. 532 (1935). See also, *Pearson v. Northeast Airlines Inc.*, 307 F.2d 131 (2d Cir. 1962), reversing 199 F. Supp. 539 (S.D.N.Y. 1961); *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

But see, e.g., Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961).

³⁴ See, e.g., Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict of Law Method*, 1960 DUKE L.J. 1.

³⁵ Professor Currie states that as the forum is determining the interest of its state, it should realize the possibility of a conflict with a foreign state's interest, and moderate its interpretation of local policy accordingly. Currie, *supra* note 1, at 30.

For a decision in which such restraint is used and the law of the foreign state applied, see *Bernkrant v. Fowler*, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961) (Traynor, J.).

insurance companies. Since both the parties were domiciled in North Carolina, Virginia has no interest in applying its policy.³⁶ North Carolina, on the other hand, with its policy of protecting the plaintiff widow, has an interest in applying this policy in the instant case, since plaintiff is a resident of North Carolina. Therefore, in applying the law of the place of injury, the North Carolina court subverted its own state's policy without advancing the policy of Virginia.³⁷

The traditional system, adopted by the Restatement in the name of uniformity, often yields unjust results. If the traditional system remains, the forum should look to its policy and interest in effectuating it in the case at hand before characterizing the conflicts problem. However, each manipulation of this sort destroys the traditionalist's defense of uniformity and its resultant certainty and predictability. Furthermore, even under an increasingly enlightened system, the bonds of precedent will sometimes be indestructible. In *Shaw v. Lee*, the court applied the *lex loci* because of "enormous preponderance of authority" and refused to "venture into uncharted seas."³⁸ Such a decision illustrates the inherent weakness of a system which is composed of artificial and arbitrary rules. A governmental-interest analysis, which looks to the content of the law involved and determines whether the circumstances provide a reasonable basis for application of policies expressed therein, is a suggested replacement.

³⁶ Virginia may have a policy of protecting its liability insurers against collusive claims, but this does not give that state an interest in applying its policy in this case. Automobile liability insurance rates are based upon loss experience in artificially defined territories. "A claim against an entrepreneur is allocated to his territory even if the accident giving rise to the claim was outside the territory . . ." Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 565 (1961). Since the assured's territory is normally that in which he resides, the result in *Shaw v. Lee* would in no way affect Virginia's insurance rate. See, Currie, *supra* note 1, at 28.

³⁷ Since there is no conflict between Virginia's interest in applying the common law rule and the North Carolina statute allowing interspousal suits, this is a false conflict case. According to Professor Currie, the mere mention of two state's laws does not produce a true conflict. It is only when each state has an interest in the application of its law that a true conflict arises. Currie, *supra* note 1, at 38. In the instant case, North Carolina has a legitimate interest in applying its policy. Virginia does not. For a functional analysis of other such cases, see Currie, *supra* note 38; Hancock, *supra* note 9; Traynor, *supra* note 29.

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