NO-FAULT AUTOMOBILE INSURANCE AND THE CONFLICT OF LAWS—CUTTING THE GORDIAN KNOT HOME-STYLE

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The system of reparations for losses caused by automobiles is undergoing a fundamental reevaluation in the United States. Opponents of the traditional tort approach, which places the loss on the shoulders of negligent drivers and their insurers, have demonstrated rather convincingly that it is wasteful, inadequate and anachronistic. It is wasteful because an inordinate amount of time, effort and money is expended in the disposition of claims which results in the clogging of courts and reduction of ultimate recoveries; inadequate because many injured persons remain uncompensated on the theory that they were negligent or contributorily negligent, and because compensation is too often delayed or inequitably distributed; and anachronistic because it is based upon fault principles when it is becoming increasingly apparent that a large proportion of accidents are due to the inherent risks of driving rather than individual fault.¹

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The author gratefully acknowledges the valuable research assistance of D. Todd Christoffer-son, a third-year student at the Duke University School of Law.

1. See U.S. Dep't of Transportation, *Motor Vehicle Crash Losses and Their Compensation in the United States* 94-100 (1971). This is the final report following a comprehensive two-year study of the problem undertaken by the Dep't of Transportation, pursuant to J. Res. 129, 90th Cong., 2d Sess. (1968) (Pub. L. No. 90-313). See also STEWART REPORT 5-55; ROKES 145-71; O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299 (1963).

THE FOLLOWING HEREINAFTER CITATIONS WILL BE USED IN THIS ARTICLE:

D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965) [hereinafter cited as *CAVERS*];

B. CURRIE, *SELECTED ESSAYS ON THE CONFLICTS OF LAWS* (1963) [hereinafter cited as *CURRIE, SELECTED ESSAYS*];

HAGUE ACADEMY OF INT'L LAW, *COLLECTED COURSES* [hereinafter cited as *HAGUE COURSES*];

R. KEETON AND J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965) [hereinafter cited as *KEETON & O'CONNELL*];

While there is general agreement on the need for reform, there is a predictably wide range of opinion about how it should be accomplished. On the conservative side, some would retain tort liability, improve its administration and correct its major inadequacies, especially by removing contributory negligence as a total bar in favor of a comparative negligence scheme which would only reduce the size of recovery.² On the radical side, a far-reaching plan, proposed in

W. PROSSER, *THE LAW OF TORTS* (4th ed. 1971) [hereinafter cited as PROSSER];

W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* (1971) [hereinafter cited as REESE & ROSENBERG];

W. ROKES, *NO FAULT INSURANCE* (1971) [hereinafter cited as ROKES];

R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (1971) [hereinafter cited as WEINTRAUB];

U.S. DEP'T OF TRANSPORTATION, *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* (1971) [hereinafter cited as DOT FINAL REPORT];

STATE OF NEW YORK INSURANCE DEP'T, *AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT?* (1970) [hereinafter cited as STEWART REPORT];

UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT (5th Tent. Draft 1972) [hereinafter cited as UNIFORM ACT];

AMERICAN INSURANCE ASSOCIATION, *REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS* (1968) [hereinafter cited as AIA PLAN];

Hearings Before the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) [hereinafter cited as *Senate Comm. Hearings*];

Hearings Before the Subcomm. on Business, Commerce, and Judiciary of the Senate Comm. on the District of Columbia, 92 Cong., 1st Sess. (1971) [hereinafter cited as *Senate D. C. Hearings*];

Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess. (1971) [hereinafter cited as *House Subcomm. Hearings*];

RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter cited as FIRST RESTATEMENT];

RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter cited as SECOND RESTATEMENT];

S. 2322, 92d Cong., 1st Sess. (1971) [hereinafter cited as D.C. Act];

S. 945, 92d Cong., 1st Sess. (1971) (revised bill, reprinted in *Hearings Before the Senate Comm. on Commerce*, 92d Cong., 1st Sess., pt. 5, at 2096 (1971)) [hereinafter cited as Hart Bill];

H.R. 1022, 92d Cong., 1st Sess. (1971) [hereinafter cited as Moss Bill];

Bill No. 8922, N.Y. Senate, March 16, 1970; Bill No. 6133, N.Y. Assembly, March 10, 1970 [hereinafter cited as Stewart Bill];

Bill No. 8000, N.Y. Senate, February 2, 1972 [hereinafter cited as Gordon Bill];

Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969) [hereinafter cited as Juenger].

2. See ABA Report of the Special Committee on Automobile Accident Reparations No. 18 (1969), approved by the House of Delegates of the ABA at its 1969 Annual Meeting. The Report is summarized in DOT FINAL REPORT 113-16. In view of the continuing debate on no-fault, the ABA appointed, in May, 1971, a Special Committee on Auto Insurance Legislation to review the new developments. In a major departure from prior policy, the Special Committee

1965 by Professors Keeton and O'Connell, would abolish negligence liability for the bulk of personal injury losses, relying on a new concept of compulsory insurance for their reparation.³ The Keeton-O'Connell "Basic Protection Plan," commonly referred to as "no-fault," has had a stormy and spectacular career. While variations in method and scope have proliferated, the fundamental premises of no-fault, though furiously debated, have received considerable acceptance and are now being translated into legislation in several states. Massachusetts was first to enact a modest no-fault plan in 1970, and Florida, Delaware, Illinois, Oregon and South Dakota have adopted statutes with some no-fault features.⁴ In addition, the government of Puerto Rico operates a no-fault plan financed through a license fee.⁵

No-fault legislation is also under consideration in many other states. The most comprehensive state plan was prepared by the New York Department of Insurance in 1970. Under this plan, negligence liability would be totally abolished and be replaced generally by an

prepared an interim report recommending that the states require auto insurance policies to provide at least \$2,000 in first-party medical, wage loss and related economic benefits, payable by the victim's insurer without regard to fault. The Special Committee estimated that the \$2,000 minimum would cover the total economic losses sustained by nearly 95% of traffic accident victims. The tort cause of action, however, would remain unaffected, except that pain and suffering recoveries could not exceed medical expenses for amounts of less than \$500. No action is expected to be taken on the Special Committee report until the annual meeting of August 11-17, 1972. ABA, News Release, Jan. 30, 1972. *See also* DEFENSE RESEARCH INSTITUTE, RESPONSIBLE REFORM: A PROGRAM TO IMPROVE THE LIABILITY REPARATION SYSTEM (1969).

3. *See generally* KEETON & O'CONNELL.

4. *Delaware*: DEL. CODE ANN. tit. 2, § 2118 (1971).

Florida: FLA. GEN. LAWS ch. 71-252 (1971).

Illinois: ILL. ANN. STAT. ch. 73, §§ 1065-.150 to -.63 (Smith-Hurd Supp. 1972). A lower court held that this legislation is unconstitutional because it arbitrarily discriminates against the uninsured and against the poor insofar as pain and suffering damages are concerned. *Grace v. Howlett*, 71 CH4737 (Cook County Civ., Dec. 29, 1971) (reproduced in full in 8 TRIAL 10-11, 13 (Jan./Feb. 1972)). This ruling was upheld on appeal by the Illinois Supreme Court. *See* 40 U.S.L.W. 2692-3 (April 25, 1972). The Illinois legislation could be modified, however, to eliminate the allegedly arbitrary distinctions without affecting the substance of no-fault.

Massachusetts: MASS. ANN. LAWS ch. 90, §§ 34A, D, M, N; *id.* ch. 231, § 6D (Supp. 1971). The constitutionality of this legislation against challenges under the due process and equal protection clauses of the Fourteenth Amendment, principally because of the taking away of the tort remedy and because of the disallowance of damages for pain and suffering when medical expenses do not exceed \$500, was upheld by the Massachusetts Supreme Court. *Pinnick v. Cleary*, 271 N.E.2d 592 (Mass. 1971).

Oregon: LAWS 1971, H.B. No. 1300.

South Dakota: S.D. COMP. LAWS ANN. §§ 58-23-6 to -23-8 (Supp. 1971).

5. Automobile Accident Social Protection Act (No. 138), P.R. LAWS ANN. tit. 9, §§ 2051-65 (1968).

insurance recovery for economic loss.⁶ In addition, the prestigious Association of the Bar of the City of New York recently espoused a pure no-fault reparation system for economic losses, with no residual tort liability,⁷ a position already embraced by the American Insurance Association.⁸ The reformers' cause received a major boost in 1971 when the United States Department of Transportation (DOT), after a comprehensive study, issued a report favoring universal, compulsory no-fault insurance for automobiles for all but the most serious economic losses.⁹ The DOT recommendations would, in essence, be enacted and expanded at the national level by bills introduced in the Senate by Senators Hart and Magnuson,¹⁰ and in the House by Representatives Moss and Eckhardt.¹¹ These congressional bills would remove most of the automobile accident reparations from the ambit of state tort law. At this point, however, the Nixon Administration prefers, as a matter of principle, to give the states time to act on the DOT recommendations, with federal action remaining in the background only as a last resort.¹² The Administration seems to be under pressure, however, and would probably be amenable to a compromise which would set up certain federal minimum standards for the states to follow.¹³ In the meantime, the National Conference of Commissioners on Uniform State Laws has set up a special

6. STEWART REPORT 83-100. The recommendations of the STEWART REPORT were put into the form of an Act—the Stewart Bill. The present status of no-fault in New York is discussed at note 150 *infra* and accompanying text.

7. N.Y. Times, Feb. 9, 1972, at 1, cols. 5-7; at 53, cols. 7-8.

8. AIA PLAN. The American Insurance Association, representing most of the stock companies, is only one of the three major trade associations in the insurance field. The two others, the National Association of Independent Insurers and the American National Insurance Alliance, are generally opposed to no-fault.

9. DOT FINAL REPORT 133-37.

10. See Hart Bill. The original Hart-Magnuson Bill (*reprinted in Senate Comm. Hearings* 305) was redrafted following the first round of senate committee hearings. See *id.* at 2096.

11. See Moss Bill (essentially identical with the Hart Bill, except that no-fault insurance for non-economic loss, mostly pain and suffering, is made mandatory). An earlier version of the House Bill, H.R. 7514, 92d Cong., 1st Sess. (1971), formed the basis for the house subcommittee hearings.

12. At the request of the Administration, Representative Staggers introduced H.R. Res. 241, 92d Cong., 1st Sess. (1971), which urges the states to embrace the general no-fault concept, but leaves the scope and methods of implementation to them. In addition, the Secretary of Transportation is authorized and directed to develop model legislation, to provide technical assistance and to follow the progress made at the state level with a view to reporting to Congress within 25 months. For the text of the Resolution, see *House Subcomm. Hearings* 3-8. Transportation Secretary Volpe testified extensively in support of this resolution. See *id.* at 89-121.

13. See 7 TRIALS 59 (July/Aug. 1971). See also *Senate Comm. Hearings* 2294.

committee which is engaged in drafting a Uniform Motor Vehicle Accident Reparations Act to serve as a model for the states.¹⁴

The enemies of no-fault, principally trial lawyers' associations and certain insurance groups, are, of course, against the introduction of no-fault on a national scale, as they have also been at the state level. When these opponents fail to defeat no-fault altogether, they strive to water it down by limiting its scope, making it voluntary and retaining tort liability as an alternative. Thus, the legislation eventually enacted in Illinois and Oregon includes only one minor no-fault feature, namely medical and wage loss protection of modest dimensions. Tort liability, however, is fully retained except that in Oregon comparative negligence replaces contributory negligence and in Illinois a general ceiling, with certain exceptions, is placed on damages recoverable for pain and suffering.¹⁵ In South Dakota, token optional no-fault coverage must be offered to prospective insureds, but tort liability is otherwise unaffected.¹⁶

It is too early to predict the outcome of the no-fault versus negligence liability battle. If the Congress does not preempt the field by adopting a comprehensive national plan, it is possible, if not likely, that the strong sentiment for no-fault will produce a repetition of the workmen's compensation story, with a few pioneering states introducing some form of no-fault, with many others following their lead within five to ten years, and with the balance coming around in the long run.¹⁷ If opposition to no-fault remains strong, however, a per-

14. The Special Committee began holding monthly meetings and it is expected that a final tentative draft of the Uniform Act will be completed by the late spring of 1972. See 39 INS. COUNSEL J. 21 (1972). The Committee has already gone through a series of tentative drafts, the fifth of which is the latest presently available. UNIFORM ACT.

15. *Illinois*: ILL. STAT. ANN. ch. 73, §§ 1065-.153 to -.158 (Smith-Hurd Supp. 1972). See also *Illinois Dep't of Insurance, Auto Reparations in Illinois—The Illinois Plan* (1971) (reproduced in *House Subcomm. Hearings* 1251-1303); O'Connell, *Critique of the Illinois Auto Reparations Plan*, reproduced in *House Subcomm. Hearings* 199-201; Hofeld, *Toward Understanding, Analyzing and Improving "No-Fault" in Illinois*, 1971 INS. L.J. 403-13.

Oregon: § 2, 7-9. See *Oregon Drops No-Fault*, 7 TRIAL 58 (July/Aug. 1971). For a critique of both plans, see ROKES 6-7.

16. *South Dakota*: S.D. COMP. LAWS ANN. §§ 58-23-6 to -23-8 (Supp. 1971).

17. See I A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 5.20-.30 (1968). According to Senator Adlai Stevenson III, "it took 40 years to achieve nationwide workmen's compensation reform through a state-by-state approach. We will be lucky if we can reform the auto accident reparations system in 40 years on a state-by-state basis." *Senate Comm. Hearings* 2125.

There is increasing support around the country, however, for some form of no-fault and it appears that the issue will be considered by the legislatures of most states in 1972. It is reported

manent stalemate may result, with some states switching to no-fault while others retain negligence liability. In either case, a "crazy-quilt" pattern lasting for many years is quite likely to develop, and the problems of choice of law will be multiplied to an unprecedented degree.

After a brief introduction into the fundamentals of no-fault, the present article will concentrate on the choice of law complications of the "crazy-quilt" situation. The interstate features of the various no-fault plans will be reviewed against the background of modern conflicts theory and practice, and the case for adopting a personal (domiciliary), rather than a territorial, approach will be developed. In view of the many issues involved, however, emphasis will be placed on the personal injury, rather than the death or property damage, aspects of the plans.

TORT LIABILITY V. NO-FAULT—A FUNDAMENTAL CHANGE IN AUTOMOBILE REPARATIONS

Under traditional principles, automobile accidents are treated as torts and the injured persons may recover their losses from the wrongdoer, usually the negligent driver of the automobile that hit them or in which they were riding. The loss is eventually shifted to the insurer of the driver, or possibly the owner, of the involved automobile if it happens to be covered by a liability policy. Many states have financial responsibility laws requiring those involved in accidents to obtain liability insurance, but only three states have compulsory insurance laws, enforced through the registration process, imposing a general insurance requirement.¹⁸ The existence of insurance, however, is supposed to be of no relevance to the determination of liability, its function being simply one of underwriting losses.

that the American Insurance Association will introduce "pure no-fault" type legislation into all the 33 states holding regular sessions and the 3 having special sessions this year. *No Fault: A Legislative Bomb of 1972*, 8 TRIAL 8 (Jan./Feb. 1972).

18. New York, Massachusetts and North Carolina. CCH AUTO. L. REP. [Insurance] ¶ 1400 (1971). For a detailed discussion of compulsory liability insurance, see KEETON & O'CONNELL 76-102.

For a discussion of developments in the direction of compulsory automobile insurance in Europe, see Gerdes, *The European Convention on Compulsory Motor Vehicle Insurance*, 1971 INS. L.J. 297, 297-303; Pfennigstorf, *Unification of the Protection of Traffic Victims in Europe*, 15 AM. J. COMP. LAW 436, 436-56. See also UNIDROIT, UNIFICATION OF LAW (YEARBOOK 1961) 156-75 (1962).

In this setting, the choice of law question is what law will govern the tort liability of the wrongdoer to the victim. Under the traditional conflicts approach of the first *Restatement of Conflict of Laws* this issue would have been resolved under the *lex loci delicti*—that is, the law of the place of the accident.¹⁹ In modern conflicts theory and practice, however, this monistic approach has been rejected and a host of connecting factors are relied upon to furnish guidance in resolving particular conflicts disputes. Nevertheless, the issue to be decided remains one of tort liability. If liability is present, a further question is whether the loss comes within the insurance coverage, if any, which calls for the interpretation and application of the insurance contract. Traditionally, liability insurance contracts were said to be governed by the law of the place where they were made, but courts have often been able to find their way to the law of the insured's domicile either by equating the place of the making to the place of delivery or by relying upon a statutory directive.²⁰ There has recently been more direct recognition of the importance of the insured's domicile, especially when the automobile is also located there and the domiciliary law is favorable to him.²¹ The law of the place of the

19. FIRST RESTATEMENT §§ 378-90.

20. See 2 G. COUCH ON INSURANCE §§ 16:2, 16:6, 16:20 (2d ed. 1959); Risjord, *Conflict of Laws Applicable to the Standard Automobile Liability Policy*, 1957 WIS. L. REV. 586; Lenhoff, *Conflict Avoidance in Insurance*, 21 LAW & CONTEMP. PROB. 549, 560-62 (1956). An exhaustive study of early insurance cases disclosed that in about three quarters of them the court located the place of contracting at the domicile of the insured. See 3 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 321, 348 (2d ed. 1964). See also E. PATTERSON, *ESSENTIALS OF INSURANCE LAW* 56-57 (2d ed. 1957). Charles D. Baker, Assistant Secretary for Policy and International Affairs of the Department of Transportation, repeatedly referred to the conformity of the liability insurance contract with the law of the insured's domicile or home state. *House Subcomm. Hearings* 116-18. On the impact of insurance regulatory statutes on the choice of law, see E. RABEL, *supra*, at 325-30; Lenhoff, *supra*, at 555-56.

21. See 2 COUCH, *supra* note 20, § 16:19.5 (Supp. 1971); Lenhoff, *supra* note 20, at 551. Cf. SECOND RESTATEMENT § 193, dealing with the contracts of fire, surety and casualty insurance, including automobile liability and workmen's compensation insurance, which calls for the application of the law of the state of the principal location of the insured risk, unless some other state has a more significant relationship to the transaction and the parties. The SECOND RESTATEMENT recognizes:

In the nature of things, the policy will usually be solicited in the state of the insured's domicile and usually the insured risk will also be located there. In the normal case, therefore, the policy will have been solicited and delivered and the last act necessary to make the contract binding will have taken place in the state where the insured is domiciled This state, in such a situation, will usually be the state of the applicable law, at least with respect to most issues. *Id.*, comment *b*, at 611.

The SECOND RESTATEMENT approach is similar to that of a tentative draft of the Uniform

accident, the *lex loci delicti*, as such is generally irrelevant.²²

A review of the essentials of no-fault shows that a radical change in the philosophy and structure of automobile reparations has taken place.²³ Starting from the premise that accidents are generally an inherent hazard of driving, no-fault views most injured persons as victims entitled to recover for their losses without any reference to culpability.²⁴ On this basis, no-fault takes the giant step of removing automobile accident reparations, at least in most cases that involve ordinary negligence, from the realm of tort liability, thus virtually abandoning any attempt to use the rules governing such reparations for deterrence and punishment purposes. The object of the law is to compensate the injured persons as efficiently and equitably as possible by spreading the losses to the motoring public. The distribution is accomplished through compulsory insurance which constitutes the backbone of the no-fault system and is responsible for the reference

Statute proposed before the Section of Insurance Law of the American Bar Association in 1940. See E. PATTERSON, *supra* note 20, at 54. It has also been said that "residence by itself may well suffice for localizing all types of insurance not connected with another unquestionable central point." E. RABEL, *supra* note 20, at 351-52.

In the following cases, the domicile or residence of the insured was referred to in making a choice of the applicable law: *American Service Mutual Ins. Co. v. Bottum*, 371 F.2d 6 (8th Cir. 1967); *Seguros Tepeyac, S.A. v. Bostrom*, 347 F.2d 168 (5th Cir. 1965); *Lowery v. Kovac*, CCH AUTO. L. REP. [Insurance] ¶ 6946 (D. Conn. 1971); *Breen v. Aetna Cas. & Sur. Co.*, 153 Conn. 633, 220 A.2d 254 (1966); *Stevens v. American Serv. Mut. Ins. Co.*, 234 A.2d 305 (D.C. Ct. App. 1967); *Public Serv. Coordinated Transp. v. Marlo Trucking Co.*, 108 N.J. Super. 232, 260 A.2d 855 (1970); *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 170 A.2d 22 (1961); *Allstate Ins. Co. v. Roberts*, 109 N.H. 108, 244 A.2d 199 (1968); *Fisk v. Atlantic Nat'l Ins. Co.*, 108 N.H. 353, 236 A.2d 688 (1967); *Connor v. State Farm Mut. Auto Ins. Co.*, 265 N.C. 188, 143 S.E.2d 98 (1965); *Urhammer v. Olson*, 39 Wis. 2d 447, 159 N.W.2d 688 (1970); *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966).

The preference for the law of the insured's home state is even more pronounced in the life insurance field. See C. CARNAHAN, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS* 250, 486-87 (2d ed. 1958); E. PATTERSON, *supra* note 20, at 54-55. SECOND RESTATEMENT § 192. In continental Europe there is also considerable support for the application of the law of the insured's domicile in life, health and accident insurance contracts. See E. RABEL, *supra* note 20, at 348.

22. See COUCH, *supra* note 20, § 16:13.

23. The discussion that follows is based on a composite picture of no-fault consisting of the main discernible trends of the major plans. See ROKES 3-5.

24. The emphasis has shifted from punishing the wrongdoer to protecting the automobile accident victim. Marryott, *The Tort System and Automobile Claims: Evaluating the Keeton-O'Connell Proposal*, 52 A.B.A.J. 639, 643 (1966). It has been said that:

The whole thrust of the evolution of automobile insurance . . . has been to focus on the plight of the injured party in the automobile accident. Punishment of the guilty driver is a secondary consideration and a minor one at that. ROKES 213.

to it as "no-fault insurance."²⁵ The system is comprehensive in that it covers all victims and places responsibility on all automobile owners. Indemnity or liability insurance concepts are superceded by social insurance considerations. The insured owners are not merely protecting their solvency but are legally exempted from liability, because the idea is to compensate the victim rather than to right a wrong. Correspondingly, victims recover only no-fault benefits, usually limited to their basic economic losses. In terms of allocation of responsibility, the owner is required to insure the occupants of his automobile and the pedestrians who may be injured by it, but not the occupants of another automobile involved in a collision, since they are to be covered by the insurance of such other automobile. Injured persons need not bring suit against their own personal insurer, except as a residual matter when the automobile was uninsured, and are protected through an assigned claims plan even when they do not happen to carry insurance.

The no-fault insurance system is often referred to as "first-party," in contradistinction to the "third-party" nature of liability insurance. This nomenclature is not entirely accurate. If one were to go all the way and treat the automobile accident as akin to a natural calamity, the insurance would be truly first-party in the sense that it would be incumbent upon the victims to protect themselves in a manner comparable to accident, health or other casualty insurance, looking to their own insurer for loss coverage. Such insurance could be voluntary or be made compulsory if the medical and income-continuation features were viewed in a social security spirit. The no-fault proposals, however, do not follow this path. Rather, they preserve so much of the traditional system as places the burden of loss on automobile owners. Accordingly, substantial categories of victims recover from insurers with whom they have had no previous relationship. It is only the injured owner and his family who, strictly speaking, recover first-party benefits. Recovery by other occupants and pedestrians is more in the nature of third-party strict liability, especially under the plans which hold the uninsured owner personally liable as a self-insurer.²⁶ On the other side of the argument, one might view these people as a class which is to come under the insurance umbrella of the owner as his proteges, so to speak, or as third-party

25. See KEETON & O'CONNELL 256-72.

26. STEWART REPORT 84.

beneficiaries, rather than as claimants against him. This interpretation is strengthened by the exclusion from the insurance umbrella of the main group of tort claimants, namely the occupants of other vehicles.

The exact characterization of the nature of no-fault insurance may not be a matter of substantive importance, but the first-party emphasis is helpful in that it underscores the major shift which has taken place from liability to loss reparation. In addition, whether the no-fault insurance is first- or third-party may have a bearing upon the resolution of the choice of law problem in this area. In first-party type insurance situations, where the victims of loss are supposed to take out insurance on their own, the place of the accident is practically irrelevant in deciding what law is applicable. Reparations are governed by the terms of the policy which, in most instances, has been issued in and under the law of the insured's domicil.²⁷ Third-party type insurance, however, presupposes that there is someone else who is responsible and the loss is to be covered by his insurance; and in allocating and measuring substantive responsibility, the place of the accident has traditionally been a key factor for choice of law purposes.

Under no-fault, the conflicts question arises in the following form: When and for whom should the owner and/or driver be required to obtain insurance, and when and from whom should he be shielded from liability? Conversely, in what circumstances should a victim be subjected to, and get the benefit of, the no-fault plan of a particular owner? Whatever the characterization of the nature of no-fault, this is a responsibility-type question—so that the domiciliary and personal considerations that prevail in insurance conflicts may not be treated as dispositive of the issue. Thus, it is still important to look for guidance to the conflicts rules for torts, with the trends in insurance conflicts remaining as auxiliary considerations.

THE CONFLICTS COMPLICATIONS OF NO-FAULT

Considering that the major conflicts controversies and the substantial majority of conflicts cases in recent years have related to automobile accidents, despite the fact that the rules of negligence liability are generally the same in most states, and taking into ac-

27. See note 21 *supra*.

count the magnitude of the automobile loss reparations problem,²⁸ it is easy to understand why the juxtaposition of multifarious no-fault plans to the traditional tort system in a "crazy-quilt" pattern evokes images of monstrous complexity. This was demonstrated rather clearly during the congressional hearings on the Hart Plan when witnesses repeatedly commented on the chaos, confusion and complication that was bound to result if the states were to be left on their own to decide what, if anything, to do about no-fault.²⁹

This almost apocalyptic vision may be exaggerated, but it does contain many grains of truth. Even during the golden age of certainty, uniformity and simplicity under the *lex loci delicti* rule of the *First Restatement*, automobile accidents produced more than their share of conflicts problems. The modern conflicts methodologies, which subordinate these objectives to the quest for a just and sensible result, have created a state of fluidity, where choice of law is no longer automatic but involves rather the evaluation of many factors for a custom-made resolution of conflicts disputes. As a result, the choice of law process has become increasingly elaborate and unpredictable.

28. It is estimated that in 1967 about 24,300,000 vehicles were involved in accidents resulting in the death of 50,000 and injuries to 4,200,000 persons. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 557 (1969). The statistics compiled by the National Safety Council show that about one-seventh of all fatal accidents and one-twelfth of all accidents involve drivers who were not residents of the states in which the accidents occurred. *Senate Comm. Hearings* 1660. In areas of substantial interstate travel, the incidence of out-of-state vehicles involved in local accidents may increase sharply. For example, for the District of Columbia, it has been estimated that such incidence stands at 40%. *Id.* at 2124.

Without a national plan, the number of cases with choice of law complications would be measured in the hundreds of thousands. *Cf. The Keeton-O'Connell Plan—Some Questions and Answers*, 9 FOR THE DEFENSE 25 (1968).

29. In his testimony before the House Subcommittee, Judge John T. Reardon of Illinois said that "[I]t boggles the mind to figure out what would happen" in choice of law if the no-fault system was placed on top of the traditional theories of liability. *House Subcomm. Hearings* 1074. In the same hearings, Representative Eckhardt repeatedly expressed the fear that if diversity were to replace the present-day substantial uniformity of state laws relating to automobile accidents, conflict of laws would be thrown into a condition of absolute chaos. *Id.* at 114-15. Pennsylvania's Insurance Commissioner Herbert S. Denenberg went even so far as to suggest, presumably in a half-joking manner, that the many lawyers who would be put out of business by no-fault could find another occupation in figuring out the problems of diversity! *Id.* at 242.

Comparable predictions of dire conflicts consequences were made at the hearings held in the spring of 1971 before the Senate Committee on Commerce. *See Senate Comm. Hearings* 412 ("the computers would get tired figuring . . . what the applicable law is"), 911 (choice of law difficulties will lead to "some very serious legal and insurance problems"), 1110 ("tremendous confusion concerning which law governs and what system of compensation applies"), 1660 (one "shudders" when he tries to figure out what law would apply).

The introduction of a drastic change in automobile loss reparations, such as no-fault, in various forms and in a piecemeal fashion, would create myriads of possibilities and complicate the conflicts problems to a point where the outcome might well depend more on prophetic insight than on a reasoning process.

The Hart-Moss Plan

It is obvious that the adoption of a substantial no-fault plan, such as the Hart-Moss Plan, at the national level would deflate and significantly reduce the conflicts problem. Since this Plan has such significant conflicts ramifications, it is necessary that it be considered in some detail. There are two innovative features of the Plan incorporated in the Hart and Moss bills. First, tort liability of automobile owners and drivers for personal injuries caused by negligence in the operation of insured automobiles anywhere in the United States is generally abolished.³⁰ This is referred to as the "tort exemption." Second, all automobiles are required to carry insurance, covering the net "economic loss" of all injured persons, except occupants of other automobiles and persons engaging in certain criminal conduct.³¹ In addition, under the Hart bill the insurance policy may, and under the Moss bill it must, provide for no-fault benefits for non-economic losses, particularly pain and suffering and general damages. However, such benefits are generally not payable until economic loss benefits cease or until a period of three years from the time of the injury has elapsed, whichever occurs first.³² Registering or knowingly driving an uninsured automobile is made a criminal offense and disqualifies the registrant or driver from receiving no-fault benefits.³³ In addition, the registrant and/or knowing driver of such uninsured automobile remain personally liable in tort.³⁴ Except for the mandatory policy provisions and certain requirements for insurance companies, the Plan does not expressly purport to affect the

30. Hart Bill, Moss Bill, § 3. Persons engaged in criminal conduct remain liable in tort under state law for damages other than economic loss.

31. Hart Bill, Moss Bill, §§ 4(a), 5(a). Economic loss is defined to include all medical costs, funeral expenses, costs of substitution services and loss of income up to \$1,000 per month. *Id.* § 2(14).

32. Hart Bill §§ 5(c)(2), (3); Moss Bill §§ 5(b), (c).

33. Hart Bill, Moss Bill, §§ 4(c), 7(e).

34. *Id.* §§ 3, 7(j).

power of the states to regulate insurance companies and policies.³⁵

By requiring the extension of the insurance coverage over certain specific categories of persons and losses, the Plan overrides precisely those features of state laws where differences have been producing most of the choice of law controversies: guest statutes, immunities, vicarious liabilities, contributory negligence rules, limitations on damages, direct-action statutes and uninsured motorist statutes.

By far the most important mandatory policy clause is the one which extends no-fault benefits not only to the owner, operator or user of the insured automobile, but also to all of its occupants and to pedestrians injured by it.³⁶ By a stroke of the pen, this clause renders inoperative the guest statutes and the intra-family and charitable immunities, which are now in effect in many states and which leave substantial categories of persons without a remedy for automobile injuries.³⁷ Under the Plan, a guest, a spouse or a child riding in the automobile, or hurt by it, is entitled to the same recovery as all others. By making benefits under the owner's policy directly available to the victims, regardless of who may have been the operator, the Plan also resolves the vicarious liability question in favor of the injured parties.³⁸ While most states accept contributory negligence as a complete defense³⁹ so that few conflicts have arisen on this point,⁴⁰ there is substantial divergence in the allocation of the burden of proof or of going forward with the evidence. In most states, it is the plaintiff

35. *Id.* §§ 6, 10.

36. *Id.* § 5(a)(1). *See also* ROKES 4.

37. Twenty-eight states either completely bar claims by guests against hosts in automobile accidents or require a showing of more than ordinary negligence. *See* WEINTRAUB 207; CCH AUTO L. REP. [Insurance] ¶¶ 1041, 1045, 1050 (1970). In about two-thirds of the states, actions between spouses for negligently caused automobile injuries are barred—that is, there is an intra-spousal immunity. PROSSER 864. Most states also bar tort actions between parents and children—that is, there is an intra-family immunity. *Id.* at 867-68. The immunity of charitable organizations from liability for the negligent actions of their employees is now recognized only in a minority of the states. *Id.* at 994-95.

38. On the vicarious liability of the automobile owner for the driver's negligence under state law, *see* PROSSER 481-86. *See also* SECOND RESTATEMENT § 174. It is interesting to note that the unknowing driver of an uninsured automobile is shielded from liability under section three of both the Hart Bill and the Moss Bill, but in a peculiar twist, the benefits payable under his no-fault policy, if any, are not made available to the victim.

39. Only about a dozen states reject contributory negligence as a bar to the action and follow a "comparative negligence" approach, under which the plaintiff's contributory negligence goes to the reduction of damages. PROSSER 436-37.

40. *See* SECOND RESTATEMENT Reporter's Notes § 164, at 498; *cf.* *Frummer v. Hilton Hotels Int'l, Inc.*, 60 Misc. 2d 840, 304 N.Y.S.2d 335 (Kings County 1969).

who must show his freedom from contributory negligence, whereas in others the defendant must establish plaintiff's contributory negligence.⁴¹ The question of whether a court should treat the issue as procedural and apply the law of the forum or as substantive, which would call for the application of the law that governs the tort, has not received a uniform answer.⁴² The Plan simply eliminates this choice of law issue altogether and allows the victim to recover under the insurance policy regardless of fault. The various limitations on the amount of damages recoverable, especially for death, which are in force in a number of states, have given rise to a host of much-debated conflicts cases involving automobile or airplane accidents.⁴³ Under the Plan, in case of death claimants are assured of full no-fault benefits of their losses.⁴⁴

A few states enable the traffic victim to sue the wrongdoer's insurer directly and primarily.⁴⁵ Since the Plan by its conception is a direct action statute,⁴⁶ it will also no longer be necessary to puzzle over the choice of law aspects of this issue,⁴⁷ and the same will be true for the "no-action" clauses in insurance policies which block an action by the victim against the insurer until a judgment against the wrongdoer has been obtained. Since the benefits will be recoverable from the insurer, the no-action obstacle will be removed from the scene. State financial responsibility or compulsory insurance laws often require that a policy cover the insured parties against injury by uninsured or unidentifiable motorists.⁴⁸ There have been disputes on

41. PROSSER 416.

42. See SECOND RESTATEMENT §§ 133-34; *id.* Reporter's Notes, §§ 133-34, at 368-69, 373-74.

43. *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), *discussed in Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 552 (1968); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *Long v. Pan Am. World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964); *DeFoor v. Lematta*, 249 Ore. 116, 437 P.2d 107 (1968), *discussed in Symposium: Conflict of Laws Roundtable*, 49 TEX. L. REV. 211 (1971). Fourteen states limit wrongful death damages in some way.

44. Hart Bill, Moss Bill, §§ 5(a)(1)(B), 5(b)(1).

45. PROSSER 544-45.

46. Hart Bill, Moss Bill, §§ 5(a), (b).

47. See SECOND RESTATEMENT § 162. This issue is also alive in Europe. For an interesting French conflicts case and accompanying comment, see *Veuve Lecoq c. Peveril et Cie London Garanty*, 60 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [REV. CRIT. D.I.P.] 67-75 (1971).

48. See C. BRAINARD, *AUTOMOBILE INSURANCE* ch. 9 (1961); ROKES 29-30; CCH AUTO. L. REP. [Insurance] ¶¶ 1190, 1500 (1970).

what law should apply to determine, for example, who is an uninsured motorist.⁴⁹ By specifically defining the categories of persons who are entitled to claim through assigned plans,⁵⁰ the Plan will also eliminate this conflicts problem.

The suppression through federalization of these state law differences would leave a few areas, mostly of secondary importance, where conflicts may still arise. The most significant of these conflicts relates to the inclusion in the insurance of coverage for non-economic loss, chiefly pain and suffering, which is to be payable only if due under the applicable state law. Other conflicts situations might arise where the automobile is uninsured and the owner remains liable under state law. Furthermore, a driver engaged in criminal conduct is not shielded by the tort exemption, at least insofar as non-economic losses are concerned.⁵¹ Finally, the Plan does not dictate the full terms of the insurance policy, and variations may spring up at the state level on the validity and effectiveness of clauses. The problems might occur in provisions requiring notice of claim and cooperation as a condition to insurer liability, and those dealing with optional coverage. These variations may still lead to choice of law questions.

All in all, the drastic reduction of conflicts in the automobile accident field which will be brought about as a consequence of the adoption of the Hart-Moss Plan will undoubtedly be greeted with sighs of relief by the beleaguered judges who have had to agonize over their resolution. One might even be tempted to speculate that the conflicts decongestion, which will follow the adoption of a national plan, will bring about some *détente* in conflicts theory in general, where conditions remain unsettled following years of vigorous and almost violent challenge to the traditional wisdom.

The fate of the Hart-Moss Plan, however, is uncertain at present: the state-by-state approach is favored by the Nixon Administration, and a draft Uniform Act is in the process of preparation.⁵² Even if some action is taken at the federal level there is no assurance that it

49. See, e.g., *Ramirez v. Wilshire Ins. Co.*, 13 Cal. App. 3d 622, 91 Cal. Rptr. 895 (Dist. Ct. App. 1970).

50. Hart Bill, Moss Bill, §§ 7(d), (e).

51. See notes 30-32 *supra* and accompanying text. The Hart and Moss Bills leave the question of choice of the applicable state law completely open, so presumably it will be governed under tort conflicts rules and methodologies of the states involved.

52. See notes 12-14 *supra* and accompanying text.

will be as far reaching as the Hart-Moss Plan.⁵³ Thus, the odds at this juncture appear to be in favor of the resolution of the no-fault versus negligence-liability controversy at the local level,⁵⁴ with all resultant potential variations and conflicts complications.

The State No-Fault Plans

If there is a common feature of the state no-fault plans, proposed or enacted, it is their extreme diversity of structure and coverage.⁵⁵ The enacted plans are quite modest in dimensions,⁵⁶ the proposed Stewart Plan for New York and the A.I.A. Plan are all-encompassing,⁵⁷ with the Keeton-O'Connell Plan falling in between.⁵⁸ The plans also differ widely on such particulars as insurance requirements and consequences of failure to insure, the fixing of primary insurer liability, the scope of the tort exemption and the availability of alternative recovery in tort, the definition of the classes of persons who are eligible to recover no-fault benefits and many others.

Apparently recognizing that a conflicts nightmare is bound to result in the absence of some statutory guidance on sphere of application, all of the major no-fault plans include express provisions specifying the situations covered and those that are excluded. Here again, however, there is a bewildering diversity of approach. One can find examples of an almost exclusive territorial approach, with reliance on the law of the locus of the accident; of a mainly personal approach, where applicability of the plan depends upon the status of the persons and automobiles involved; and of combinations of these factors. It does not take a great deal of imagination to visualize the veritable chaos that could result if diversities of conflicts rules were added to

53. For example, Mr. Benjamin Schenk, New York Superintendent of Insurance, stunned the House Subcommittee by proposing that Congress do nothing more than abolish the "lawsuits based on tort to recover damages for automobile accidents" without adopting a substitute system, in particular a national no-fault insurance plan. *House Subcomm. Hearings* 328. The states would then be in effect forced to take some action to provide compensation for automobile victims through another system, most likely through insurance. The Subcommittee members were apparently less sanguine than Mr. Schenk on the likelihood of the states' taking effective and timely action on their own in this setting and were inclined to favor the imposition of federal standards. *Id.* at 328-38.

54. For a summary of the state versus federal argumentation, see *ROKES* 7-12.

55. For a summary description and comparison of the features of most of the proposed plans, see *id.* at 33-96, 272-75.

56. See notes 4, 15, 16 *supra* and accompanying text.

57. See notes 6-8 *supra* and accompanying text.

58. See note 3 *supra* and accompanying text.

the differences in substantive law. The draftsmen of the Uniform Act⁵⁹ can expect little in-depth guidance in their arduous work from the plans already proposed. This is so because in the heat of the debate over the merits of no-fault, the interstate aspects have been rather neglected with a tendency too often to seek refuge in the security blanket of the *lex loci delicti* as if it were still the rule in this area, not taking into account the implications for no-fault of the recent drastic changes in conflicts theory and practice, and without full consideration of the significant conflicts consequences of the change of fundamental objectives and methods for automobile loss reparation inherent in the no-fault concept.

It is important at this point, therefore, to look at the modern developments in choice of law with a view to determining what conflicts approach would best fit the no-fault plan.

THE NEW CONFLICTS AND NO-FAULT

Traditional Conflicts in Full Retreat

Conflicts orthodoxy, which was enshrined in the *First Restatement* and the *lex loci delicti*, one of its main commandments, have become a rapidly vanishing faith. The early blows dealt to them by Professors Cook⁶⁰ and Lorenzen⁶¹ were followed by a widespread dissatisfaction in the post-war period. The thaw following the "Ice Age of conflict of laws jurisprudence"⁶² became a flood in the sixties, and within a few short years the *lex loci delicti* as the iron rule of tort conflicts became moribund.⁶³ This does not mean that the law of the

59. See note 14 *supra* and accompanying text.

60. W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 3-89 (1942).

61. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736 (1924).

62. This is the phrase of Judge Kaufman in *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 557 (2d Cir. 1962).

63. So far, courts in at least 22 jurisdictions have refused to follow the rule. These jurisdictions include New York, California, Illinois, Pennsylvania and the District of Columbia. WEINTRAUB 234-36 n.36; Note, *The Erosion of Lex Loci Delicti: Toward a More Rational Choice of Tort Law*, 5 *U. RICHMOND L. REV.* 331-34 (1971). A recent Ohio case seems to place that state also in the column of the reformers. *Fox v. Morrison Motor Freight, Inc.*, 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971). On the other hand, the rule has been reaffirmed in only ten states, WEINTRAUB 237 n.43, sometimes only upon stare decisis, *see, e.g.*, *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *McDaniel v. Sin*, 194 Kan. 625, 400 P.2d 1018 (1965); or sometimes halfheartedly, *see, e.g.*, *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967); or sometimes for the lack of an easily administrable alternative, *see, e.g.*, *Friday v.*

place of the accident is necessarily irrelevant, but that it has been dethroned as the single applicable connecting factor and that its continued use must be justified on policy grounds.

While a detailed description of the new theories that have revolutionized the conflicts rules in the torts field is beyond the scope of this article, it is necessary to review their fundamental tenets and methods, albeit in an oversimplified way, before attempting to assess their implications for the resolution of conflicts in no-fault. Broadly speaking, the arena of conflicts for torts is presently dominated by two currents—the revolutionaries, who basically reject the *First Restatement* approach and advocate in its place a variety of novel concepts and methodologies, and the revisionists, who admit many of the shortcomings of the traditional system but attempt to rectify them by taking policies into account, particularizing the rules and introducing flexibility in their application. The variations within each current are virtually infinite and need not be of particular concern here. It will suffice, for present purposes to concentrate on two representative approaches—the theory of “governmental interests” and the “most significant relationship” test.

The Theory of Governmental Interests—A Conflicts Revolution

The late Professor Brainerd Currie continues to occupy the center stage of the revolutionary group.⁶⁴ His iconoclasm was so pervasive that his “governmental interests” system left no room for choice of law rules in the traditional sense. To fill the resultant vacuum, he proposed a methodology which sought to determine on an ad hoc basis whether a given substantive law or rule of the forum state should apply in a given multi-state situation. This determination was to be accomplished essentially through a process of construction and interpretation of the law or rule. If the policy underlying the law or rule would be advanced by its application in a particular case, and an appropriate relationship existed between the transaction, the parties or the litigation and the forum state, there was a “governmental

Smoot, 211 A.2d 594 (Del. 1965); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966); *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964). See Juenger 203 n.7.

64. Professor Currie's theory is described and explained in his various writings. See CURRIE, *SELECTED ESSAYS*; Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

interest" and the courts had no choice except to apply the forum's law. The presence or absence of a comparable governmental interest in another state was essentially irrelevant. Where only the forum or only another state was interested, there was a "false conflict," and the application of the substantive law respectively of the forum or of the other state made eminent sense. Where, however, both the forum and another state were interested, there was a "true conflict," and the forum judge ought to prefer the local over the foreign interest, at least where no interstate compact or federal law dictated to the contrary.⁶⁵ To avoid complete displacement of foreign by domestic law through overzealous localism, Currie in his later writings admonished the courts to engage in a moderate and enlightened interpretation of the governmental interests of their state, and to seek accommodation by applying the law of another interested state when the local policies would not be significantly infringed.⁶⁶ In the infrequent instances where the forum was a "disinterested state," the court again ought to apply, *faute de mieux*, its own local law, at least when it coincided with that of one of the interested states, or the court might choose the better law.⁶⁷

The Currie methodology has attracted considerable scholarly support and even the leading revisionists have been forced to make allowance, in the *Second Restatement*, for the policies and interests of the forum state.⁶⁸ More importantly, many of the landmark decisions that ushered in the brave new world of conflicts, especially in the bellwether states of New York and California, bear the distinct imprint of governmental-interest analysis.⁶⁹

Opposition to the Currie theory, however, has been strong in Europe and is increasing in the United States. The critics assail its theoretical foundations, disputing the existence of governmental in-

65. See CURRIE, SELECTED ESSAYS 183-84; REESE & ROSENBERG 523-24.

66. See CURRIE, SELECTED ESSAYS 186; REESE & ROSENBERG 523.

67. REESE & ROSENBERG 524; Currie, *The Disinterested Third State*, *supra* note 64, at 777-80.

68. SECOND RESTATEMENT §§ 6(2)(b), (c), (e).

69. See, e.g., *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743. A recent ingenious and far reaching use of governmental interests analysis came in *Lester v. Aetna Life Ins. Co.*, 433 F.2d 884 (5th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971), where the court read *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), to require federal courts to apply state conflicts law only in "true conflict" cases, and disregarded the Louisiana "place of delivery" rule and applied substantive forum law on the theory that the particular conflict was "false." 433 F.2d at 889-91.

terests which should be of significance in determining the spatial application of private law.⁷⁰ They also contend that, in any event, the theory is unworkable since such interests are not easily ascertainable, and no matter how arduous and conscientious the search, the conclusion is bound to be conjectural and subjective, all to the detriment of the recognized objectives of certainty, uniformity and ease of application.⁷¹ Even when the search bears fruit, multiple interests may be discovered, each pulling in a different direction.⁷² Finally, the most effective attacks against Currie's theory focus on his arbitrary selection of the law of the forum to resolve all "true conflicts." This forum preference is said to be destructive of efforts to provide criteria for allocation of law-making powers in a rational system of choice of law and to foster forum-shopping.⁷³ In fact, in most cases where the courts use governmental interests analysis, this built-in forum preference is rejected and an attempt is made to weigh the interests of the states involved in a more or less neutral fashion—in a manner reminiscent of the approach of the *Second Restatement*.⁷⁴

Another influential conflicts scholar, whose approach parallels Currie's in a number of ways, is Professor David Cavers. Like Currie, he believes that the purposes underlying the substantive law are germane in delineating the ambit of its territorial and personal applica-

70. *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 63-64 (1967); REESE & ROSENBERG 571-72; Kegel, *The Crisis of Conflict of Laws*, in 112 *HAGUE COURSES (II)* 181-89, 198 (1966); cf. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 237 (1965).

71. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 223-25 (1968); Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1, 18-22 (1963); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 *HARV. L. REV.* 377 (1966); Evrigenis, *Tendances Doctrinales Actuelles en Droit International Privé*, in 118 *HAGUE COURSES (II)* 313, 362-64 (1966); Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 *U. CHI. L. REV.* 463, 474-77 (1960); Juenger 206-11; Reese, *Recent Developments in Torts Choice-of-Law Thinking in the United States*, 8 *COLUM. J. TRANSNAT'L L.* 181, 186-88 (1969); Rheinstein, *How to Review a Festschrift*, 11 *AM. J. COMP. L.* 632, 663 (1962); Rosenberg, *Two Views on Kell v. Henderson, An Opinion for the New York Court of Appeals*, 67 *COLUM. L. REV.* 459, 464 (1967); Von Mehren, *Book Review*, 17 *J. LEGAL ED.* 91, 92-97 (1964). See also CAVERS 74-75, 108, 135.

72. Evrigenis, *supra* note 71, at 362.

73. See REESE & ROSENBERG 524-25; Evrigenis, *supra* note 71, at 365-68; cf. CAVERS 119-20.

74. See discussion and authorities cited in R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 253 (1968); A. EHRENZWEIG, *supra* note 70, at 64; Ehrenzweig, *A Counter-Revolution in Conflicts Law*, *supra* note 71, at 389; Juenger 208; cf. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 *CALIF. L. REV.* 845 (1961). For a very recent and particularly interesting case, see *Pryor v. Swarner*, 445 F.2d 1272 (2d Cir. 1971).

tion, and he basically goes along with Currie in identifying and resolving "false conflicts."⁷⁵ At the same time, he recognizes that the choice of law should be made in a way to render justice in disputes among private persons, and therefore, he is not satisfied with the wholesale application of the *lex fori* in "true conflict" situations.⁷⁶ To take care of "true conflicts," Cavers has developed certain "principles of preference"⁷⁷ which differ from traditional rules in that they take into account not only the various significant contacts but also the content of the potentially applicable laws. In the personal injury field, the Cavers principles evaluate contacts and content with a view to reaching a balance between two contradictory objectives: first, granting the plaintiff the fullest possible reparations; second, shielding the defendant from excessive liability under laws which should not, in fairness, be applied against him. Despite the fact that the principles of preference actually formulated by Cavers are tentative and fragmentary,⁷⁸ they are increasingly referred to by the courts.⁷⁹

The Revisionist Approaches

The *Second Restatement* best exemplifies the revisionist position. In it, the traditional connecting factors—such as the *lex loci delicti*, *lex loci contractus*, *lex domicilii* and *lex rei sitae*—often remain, but only as guides, in the search for the state with the most significant relationship to the parties and the transaction or occurrence with regard to the particular issue in dispute. In an effort to reduce the subjectivity of the determination of the most significant relationship, the *Second Restatement* sets up a number of particular presumptions, usually rebuttable, that the law of a state where a certain combination of factors is present should apply. Certain general objectives of the choice of law process are also enumerated, in preferential order, as aids in the evaluation of the significance of particular contacts. In addition to such time-honored objectives as the needs of the interstate and international systems, the protection of the justified expectations

75. CAVERS 72-73.

76. *Id.* at 73-75, 121.

77. *Id.* at 75-87, 139-80.

78. For an excellent critique of the Cavers principles, see Evrigenis, *supra* note 71, at 341-54.

79. See, e.g., *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

of the parties, the certainty, predictability and uniformity of results, and the ease of determination and application of the law chosen—the *Second Restatement*, in a major concession to the Currie approach, recognizes the importance of the policies and interests of the forum and of other states.⁸⁰

In a sense, one cannot but welcome the constructive approach of the *Second Restatement* at a time when the demolition of the traditional system and the continued factionalism among the apostles of the new creeds have brought conflicts law to the brink of anarchy. It has, however, been attacked by those who do not want conflicts to be strait-jacketed into rules, or who consider their present reformulation as misguided or premature.⁸¹ It has also been claimed that the *Restatement's* eclecticism and efforts to accommodate divergent viewpoints have led to such a dilution of its standards that they have become amorphous and may mean all things to all people.⁸² The "most significant relationship" test has also been branded as involving circular reasoning since the significance is the point in question.⁸³

Policy Orientation and the Importance of Home-State Law in Modern Tort Conflicts

Modern conflicts law is still in a state of ferment, and the logomachies go on with the zeal and unreality of medieval theological disputations. While it is too early to tell which way the new conflicts will eventually crystallize, if one were to cut through the doctrinal maze, focus on the practical implications of the modern approaches and take stock of the results suggested by the commentators or reached by the courts, certain definite common trends stand out, which are of particular significance for choice of law in the automobile accident field.

The modern theories are policy-oriented, in the sense that they

80. SECOND RESTATEMENT § 6(2).

81. See, e.g., CAVERS 29 (describing Currie's view); Ehrenzweig, *A Counter-Revolution in Conflicts Law?*, *supra* note 71, at 388; Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963); Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713 (1961); cf. CURRIE, *SELECTED ESSAYS* 170; Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 681 (1963).

82. CAVERS 69-72; A. EHRENZWEIG, *supra* note 70, at 67; Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1241 (1965); cf. Reese, *Products Liability and Choice of Law: The United States Proposals to the Hague Conference*, 25 VAND. L. REV. 29, 30-31 (1972).

83. CAVERS 207; A. EHRENZWEIG, *CONFLICTS OF LAWS* 351, 464, 548 (1962); Juenger 212.

reject the territorial sovereignty and vested rights dogmas of the *First Restatement*, and rely heavily on the purposes sought to be achieved by the substantive law in delineating its sphere of application.⁸⁴ As a consequence of the renunciation of the geographical test in favor of a teleological one,⁸⁵ the internal objective of the particular substantive law becomes the most useful guide in determining its external scope. "Purposes," "policies," "objectives" and "interests" have replaced the traditional localization concepts, and there has been a reconsideration of the very foundations of the basic conflicts rules. The most important consequence of this for automobile loss reparations has been the emergence and predominance of personal, in particular domiciliary, factors over territorial ones.

Policy analysis shows that the main objectives of tort law are first, to regulate conduct, particularly to deter or punish undesirable actions, and second, to provide reparations to those who have suffered losses attributable to such conduct.⁸⁶ The conduct-regulation objective supports a territorial orientation for choice of law since states normally are concerned with acts, and their effects, within their own boundaries, regardless of who may be involved. Loss distribution, however, is of primary concern to the home states of the parties, because that is usually where they have come from and where they will eventually return. The state of the accident has, at most, only an indirect interest in reparations—that is, to the extent that the availability and size of reparations may deter undesirable conduct through its punitive effect and may provide a fund for the protection of local creditors.

When these objectives are particularized and brought to bear upon automobile accidents, the importance of personal over territorial considerations becomes evident. Whatever the deterrent effect of liability for negligent driving may be in a vacuum, it is negligible when considered in the context of the present situation in the United States. Every state requires negligent drivers to compensate their victims for their personal injuries and permits owners and drivers to protect and cover the loss through insurance. Against this back-

84. See CAVERS 93.

85. See Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1214 (1946).

86. SECOND RESTATEMENT § 145, comment c, at 416-17; Juenger 216; Reese, *Recent Developments*, *supra* note 71, at 189; Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROB. 137 (1951).

ground, state laws relating to the modalities of recovery—for example, restrictions on who may recover (guest statutes, immunities and survival statutes) and on what may be recovered (damage limitations)—are recognized to have little, if any, deterrent effect.⁸⁷

With compensation looming as so large a factor in automobile accident liability,⁸⁸ the search for the states which are likely to have the closer connection with the issue of recovery, and the greater claim for and interest in the application of their law to its determination, leads to the home states of the parties involved in the accident.⁸⁹ While it may be true that with the increasing mobility of our population the relationship linking persons to states is not as permanent and as profound as it once was,⁹⁰ it is beyond dispute that, in significance and durability, it far surpasses any other relationship—especially the relationship of a person to the state where the accident happens to occur.⁹¹ It is interesting to note that the drift away from territorial

87. See, e.g., KEETON & O'CONNELL 247-49; Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373, 375 (1971); Senate D.C. Hearings 83, 140.

88. KEETON & O'CONNELL 242, 256; Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 333 (1972).

89. The terms "home state" and "domicil" are used interchangeably in the present article to refer to the locality where the personal and occupational activities of a person are centered. The concept may not be unambiguous to the point of perfection, but its basic meaning is generally well understood. See REESE & ROSENBERG 8, 50-51. Professor Cavers, in his principles of preference, prefers to use "home state," meaning "settled residence," instead of domicil as a connecting factor in order to avoid the traditional association of domicil with only one place at a time. CAVERS 140, 154-55 n.21. He is almost promiscuous, however, in the use of terminology, referring indiscriminately, for example, to "resident," *id.* at 124, 129, "inhabitant," *id.* at 135, 148, "citizen," *id.* at 125, 144, 149, "out-of-stater," *id.* at 143, 149 n.15, 154, and "domiciliary," *id.* at 141-42. Currie labelled domicil "an intolerably elusive factor in commercial transactions," but recognized that the ambiguity could be largely overcome by substituting the factual concept of "settled residence" as advocated by Cavers. CURRIE, SELECTED ESSAYS 103-04, n.41. Currie indicated that domicil is not as objectionable in tort cases as in commercial cases, but still expressed a preference for "residence, carefully defined." *Id.* at 141, n.53. SECOND RESTATEMENT § 145(2)(c) refers to both domicil and residence as relevant connecting factors for torts.

90. *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 749, 752 (Fla. 1967); CAVERS 135-36; R. LEFLAR, *supra* note 71, at 15.

91. The fortuity of the locus of the accident has been underscored in many of the modern conflicts cases, including in particular the pioneering case of *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), where Chief Judge Desmond emphasized 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. *Id.* at 39, 172 N.E.2d at 527, 211 N.Y.S.2d at 135.

The latest major New York case restated this view in no uncertain terms:

considerations and toward personal ones is not only an American phenomenon but has affected in some measure recent efforts to unify or codify torts conflicts in other countries.⁹²

We rejected the *lex loci delictus [sic]* rule because it placed controlling reliance upon one factor totally unrelated to the policies reflected by the ostensibly conflicting laws. *Tooker v. Lopez*, 24 N.Y.2d 569, 589, 249 N.E.2d 394, 400, 301 N.Y.S.2d 519, 527 (1969).

In *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) it was stated:

All of the commentators and all of the cases that end up in disagreement with the unbending application of the *lex loci* have a common thread . . . that the place of the occurrence of an unintentional tort is fortuitous, and it is by mere happenstance that the *lex loci* state is concerned at all. . . . They are also dismayed that in this day of rapid transportation, whether by land or air, that the rights and liabilities of the parties to each other should vary from hour to hour, or indeed minute to minute as state boundaries are crossed. *Id.* at 629, 133 N.W.2d at 414.

In *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967), the court used the following language:

In the present case appellant and appellee were residents of and domiciled in this state. The automobile trip was initiated here. By fortuitous circumstances the accident happened on the other side of the Ohio River instead of on this side. The suit was brought in this state. It would be strange if under Kentucky law the respective rights of the parties should undergo some metamorphosis at a point on the bridge just before reaching the Indiana shore. *Id.* at 260.

See also the testimony of Senator Adlai Stevenson III to the effect that: "If the motorist is to comply with a new and different set of complex laws everytime he crosses a State line, he may need a Philadelphia lawyer as a traveling companion." *Senate Comm. Hearings* 2124.

According to Professor Sedler:

The place where the accident occurs may not be "fortuitous" in the sense that if the vehicle or vehicles had not been in that particular place at that particular time there would not have been an accident, but in realistic and practical terms, it is certainly irrelevant The fact that state lines exist does not mean that they should be significant in automobile accident cases The state line as a basis for the solution of conflicts problems becomes significant only if we make it. We can solve these problems on the basis of territorialism or we can look at them existentially in light of social, economic and behavioral realities. We can give maximum weight to the place where an automobile accident occurred or we can recognize that in this day and age the social and economic consequences of automobile accidents will be felt in the place where the parties live. Sedler, *The Territorial Imperative—Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 410-11 (1971).

92. The Benelux Draft Convention of 1951, embodying a Uniform Private International Law, originally ratified by Luxembourg, was revised in 1969 and signed by all the Benelux countries. While the first paragraph of Article 14 of the Convention establishes the *lex loci delicti* as the general rule for torts, the second paragraph provides:

However, if the consequences of a wrongful act belong to the legal sphere of a country other than the one where the act took place, the obligations which result therefrom shall be determined by the law of that other country.

The text of the Convention and Uniform Law is available in English translation in 18 AM. J. COMP. L. 420 (1970). The official comments to the Convention illustrate the exception by referring to the situation where the parties involved in an automobile accident are nationals and domiciliaries of another state. 41 REV. CRIT. D.I.P. 165, 174 (1952), *reprinted in* Nadel-

mann, *International Developments in Choice of Law Governing Torts—Introductory Remarks*, 19 AM. J. COMP. L. 1, 2 (1971).

The Institute of International Law at its Edinburgh Session of 1969 adopted a Resolution Regarding Torts in Private International Law which uses, in Articles 1 and 2, a "most closely connected" test similar to that of the *Second Restatement*. Article 3, however, establishes certain special rules relegating members of a family to the law of their common habitual residence and drivers, owners and passengers to the law of the automobile's registration. See Cavers, *Contemporary Conflicts Law in American Perspective*, in 131 HAGUE COURSES (III), 75, 164-66 (1970); Nadelmann, *supra*, at 5-6.

Perhaps the most important attempt for international unification of automobile torts conflicts is represented by the draft Convention on the Law Applicable to Traffic Accidents, approved by the Hague Conference on Private International Law at its Eleventh Session in October, 1968 and adopted unanimously by all delegations, with the exception of those from the United States and England which abstained. For the text of the draft convention, see 16 AM. J. COMP. L. 588-93 (1968). In view of the great importance attributed in Europe to the values of certainty, uniformity and ease of application, the draft Convention establishes hard and fast rules, starting with the *lex loci delicti* rule in Article 3. It is of particular interest to note, however, that the broad exceptions engrafted upon the rule make frequent use of the domiciliary contacts of the parties, and the preparatory works reflect the general consensus on the importance of such contacts. In particular, an earlier draft of the Convention expressly subjected claims between driver and passengers to the law of their "habitual residence." Cavers, *Contemporary Conflicts Law*, *supra*, at 168-69 n.88; Loussouarn, *La Convention de la Haye, Sur La Loi Applicable en Matière d'Accidents de la Circulation Routière*, 96 J. DU DROIT INT'L 5, 8, 15 (1969). In the final text, the law of the place of the automobile's registration became the focal point of the exceptions, not so much because of a disagreement in fundamentals but because it is more easily ascertainable, it facilitates insurance planning and settlements, and in any event, in most instances it does coincide with the habitual residence of the occupants. See Castel & Crepeau, *International Developments in Choice of Law Governing Torts—Views from Canada*, 19 AM. J. COMP. L. 17, 20 (1971); Cavers, *Legislative Choice of Law: Some European Examples*, 44 S. CAL. L. REV. 340, 354-59 (1971); Cavers, *Contemporary Conflicts Law*, *supra*, at 168-70; Loussouarn, *supra*, at 7-8, 15-16; *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law—The Law Applicable to Traffic Accidents*, 8 INT'L LEG. MAT. 785, 801-02 (1969). The Uniform Law Section of the Conference of Commissioners on Uniformity of Legislation in Canada approved a Uniform Conflict of Laws (Traffic Accidents) Act based on the Hague Convention which makes greater use of the parties' habitual residence. See Castel & Crepeau, *supra*, at 36-38.

The Special Commission, appointed to prepare a draft convention on the law applicable to products liability for the 1972 Hague Conference, has chosen the "habitual residence" of the plaintiff as the key conflicts contact. See Reese, *supra* note 82, at 38-41.

A number of European countries often peg their departures from the *lex loci delicti* to the national and/or domiciliary law of the parties. Most noted of these is Article 45 of the new Civil Code of Portugal, dealing with extracontractual liability, which provides in paragraph three:

[If the] actor and the victim have the same nationality, or, failing that, have the same habitual residence and happen to meet in a foreign country, the applicable law shall be that of the common nationality or common residence.

See Cavers, *Legislative Choice of Law*, *supra*, at 353-54. The Swiss Law on Road Traffic of 1958, Art. 85(2)(b), calls for the application of Swiss law to determine the rights of Swiss domiciliaries injured abroad by Swiss-registered vehicles. See Nadelmann, *supra*, at 3 n.10. Under German law, certain automobile injury actions between Germans are governed by German law even when the place of the wrong is located abroad. Road Traffic Law of 1952 (I.B.G. BP 837) cited in Drion, *The Lex Loci Delicti in Retreat*, in Festschrift fuer

From the victim's point of view, his present losses and future financial needs are best defined and measured in the context of his home state. He is supposed to be, and frequently is, familiar with its law, and his plans for accident protection, if any, are made with local companies, with the expectation that, for better or worse, such law will be applied. His dependents and most of his creditors, who have a stake in his finances, are also likely to be local. And, in the last analysis, it is his home state which may eventually have to provide public support for him and bear the burden of the obligations which he can no longer assume.⁹³

Since, however, under tort reparations the burden falls on the alleged wrongdoer, the latter's home state appears to have a commensurate protective interest in shielding him from unreasonable liability.⁹⁴ His familiarity with, and planning in accordance with his state's law, the location of most of his creditors and his continued welfare,

OTTO RIESE 225 (1964). See also KEETON & O'CONNELL 207-09; Kegel, *supra* note 70, at 194; CAVERS 176 n.59. In England, the House of Lords recently applied English law to decide the claim of one Englishman against another for injuries suffered in an automobile accident in Malta, adopting in the process a choice of law approach resembling that of the *Second Restatement*. *Chaplin v. Boys*, [1969] 2 All E.R. 1085. See Cavers, *Contemporary Conflicts Law*, *supra*, at 184-85; Reese, *Choice of Law in Tort Cases*, 18 AM. J. COMP. L. 189 (1970). On the application of the common domiciliary law of the parties, see also Cavers, *Contemporary Conflicts Law*, *supra*, at 183, 186; Kahn-Freund, *Delictual Liability and Conflict of Laws*, in 124 HAGUE COURSES (II) 1, 64-87, 121-28 (1968).

93. "[I]n the ordinary accident case, the realistic purpose in allowing recovery is to provide compensation for the victim or his dependents. Since the social and economic consequences of the accident will be borne in the victim's home state, the only real interest in allowing compensation lies there." Sedler, *Symposium: Conflicts of Laws Roundtable*, 49 TEX. L. REV. 224, 226 (1971). See also Reese, *supra* note 82, at 34 n.7, 39.

Section 7(d) of the federal Hart and Moss Bills, notes 10-11 *supra*, relegates the person injured by an uninsured automobile to the assigned claim plan of the state in which he resides.

In a recent case involving the Jones Act, the three dissenters elaborated on the Supreme Court's application of interests analysis in the delineation of the sphere of application of federal statutes. In an opinion written by Justice Harlan, it was stated:

The only justification that I can see for extending extra-territorially a remedial type provision like § 688 is that the injured seaman is an individual whose well-being is a concern of this country. . . . [T]he necessary ingredients for a statutory cause of action [are]: first, as a matter of statutory construction, is plaintiff within that class of seamen that Congress intended to cover by statute? . . . Where, as in the case before us, the injured plaintiff has no American ties, the inquiry should be directed toward determining what jurisdiction is primarily concerned with plaintiff's welfare *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 313-14, 318 (1970).

See also notes 97, 101-02 *infra*.

94. *Cipolla v. Shaposka*, 439 Pa. 563, 564-65, 267 A.2d 854, 855-56 (1970). See CAVERS 146-50, 152, 158; Reese, *Recent Developments*, *supra* note 71, at 193-94. See also notes 114-15 *infra*.

as well as that of his insurer, all point toward the application of his own home state law.

The interest and concern of the state of the accident in the victim's recovery, when it is not the domiciliary state of any of the parties, is at best residual and limited. With the deterrence objective no longer significant, the single basis for the application of its compensatory law would be to create a fund for the benefit of local creditors, if any.⁹⁵

With these considerations in mind, the principal question then is to resolve the particular dispute in a way that will best accommodate the policies underlying the laws of the plaintiff's and the defendant's home states and at the same time do justice between the parties. It must be recognized that this is quite a difficult task. Whatever its shortcomings, the *lex loci delicti* rule, by its own nature, pointed to a single state as the source of the substantive rules to be applied. Domicil and residence, however, are personal to the parties, and quite often more than one home state's law may be applicable. What to do in that situation has become the major headache of modern torts conflicts.

In the context of an action by a victim against a tortfeasor, three main home-state types of situations may arise: first, a situation where the plaintiff's home state provides compensation which is denied to him under the defendant's home state law—this is the really hard case;⁹⁶ second, the inverse situation where defendant's home law is

95. The alleged interest of the state of injury for the welfare of its medical creditors and other persons who aided the injured victim has been blown out of proportion in the choice of law context, considering the lack of proof of actual legislative concern with this problem. It is probably Currie who is responsible for the postulation of the existence of such an interest which is to be taken into account in the process of conflicts resolution. In so doing, he relies upon Supreme Court decisions in workmen's compensation cases, such as *Carroll v. Lanza*, 349 U.S. 408 (1955); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935), which held that such a state interest may provide a constitutional justification for the application of its laws in a particular context. CURRIE, *SELECTED ESSAYS* 145 n.64, 210, 294, 369, 373, 375, 701; Currie, *Comments on Babcock v. Jackson*, *supra* note 64, at 1237. For an opposing view, see Kegel, *supra* note 70, at 90, 192 where it is stated that "[t]he Good Samaritan has to take the injured party as he finds him, with or without a claim of damages based on the appropriate tort statute." See also the views of Professor J.H.C. Morris summarized in *CAVERS* 179 n.62. In any event, many commentators, including Currie, recognize that such an interest may be residual and limited. See note 124 *infra*.

96. See *Pryor v. Swarner*, 445 F.2d 1272, 1277 (2d Cir. 1971); *Cipolla v. Shaposka*, 439 Pa. 563, 568-69, 267 A.2d 854, 859 (1970) (Roberts, J. dissenting); Sedler, *The Territorial Imperative*, *supra* note 91, at 409 n.67.

more generous to the victim than plaintiff's—this is a relatively easier case, since the issue is simply whether the plaintiff should get the extra benefit (or windfall) of the defendant's personal law; third, a situation where both parties are domiciliaries of the same state, or their domiciliary law is the same, in which case the choice under modern conflicts is not in much dispute.

Since the first situation is the most difficult, it shall be examined in depth, with reference made to how Currie, Cavers and the *Second Restatement* might resolve it. Currie, probably more than anyone else, hammered upon the irrelevance, in most instances, of territorial contacts and upon the importance of a state's interest in its people.⁹⁷ The governmental interests theory has thus been attacked as having created a "personal" law of torts.⁹⁸ Under the Currie methodology, the first situation would present a "true conflict" of state interests which could not be resolved in any completely satisfactory way. Consequently, if the action were to be brought in one of the domiciliary states, a court should apply the forum law in preference to that of the other states, unless the conflicting state policies could be accommodated through a moderate and restrained interpretation of the forum law.⁹⁹ It is to be noted that the forum law preference built into the Currie system generally favors the plaintiff, because it is he who has the litigation initiative.¹⁰⁰ Plaintiff cannot sue in his home state as such, however, unless the defendant can be personally served therein, but he may seek to take advantage of his initiative by avoiding defendant's home state and suing instead either in the state of the accident or where the insurer may be available under a direct action

97. The importance of the domiciliary contacts of the parties in the determination and definition of governmental interests permeates the entire Currie work. See CURRIE, SELECTED ESSAYS 77-176. For specific references to the relevance of the personal contacts, such as domicil, residence or citizenship, see *id.* at 85-86, 103, 113, 144, 149, 184, 420, 722.

98. Kegel puts it this way:

The [Currie] assumption that the state is interested primarily in the protection of its own citizens and for that reason strives to apply its own law, leads, in the parlance of traditional conflict of laws, to a rather pronounced preference for the *personal statute* as opposed to *territorial* points of contact. Kegel, *supra* note 70, at 119.

See also the dissenting opinion of Judge Breitel in *Tooker v. Lopez*, 24 N.Y.2d 569, 593, 597, 249 N.E.2d 394, 409, 411, 301 N.Y.S.2d 519, 539, 542-43 (1969).

99. CURRIE, SELECTED ESSAYS 167, 169; REESE & ROSENBERG 523-24.

100. Currie was aware of the forum-shopping possibilities inherent in his methodology but was not too concerned about them. He suggested that "if the demand for uniformity is subject to moderation, so must be the distaste for forum shopping." CURRIE, SELECTED ESSAYS 168-69.

statute or, *quasi in rem*, in the state where the insurance obligation may be garnished.¹⁰¹ Assuming these to be essentially disinterested jurisdictions, if their law should be favorable to the plaintiff and coincides with that of his home state, the Currie method would call for its application.¹⁰² Even where the law of his home state is unfavorable to him, the plaintiff may get the benefit of the compensatory policy of the accident state by making a case for a local interest.¹⁰³ By contrast, the defendant can attempt to use the declaratory judgment route only where personal jurisdiction over the plaintiff is available. As has already been noted, the judicial adherents of the governmental interests methodology are not willing to indulge in the Currie forum preference, at least not openly, so that they search instead for a solution to this "true conflict" situation by a weighing process—either by taking into account the other contacts, including the place of the accident, or by developing additional interests of the domiciliary states. Thus, they essentially converge toward the Cavers and the *Second Restatement* approaches.

When the home states' interests pull in different directions, as in the first posited situation, Cavers would apparently be willing to resolve the compensation issue by giving the plaintiff or the defendant, as the case may be, the benefit of the law of the place of the accident, at least if it occurred within his home state. This is the core of his first and second proposed principles of preference.¹⁰⁴ This "enlightened territorialism" at the second level of reference is defended as being fair to the parties and consistent with their expectations, while also taking into account any regulatory interests of the accident state as such.¹⁰⁵

Cavers also emphasizes the significance of the pre-existence of a relationship, if any, between the parties and focuses on the "seat" of such relationship as the crucial connecting factor in principles of preference number four and five, which contain the major exceptions

101. *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); *Pryor v. Swarner*, 445 F.2d 1272 (2d Cir. 1971). See WEINTRAUB 147-50; Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 360, 363-64 (1971).

102. See note 67 *supra*.

103. See note 95 *supra*.

104. CAVERS 139, 146. Cavers would apply the higher standard of financial protection of the state of the accident even where the plaintiff is an out-of-stater, so long as the defendant is also an out-of-stater. Cf. Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 641, 646-47 (1968).

105. CAVERS 139-59.

to the rules set out in principles one and two.¹⁰⁶ This view made some inroads with the courts, as *Dym v. Gordon* aptly illustrates,¹⁰⁷ but was dealt a blow in *Macy v. Rozbicki*¹⁰⁸ and was probably laid to rest, at least in New York, in *Tooker v. Lopez*.¹⁰⁹ The Cavers position sounds reasonable enough where the relationship itself is the source of legal rights and obligations between the parties—for example, in carrier-passenger and master-servant situations—in which case it may be more appropriate to choose the applicable law on the basis of relational or contract-type criteria.¹¹⁰ When it comes to casual or temporary relationships, however—such as that of guest-host—their relevance is quite questionable on policy grounds;¹¹¹ and in the family relationship context, the “seat” is nowhere else but at the parties’ domicile.

The tort provisions in the *Second Restatement* are still burdened by the vestiges of conflicts orthodoxy, and section 146 establishes a rebuttable presumption in favor of the *lex loci delicti* in personal injury cases. It is to be noted, however, that this rule is intended to apply generally to all torts, and it must be understood as implementing in part the deterrent objectives in this area of the law. When the scope of inquiry is narrowed and the focus is placed on compensatory legislation, the *Second Restatement* moves away from the rigidity of territorialism and demonstrates recognition of the significance of the personal contacts. More particularly, a number of special sections relating to the availability and size of compensation are not restricted by the territorial presumption of section 146, but refer generally to the state of the most significant relationship¹¹² to be chosen under the omnibus section 145, which includes the domicile and residence of the parties as major significant contacts. Be that as it may, in the first posited situation the *Second Restatement* is likely to lead to the same choice of law results as the Cavers method. With the domicile or

106. *Id.* at 166-80.

107. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

108. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

109. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

110. Cavers places these kinds of relationships at the center of his illustrations, but unfortunately, he does not stop there but carries his analysis over into incidental relationships.

111. See *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Rosenberg, *Two Views on Kell v. Henderson*, *supra* note 71, at 462-63; Trautman, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 618 n.1 (1968).

112. SECOND RESTATEMENT §§ 167 (survival of actions), 168 (charitable immunity), 171 (measure of damages), 174 (vicarious liability).

residence of the parties split, and in the absence of a special relationship among them, the territorial contacts remain as the only other significant factor.¹¹³

This brief review of the position of Currie, Cavers and the *Second Restatement* on the resolution of the central "true conflict," posited in the first situation, would be incomplete without reference to a more drastic result-oriented approach advocated by some scholars and having a considerable, if implicit, influence upon the courts, especially in situations where the rules denying or limiting compensation are believed to be little more than the "dregs of history." Professor Weintraub is probably the leading exponent of a trend to tip the scales in true conflict cases in favor of the plaintiff and establish a presumption in favor of distribution rather than concentration of the losses, assuming the presence of insurance, except when this would unfairly surprise the defendant.¹¹⁴ The solution proposed by Professor Weintraub is cast in the form of an alternate reference rule which states that

[a]n actor is liable for his conduct if he is liable under the law of any state whose interests would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise the actor.¹¹⁵

This rule, which bears some resemblance to workmen's compensation practice, may be difficult to apply, since it does not provide any guidance in determining what would unfairly surprise the defendant. What it does, however, is unmistakably establish compensation as the general principle and insulation from liability as the exception. Weintraub's more recent interpretation of the exception would give it considerable breadth, extending it to all cases where the defendant had no significant nexus with the pro-compensation state.¹¹⁶

A pro-plaintiff bias appears in some form in the writings of other

113. Cf. *id.* § 145, comment c, at 416-17; Reese, *Recent Developments*, *supra* note 71, at 193.

114. WEINTRAUB 204; Weintraub, *A Method for Solving Conflict Problems-Torts*, 48 CORNELL L.Q. 215, 238-44 (1963).

115. WEINTRAUB 209. Currie expressed the view that such an alternative reference principle would have a minimal chance of adoption because it dealt forthrightly with the policy conflict. CURRIE, *SELECTED ESSAYS* 707.

It is quite remarkable that the United States delegation at the Hague Conference, with Professor Reese as the Rapporteur, recently proposed a pro-plaintiff alternative reference bill for products liability cases in almost identical language. This proposal, however, was rejected precisely because of its pro-plaintiff bias. See Reese, *supra* note 82, at 30-38.

116. WEINTRAUB 248-49, and examples given therein.

conflicts experts,¹¹⁷ and it surfaces prominently in two categories of cases and comments of rather recent vintage: those that opt for the compensatory rule as the "better law"¹¹⁸ and those that find a way to impose liability when the defendant is insured.¹¹⁹

Turning now to the second posited situation, where the law of plaintiff's home state is less generous to him than the defendant's, the plaintiff is not in a strong position to make a claim to the extra benefit. Assuming that the principal aim of the liability rule in both states is to compensate the plaintiff rather than punish the defendant, it is quite appropriate in this situation to have plaintiff's recovery measured under the standards of his home state regardless of who happened to injure him.¹²⁰ There are those, however, who would give

117. Cavers opened the door to this kind of an approach by condemning "jurisdiction-selecting" choice of law rules and by advocating consideration of the contents of the potentially applicable laws in making the final selection. CAVERS 8-10, 84-87; Cavers' principles of preference contain a built-in pro-plaintiff stance in that the range of situations where a higher standard of care or financial protection is applicable, is broader than that for a lower one. A comparison of principles one and four with principles two and five, respectively, demonstrates this. *Id.* at 139-59, 166-80. *Cf. id.* at 127. According to Professor Baade, "the thrust of these Principles is unabashedly plaintiff-oriented." Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 162 (1967). See also A. EHRENZWEIG, *supra* note 83, at 555; Juenger 228-29; Rosenberg, *Two Views on Kell v. Henderson*, *supra* note 71, at 464. Professor Reese recognizes that "the great majority of cases applying the governmental interests analysis approach in the torts area have reached a result favorable to the plaintiff." Reese, *Recent Developments*, *supra* note 71, at 188; Reese, *supra* note 82, at 35.

118. Professor Leflar is one of the main supporters of the "better-law" approach. See R. LEFLAR, *supra* note 71, at 254-59. See also Juenger 230-35. For a collection of such cases, see WEINTRAUB 244 n.73.

119. See, e.g., *Johnson v. Hertz*, 315 F. Supp. 302 (S.D.N.Y. 1970); *Tooker v. Lopez*, 24 N.Y.2d 569, 576-78, 249 N.E.2d 394, 398-99, 301 N.Y.S.2d 519, 524-27 (1969); *Miller v. Miller*, 22 N.Y.2d 12, 19-21, 237 N.E.2d 877, 881-82, 290 N.Y.S.2d 734, 739-42 (1968). *Cf.* the views of Professors Rheinstein and Currie in CAVERS 26, 33, 47. Professor Cavers is an outspoken critic of this trend. *Id.* at 50, 309; Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 219-20 (1971); Cavers, *Conflicts Justice*, *supra* note 101, at 365; Cavers, *Some of Ehrenzweig's Choice-of-Law Generalizations*, 18 OKLA. L. REV. 357, 362-64 (1965). But see CAVERS 31.

120. Professor Cavers has considered this issue on a number of occasions, but his position is not entirely free from ambiguity. It appears that he would limit the plaintiff to the measure of recovery provided by his home state, at least when the accident happened there. See CAVERS 48-49; Cavers, *Contemporary Conflicts Law*, *supra* note 92, at 179-80; Cavers, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 647, 651-52 (1968). But see Cavers, *Conflicts Justice*, *supra* note 101, at 368-72. When the accident happens in defendant's state, however, Cavers is inclined to let the plaintiff recover under defendant's law on the theory that such law is intended not only to compensate the injured but also to provide for deterrence and retribution in the interests of general security. CAVERS 53-54, 143-44. What if, in an accident in a pro-compensation state, both parties are out-of-staters from different states? Cavers poses but does

the plaintiff the windfall of the extra compensation under defendant's law, motivated principally by a pro-compensation bias.¹²¹

The third situation, where the parties' domiciliary law is the same, is easier than the other two. In the overwhelming majority of recent cases that do not follow automatically the *lex loci delicti*, the courts have applied the common domiciliary law of the parties to decide issues of compensation for personal injuries caused by automobiles, at least when such law is more favorable to the plaintiff than the *lex loci*. This is generally consistent with the modern conflicts approaches of all persuasions.¹²² When such law precludes or limits recovery, however, some courts and commentators strain to choose the more favorable *lex loci* or other law on the theory that this would be

not directly answer the question. *Id.* at 145 n.8. Professor Twerski criticizes the Cavers solution to the situation where the accident happened in defendant's state, arguing:

[I]t is hard to see why the state of injury has any interest in providing more liberal compensation to the out-of-state plaintiff at the expense of its own citizen. Twerski, *supra* note 87, at 376.

See also Reese's comments in CAVERS 46. The Private International Law Committee of the Office of the Revision of the Civil Code of Quebec proposed a rule which focuses squarely on plaintiff's domiciliary law, whether more or less favorable to him than any other potentially applicable law, in determining his right to recovery. The text of the rule is as follows:

Extracontractual civil liability is governed by the law of the domicile (habitual residence) of the plaintiff at the time when the act which caused the damage occurred.

See Castel & Crepeau, *supra* note 92, at 33. See also the rule proposed for products liability for adoption by the Hague Conference. Reese, *supra* note 82, at 38-39.

121. See WEINTRAUB 223-24; Juenger 226; Kay, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 584, 590 (1968); Sedler, *The Territorial Imperative*, *supra* note 96, at 409 n.67; Trautman, *Two Views on Kell v. Henderson—A Comment*, 67 COLUM. L. REV. 465, 467, 472 (1967); notes 114-15 *supra*; cf. *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

Currie spoke both of a possible "altruistic interest" of the pro-compensation state to protect whoever may be injured by the negligence of its defendants, whatever the location of the accident or their home, and of a possible deterrent effect on negligent conduct. See Currie's comments in CAVERS 33, 47, 53; CURRIE, *SELECTED ESSAYS* 488-89, 495. Cf. *Neumeier v. Kuehner*, 37 App. Div. 2d 70, 72-73, 322 N.Y.S.2d 867, 869 (1971).

122. CAVERS 134, 152-53; Cavers, *The Value of Principled Preferences*, *supra* note 119, at 217-18; Cavers, *Contemporary Conflicts Law*, *supra* note 92, at 156-57, 160, 182. See also CAVERS 46 (quoting Reese); Reese, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1251, 1255 (1963); Reese, *Choice of Law: Rules or Approach*, *supra* note 88, at 327-28; Trautman, *Comments on Reich v. Purcell*, *supra* note 111, at 618. See also authorities cited in note 123 *infra*. Cf. Rosenberg, *Two Views on Kell v. Henderson*, *supra* note 71, at 464. For cases where the more favorable common domiciliary law was applied, see, e.g., *Aurora Nat'l Bank v. Anderson*, ___ Ill. 2d ___, 268 N.E.2d 552 (1971); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967); *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966); *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917 (1968), *cert. denied*, 393 U.S. 957 (1968); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

consistent with the accident state's interest to protect local creditors or because of a pro-compensation stance.¹²³ It appears clear, however, that such interest of the accident state, if any, is limited and residual¹²⁴ and does not justify the wholesale application of local law to the main compensation claims. The basic soundness of the pro-

123. Most of the debate on this point centers around *Kell v. Henderson*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966), a rather obscure, laconic case which never reached the New York Court of Appeals. What attracted interest to it was that it involved the inverse fact-law pattern of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the celebrated case that ushered modern tort conflicts into New York. In *Kell*, the only contact with New York was that the single-car accident happened there. The parties, members of Ontario families, commenced their trip in Ontario in a locally-registered car and were only passing through New York. The case was supposed to provide a clue on whether the new "grouping of contacts" or "governmental interests" methodology of the New York courts was to be operated with a plaintiff-protective or home rule preference or in a neutral fashion. The *Kell* court found for the plaintiff under New York law disregarding the Ontario guest statute. Had it not been for the fact that *Kell* was the mirror image of *Babcock*, it would surely have passed unnoticed. The opinion appears to be leaning toward New York law more on traditional *lex loci* than on policy grounds. Furthermore, it reflected the views of only two of the five judges. The third judge concurred principally on a procedural ground, namely that the Ontario guest statute had not been pleaded in time and that an amendment to the pleadings would have prejudiced the plaintiff. For an approving view of *Kell*, see Trautman, *Two Views on Kell v. Henderson*, *supra* note 121, at 472-73. Comparable results on a "better law" theory were reached in *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). See also *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968).

Cavers almost predicted the *Kell* result. *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1219, 1222-26 (1963). Stressing the "local creditors" and "deterrent effect" points, he appears to favor the *Kell* result. See Cavers, *The Value of Principled Preferences*, *supra* note 119, at 218-19; but cf. CAVERS 156-57. Professor Cavers has also conceded that *Kell* appears to be in conflict with the criteria set up by Judge Fuld in *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). Cavers, *Contemporary Conflicts Law*, *supra* note 92, at 160-61, 179, 182-83. On the inconsistency between *Babcock* and *Kell*, see Juenger 225-26; Rosenberg, *Two Views on Kell v. Henderson*, *supra* note 71, at 463. It is interesting to note that Professor Weintraub, one of the leading pro-compensation advocates, has reservations on the soundness of the *Kell* result. WEINTRAUB 246-47.

In view of the fact that *Kell* has served as the rallying point for the pro-compensation group and undercut the credibility of *Babcock's* use of the personal law of the parties, it is important to note that *Kell* has been put to rest by the same court that decided it. In the case of *Arbuthnot v. Allbright*, 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (3d Dep't 1970), which involved essentially identical facts with *Kell*, the court unanimously limited *Kell* to its procedural holding and upheld the Ontario guest statute defense—on the ground that the mere happening of the accident in New York is insufficient to support the application of New York law, citing, quite appropriately, Judge Fuld's concurring opinion in *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 403, 301 N.Y.S.2d 519, 531 (1969). But see *Saleem v. Tamm*, 67 Misc. 2d 335, 337, 323 N.Y.S.2d 764, 766 (Broome County Ct. 1971).

124. Cf. CAVERS 144; CURRIE, *SELECTED ESSAYS* 368; Currie's comments in CAVERS 52-53; WEINTRAUB 219; Twerski, *supra* note 87, at 376. See also note 95 *supra*.

compensation stance is also questionable,¹²⁵ and in fact, the courts have not hesitated in many instances to apply the common domiciliary law against the plaintiff.¹²⁶ In conclusion, it is fair to state that in modern conflicts the common domiciliary law of the parties, whatever its content, is of paramount importance in deciding automobile reparations claims.¹²⁷

The Domiciliary Factor in No-Fault

The choice of law problem in automobile accidents has so far been considered under both the old and the new conflicts theory and practice only in the context of tort liability. To be sure, the fact that the insurance of the tortfeasor covered a given liability has sometimes influenced the courts in favor of selecting the law that imposed liability.¹²⁸ In principle, however, automobile insurance has been viewed only as underwriting the tortfeasor's liability and as being immaterial to its determination.

The no-fault approach, permeated as it is with a compensation philosophy and built around insurance rather than relying on old-

125. [W]henever two parties from an immunity, no liability, or limited liability state are involved in an accident in a "recovery" state—assuming no interest of the recovery state in implementing any admonitory policy—there is, in reality, a false conflict and the law of the parties' home state should be applied. Sedler, in *Symposium: Conflict of Laws Roundtable*, 49 TEX. L. REV. 224, 226 (1971).

See also Sedler, *The Territorial Imperative*, *supra* note 96, at 409 n.67.

126. See, e.g., *Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); *Wartell v. Formusa*, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); *Witherspoon v. Salm*, 142 Ind. App. 655, 237 N.E.2d 116 (1968), *rev'd on other grounds*, 251 Ind. App. 575, 243 N.E.2d 876 (Sup. Ct. 1969); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *Schneider v. Schneider*, 110 N.H. 70, 260 A.2d 97 (1969); *Dow v. Larrabee*, 107 N.H. 70, 217 A.2d 506 (1966); *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966); *Stacy v. Greenberg*, 9 N.J. 390, 88 A.2d 619 (1952); *DeFoor v. Lematta*, 249 Ore. 116, 437 P.2d 107 (1968); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966); *Garza v. Greyhound Lines, Inc.*, 418 S.W.2d 595 (Tex. 1965). Cf. *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967). See also, *Watts v. Pioneer Corn Co.*, 342 F.2d 617 (7th Cir. 1965).

127. In most of the cases where the common domiciliary law of the parties was applied in the automobile accident context, see notes 122, 126 *supra*, the courts used language indicating that such law was chosen because of the importance of the domiciliary contact as such. See *CAVERS* 134, 136, 150-52, 156-57; Sedler, *supra* note 125, at 226-27; Trautman, *Comments on Reich v. Purcell*, *supra* note 111.

The *Second Restatement* goes as far as to create a presumption in favor of the choice of the common domiciliary law as such to determine issues of tort liability among members of families, *SECOND RESTATEMENT* § 169, and generally refers to such law in many tort loss reparation contexts. See, e.g., *id.* § 145, comments *d* and *e*, § 156, comment *f*, § 159, comment *b*, § 171, comment *b*. Cf. *Cavers, Contemporary Conflicts Law*, *supra* note 92, at 186.

128. See notes 21, 119 *supra*.

fashioned person-to-person recovery concepts to distribute the losses caused by automobiles, is ideally suited to use the teachings of modern conflicts. Indeed, it is when the substantive law aims at compensation, rather than deterrence or punishment, that the predominance of the personal over the territorial contacts becomes unquestionable.

It is not without some surprise, therefore, to find that the main no-fault proposals rely heavily on the *lex loci delicti* in delineating the sphere of their application. Only the District of Columbia Plan and the intrastate provisions of the Massachusetts Plan dispense some no-fault rights and obligations according to criteria that are reconcilable with the fundamental teachings of modern conflicts and reflective of the objectives of no-fault.

The next step, then, is to analyze the interstate features of the main no-fault plans. When this analysis is completed, the outline of a totally personal approach to the no-fault conflicts problem will be drawn, with an explanation of its responsiveness to modern conflicts learning and its workability.

THE INTERSTATE FEATURES OF THE NO-FAULT PLANS

The New York Plans—The Revival of the Lex Loci Delicti

*The Stewart Plan.*¹²⁹ The boldness on the substantive side of the Stewart Plan—that is, the total abolition of tort liability for automobile accidents based on fault and its replacement with substantial no-fault benefits for economic loss¹³⁰—is matched by a straight-forward choice of law approach. The Plan applies fully to all accidents that occur within the territorial boundaries of New York and does not apply at all to out-of-state accidents.¹³¹ The domicile of the owner, driver and injured persons; the seat of the various relationships, where the automobile was registered, garaged and insured; and all other connecting factors are thus irrelevant and immaterial. All automobiles driven in New York, even temporarily or in transit, and wherever registered, must carry no-fault insurance for the benefit of all persons, including pedestrians, who might be injured in New York,

129. See note 6 *supra*.

130. Stewart Bill §§ 670-76; Note, *The Viability of No-Fault Automobile Insurance in New York*, 17 N.Y.U.L. FORUM 207, 233-35 (1971).

131. Stewart Bill §§ 670, 671, 675; STEWART REPORT 98-99; J. GHIARDI & J. KIRCHER, *AUTOMOBILE INSURANCE: THE ROCKEFELLER-STEWART PLAN* (1970), reproduced in *Senate Comm. Hearings* 798, 805-06.

excluding, however, the occupants of other automobiles who are to be covered by the insurers of those automobiles.¹³² When the automobile is insured, the owner is completely insulated from liability, and an action lies only against the insurer.¹³³ If the automobile involved is uninsured, however, the owner is personally strictly liable for all injuries to passengers and pedestrians as self-insurer.¹³⁴ Through modification of the law relating to New York's Motor Vehicle Accident Indemnification Corporation, passengers and pedestrians who cannot recover from an insurer—because, for example, the automobile is uninsured, unidentified, unregistered, or stolen—are entitled to collect from the Corporation in a manner comparable to an assigned claim plan.¹³⁵ For out-of-state accidents, the Stewart Plan would maintain in effect the third-party liability insurance presently required of automobiles registered in New York.¹³⁶

The territorialism of the Stewart Plan is directly antithetical to the personal or domiciliary approach prevalent in modern conflicts theory in this area. It is indeed ironic that the revival of the moribund *lex loci delicti* was proposed for New York, the state which was the first to make a clean break with the past in the automobile accident field in *Babcock v. Jackson*,¹³⁷ and in such other "radical" conflicts cases as *Macey v. Rozbicki*¹³⁸ and *Tooker v. Lopez*.¹³⁹

Why this wholesale regression to the *First Restatement*? The Stewart Report makes reference to the "present compulsory insurance law [which] applies to all motor vehicles driven in [New York] state" and to the general rule that "traffic regulations and motoring costs are determined by the state in which the motoring takes place," and attempts to explain the territorialism of the Stewart Plan as being "in keeping with the established pattern."¹⁴⁰ But traditional liability insurance does not relate to who may recover what from whom, it merely protects the insured against liability. In contrast, no-fault insurance under the Stewart Plan is in the nature of a repara-

132. Stewart Bill §§ 670-72; STEWART REPORT 84, 85.

133. Stewart Bill §§ 672, 675; STEWART REPORT 84, 85 n.136.

134. Stewart Bill § 671; STEWART REPORT 84, 85.

135. STEWART REPORT 85 n.137. For a description of how the New York system generally operates in this context, see KEETON & O'CONNELL 113-18.

136. STEWART REPORT 99; N.Y. VEH. & TRAF. LAW §§ 311-16 (McKinney Supp. 1971).

137. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

138. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

139. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

140. STEWART REPORT 98.

tions system *in lieu* of tort liability. The fact that under the Stewart Plan the accident costs are to be internalized and distributed through insurance is of no significance as such in deciding eligibility for, and the amount of, reparations. Regardless of whether the proposed New York no-fault insurance is to be characterized as first-party or strict liability insurance,¹⁴¹ no reason is given why recovery should be made to vary with the locus of the accident. The importance of the domiciliary factor in first-party insurance has already been explained.¹⁴²

As for traffic regulations and motoring costs, the analogy is at best misplaced. Traffic regulations, such as speed limits and road signs, are aimed at conduct. At the very heart of the no-fault system lies the assumption that accidents are a hazard inherent to motoring and that reparations should be determined by the victim's needs rather than by the culpability of the drivers. This is particularly true under the Stewart Plan because of its total abolition of negligence liability for accidents within the state. The reference to traffic regulations in support of territorialism for reparations simply makes no sense. The attempt to analogize accident costs to motoring costs such as highway and bridge tolls, gasoline taxes and requirements of anti-pollution devices¹⁴³ is, if anything, even less tenable. These costs do have a direct relation to the maintenance of a state's road network and the purity of its air, but the main costs of accidents are losses to people and a state's concern is principally for the welfare of its own people.¹⁴⁴

141. The Stewart Report suggests that its proposal has elements of both first-party and strict-liability insurance. It is first-party where the automobile owner claims against his own insurer, and strict-liability where a passenger, pedestrian or some other party is the claimant. *Id.* at 84 n.134. The applicable section of the proposed act itself is entitled "Strict Liabilities." Stewart Bill § 671.

142. See notes 20-21 *supra*.

143. STEWART REPORT 98 n.168.

144. There are, however, several clues to the real reason for the territorialism of the Stewart Plan. First, the footnote to the "traffic regulations" and "motoring costs" text of the Stewart Report states:

This approach is generally consistent with the territorial basis of modern political jurisdiction and with the territorial, rather than personal or tribal, nature of modern systems of civil and criminal law. *Id.*

It is also, and more significantly, noted in the text:

New York vehicles, when driven outside the state, would be under the accident law of the state or country in which the accident occurred, *just as is now the case*. *Id.* at 99 (emphasis added).

That this is not now the case and that the territorial and vested rights dogmas of the *First Restatement* have few adherents has already been demonstrated.

The principal interstate dysfunctions of the Stewart Plan may be summarized as follows:

(a) New York domiciliaries injured in other states will not be entitled to no-fault benefits even when they were driving, riding in or hit by a New York automobile. Assuming, for example, that an accident involves one or more New York automobiles in a guest-statute state, or in any liability state where the driver or drivers were not at fault, the New York passengers will be left without a remedy and may become a burden on the state of New York when they return, despite the fact that the automobiles carried the required no-fault insurance. This result is indefensible and is not incorporated in any other major no-fault plan.¹⁴⁵ Note that even where an action between New Yorkers is brought in an accident state whose courts follow the modern conflicts approaches, the outcome will probably be the same since the no-fault domiciliary law of the parties is by its own terms limited to New York accidents. Thus, the Stewart Plan would undo the essence of *Babcock*, *Rozbicki* and *Tooker*, the cases which served as models of the new methodologies for the nation and which were hailed for the equitable results that they reached.

(b) Out-of-staters driving in New York would be subject to the New York no-fault strict liabilities toward injured passengers and pedestrians of their own state whether or not their insurance covers them. Consequently, if their insurance policy happens not to have a no-fault rider, they will be personally strictly liable. The reparations for losses inflicted by out-of-staters on out-of-staters should not be the business of New York, except possibly for local medical costs. Imposing the New York no-fault system on unsuspecting owners and/or drivers of out-of-state automobiles who motor in New York, however transiently, and exposing them to the personal risk of staggering reparations claims, even when they are not at fault, also goes beyond any legitimate interest of New York.¹⁴⁶ For example, an out-of-stater carrying liability insurance who, while driving carefully in New York, has a collision with another automobile of his own state, whose driver is at fault, will be placed in the absurd position of paying out of his own pocket no-fault benefits to his own passengers while

145. But cf. the provisions of the Columbia Compensation Plan of 1932, see note 159 *infra*, described in *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 784, 810 (1932).

146. For a discussion on this point relating to the Columbia Compensation Plan, cf. *A Symposium*, *supra* note 145, at 822-24.

he himself can neither recover such benefits nor sue the other driver in tort!

(c) From the viewpoint of non-domiciliaries who are injured in New York by their co-domiciliaries who are at fault, the deprivation under the Stewart Plan of certain rights, for example damages for pain and suffering, available to them under their own liability law, is unnecessarily restrictive. In fact, other states which are not wedded to the *lex loci delicti* may refuse to recognize this feature of the Stewart Plan and proceed to apply their own law in any event.¹⁴⁷

(d) The insurers, and eventually the insurance population, of New York will have to carry the burden of the losses of out-of-staters who are injured in or by out-of-state automobiles while being drivers, passengers or pedestrians in New York in circumstances not covered by the liability policies of the automobiles involved, even though neither the victims nor the owners or drivers have paid any insurance premiums in New York.¹⁴⁸ The paying insurers are relegated to the uncertain remedy of recoupment through personal recovery against the out-of-state owner whose liability insurance may not protect him in this situation. Even where the out-of-staters are injured in or by New York automobiles, the question remains why their reparation rights should be determined under the New York standards, where the accident happened, rather than under the rules of their home state, which has the paramount interest in their welfare. The recognized but limited interest of New York to create a fund for local creditors could be vindicated through a narrowly drafted provision, without the wholesale application of New York law to the main claims.¹⁴⁹

A no-fault system which bestows benefits upon out-of-staters under circumstances where they do not bear a fair share of the expenses is particularly unsuitable for "corridor" states such as New Jersey or states or areas where a substantial proportion of the automobiles

147. In fact they may do so even where only the victim is their domiciliary but the tortfeasor is a New Yorker, with the result that the latter, if negligent, would be liable in tort in a situation not covered by his no-fault insurance, for example, a two-car collision in New York. Cf. J. GHIARDI & J. KIRCHER, *supra* note 131, at 806.

148. Although out-of-state vehicles would be required to secure no-fault insurance coverage for operation in New York through a "rider," or additional provision of the liability policy, there is no adequate procedure for effective enforcement. Stewart Bill § 672; STEWART REPORT 98 n.169.

149. See notes 95, 124 *supra*.

on the highways properly bear out-of-state license plates, such as in the District of Columbia.

The Gordon Plan. While the chances for the adoption of the Stewart Plan, in the original version, by the New York legislature are becoming remote, a new but limited no-fault plan offered in February, 1972, by state Senator Gordon is now in the process of active consideration and has the support of Governor Rockefeller.¹⁵⁰ The Gordon Plan provides for maximum recovery per person for "basic economic loss" of up to \$50,000 for medical expenses, up to \$1,000 per month for three years for lost earnings and replacement services, and up to \$25 per day for one year for other expenses.¹⁵¹ Negligence liability is abolished except for economic loss in excess of "basic economic loss" and for non-economic loss in the case of a serious injury as defined by the Plan.¹⁵² The owner, or the driver if unauthorized, is strictly liable for the "basic economic loss" of all injured persons other than the occupants of other automobiles,¹⁵³ but insurance coverage discharges the owner's liability; the injured persons are relegated to an action directly against the insurer.¹⁵⁴ The insurers are also required to offer to the owner commensurate first-party type insurance for injuries which may be suffered by himself or members of his household.¹⁵⁵

Turning to the interstate features of the Gordon Plan, the territorialism that pervaded the Stewart Plan has been taken over almost intact. All of the aforementioned strict liability and tort exemption provisions apply only when the automobile is driven in-state.¹⁵⁶ In out-of-state accidents, the Gordon no-fault is totally inapplicable. The only significant change made to the Stewart Plan treatment of this point is the requirement of a clause in the liability insurance policy to the effect that an automobile driven out-of-state shall be covered in accordance with the minimum insurance requirements of the state where driven,¹⁵⁷ as if the *lex loci delicti* still reigned supreme!

150. N.Y. Times, Feb. 2, 1972, at 1, cols. 6-7; at 48, cols. 5-8.

151. Gordon Bill §§ 672(2), (3), 674(1).

152. *Id.* § 673.

153. *Id.* § 674(1), (2).

154. *Id.* § 675(1). While the unauthorized driver has been left out of the discharge section, he can presumably rely on his no-fault insurance, if available, to cover his strict liabilities.

155. *Id.* § 675(2).

156. *Id.* §§ 673-74.

157. *Id.* § 675(4).

The no-fault features of the Gordon Plan would apply in all in-state accidents, regardless of the registration of the automobiles involved, the domicile or residence of the parties and other connecting factors, much like the Stewart Plan. But in order to reduce the burden to be borne by New Yorkers and their insurers for injuries of non-residents, the Gordon Plan requires all insurers authorized to transact business in New York to include in all their automobile liability policies, wherever issued in the United States or Canada, coverage under the Plan when the automobile is driven in New York and, in addition, the Plan directly engrafts upon such policies the required coverage.¹⁵⁸ The criticism addressed to the Stewart Plan is generally applicable to the present version of the Gordon Plan as well.

With all due respect, it is submitted that the interstate features of the New York plans are plainly bad. It is indeed unfortunate that these plans, progressive and trail-blazing on the substantive side, should be saddled with such antiquated interstate features. There is time for their reconsideration, however, and it is to be hoped that New York will get back in the main stream of modern conflicts not only for its own sake but also because of its force of attraction throughout the nation.

The Keeton-O'Connell Plan and the Draft Uniform Motor Vehicle Accident Reparations Act: Territorialism Cum Some Insurance Benefits for Out-of-State Accidents

The Keeton-O'Connell Plan, the very young granddaddy of current no-fault,¹⁵⁹ has had a profound influence upon all subsequent

158. *Id.* § 681. For a similar approach to non-resident in-state driving, see UNIFORM ACT § 9; notes 176-77 *infra* and accompanying text.

159. Among the many other proposals aiming at the restructuring of automobile accident reparations, three deserve special mention. First, the pioneering Columbia Compensation Plan of 1932, which was closely modelled after workmen's compensation, would have replaced negligence with strict liability and required compulsory insurance. In a very real sense, the Columbia plan is the precursor to the modern no-fault proposals. It soon became the center of intense controversy and was considered in some legislatures, but it never became law anywhere. Second, Professor Green's "Loss Insurance" proposal revived in the late 1950's the essentials of the Columbia Plan, more particularly compulsory insurance and liability without fault, but despite extensive favorable comment, it was not translated into action. Lastly, Professor Ehrenzweig's "Full Aid Insurance" concept involves a system of voluntary accident insurance paying benefits without regard to fault and exempting those insured from tort liability. This plan stimulated much interest but failed to produce any significant changes in the law. These and other plans are analyzed and discussed extensively in KEETON & O'CONNELL 124-89. See also ROKES 51-96.

proposals. The pronounced territorialism of the New York plans and the draft Uniform Act may be traced, at least in part, to the Keeton-O'Connell decision to stick to the *lex loci delicti*, with the single but important exception that no-fault benefits are made payable to certain classes of insureds involved in out-of-state accidents.

On the substantive side, the Keeton-O'Connell plan was drafted on a relatively modest scale. The basic protection insurance compensates injured persons, without regard to fault, for out-of-pocket losses of up to \$10,000 per person, and the insureds are exempt from tort liability where damages for pain and suffering do not exceed \$5,000 and other tort damages do not exceed the \$10,000 limit of basic coverage. In all other cases, the effect of the exemption is to reduce tort liability by the same amounts.¹⁶⁰

On the interstate side, the locus of the accident under Keeton-O'Connell is of fundamental importance. In essence, the Plan does not apply to out-of-state accidents except that certain classes of persons—that is, the named insureds, relatives residing in the insureds' household and other occupants of insured automobiles—are allowed to recover basic protection benefits for out-of-state injuries, which means that they become first-party type claimants under the insurance policy. Other persons, in particular pedestrians and occupants of out-of-state automobiles, are left out, even if they are domiciliaries of the no-fault state. The tort exemption is completely inapplicable to out-of-state accidents regardless of whether, for example, the automobile or automobiles involved were all insured in the no-fault state, and whether the injured persons were no-fault state domiciliaries. Thus, even those who recover basic protection benefits in out-of-state accidents retain the right to sue other no-fault state domiciliaries in tort.¹⁶¹

One would search in vain in the Keeton-O'Connell writings for an explanation of the substantive reasons for leaving some no-fault domiciliaries injured in out-of-state accidents uncovered by the Plan and, more importantly, for preserving the tort liability of no-fault domiciliaries in such accidents even where, for example, all victims are also

160. KEETON & O'CONNELL 5-10, 273-76, 323-24; Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241, 245 (1971); Keeton & O'Connell, *Basic Protection Automobile Insurance*, 1967 U. ILL. L. FORUM 400, 410-11 (1967).

161. KEETON & O'CONNELL 292, 309 (§ 2.3(b) of the Proposed Act), 317-18 (§ 2.10 of the Proposed Act), 429-30; Keeton & O'Connell, *Basic Protection Automobile Insurance*, *supra* note 160, at 426-27.

no-fault domiciliaries. It seems that the out-of-state provisions of Keeton-O'Connell were formulated in conformity with what was then supposed to be the best choice of law approach. Thus, their territorial orientation may be better understood when considered against the conflicts background of the late fifties and early sixties when the authors put the plan together. The brief discussion of the interstate problem in their main work supports this interpretation.¹⁶²

It is thus clear that the authors made their choice out of deference to now-outdated conflicts doctrine, and with extensive preoccupation with the full faith and credit aspects, rather than because of the exigencies of the substantive features of their Plan. While at one point they seek to justify their territorial orientation by referring to the possibility of inconsistent results that might ensue if a *lex loci delicti* accident state decided not to honor the non-territorial no-fault approach of a domiciliary state, at another point they seek to force the accident state, by rejecting *renvoi*, to apply its own law even where such state would have preferred to apply the domiciliary law of the parties. It is also quite possible that the authors were influenced by the interstate provisions of the workmen's compensation acts. The reference to the *Pacific Employers* case and to the full faith and credit considerations,¹⁶³ which were developed principally in workmen's compensation cases, supports this hypothesis. To be sure, workmen's compensation acts and no-fault automobile plans start from the same

162. It seems wise not to grant the insured a tort exemption even in the limited group of cases in which basic protection benefits are payable to victims of out-of-state injuries. This is so even though in some instances both the insured and the victim will be residents of the legislating state. If the plan provided that the tort exemption applied to extraterritorial injuries and suit were brought in another state in which the accident occurred, probably that state would not be required to give full faith and credit to the tort exemption. KEETON & O'CONNELL 292.

The footnote accompanying this text reads as follows:

Cf. Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939). The statute could properly extend the tort exemption to tort actions arising from out-of-state injuries that were brought in the legislating state by a resident of that state. Probably the exemption could also be extended to tort actions on out-of-state injuries brought in the legislating state by a resident of the state in which the accident occurred. Despite the possibility of such extensions, we have chosen to allow the victims of out-of-state accidents that give rise to claims for basic protection benefits, the right to sue in tort in the courts of the legislating state. The victim's tort claim is preserved regardless of whether the state in which the accident occurred, assuming that the tort claim was brought there, would have applied its law or the law of the legislating state. *Id.* at n.63.

163. See note 160 *supra*. See generally Larson, *Constitutional Law Conflicts and Workmen's Compensation*, 1971 DUKE L.J. 1037.

basic premises and share similar reparation philosophies and techniques. While one might persuasively argue for a different conflicts approach for no-fault than for workmen's compensation, because of the substantive differences in the patterns of automobile and industrial accidents and in the nature of the relationships between the victims and the loss distributees,¹⁶⁴ these are not the most significant considerations. Workmen's compensation acts came into being during the heyday of territorialism, and it is quite natural that their interstate provisions bear its imprint. Even so, such acts by their own terms apply in more out-of-state situations than does the Keeton-O'Connell Plan.¹⁶⁵ There is no good reason why the no-fault plan should be burdened with the relics of workmen's compensation choice of law approaches, which did not work out well in practice¹⁶⁶ and, moreover, which are not basically consistent with the fundamental compensatory goals of no-fault.

Turning to the in-state aspects of Keeton-O'Connell, territorialism also leads the authors to extend basic reparation benefits to all persons injured in the enacting state, whether or not such persons are insured or even covered by a no-fault insurance policy, without consideration of the domiciliary contacts of the persons and registration of the automobiles involved.¹⁶⁷ Out-of-staters, however, are liable for in-state accidents only in tort and only to the injured party.¹⁶⁸ An insurer who pays no-fault benefits is entitled only to reimbursement from the collecting insured, if any, but not to regular subrogation.¹⁶⁹

This arrangement has, in some situations, the paradoxical effect of placing out-of-staters in a privileged position over domiciliaries,

164. KEETON & O'CONNELL 6; *House Subcomm. Hearings* 115; *A Symposium, supra* note 145, at 805.

165. 3 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 87, Appendix A, Table 6 (Supp. 1971); *SECOND RESTATEMENT Reporter's Note* § 181, at 540-41.

166. There is no portion of the compensation act more urgently in need of coordinated state action than the extraterritoriality provision. The present provisions of the various state acts are in a state of chaos. The reason is that the circumstances under which a state act covers an out-of-state injury, or even an in-state injury of an out-of-state employee, vary so drastically from state to state that it is often hopeless to try to make the "gears mesh." COUNCIL OF STATE GOVERNMENTS, *WORKMEN'S COMPENSATION AND REHABILITATION LAW 97* (Program of Suggested State Legislation 1963, 1965).

167. KEETON & O'CONNELL 291, 317 (§ 2.9 of the Proposed Act), 429, 467-68; Keeton & O'Connell, *Basic Protection Automobile Insurance, supra* note 160, at 425-26.

168. KEETON & O'CONNELL 291, 402-04.

169. *Id.* at 403-04. Rights of contribution and indemnity as between tortfeasors (or their insurers) are preserved. *Id.* at 326, 462-65.

at the expense of the insurers and insurance population of the no-fault state. For example, the out-of-state occupants of an out-of-state automobile which runs off the road and hits a tree in-state are entitled to recover basic reparations benefits from an insurance fund to which neither they nor the owner or driver contributed.¹⁷⁰ The same is true for collisions among out-of-state automobiles. If the out-of-state driver or drivers were not at fault, this would be the end of the matter. But even if they were negligent, the out-of-state passengers may be satisfied with their no-fault recovery and decide not to sue, possibly in collusion with the owners or drivers, in which case the insurer again recoups nothing.¹⁷¹ In a collision with an in-state automobile, the results would be essentially the same, insofar as the out-of-staters rights and liabilities *inter sese* are concerned. Furthermore, while the in-stater could not sue the insured owner in tort in such a situation, the out-of-stater from a liability state which does not follow the *lex loci delicti* but instead applies, for example, the common domiciliary law of the parties, has the option, in lieu of or in addition to recovery of basic protection benefits, of bringing an action in his own state against his negligent driver and recovering fully in tort. Out-of-state pedestrians injured in the no-fault state would also get no-fault protection without bearing any of the costs.¹⁷² Serious as these inequalities may be, however, this is only a part of the story. The real problem with the territorial approach for no-fault state accidents is that it brings into the no-fault coverage out-of-staters whose welfare is not generally the concern of the no-fault state. But the parameters of the Keeton-O'Connell Plan are rather narrow and, therefore, the damage that its territorialism may do is limited. The implantation of such an approach into the more extensive plans, however, is not easily defensible. This is the case with the New York proposals as it also is, quite disappointingly, with the latest (fifth) tentative draft of the Uniform Motor Vehicle Accident Reparations Act.¹⁷³

The no-fault benefits provided under the Uniform Act are comprehensive and comparable in many ways to those in the original federal Hart Plan. Tort liability is retained for only major harm,¹⁷⁴

170. *Id.* at 291, 317 (§ 2.9 of the Proposed Act), 429; Keeton & O'Connell, *Basic Protection Automobile Insurance*, *supra* note 160, at 425-26; Kemper, *The Basic Protection Plan: Reform or Regression?*, 1967 U. ILL. L. FORUM 458, 467-68 (1967).

171. KEETON & O'CONNELL 403-04.

172. *See* Kemper, *supra* note 170, at 468.

173. *See* note 14 *supra*.

174. UNIFORM ACT §§ 2-4.

so that the tort exemption will be complete in most instances. One of the interesting innovations of the Uniform Act is that benefits are recoverable primarily from the injured person's insurer, rather than from the automobile owner's, as is the case in the other major plans. The insurer of the owner remains only residually obligated to pay.¹⁷⁵ This underscores the first-party nature of the recovery and one would have expected the Uniform Act, therefore, to have been particularly responsive to domiciliary considerations in framing its interstate provisions. Instead, the Uniform Act is fundamentally territorial, and its approach may be classified somewhere between that of the New York and the Keeton-O'Connell plans.

The Uniform Act extends benefits out-of-state, much like Keeton-O'Connell does, by providing basic protection for out-of-state injuries of the insured, relatives and minors residing in his household, and occupants of the insured automobile.¹⁷⁶ While this is an improvement over the New York total territorial orientation for out-of-state injuries, it is subject, however, to the same general criticisms, because of its limited scope, as is the Keeton-O'Connell Plan.

For in-state injuries, the Uniform Act also follows Keeton-O'Connell in making benefits available to all injured persons, including out-of-staters. But, in an attempt to rectify the imbalance in the distribution of losses between in-state and out-of-state insurers, it engrafts by legislative fiat a no-fault benefits obligation upon all out-of-state liability insurance policies, when the automobile is driven in-state, however transiently or temporarily.¹⁷⁷ The constitutional validity of such an imposition of liability beyond the terms of the insurance contract upon out-of-state insurers dealing with out-of-state policy-holders merely because the automobile may be driven in-state, however, is not entirely clear.¹⁷⁸ Therefore, the Uniform Act seeks to

175. *Id.* § 22.

176. *Id.* §§ 1(c), 12.

177. *Id.* § 9, which reads in part:

Every policy or contract of liability insurance covering the maintenance or use of a motor vehicle shall include basic reparation benefits in accordance with this Act while the vehicle is maintained or used in this State regardless of any provision to the contrary in the policy. An insurer authorized to transact business in this State, or transacting business in this State, may not exclude coverage of basic reparation benefits in accordance with this Act in any policy or contract of liability insurance covering the maintenance or use of a motor vehicle when the vehicle is maintained or used in this State.

178. *Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See *Senate D.C. Hearings* 494. The majority opinion in *Watson* and such cases as *Clay v. Sun Ins. Office Ltd.*, 377 U.S. 179 (1964) would lend support to the constitutionality of such legislation. See also CURRIE, *SELECTED ESSAYS* 214-42; *Senate D.C. Hearings* 198.

reinforce this no-fault graft through a second provision which rests on a more solid constitutional ground¹⁷⁹—namely, a prohibition against the exclusion of basic reparation benefits from any and all liability insurance policies written anywhere by insurers authorized to transact business in the state. Assuming that the Uniform Act is adopted in a few of the major states, this compulsion is likely to be quite effective. The insurance plexus of the Uniform Act is completed by a requirement, similar to that under New York's compulsory liability insurance law,¹⁸⁰ that all automobiles operated in the state, however transiently or temporarily, and whether or not required to be registered in the state, should carry no-fault insurance.¹⁸¹

On the tort exemption side, the Uniform Act conforms to the Keeton-O'Connell pattern by not extending the exemption to out-of-state injuries, but departs from Keeton-O'Connell and aligns itself with the Stewart Plan by granting a full exemption to all persons causing in-state injuries.¹⁸² The Stewart Plan would penalize the owners or drivers of automobiles causing such injuries who fail to obtain the required insurance, by depriving them of no-fault benefits and, more importantly, by holding them personally liable without fault as self-insurers to reimburse the insurers who pay benefits to injured passengers and pedestrians.¹⁸³ The Uniform Act, however, merely deducts from their own recovery the sum of \$500 for each year of continuous non-compliance and imposes no reimbursement liability on them for payments made by insurers to others.¹⁸⁴ The Uniform Act apparently expects to produce compliance with its insurance requirements through the exercise of state power over insurers and insurance policies and through criminal penalties against non-complying automobile owners and operators.¹⁸⁵

As with the New York and the Keeton-O'Connell Plans, one of the major problems with the Uniform Act is that it seeks to impose

179. See *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Senate D.C. Hearings* 198, 491.

180. N.Y. VEH. & TRAF. LAW §§ 310-31 (McKinney Supp. 1971).

181. UNIFORM ACT §§ 6, 7. The constitutionality of imposing the insurance obligation directly upon the owner or driver of an operated car is apparently clear. *Senate D.C. Hearings* at 490-92. But see *id.* at 188, 198, 490.

182. *Id.* § 2. Cf. Stewart Bill § 672; KEETON & O'CONNELL 323-25 (§§ 4.1-.2 of the Proposed Act).

183. Stewart Bill § 671(4)(a).

184. UNIFORM ACT §§ 5, 23.

185. *Id.* § 40.

the entire no-fault system upon out-of-staters who suffer injuries in-state. This is contrary to the fundamental premise of modern conflicts that the domiciliary state of injured persons has the primary concern for their long-term welfare. At the present time, it is not known why the drafters of the Uniform Act decided to include out-of-staters willy-nilly in the no-fault plan, especially with regard to their relations to other out-of-staters.

Since we are dealing with a Uniform Act, presumably a modern and desirable piece of legislation, it might be supposed that the over-extension of the no-fault plan for in-state injuries reflects an intention to apply the Act to the maximum number of situations in a way comparable, for example, to that of the *Uniform Commercial Code*.¹⁸⁶ This kind of supremacy intent, especially questionable in the tort field, is, however, negated by the underextension of the Uniform Act coverage for out-of-state accidents.

The Massachusetts Plan

The Massachusetts Plan,¹⁸⁷ generally patterned after Keeton-O'Connell, is quite modest in dimension, but it enjoys the distinction of having been the first plan enacted in the United States, as of January 1, 1971. It is already serving as a pilot project for testing the merits of the no-fault approach. Under this Plan, no-fault recovery is made available, through compulsory insurance, for medical expenses, lost wages and expenses for replacement services up to a total amount of \$2,000 per person. A commensurate exemption protects owners and drivers of insured automobiles from tort liability to those injured persons who are entitled to recover no-fault benefits.¹⁸⁸

For out-of-state injuries, Massachusetts generally follows Keeton-O'Connell, with an important modification. In addition to the insureds and members of their households and to the occupants of an insured automobile, pedestrians who are residents of Massachusetts, a class excluded by Keeton-O'Connell, are entitled to no-fault

186. UNIFORM COMMERCIAL CODE § 1-105(1).

187. MASS. ANN. LAWS ch. 90, §§ 34A, D, M, N (Supp. 1971); *as amended by id.* § 34o.

188. MASS. ANN. LAWS ch. 90, § 34M (Supp. 1971); Kenney & McCarthy, "No-Fault" in *Massachusetts: Chapter 670, Acts of 1970, A Synopsis and Analysis*, 55 MASS. L.Q. 23, 38-41 (1970); Note, *The Massachusetts "No-Fault" Automobile Insurance Law: An Analysis and Proposed Revision*, 8 HARV. J. LEGIS. 455, 459, 483-89 (1971); *House Subcomm. Hearings* 1186-90.

benefits for injuries inflicted on them by an insured automobile anywhere in the United States or Canada.¹⁸⁹ With these exceptions, the Plan does not apply to out-of-state accidents. In particular, tort liability for out-of-state accidents is left untouched, even where no-fault benefits are recoverable—so that, for example, a Massachusetts or out-of-state injured party, or his insurer through subrogation, may bring tort actions against Massachusetts insureds in all cases of out-of-state accidents.¹⁹⁰

The Massachusetts treatment of in-state accidents is significantly different than under the Keeton-O'Connell and the New York Plans. No-fault benefits are payable only to those who are *actually* covered by no-fault policies or protected by the assigned claims plan—that is exactly the same classes of persons who recover benefits in out-of-state accidents.¹⁹¹ The tort exemption is correspondingly limited and available solely to owners and drivers of insured automobiles in suits by no-fault beneficiaries.¹⁹² The net effect of these provisions for in-state accidents is quite clear. Out-of-staters generally are not covered by the Plan on both the benefit and responsibility sides, and are relegated to the traditional tort liability rules except as occupants of insured automobiles, when they are entitled only to a no-fault claim, or as drivers of such automobiles, when they are given the protection of the tort exemption. The territorial and personal coverage provisions of the Massachusetts Plan for in-state accidents are likely to bring within its coverage most Massachusetts people in most situations regardless of the *locus delicti*. Massachusetts people are excluded only as passengers of out-of-state automobiles and as owners

189. MASS. ANN. LAWS ch. 90, § 34A (Supp. 1971). This conclusion is not mandated by the language of the statute. Indeed, that language can be and has been read to limit no-fault coverage to accidents within the commonwealth only. See Kenney & McCarthy, *supra* note 188, at 24-26. However, the Massachusetts Basic Liability Form, approved by the Commissioner of Insurance, has adopted a broader interpretation and extended coverage to no-fault insureds and resident pedestrians injured anywhere within the United States or Canada; this appears to be a reasonable interpretation of the statute. See *House Subcomm. Hearings* 1154, 1156-57, 1165-67, 1187; *Alternative Paths*, *supra* note 158, at 251 n.48; Note, *supra* note 188, at 479-82.

190. MASS. ANN. LAWS ch. 90, § 34M (Supp. 1971); Kenney & McCarthy, *supra* note 188, at 41, 45, 46; Note, *supra* note 188, at 483-84, 488, 498-500; *House Subcomm. Hearings* 1188.

191. MASS. ANN. LAWS ch. 90, §§ 34A, N (Supp. 1971); Kenney & McCarthy, *supra* note 188, at 26-29; Note, *supra* note 188, at 466-70. See text accompanying note 189 *supra*.

192. MASS. ANN. LAWS ch. 90, § 3M (Supp. 1971); *House Subcomm. Hearings* 133-34, 1188-89, 1201; Kenney & McCarthy, *supra* note 188, at 38-41; Note, *supra* note 188, at 483-84.

or drivers of uninsured automobiles. Conversely, out-of-staters are in most instances left out of the Plan.

The Massachusetts Plan has the seed of a promising approach, which is in harmony with the policy analysis of modern conflicts. Personalizing the no-fault benefits by extending them mostly to Massachusetts people, whatever the locus of the accident; generally excluding out-of-staters, even where the accident occurred in Massachusetts; and retaining the territorial factor, at least in part, in delineating the scope of the tort exemption, may reflect the Massachusetts conception of no-fault as more of an insurance system than a comprehensive reparations scheme—thereby justifying Massachusetts' making the benefits available only to those who pay for them as a group. The fact remains, however, that Massachusetts decided to provide insurance protection on the basis of personal considerations and, even for the tort exemption, it tempered territorialism with some personalism.

The Florida and California Plans—Following the Lead of Massachusetts

A plan very similar in structure and approach to that of Massachusetts became effective in Florida on January 1, 1972.¹⁹³ The Florida Plan is more advanced than the Massachusetts one in that the amount of no-fault benefits is higher (\$5,000);¹⁹⁴ the insurance is more of the first-party kind with the burden being borne more often by the injured party's, rather than the owner's, insurer;¹⁹⁵ and the owner who fails to obtain insurance as required is liable as self-insurer for the no-fault benefits.¹⁹⁶

On the interstate side, the Florida Plan follows essentially the Massachusetts approach with substantial limitations on the extraterritoriality of benefits. Such benefits are recoverable only by the insured owner or a relative domiciled in the owner's household who is not an owner of an insurable automobile when injured as occupant of the automobile.¹⁹⁷ The tort exemption is available only for in-state injuries and only to the extent that no-fault benefits are payable,¹⁹⁸

193. See note 4 *supra*.

194. FLA. GEN. LAWS, ch. 71-252, § 7(1) (1971).

195. See, e.g., *id.* §§ 7(4)(d)(3) & (d)(4).

196. *Id.* § 4(4).

197. *Id.* §§ 7(4)(d)(2) & (3).

198. *Id.* § 8(1).

with an interesting exception. The bar to claims for pain and suffering when no-fault benefits for medicals do not exceed \$1,000 is apparently portable out-of-state.¹⁹⁹ But since only certain classes of relatives may recover such benefits in out-of-state accidents, this exception is not of practical significance. The in-state accident features of the Florida Plan generally parallel those of Massachusetts²⁰⁰ and need not be discussed separately.

The latest no-fault plan proposed for California represents a blend of the Keeton-O'Connell and the Massachusetts approaches both on substance and on the sphere of application. No-fault benefits are recoverable up to \$10,000 per person, and there is a commensurate tort exemption.²⁰¹ Pain and suffering damages are barred unless the medicals exceed \$1,000, or the injury is serious, in which case they may be claimed in tort.²⁰² An optional clause to cover some pain and suffering on a no-fault basis is required to be offered by the insurer.²⁰³

No-fault benefits are payable for extraterritorial injuries suffered by the insured owner, spouse or relatives residing in the household in any automobile accident, and by the occupants of, and pedestrians struck by, the insured automobile.²⁰⁴ If the automobile is uninsured, however, only the spouse, relatives and occupants can claim benefits from the assigned claims plan.²⁰⁵ The owner is generally excluded,²⁰⁶ and the pedestrians are excluded when the accident happened out-of-state.²⁰⁷ In the case of in-state accidents, all enumerated persons are entitled to no-fault benefits through the applicable insurance or the assigned claims plan, including pedestrians as well as resident occupants of out-of-state automobiles.²⁰⁸ The tort exemption applies only in-state and only to the extent of the availability of no-fault benefits.²⁰⁹ For example, the exemption does not apply in actions by

199. *Id.* § 8(2).

200. *Id.* §§ 7(4)(d)(4), 8(1) and 11.

201. Bill A.B. 1505, Motor Vehicle Basic Loss Insurance Act §§ 11901-2, 11951(b) (commonly known as the Fenton Bill). This bill had not been as yet enacted, and the chances of its adoption appear slim.

202. *Id.* § 11951(a).

203. *Id.* § 11921(c).

204. *Id.* § 11904.

205. *Id.* §§ 11905, 11968.

206. *Id.* § 11907(b).

207. *Id.* §§ 11905, 11968.

208. *Id.* § 11968.

209. *Id.* § 11950.

out-of-state motorists against the no-fault insureds. Except for the fact that benefits are payable to larger classes of injured persons, possibly under a Keeton-O'Connell influence, and that the interstate provisions have been drafted very carefully and with sophistication, the California Plan does not materially differ from that of Massachusetts insofar as interstate application is concerned.

The Delaware Plan—The Emphasis Is on Insurance

Delaware adopted a no-fault plan, as of January 1, 1972,²¹⁰ quite simple in its substantive provisions but silent on its territorial scope. This opens up some intriguing possibilities. The Delaware Plan requires all Delaware automobiles to carry no-fault insurance providing substantial no-fault benefits: \$10,000 per person for medical, funeral and replacement services expenses and for loss of earnings.²¹¹ Such benefits are recoverable by occupants of the insured automobile and pedestrians struck by it, but not by occupants of other automobiles.²¹² The injured party may not sue a tortfeasor for the amount of benefits recoverable under an applicable policy,²¹³ but the paying insurer is subrogated pro tanto to the tort claim.²¹⁴

What does this mean on the interstate side? Unless there are some hidden territorial limitations implied, the Delaware system is rather clear. Tort liability is generally unaffected;²¹⁵ presumably it is to be governed by the applicable choice of law rules or principles. But, regardless of fault, all occupants and pedestrians injured in or by the insured automobile are entitled to claim these substantial no-fault benefits on an insurance basis—apparently regardless of where the accident occurred and of all other connecting factors. This approach is quite consistent with a view of no-fault benefits as being genuinely of the first-party type, similar to medical benefits presently available under liability policies, with an extended range of coverage. It is also

210. DEL. CODE ANN. tit. 2, § 2118 (1970). The Delaware Plan resembles, in its main features, the "Guaranteed Protection Plan" proposed by the American Mutual Insurance Alliance. See ROKES 76-77. The emphasis on expanded first-party type coverage without the abolition of tort liability is also typical of most Canadian plans. O'Donnell, *Automobile Insurance—The Canadian Experience*, 11 FOR THE DEFENSE 67-81 (1970).

211. DEL. CODE ANN. tit. 2, § 2118(a)(2).

212. *Id.* § 2118(a)(2)(A).

213. *Id.* § 2118(g).

214. *Id.* § 2118(f).

215. The injured party recovers his losses in full from the owner in tort and from the latter's insurer in no-fault.

to be noted that the Delaware Plan does not hold the uninsured owner as a no-fault self-insurer; it seeks to enforce the insurance obligation only through criminal penalties.²¹⁶ The Delaware Plan's generosity toward all victims of all accidents is to be borne, however, solely by the Delaware automobile owners. However, other states may not wish to carry their altruism to that extent. In addition, the retention, in essence, of tort liability not only gives no protection to the no-fault insureds but also does not substantially contribute to the reduction of tort litigation which is supposedly one of the aims of no-fault.

From a choice of law point of view, however, one can have no quarrel with the Delaware Plan. Assuming a proper concern by Delaware for some losses of all victims of Delaware automobiles, and a willingness to leave the tort system otherwise intact, the extended insurance coverage is quite reasonable and appropriate, and there is no undue interference with the sphere of application of the tort law.

The District of Columbia Plan—A Long Step Into Personalism

In November, 1970, the District of Columbia Council recommended "that the Congress consider providing a no-fault insurance system for the District." In response to this recommendation, Senators Stevenson and Hart introduced in July, 1971, the "District of Columbia Automobile Insurance Reform Act,"²¹⁷ a substantial piece of legislation patterned essentially upon the original federal Hart bill.

Under the D.C. Act, no-fault benefits cover all medical expenses, funeral expenses up to \$1,000, and lost earnings of the insured, passengers and pedestrians up to \$54,000.²¹⁸ The tort exemption is available in all situations where the injured parties are eligible to receive no-fault benefits and protects the tortfeasor up to the amount of such benefits. The tort action is maintained, however, for excess net loss—that is, for excess loss falling within the no-fault recovery categories.²¹⁹ Pain and suffering damages are not recoverable in tort, with certain exceptions.²²⁰

What makes the D.C. Act particularly interesting, for present purposes, is its detailed treatment of the interstate accident problem

216. *Id.* § 2118(j).

217. The prospects for the eventual adoption of a no-fault bill for the District of Columbia appear excellent. *Senate Comm. Hearings* 2123, 2136.

218. D.C. Act §§ 5(a), (b).

219. *Id.* § 8(a).

220. *Id.* § 8(c).

and its greater reliance upon personal rather than territorial considerations. Reference to the various categories of persons affected is the best way to summarize these interstate provisions.²²¹

Owners and Operators. Owners and operators of automobiles registered, or required to be registered, in the District must carry a package of no-fault and residual liability insurance.²²² Irrespective of whether the accident occurred within or without the District, owners and operators of automobiles so insured are immune from tort liability to the extent that no-fault benefits are payable to injured persons.²²³ The Act is unique in making the tort exemption portable extra-territorially.

Owners of uninsured automobiles which were required to be insured are subject to criminal penalties,²²⁴ the tort exemption is unavailable to them,²²⁵ they are strictly liable for no-fault benefits as self-insurers,²²⁶ and they are disqualified from receiving no-fault benefits when involved in an accident.²²⁷ Operators of such automobiles are similarly treated except that their disqualification as claimants depends upon whether they had reason to believe that the automobile was uninsured.²²⁸ Owners of insured automobiles are entitled to receive no-fault benefits for injuries suffered while riding in or struck by any automobile.²²⁹

221. For a discussion of some of the interstate problems faced by the drafters of the D.C. Act, see the testimony of Senator Adlai Stevenson III, *Senate Comm. Hearings* 2124, 2128, 2136.

222. D.C. Act §§ 3(b), 4, 5. Non-residents are required to register in the District of Columbia in accordance with registration provisions applicable to District residents in the non-resident's jurisdiction. Alternatively, registration is governed by any existing reciprocity agreement reached between the District and the non-resident's jurisdiction. Reciprocity agreements often require registration only after the non-resident's current motor vehicle license has expired. Exempted from registration provisions are such persons as Senators, Representatives, staff members and presidential appointees in the executive branch who are registered at their residence or place of election or appointment. D.C. CODE ENCYCL. ANN. § 40-303(a) (1967). In the House, Representative Abner Mikva introduced a no-fault insurance bill in July, 1971, which would require such insurance (usually in the form of riders on present policies) for all who drive in Washington, D.C., regardless of residence or the length of time spent in the District. See 117 CONG. REC. E10839-40 (daily ed., Oct. 13, 1971).

223. D.C. Act § 8(a).

224. *Id.* § 15 (guilty of a misdemeanor with fine up to \$1000 or imprisonment not exceeding one year or both).

225. *Id.* § 12(c).

226. *Id.* § 12(e)(2)(A).

227. *Id.* § 10(e)(2)(A).

228. *Id.* § 10(e)(2)(B).

229. *Id.* § 5(a).

Occupants. Persons riding in an insured automobile as passengers or operators are entitled to receive no-fault benefits whatever the locus of the accident.²³⁰ The tort exemption shielding owners and operators of insured automobiles limits the occupants' residual tort claims only to such net loss as exceeds the policy limits and to pain and suffering in certain exceptional cases.²³¹ The insured occupants, however, retain any tort claims that they may have against negligent drivers of other automobiles which were uninsured, subject to the pro tanto subrogation rights of insurers who paid no-fault benefits to them.²³² The tort claims of occupants, and of pedestrians as well, are curtailed under a provision of the D.C. Act which bars recovery for pain and suffering in all cases except death, and serious injury but even then recovery may not exceed \$25,000 per claimant per tort.²³³ By its own terms, this limitation applies only to tort actions governed by the law of the District, presumably under the choice of law rules of the District.

Occupants of uninsured automobiles which were required to be insured are given the right to recover no-fault benefits from an assigned claims plan, but only if no first or third party automobile insurance benefits are recoverable elsewhere for the injury.²³⁴ It would appear that the assigned claims protection is available regardless of where the accident took place.²³⁵ Occupants of uninsured automobiles which were not required to be insured are not affected by the D.C. Act, except again for the pain and suffering limitations, if applicable.

Pedestrians. When it comes to pedestrians, the D.C. Act reverts to a territorial approach. Only pedestrians injured within the boundaries of the District are entitled to recover no-fault benefits from the insurer of the injuring automobile or under the assigned claims plan, as the case may be, and are subjected to the Act's limitations on tort recovery in a manner similar to that for automobile occupants.²³⁶ Pedestrians injured in out-of-state accidents are not affected, with the possible exception of the pain and suffering limitations when, under

230. *Id.* § 5(a); 117 CONG. REC. S11679 (daily ed. July 21, 1971).

231. D.C. Act §§ 8(a), (c).

232. *Id.* §§ 8(a), (b).

233. *Id.* § 8(c).

234. *Id.* §§ 10(d), (e).

235. *Id.* § 10(d).

236. *Id.* §§ 5(a), 8; 117 CONG. REC. S11679 (daily ed. July 21, 1971).

the District conflicts rules, District tort law is applicable.

Fundamentally, the applicability of the D.C. Act hinges upon the registration, or required registration, of the automobile or automobiles involved in the accident. In accidents where a single District automobile and its occupants are involved, the Act applies in its entirety whatever the locus of the accident. When pedestrians are struck by a District automobile, however, the Act applies only if the accident occurred in the District. Conversely, the owners and occupants of out-of-state automobiles in single car accidents remain outside the ambit of the Act, and the same is true for pedestrians injured by them, irrespective of the place of the accident. Where two or more District, or two or more out-of-state, automobiles are involved in an accident *inter sese*, the result is the same—that is, the Act covers the former, but not the latter with the same wrinkle on pedestrian claims.

The more difficult case is where a District automobile collides with an out-of-state automobile. Whatever the locus of the accident, the occupants of the District automobile are entitled to recover no-fault benefits under the D.C. Act as if the Act were the “law of the flag,” but the occupants of the out-of-state automobiles are relegated to their tort claims, whatever they may be. The owner of the District automobile, however, remains potentially liable in tort to the occupants of the out-of-state automobile because such occupants are not within the classes protected by the no-fault features of his insurance policy.²³⁷ On the other hand, the owner-driver of the out-of-state uninsured automobile is completely unaffected by the Act and remains potentially liable in tort also to the occupants of the District automobile or to their no-fault insurers as subrogees.²³⁸ Pedestrians come within the no-fault provisions of the Act only if they are injured by the District automobile in the District, otherwise they may sue only in tort.

The old-fashioned treatment of pedestrians should not obscure the fact that the D.C. Act goes a long way in pegging the law applicable to automobile accidents upon personal, rather than territorial, considerations. While the Act does not refer to domicile as such, the combined effect of making both the insurance and the tort exemption features follow out-of-state the insured automobile and its owners and occupants and of imposing the insurance obligation on automo-

237. D.C. Act §§ 5(c), 8(a).

238. *Id.* §§ 8(a), (b); 117 CONG. REC. S11679 (daily ed., July 21, 1971).

biles registered or required to be registered in the District and excluding out-of-state automobiles,²³⁹ is to make the Act applicable to determine the rights and responsibilities of most District domiciliaries, with the partial exception of pedestrians, for accidents anywhere in the United States and Canada. Conversely, the Act is mostly inapplicable to non-domiciliaries because, as a practical matter, automobiles are generally registered or required to be registered at the domicile of their owners and their occupants tend to be domiciliaries of the same state.²⁴⁰

The District of Columbia Plan points the way to the modernization of the interstate features of no-fault.

THE MERITS OF THE TOTAL PERSONAL APPROACH FOR NO-FAULT AND HOW IT CAN BE MADE TO WORK

It is quite important at this juncture to consider whether there are any reasons, doctrinal or practical, why the personal approach should not be given full sway in the no-fault automobile loss reparations field, sweeping away the last vestiges of territorialism. Anticipating the conclusion, it would appear that a totally personal no-fault system is more consistent with the teachings of modern conflicts than a territorial or any other available system, and that the practical problems of its implementation are solvable through appropriate modification of the insurance and tort exemption provisions of the plan.

Whatever the differences among the modern conflicts approaches

239. On Oct. 12, 1971, Representative Mikva introduced in the House a modified version of the D.C. Act, H.R. 11183, 92d Cong., 1st Sess. (1971), which would significantly alter the regime applicable to in-state accidents. See 117 CONG. REC. E10839-40 (daily ed. Oct. 13, 1971). Under section 4 of the Mikva bill, out-of-staters driving in the District must carry no-fault insurance coverage under the D.C. Plan. If they fail to do so, they are to be personally subject to the D.C. Plan obligations under section 11(c). The District of Columbia is unique in the United States in that over 40% of automobile accidents in its territory involve out-of-state automobiles. A major proportion of such automobiles belong to persons who work in the District but commute to the suburbs in Maryland and Virginia. It was felt appropriate to bring these persons, as well as the many tourists, within the D.C. Plan because otherwise the anticipated premium savings and litigation reduction for the D.C. motorists might not have materialized. See *Senate D.C. Hearings* 73, 78, 142, 146, 150-51, 192, 206, 211-12, 214. While this increased territorialization is a step in the wrong direction from the conflicts viewpoint, it is understandable in light of the special situation of the District. Furthermore, reliance on the *lex loci* in mixed domicile cases of accidents in the no-fault state is probably less objectionable than its use in any other context, especially where one wishes to apply the no-fault system in an expansive way.

240. See discussion of registration requirements, note 222 *supra*; cf. the provisions of the Hague Convention, note 92 *supra*.

on the theoretical level, there appears to be a common core of agreement on certain basic objectives which, in the no-fault context, may be put in the form of two propositions. First, each victim should ideally be able to receive the full benefit of the reparations law of his home state regardless of the place of the accident.²⁴¹ Under traditional tort liability, however, the victim recovers from the tortfeasor, and always subjecting the tortfeasor to the personal law of the victim presents obvious problems of unfairness.²⁴² Indeed, this has been the central problem of modern conflicts and of the domiciliary approach in this area—namely, what to do in cases of split domicile where plaintiff's law calls for greater reparations than those provided by defendant's law.²⁴³ The structure of no-fault with the integration of insurance as part and parcel of reparations makes it possible to benefit Peter without robbing Paul. Accordingly, a second proposition may be added to the first, which would have been contradictory to it under tort recovery principles—that is, neither the owner nor the driver of the injuring automobile should be subjected to a reparation burden greater than that imposed by the law of his home state, wherever the place of the accident.

To put these two propositions together epigrammatically and in the form of a "golden rule": to each according to his need, as determined by his state, and from each according to his obligation, as defined by his own state.²⁴⁴ At first glance, this appears utopian in that it combines the best of all possible worlds. It gives full protection to the victim without overpenalizing the person on whom the responsibility is placed. In point of fact, however, this golden rule is workable within the no-fault insurance framework, as will be demonstrated

241. See note 93 *supra*.

242. See note 94 *supra*.

243. See pp. — and note 96 *supra*.

244. Cf. CAVERS 153:

In this situation, the analysis we have been pursuing should entitle plaintiff to claim only when, and to the extent that, the law of his own state should permit; similarly, the defendant should be obligated to pay only when, and to the extent that, his state requires.

Cavers is referring to a wrongful death action involving citizens from two states having different laws but more beneficial to the plaintiff than the law of the accident state. See also *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), a wrongful death case, where Justice Traynor used interests analysis Cavers-style to arrive at a comparable result:

A defendant cannot reasonably complain when compensatory damages are assessed in accordance with the law of his domicile and plaintiffs receive no more than they would had they been injured at home. *Id.* at 555, 432 P.2d at 731, 63 Cal. Rptr. at 35.

Cf. *House Subcomm. Hearings* 116-19.

shortly. At the same time, it epitomizes the personal approach which occupies a central position in modern tort conflicts and is likely to be acceptable to the exponents of the main new theories, at least to those who are reconciled with the necessity of developing workable conflicts rules or guidelines, subject to two possible qualifications.

First, it is true that the golden rule does not take into account the potential concern of the accident state for local and medical and other creditors, which concern has been used in support of the *lex loci delicti*.²⁴⁵ Assuming this concern to be justified, however, the accident state could and should be expected to enact special provisions imposing liability, whether in negligence or without fault, upon the owner or driver regardless of what his home state law provides. This would appear, then, as a special exception to the second proposition of the golden rule. There is clearly no reason why the existence of a concern so limited should bring about the wholesale application of the reparations system of the state of the accident to the basic claims of the parties toward each other. From the viewpoint of the no-fault state, this concern of the accident state need not be specially considered since the insurance requirement imposed on its domiciliaries should cover medical expenses for out-of-state accidents.

Second, there is some support for the view that the victim should receive compensation under the most favorable of the potentially applicable laws, even beyond the reparations requirements of his own home state. This would mean, for example, that where defendant's law, or where the law of the accident state, is more generous than plaintiff's, the extra benefit should belong to the plaintiff.²⁴⁶ While the defendant has no reason to complain here under the second proposition of the golden rule, placing his windfall within the reach of the plaintiff is not consistent with the first proposition. It is submitted that this approach, incorporating a pro-compensation bias on the merits, violates the spirit of neutrality which should ideally prevail in choice of law and, in practical terms, benefits the plaintiff beyond his reasonable requirements. One of the fundamental premises of the personal approach is that the victim's home state is the one most concerned and best suited to determine his reparation needs. It is also a fair assumption that the victim makes his plans against the law of his home state and if for some reason he is dissatisfied with the

245. See note 95 *supra*.

246. See notes 114-19, 123 *supra*.

protection provided under such law he is in a position to obtain excess insurance.²⁴⁷ For this reason, the golden rule has not been drafted to allow recovery by the victim under the most favorable of his own law or the owner-driver's law or the law of the state of the accident. For those who espouse the contrary view, however, the rule could be modified accordingly without departing from the total personal approach, at least in the split domicile cases.

The beauty of the golden rule is that it can be applied by a no-fault state even in the worst possible interstate situation—namely, in a “crazy-quilt” pattern where some states adopt no-fault variants while others retain traditional negligence liability, and where some states use the personal choice of law approach while others adhere to the *lex loci delicti*. Furthermore, the golden rule is quite comprehensive. Not only does it furnish guidance in drafting the interstate features of the no-fault plan and in deciding what situations it should cover, but it also provides a choice of law principle for the situations which are not covered. The emphasis here will be on the first function, but the broader choice of law implications will also be explored in order to provide a complete picture and to underscore the soundness of the total personal approach.

The definitional problems relating to the concept of domicile have already been mentioned,²⁴⁸ and it must be conceded that no completely unambiguous label can be found for the kind of relationship between a person and a state which would justify the application of its law in all personal contexts. Given the desirability of subjecting the parties involved in an automobile accident to the law of their “home” state, accepting the wisdom of fashioning workable rules based on available experience rather than relegating each case to an ad hoc solution which depends upon the vagaries of the various modern methodologies, and recognizing the imperfectability of human affairs, one should be able to agree on some terminology which would express the basic idea, and rely on the specifics of the given definition to adequately cover most situations.²⁴⁹ For this purpose, the term “domicil” itself could be used or preferably, the term “settled” or “habitual” residence could be adopted,²⁵⁰ possibly reinforced by

247. See the views of Professor Rheinstein contained in CAVERS 45.

248. See note 89 *supra*.

249. See Rosenberg, *Comments on Reich v. Purcell*, *supra* note 104, at 646 n.4.

250. See note 89 *supra*. The term “habitual residence” is being extensively used in the Hague Conventions. For an in-depth analysis of the issues in the domicile vs. habitual residence choice and for extensive comparative and historical information, see DeWinter, *Nationality or Domicile? The Present State of Affairs*, 128 HAGUE COURSES (III) 347, 419-78 (1969).

presumptions—for example, that the state where an owner registers his automobile and obtains his driver's license is his habitual residence. In view of the stringency of state requirements for registration and licensing, it is unlikely that this would lead to registration-shopping. Rental automobiles may be subjected to special treatment²⁵¹—for example, imputing the driver's law to the owner on the assumption that the latter's insurance should carry this extra burden in view of the commercial nature of the transaction. With this exception, where the driver is not the owner of the automobile, the liabilities of each should be determined under his own personal law, and this would extend to the question of the owner's imputed liability. For corporations, which are generally defendants in automobile injury cases, one might also adopt an alternative reference rule giving the plaintiff, and his insurer through subrogation, the choice of the most favorable law among those of incorporation, principal place of business, or other major corporate connecting factor, at least to the extent that such law is not more favorable to the plaintiff than his own law. On the other hand, one might, in a more limited way, use the basic criterion of registration or principal location of the automobile involved to fix the law governing the defendant's obligations.²⁵²

Those who place an even greater value on certainty, predictability and ease of application may opt for the law of the place of the automobile's registration over that of the habitual residence of the parties on the theory that this usually coincides with that of the owner-driver's residence,²⁵³ and because of the facilitation of insurance planning, and possibly add some exceptions especially in favor of the plaintiff injured in his own state, in a manner resembling that of the Hague Convention²⁵⁴ and the District of Columbia Plan.²⁵⁵

Assuming a proper definition of "home state," we may now consider in some detail how the golden rule—from each according to his

251. See *Palmer v. Hertz*, 36 App. Div. 252, 258-59, 319 N.Y.S.2d 949, 957 (2d Dept. 1971).

252. See note 249 *supra*.

253. Cf. A. EHRENZWEIG, *supra* note 83, at 580; *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785, 824 (1932). Professor Cavers has expressed, rather unpersuasively, some doubts on the coincidence of registration and habitual residence in the United States. See Cavers, *Legislative Choice of Law*, *supra* note 92, at 355 n.62; Cavers, *Contemporary Conflicts Law*, *supra* note 92, at 169.

254. See note 92 *supra*. Cf. INT'L INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRELIMINARY DRAFT OF A UNIFORM LAW ON CIVIL LIABILITY OF MOTORISTS, *reprinted in* 1948 YEARBOOK 172, 179.

255. See note 215 *supra*.

obligation, as defined by his state, and to each according to his need, as determined by his state—could be made to work in the context of a compulsory and substantial no-fault plan.

The Total Personal Approach When All Parties Have Their Home in the Same State

The conflicts problem is the simplest where all persons involved in an accident come from the same state and the automobile or automobiles involved are all registered or should have been registered there. In this situation, the only thing that really makes sense for the no-fault state is to extend its full plan, first-party benefits, limited strict liability and tort exemption included, to its people and only to them—regardless of where the accident took place and irrespective of the content of the potentially applicable laws. Since the victims and the owners-drivers have their home in the same state, the territorial contacts may be essentially ignored, and since the automobile is or ought to have been registered there, the insurance, or liability in its absence, should conform to its laws.²⁵⁶

Where the victims come from the no-fault state, they will be entitled to recover benefits under its system. Pursuant to the usual no-fault provisions, the occupants of each automobile and the pedestrians injured by it will claim against its insurer. If an automobile is uninsured when it ought to have been, the same victims may claim against the owner or driver directly or against their own insurer, if any, or against the assigned claims fund, with the paying insurer in these cases being given a right of reimbursement. If the accident involving persons and automobiles of the no-fault state occurred elsewhere and litigation is commenced there, a court following the modern conflicts methodologies would recognize and apply the no-fault state's law without hesitation. If the other state follows a strict *lex loci* approach, however, it may insist on applying the local liability or possibly no-fault law, as the case may be. For this reason, pending nationwide modernization of conflicts rules, the insurance in the no-

256. Cf. the Fuld concurring opinion in *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969):

Without attempting too much, I believe that we may accept the following principles as sound for situations involving guest statutes in conflicts settings:

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest. . . . *Id.* at 585, 249 N.E.2d at 403-04, 301 N.Y.S.2d at 532.

fault state should carry a rider covering payments that may have to be made under the law of other states if held applicable, as is now the case with liability insurance. In view of the full retreat of *lex loci* and the fundamental changes introduced by no-fault, this eventuality would tend to become remote.

In the reverse situation, where the accident involving persons and automobiles of another state occurs in the no-fault state, there is no good reason to apply its no-fault plan, except, possibly, in a limited way for the protection of local creditors if the otherwise applicable law completely bars recovery. In addition, it is burdensome and unconventional to require out-of-state automobiles temporarily in the no-fault state to be subject to its full insurance requirements at the penalty, possibly, of strict liability. Moreover, in order to put teeth into such insurance requirements, the no-fault state may also have to resort to interference with the insurance policies for out-of-state automobiles either directly or through compulsion over the insurance companies doing business in the state. If action in this situation—that is, of an accident involving out-of-staters in the no-fault state—were brought in the no-fault state, the golden rule would call for the choice of the common personal law of the parties, be it of the liability or no-fault type. Some complications may arise if the action is brought in a home forum which espouses the *lex loci delicti*, but this is really not a problem of the no-fault state. The courts of such forum may well find a way back to their own substantive law through the *renvoi* process by recognizing the reference to domiciliary law incorporated in the no-fault state's interstate provisions. The choice of the personal law is also appropriate in a situation where the applicable law is the same for all parties and automobiles even though not of the same state. This should not be treated differently than is the common domicil situation.²⁵⁷

A more difficult case is presented by the uncommon situation where the automobile is properly registered in a state other than that of the common home of the parties. For example, where it is registered in a liability state by a local domiciliary and an accident without fault occurs in that state while it is driven by a no-fault state domiciliary, and all injured parties are also no-fault state domiciliaries. In this case, it may be argued that it would be unfair to subject the

257. See *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Trautman, *Comments on Reich v. Purcell*, *supra* note 111, at 618-19.

owner, and his insurer, to the no-fault liabilities. This argument, however, is not entirely persuasive. In a pattern where some states have switched to no-fault while others retain negligence liability, automobile owners, and their insurers, will have to face the possibility of being subjected to responsibility under either system, irrespective of whether the territorial or the personal approach is used in the choice of law. Indeed, the personal approach in common domicil cases will probably reduce the incidence of the application of out-of-state law because it is more likely that an automobile will be involved in an out-of-state accident than in an accident where all injured parties are from the same state other than the state of registration.²⁵⁸ Furthermore, no-fault is not necessarily more burdensome to the owner than tort liability. While it transforms negligence liability to passengers and pedestrians into strict liability with added first-party type benefits for the driver, it usually limits the amounts payable and it also eliminates liability to the occupants of other vehicles. Where the automobile comes from the no-fault state and the parties from a liability state, the case will come under the residual liability coverage of the insurance policy. In any event, even if one were to take the domicil of the owner into account, the choice of law problem can be solved under the different domicil rules.

To sum up, the total personalization of loss reparations, with possibly the medical creditors territorial ripple, where all parties involved are from the same state is workable and in harmony with the teachings of modern conflicts, and is particularly consistent with the compensatory orientation of no-fault. This is quite significant if one considers that a substantial proportion of automobile accidents involve a single automobile²⁵⁹ and that many two-car accidents injure common domiciliaries.

The Personal Approach in Cases of Different Home States

Where the parties involved in an accident come from at least two states having different reparations systems, the problem is more complex. From the point of view of a no-fault state determined to give the personal factor maximum play, the different features of the no-fault package may be treated separately. No-fault is a coin with two sides: a benefits side and an obligations side. With regard to benefits,

258. The latter situation is not likely to occur except when the automobile is rented.

259. *Senate D.C. Hearings* 115, 118.

there is no difficulty whatsoever in permitting the insured owner and additional insureds to recover the first-party type benefits provided in the policy, regardless of fault, place of accident and place of registration. He paid for them and they are due to the insureds on a contract basis. By the same token, no true first-party benefits should be payable to anyone other than the insureds under a policy. This would exclude uninsured owners who are non-domiciliaries of the no-fault state or domiciliaries who failed for some reason to procure insurance. It is the owners who are supposed to bear the burden of insurance and limiting their benefits to those provided for in the policy is entirely proper. Comparable considerations should apply to automobile drivers.

Turning to the limited strict liability type benefits under no-fault—that is, those payable to injured passengers and pedestrians—the plan should then extend to only the domiciliaries of the no-fault state in all circumstances and regardless of the locus of the accident. The claims by persons from other states should be relegated to their own laws, whether no-fault or liability, and should be handled through the obligations side of the insurance.²⁶⁰ Injured domiciliaries who were uninsured and properly not covered by a no-fault policy—for example, pedestrians hit by an automobile driven by an out-of-stater—should recover benefits through the assigned claims plan. This is essentially the District of Columbia approach, in cases where registration coincides with the domicile of the parties, expanded to cover also the pedestrians.

On the obligations side, the plan should require all automobiles registered in the state to carry the appropriate no-fault and residual liability insurance. The tort exemption should be commensurate with the insurance coverage. The insurance obligation would be easily enforceable by conditioning registration upon appropriate proof of insurance. The owners of automobiles which should have been registered in the no-fault state, but were not, would be personally subject to the strict liability obligations of the plan as self-insurers. The domiciliary victims would also be protected through the assigned claims plan, their insurers being allowed to recoup from the unin-

260. Under the D.C. Act, the tort exemption applies only when benefits are recoverable pursuant to its provisions. This leads to the undesirable result that claims between a D.C. person and a person from a state with another type of no-fault system, or even the same type, are to be determined in accordance with tort principles because of the residual preservation of liability. The proposal in the text would eliminate this.

sured owners the benefits which they have paid. Some no-fault plans do not go this far, subjecting the uninsured owner instead to the traditional negligence system and relying solely on criminal penalties to enforce compliance with the insurance requirements. Thus, the no-fault obligations are treated as recessive and the owner is allowed, at least on the civil side, to opt out of no-fault by mere non-compliance. It is submitted that treating the owner in substance as the insurer will provide a stronger motive for compliance without putting an undue burden on him since, after all, the no-fault obligations as lightened by the limitations and exemption, are not, on the whole, narrower than those of tort liability.

A domiciliary of the no-fault state, and his insurer, would be subject to the limited strict liabilities of, and benefit from, the tort exemption, only in his relationship to other domiciliaries. All claims by non-domiciliaries against domiciliaries would be relegated to the formers' personal law and would come under the residual liability coverage of the domiciliaries' insurance policy.

The effect of this allocation of benefits, obligations and exemptions is to make the no-fault plan applicable only to relationships between persons from the enacting state. Non-domiciliaries are completely left out of it, and as a matter of a broader choice-of-law principle, they are relegated to their own personal law. Since the latter receive the full protection of their law on both the benefits and liabilities sides, they obviously should have no basis for complaint.

How about the domiciliaries of the no-fault state, however, who, as the insurance population of such state, will have to absorb the costs of the no-fault plan? Is this allocation fair to them? Is there a gap in insurance here for the benefit of non-domiciliaries at the expense of the insurance population of the no-fault state? If no-fault domiciliaries could recover full benefits in all instances under the no-fault plan, whereas the corresponding obligations of the out-of-staters may be more limited or non-existent under their own personal law, a situation of long no-fault benefits and short liabilities could result, with the difference borne by the no-fault insurers. At the other end, such insurers may also find themselves exposed to greater obligations than what would have been due under no-fault where an out-of-stater injured by a domiciliary claims more under his own personal law. These discrepancies are created by the second proposition of the golden rule, which gives to the out-of-stater the full benefit of his own law—a feat considered virtually impossible in a system of recovery

under tort principles. Does this not prove that the golden rule places an unfair burden on the insurance population of the no-fault state, and is this not a good reason for rejecting the personal approach, at least in the non-domiciliary versus domiciliary, and vice versa, contexts? The answer is clearly in the negative.

First, this kind of discrepancy would also exist under a no-fault plan with territorial interstate features, where the insurer of a no-fault state domiciliary involved in an out-of-state accident may have to pay more under the *lex loci delicti* than the amount due under the no-fault plan. The insurer would also be required by the *lex loci delicti* rule to pay no-fault benefits to an out-of-stater injured in-state even where his domiciliary law would have precluded even a limited recovery. In both of these instances, the out-of-stater is likely not to have contributed anything to the no-fault state plan. The greater burden on the insurer is a result of the juxtaposition of different reparations systems and is not due to the choice of law approach used.

Second, this potentially greater exposure of the no-fault insurer under either a territorial or a personal choice of law approach generally is not unfair because it is matched by a potentially lesser exposure which is as probable in occurrence and dimensions as the greater one. Assuming that out-of-staters are statistically as likely to be victims as actors in automobile accidents, the total payments to them by the no-fault system under the golden rule would tend to be about the same as the total receipts from them. To clarify this point through an example, let it be assumed that the other state has retained the tort liability system, including a guest statute. A domiciliary of the no-fault state, who is injured as a passenger of an automobile owned by an out-of-stater, would recover no-fault benefits through the no-fault insurance system of his state; however, the paying insurer would not be able to recoup the benefits paid from the out-of-stater, even if at fault, because the out-of-stater will be given the benefit of the guest statute. In the reverse situation, however, which should be just as likely, where an out-of-state passenger is injured in a no-fault automobile, the insurer will pay nothing, even if the driver was at fault, because, by the same token, the out-of-stater will be burdened by the guest statute.

A subsidiary question in this area is whether the insurer paying no-fault benefits to a domiciliary should be given only subrogation or reimbursement rights in the claim against the out-of-stater obligor. The proposed plans preserve the excess tort recovery, if any is avail-

able under the applicable law, to the injured party and allow the insurer only to recoup what he has in fact paid out. Under the New York Plan, for example, a passenger in an automobile insured in New York is placed in a better position when the accident occurs in a liability state than when it occurs in New York. In the latter case, he is entitled only to no-fault benefits under the applicable New York law, whereas in the former he may also sue in tort and recover possibly more under another law. This is inconsistent with the premise that the law of one's own home state adequately provides for his reparations needs. The better solution would be to limit no-fault domiciliaries to no-fault benefits only, while providing for the assignment by law of the tort claim, if any, to the paying insurer, with the result that the additional recoveries of the insurance system will reduce in the long run the burden carried by the insurance population of the no-fault state.²⁶¹

The Total Personal Approach: An Illustration

Because of space limitations, the recommended features of the total personal approach for no-fault were given only in compact outline, and in view of the complexity of the subject, it may be useful to illustrate how they would operate by means of a hypothetical case.

Let it be assumed that state X is the state enacting the no-fault plan, that state Y has another personal no-fault plan, and that state Z is a traditional liability and *lex loci delicti* state with a guest statute. A collision occurs in Y between (1) an automobile registered and insured in X, owned and driven by A, an X domiciliary, and (2) an automobile registered and insured in Z, owned and driven by D, a Z domiciliary. A is the only negligent party. Both drivers are injured as well as B, a domiciliary of X, and C, a domiciliary of Y, who are both guest passengers in A's automobile, and E, an X domiciliary, and F, a Z domiciliary, who are both guest passengers in D's automobile. P1 and P2, pedestrians domiciled respectively in X and Z, are also injured in the collision. Actions are brought in X. Who recovers what from whom? The answer may be best presented in tabular form:

261. A statutory provision to that effect would overcome any problems arising from the common law rules against the assignment of unliquidated tort claims. See 6 C.J.S. *Assignments* §§ 32-33 (Supp. 1971).

<u>Parties</u>	<u>Recoveries</u>	<u>Payors</u>
A	No-fault (first party) benefits under the X plan	A's insurer
B	No-fault (strict liability) benefits under the X plan . . .	A's insurer
C	No-fault (strict liability) benefits under the Y plan . . .	A's insurer
D	Claim in tort under Z law	A and eventually his insurer
E	No-fault (strict liability) benefits under the X plan . . .	E's own X insurer, if any. Otherwise X's Assigned Claims Plan, without subro- gation
F	Claim in tort under Z law	A and eventually his insurer
P ₁	No-fault (strict liability) benefits under the X plan . . .	A's insurer
P ₂	Claim in tort under Z law	A and eventually his insurer
		What if only D were at fault?
A	No-fault (first-party) benefits under the X plan . . .	From A's insurer, with sub- rogation to the tort claim of A against D under Z law
B	No-fault (strict liability) benefits under the X plan . . .	From A's insurer with sub- rogation in B's tort claim against D under Z law
C	No-fault (strict liability) benefits under the Y plan . . .	From A's insurer with sub- rogation in C's tort claim against D under Z law
D	Nothing	
E	No-fault (strict liability) benefits under the X plan . . .	E's own X insurer, if any. Otherwise from X's As- signed Claims Plan, without subrogation in view of the Z guest statute

<u>Parties</u>	<u>Recoveries</u>	<u>Payors</u>
F	Nothing, in view of Z's guest statute	
P ₁	No-fault (strict liability) benefits under the X plan . . .	A's insurer, with subrogation in the tort claim of P. against D under Z law
P ₂	Claim in tort under Z law	D and eventually his insurer

It is to be noted that the fact that the accident happened in Y is irrelevant to this allocation of claims and responsibilities. If state Y, however, insisted on protecting its local creditors and imposed, for example, commensurate liabilities upon those driving on its highways for the benefit of their passengers, then D, and his insurer, may have been held liable for the local expenses of F in the second situation despite the Z guest statute, and the courts in X would have recognized this liability.

Assuming that A was required under the law of X to carry insurance for the liabilities described in the first example and had failed to do so, he would be personally liable directly or through subrogation, as the case may be, under the same principles. In the second example, A would be required to pay no-fault benefits to B, C, and P₁, even though he was not negligent, but he would also be subrogated, at least pro tanto, to their claims against D. One could considerably simplify the drafting problem for the interstate features of no-fault by focusing only on when the plan does and when it does not apply, leaving the choice of law question in the latter instance for resolution under general conflicts principles. The plan would then incorporate provisions covering only the benefits recoverable by A, B, E and P₁ and the obligations imposable on A and on D.

The foregoing illustrative case was intentionally based on a very complicated fact pattern, not likely to occur often in reality, in order to explore the most distant ramifications of the total personal approach, and to demonstrate that it can be made to work. While the *lex loci delicti* rule is obviously easier to apply, the very essence of modern conflicts lies in the rejection of simple and easy rules when they lead to unreasonable and haphazard results, in favor of a search for ways of vindicating the policies underlying the potentially applicable laws. The practical burden placed on the courts in selecting the

law applicable to each individual claim under domiciliary criteria is not too great and is, in fact, insignificant when measured against the goal achieved—namely, giving each person the full benefits and protection of his own law. The modern approaches have liberated conflicts from the notion, derived from some vague feeling of equality, that in a federal union a single law should govern all claims from an occurrence such as an accident.

From the constitutional viewpoint, domicil or residence of the parties is a sufficient contact to generate state interests and justify the application of a state's law—especially to issues of loss reparation or liability, under the full faith and credit and due process clauses.²⁶² The different treatment of domiciliaries and non-domiciliaries through the choice-of-law process and in recognition of the differing state interests does not present equal protection problems, especially when each party is relegated to his own personal law.²⁶³

262. After decades of judicial activism in the conflicts field, the Supreme Court, consistently with the philosophy underlying *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), has been interpreting the full faith and credit and the due process clauses of the Constitution in a way granting to the states the greatest autonomy in the choice of law. For a description of this evolution see CURRIE, *SELECTED ESSAYS* 188-288; WEINTRAUB 379-422; Leflar, *Constitutional Limits on Free Choice of Law*, 28 *LAW & CONTEMP PROB.* 706-31 (1963). According to Cavers:

The Supreme Court has granted ample room for the exercise of [state] autonomy by imposing constitutional restraint only when a state's assertion of authority goes beyond any reasonable state purpose or is found to impair a national policy. *CAVERS* 217.

The latest pronouncement by the Supreme Court on this point supports this interpretation:

Where more than one state has a sufficiently substantial contact with the activity in question, the forum state, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity. *Richards v. United States*, 369 U.S. 1, 15 (1962).

The use of the common domiciliary law of the parties is well entrenched in various conflicts rules, and there is no reason to suppose that its extension into the automobile accident area will face any constitutional obstacles. The same would be true for a choice of law system which in a split domicil case gives to each party the benefit of his own home state's law, as suggested in the text. In fact, the Supreme Court case law, as developed in the workmen's compensation context, on the interests of the home states of the parties, especially that of the victim, to apply their own law on issues of compensation clearly supports the propriety of the use of personal considerations. See, e.g., 3 A. LARSON, *WORKMEN'S COMPENSATION LAW* §§ 86.33, 87-60 (1968, Supp. 1971); Larson, *Constitutional Law Conflicts*, *supra* note 161, at 1055, 1060.

263. For the best and most comprehensive analysis of unconstitutional discrimination in conflicts law, see CURRIE, *SELECTED ESSAYS* 445-83. See also *CAVERS* 144-45; R. CRAMTON & D. CURRIE, *supra* note 74, at 422-29; WEINTRAUB 422-26. While the indiscriminate denial of the benefits of local laws to out-of-staters or the indiscriminate imposition of burdens on them presents obvious equal protection problems, the use of the domicil or residence of the parties as a neutral factor in the choice of law in a way intended to give maximum recognition to

CONCLUSION

The 1970's have been called the decade of no-fault on the expectation that during this period the nation will reconsider the wisdom of using subjective rather than objective criteria in fashioning the rules dealing with loss distribution, continuation of personal relationships and other fundamental questions. The battle of no-fault for automobile loss reparations represents probably the most important confrontation between the traditional and the reform views, and unless the Congress steps in with a bold national no-fault plan or strict guidelines, the outcome of the confrontation at the state level in this area is likely to be a patchwork of automobile no-fault variants co-existing side by side with tort liability for some time to come. In this kind of a setting, choice of law problems are bound to be multiplied and compounded to an unprecedented degree.

Modern conflicts law is in a state of ferment and revolution, and no new methodology, let alone rules, may claim general acceptance. The no-fault legislator could take the easy way out by merely prescribing substantive rules and leaving to the courts the Herculean task of figuring out the conflicts consequences. This would place the courts in the virtually impossible position of first having to adapt their preferred conflicts approach to the no-fault plan of their state and then having to resolve the conflicts controversies as they arose on an ad hoc basis, with the hope that precedent would eventually crystallize into workable guides, principles, rules or some kind of wisdom, as the case may be. Indeed, if the courts were led to follow the views of those modern theorists who prize methodology as an end in itself, to be pursued at all costs and regardless of results, in what may be termed a quixotic quest for perfection, each case would become a *cause celebre*, a monument to the technical virtuosity and ideological purity of the judges who decided it and a milestone in the eternal search for conflicts truth!

The authors of no-fault, being principally practical men with a bird-in-the-hand mentality, introduced rather specific, clear-cut rules on the sphere of application of their plans in order to resolve most

legitimate governmental interests is beyond reproach. Cf. *CAVERS* 557-72. No federal case has been found invalidating a neutral state conflicts rule determining private rights on the basis of the home law of the parties involved, as proposed in the text. The tendency of the Supreme Court to remove itself from the conflicts area will probably lead to an unconstitutionality decision only in the most offensive situation.

conflicts controversies in predictable and, what appeared to them to be, just ways, leaving only the fringe cases to the ingenuity of the courts. This option for certainty in an extremely complex field is, on balance, to be applauded,²⁶⁴ but one cannot but be critical of the content of many of the rules adopted. In the melange of territorial and personal factors used in the various no-fault plans, the former generally predominate, apparently due less to an ideological commitment to the *lex loci delicti* and more to old habit. This ignores the greatest contribution of modern conflicts theory—policy analysis—which in evaluating the connecting factors and delineating their sphere of application, focuses on the purposes intended to be implemented by the substantive laws which are potentially in conflict. The compensatory orientation of no-fault automobile reparations and the reliance upon compulsory insurance to distribute the losses make the territorialization of the new legislation singularly inappropriate. While it may be true that the links between persons and states, especially in a federal context, are not as permanent as in times of yore, they certainly are materially closer and more significant than the connections between a person and the place where he might be involved in an automobile accident.

A personal system of choice of law incorporating explicit directives based on domicile or habitual residence, adequately defined, giving to all parties the benefits of, and imposing on them the obligations under, their own home state law, with certain minor territorial exceptions for special problems, is clearly more consistent with the goals of no-fault automobile reparations than a territorial or any other presently known system. Tested against the principal conflicts *desiderata*, such a system is superior. It promotes certainty, predictability and uniformity of result as well as ease in the determination of the law to be chosen. The basic policies of no-fault and the justified expectations of the parties are effectuated through determination of the rights and liabilities of each party according to the law of his home state, the state most likely to be concerned with his protection and long-term welfare. Furthermore, by relying on a neutral factor, namely the domicile or habitual residence of the parties, it escapes the pro-compensation bias and the vagaries of the forum law preference inherent in some modern theories and helps advance harmonious relations between states, serving well the cause of interstate collabo-

264. Cf. Reese, *Choice of Law: Rules or Approach*, *supra* note 88, at 319-20.

ration. Finally, it is also more consonant with modern torts conflicts which would govern the residual liability remaining in effect under most no-fault plans. All in all, the no-fault automobile loss reparations present a unique opportunity to put to good use what is best in modern conflicts, and it is to be hoped that the occasion will not be missed.