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Anti-Guest Statutes and Marital Immunity for Torts in Conflict of Laws:

Techniques for Resolving Ostensible True Conflict Cases and Constitutional Limitations

Moffatt Hancock*

1. Historical Introduction

In the now historic case of *Babcock* v. *Jackson,*[1] decided in 1963, the New York Court of Appeals introduced an apparently[2] novel mode of analyzing tort choice-of-law issues that has achieved remarkable popularity with the judges of other states. It has been adopted in tort cases where the facts and issues were quite different from those of *Babcock* v. *Jackson*[3] and in contract cases as well.[4] Why does the *Babcock* v. *Jackson* methodology appeal so strongly to the judges of the highest state tribunals? The short answer is that this methodology is extremely realistic; it brings the judges directly to grips with the basic elements of the choice problem: two divergent rules of law producing divergent practical results and ef-

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1. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Canadian courts had reached the same result in a series of analogous cases beginning 27 years before *Babcock* v. *Jackson.* The Canadian courts had reached this result by manipulating the so-called *Phillips* v. *Eyre* formula. See Hancock, *Canadian-American Torts in the Conflict of Laws,* 46 Can. Bar Rev. 226 at pp. 239-244 (1968).

2. An analysis similar to that of *Babcock* v. *Jackson,* couched in terms of statutory construction, was used by the courts of New York and of other states in a number of nineteenth century cases involving statutory restraints on testamentary gifts to charity. See Hancock, *"In the Parish of St. Mary le Bow in the Ward of Cheap,"* 16 Stan. L.Rev. 561, 574-611 (1964). For older English torts cases using a similar technique see Hancock, *Torts Problems in Conflict of Laws Resolved by Statutory Construction,* 18 U. of Tor. L. J. 331 at 341-47 (1968).

3. For a convenient recent list of torts cases and specific subject-matters see Weintraub, *Conflict of Laws* 234, Note 36 (1971).

4. See e.g., *Intercontinental Planning Ltd.* v. *Daystrom* Inc. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

fectuating divergent policies. Of these two rules the judges must choose one. The new methodology emancipates them from the simplistic place of injury formula with its distracting and misleading escape devices.[5] It enables them to base their choice upon a rational consideration of the policies and effects of each of the proffered rules in relation to the domiciles of the parties and the location of other significant facts in the case.

What were the divergent rules policies and practical effects faced by the New York judges in *Babcock* v. *Jackson?* In 1935 the legislature of the Province of Ontario enacted the following statutory provision: "Notwithstanding the provisions of section 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in or upon or entering or getting into or alighting from such motor vehicle."[6]

The effects of this statute in the year 1963 upon Ontario domestic cases where guest-passengers suffered injury or death in a motor vehicle can be summarized as follows: *First,* such guest-passengers or their surviving dependents were not entitled to collect one penny from the driver or owner of the motor vehicle or his insurer. *Secondly,* the statute had the important consequence of protecting insurance counsel from the embarrassment of having to defend insured defendants who, because the injured guest-passenger was a relative or close friend, were perfectly willing to lose the lawsuit. When the statute was first enacted, a prominent Ontario barrister stated that it was designed "to prevent the fraudulent assertion of claims by passengers in collusion with the drivers against insurance companies."[7] "Fraudulent" and "collusion" are strong words;

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5. These devices are discussed in text at notes 10, 11 and 12.

6. Stats. Ontario 1935, c.26, s. 11.

7. John J. Robinette, *Survey of Canadian Legislation* (Ontario) 1 Univ. Toronto L.J. 364, 366 (1936). Mr. Robinette was a lecturer in the Osgoode Hall Law School and held the important position of editor of the Ontario Reports and the Ontario Weekly Notes. See 11 Canadian Who's Who 941, 942 (1969).

A similar view of the statute's purpose and practical effect was taken by Dr. Cecil A. Wright, lecturer in the Osgoode Hall Law School and editor of the Canadian Bar Review (see 23 Can. Barr Rev. 344, 347) and by

the overly friendly drivers would have displeased the insurance counsel had they done nothing worse than admit their own errors in driving. Whether the claims were "fraudulent" or not, the insurance counsel understandably disliked defending defendants who preferred to see the plaintiff win.

In the state of New York, on the other hand, the picture was totally different. Three times had the New York legislature refused to abrogate or even to limit the liability of owners and drivers to guest-passengers.[8] They were entitled to recover full compensation for the driver's ordinary negligence. Insurance counsel had to defend or settle their claims despite the unpleasant possibility that the insured defendants were not true adversary parties.

In the *Babcock* case, both parties were domiciled in New York and the defendant was insured. Had the plaintiff guest-passenger been injured there, she would have been entitled (like other New Yorkers suffering the same misfortune), to compensation for her medical expenses, loss of income and pain. But inasmuch as she had been injured in Ontario, the defendant's counsel argued that she should get nothing because a traditional choice-of-law formula required that the law of the place of injury should determine the defendant's liability. Under these circumstances, it is scarcely surprising that a number of judges in the New York Court of Appeals felt inclined to apply the law of New York. To such a conclusion, the traditional place of injury formula presented no serious obstacle. Six prior precedents of the New York Court of Appeals[9] clearly indicated that where both parties were New York citizens (or carrying on business there), the law of New York could and probably should be applied rather than that of the place of injury. True, the reasons for disregarding the law of the place of injury were not very satisfactorily explained in these cases; the judges had simply made use of one or more unconvincing escape devices. However, it is a recognized

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Professor A. M. Linden of the Osgoode Law School (see 40 Can. Bar Rev. 284, 285-86 (1962). The marital immunity from tort liability has a very different historical origin but in practice effectuates the same purpose. See note 20 Part 5.

8. 12 N.Y.2d 473, 482.
9. See notes 10, 11 and 12 *infra*.

principle of common-law legal methodology that decisions upon particular sets of facts may be correct and persuasive even though the judges have not entirely succeeded in reconciling them with a traditional legal formula.

What, then, were the escape devices utilized by the judges in the six prior precedents? Sometimes the issue to be decided was classified as one of contractual liability to be governed by the law of the place of contracting (New York).[10] Sometimes the issue to be decided was classified as one of remedial law to be governed by the law of the forum.[11] And sometimes the judges simply held that the proffered rule of the place of injury was contrary to the public policy of New York.[12] Other American courts had relied upon the same devices to circumvent the place of injury formula.[13] The notion that the judges of New York or other states had consistently adhered to the place of injury formula to achieve uniform and predictable results is sheerest fantasy. The most that can be said is that it was frequently reiterated by judges whose superficial research did not go beyond the black-letter generalizations of the textbooks. Ingenious judges who read the nonconforming cases and exploited the escape devices continued to produce a steady stream of nonconforming opinions.

Any or all of these escape devices could have been employed in *Babcock* v. *Jackson.*[14] Why did the judges not

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10. Dyke v. *Erie Ry. Co.*, 45 N.Y. 113 (1871). (Limitation of damages to $3,000 by statute of state of injury *not* enforced.) *Conklin* v. *Canadian-Colonial Airways,* 266 N.Y. 244, 194 N.E. 692 (1935) (Contractual limitation of carrier's liability for wrongful death held invalid under law of place of contracting, New York; *semble* valid by law of place of injury and death, New Jersey. See also *Fish* v. *Delaware etc.* Ry. Co. 211 N.Y. 374, 105 N.E. 661 (1914).

11. *Wooden* v. *Western N.Y.* and *Pa. Ry. Co.*, 126 N.Y. 10, 26 N.E. 1050 (1891); *Mertz* v. *Mertz,* 271 N.Y. 466, 3 N.E.2d 597 (1936); *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

12. See cases cited in note 11 *supra* and also *Herzog* v. *Stern,* 264 N.Y. 379, 191 N.E. 23 (1934).

13. For a concise summary of judicial practice, with references to collections of cases see Leflar, *American Conflicts Law* 323 (1968).

14. *First,* the court might have classified the relation of driver to passenger as contractual or quasi-contractual and so to be governed by the law of New York where the relation was formed. *Second,* the court might have classified the Ontario statute as remedial because it was designed to

make use of them? Apparently some of the New York judges were becoming aware of the distracting[15] and misleading[16] effects of these escape devices and wanted a more comprehensive and realistic analysis. Only two years earlier, the Court of Appeals had relied upon two of these devices in deciding the celebrated case of *Kilberg* v. *Northeastern Airlines.*[17] Though the decision aroused considerable criticism, Brainerd Currie, by making an analysis of the policies and effects of the two divergent rules involved, persuasively defended the result.[18] His analysis was closely similar to that adopted in *Babcock* v. *Jackson*. Ten years earlier Mr. Justice Traynor, speaking for the Supreme Court of California, had made use of one of the escape devices in deciding *Grant* v. *McAuliffe.*[19] Though that decision had also excited criticism, Brainerd Currie had defended the

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exclude "collusive" litigation from Ontario courts. *Third,* the court might simply have held that the Ontario statute was contrary to the public policy of New York as evinced by its legislature's refusal to enact such a statute.

15. The escape devices are distracting because they tend to focus the judges' attention upon the abstract issues of classification; should the Ontario anti-guest statute be classified as a rule of quasi-contractual liability, *or* as a rule of tort liability *or* as a rule barring the guest's remedy in Ontario courts? But the real basic question before the court was whether the facts of the present case brought it within the policy range of the Ontario statute.

For a fuller discussion of the diversionary effect exerted by crude, over-simplified choice-of-law formulae upon the judicial mind, see Hancock, *The Rise and Fall of Buckeye v. Buckeye,* 29 U. Chi. L. Rev. 237 at pp. 246 to 252 (1962).

16. The escape devices are misleading because they are so crudely comprehensive that they necessarily imply highly undesirable decisions in cases other than the one before the court. Thus, to hold that the legal relationship of the host and guest-passenger should be governed by New York law because it was originally formed there would imply that the New York rule should be enforced in a case where both parties were domiciled in Ontario and the injury occurred there so long as the host-guest relation was formed in New York. To hold that the Ontario anti-guest statute was procedural or contrary to New York's public policy would imply that it should be disregarded in *all cases litigated* in New York courts.

17. See note 11, *supra.*

18. See B. Currie, *Selected Essays on Conflict of Laws* (1963) at pp. 690-710. This essay was originally published in [1963] Duke L. J. 1.

19. 41 Cal.2d 859, 264 P.2d 944 (1953).

result by making an analysis[20] similar to that adopted in *Babcock* v. *Jackson.* Four years before the *Babcock* decision, in an influential article, Mr. Justice Traynor had eloquently urged other judges to adopt the analysis so successfully demonstrated by Currie. In discussing his opinion in *Grant* v. *McAuliffe,* he referred to the place of injury formula with its various escape devices as "a petrified forest."[21] In *Babcock* v. *Jackson,* the New York Court of Appeals decided to get out of the petrified forest.

The outstanding characteristic of the methodology adopted in *Babcock* v. *Jackson* was its primary emphasis upon the policies and practical effects of the divergent domestic rules involved. It also sought to provide a test to assist judges in making a choice between the divergent rules.[22] This test was

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20. See B. Currie, Selected Essays in Conflict of Laws (1963) at pp. 128-172. This article originally appeared in 10 Stan. L. Rev. 205 (1958). The mode of analysis employed in this article was, according to Professor Currie, derived from and inspired by the opinion of Stone, J. in *Alaska Packers Ass'n* v. *Industrial Accident Commission,* 294 U.S. 532 (1935). See Selected Essays at p. 613.

21. Traynor, *Is This Conflict Really Necessary?* 37 Texas L. Rev. 657, 670 note 35 (1959).

22. See 12 N.Y.2d 473 at p. 481. "Justice, fairness and the best practical result . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship with the occurrence or the parties, *has the greatest concern with the specific* issue raised in the litigation. The merit of such a rule is that it gives to the place *having the most interest in the problem* paramount control over the legal issues arising out of a particular factual context. . . ." (Italics added.)

In the light of the foregoing test the strongest argument for choosing the compensatory rule of New York was that the plaintiff was domiciled there and, since the defendant was *not* domiciled in Ontario and the suit was *not* brought there, *neither* policy of the Ontario statute called for its application. Unfortunately, in his eagerness to justify an apparently novel mode of analysis, Judge Fuld stressed several factual contacts with New York that add little or nothing to the strength of any policy directed argument for choosing the New York rule, namely: that the car was garaged, licensed and insured in New York, that the host-guest relationship was formed in New York and that the trip began and was to end there. Reliance upon these insignificant contacts lead to the confusing and now discredited opinion in *Dym v. Gordon,* 16 N.Y.2d 120, 209 N.E.2d 792 (1965). It was severely criticized in the concurring opinion of Keating J. in *Macey v. Rozbicki,* 18 N.Y.2d 289, 221 N.E.2d 380 (1966) and explicitly overruled in *Tooker v. Lopez,* 24 N.Y.2d 569, 249 N.E.2d 294 (1969).

easily applied in the *Babcock* case because the facts obviously fell within the policy-determined range of the New York compensatory rule and outside that of the Ontario statute giving immunity to negligent host-drivers.

In one of the most realistic passages of his opinion, Judge Fuld considers the significance of automobile liability insurance for a policy-determined choice analysis, a prickly problem that judges have often preferred to ignore. In demonstrating that the policies of the Ontario statute did not extend to the facts of the *Babcock* case, he relied upon the statement discussed above that the object of the statute was "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies."[23] As has been noted, this statement unduly confines the aversion felt by insurance counsel to defending guest-passenger claims. Whether the claims are fraudulent or not, insurance counsel fear the possibility that the host-driver may not sufficiently insist upon his own innocence of negligence. Assuming the statute was intended to relieve Ontario insurance counsel from defending such claims, that policy had become completely irrelevant when the suit was brought in New York where it would be defended by New York counsel.

In practice, of course, the Ontario statute benefited not only insurance counsel but insurance companies as well since it eliminated the necessity to litigate or settle a large number of claims. Conceivably, Mr. Jackson's insurer might have been carrying on an extensive business in Ontario. But it would have been most inappropriate for its counsel to argue that as a member of the Ontario economic community it was entitled to the protection of Ontario law. For it had bound itself by a solemn contract to pay the damages if Mr. Jackson was liable. Whether the law of Ontario, or any other jurisdiction where it operated, purported to protect it against guest claims was quite beside the point.[24] Indeed it is highly unlikely that any responsible insurance counsel would actually advance such an argument.

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23. See 12 N.Y.2d 473 at 482-83.

24. In short, a fully articulated analysis of all relevant domestic policies would have to recognize Ontario's interest in protecting the insurer from liability if it were carrying on a substantial amount of business in Ontario.

Though the court demonstrated convincingly that its decision did not conflict in any way with the policies of the Ontario anti-guest statute, it might have gone further and demonstrated that its decision actually advanced certain other policies of Ontario law. For the anti-guest statute was not the only element of Ontario law involved in the decision of this case. Ontario had a general policy of compensating persons injured on its highways; its comparative negligence statute[25] actually enabled them to recover damages even when their own negligence had been a contributing cause of their injury. Moreover, the imposition of civil liability was designed to deter careless drivers from violating Ontario's admonitory rules governing the operation of motor vehicles. In a purely domestic case involving an injured guest-passenger, these policies would, of course, have been subverted in favor of the anti-guest statute's policies of protecting kind-hearted hosts and their insurance counsel. Since these policies had no application to a case involving a New York host and his New York insurance counsel, the decision in *Babcock* v. *Jackson* actually advanced the Ontario compensatiory and deterrent policies without subverting those of the anti-guest statute. In addition, the decision had the effect of providing a fund for the payment of Ontario doctors and nurses who had provided emergency treatment for Miss Babcock.[26]

That several significant policies of Ontario law were effectuated by the award of damages to the plaintiff was not of great importance in the *Babcock* case. But in a case where the facts were different, these policies might be the only significant ones requiring recognition. Suppose that a gentleman domiciled in New York had, while vacationing in Ontario, met an

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But because of the insurer's contract the court could give effect to this policy only by exonerating the defendant from liability. The notion that a court should exonerate the defendant from liability to implement an Ontario policy of protecting his insurer would surely strike most judges as bizarre and grossly unfair to the plaintiff.

25. See the Negligence Act, R.S.O. 1970 c. 296. For brief history and commentary see Linden, *Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents* (1965) ch. 4, p. 7.

26. This point is made by Keating, J. (concurring) in the subsequent and similar case of *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380 (1966). See 18 N.Y.2d 289 at p. 295.

attractive lady domiciled there and offered her a ride in his car. When he carelessly drove off the road and hit a tree, she was severely injured. How should a New York court apply the *Babcock* v. *Jackson* methodology to such a case? New York's policy of compensating injured guests certainly has no obvious application to this lady domiciled and injured in Ontario. On the other hand, Ontario's policy of protecting kind-hearted hosts and their insurance counsel has no obvious application to a suit in a New York court against a New York host. A decision for the plaintiff will, however, clearly advance Ontario's interest in deterring careless driving on its highways, in compensating persons injured there and in securing the payment of therapeutic creditors who had come to their aid. Though other theories may be suggested to support a judgment for the plaintiff,[27] the interests most obviously advanced thereby would be those of Ontario.

The necessity imposed by the *Babcock* v. *Jackson* methodology for giving careful consideration to the laws and policies of the concerned states had made the judges acutely aware of a type of problem that may be stated abstractly as follows: what should a court committed to a policy-determined analysis of choice cases do when it appears that, though the factual contacts of a case bring it within the policy range of a rule of the forum, they also bring it within the policy range of a divergent rule of another state? It is the principal purpose of this article to discuss the recent marital immunity and anti-guest statute cases involving this problem and to consider some techniques for reconciling the ostensibly conflicting rules that have been suggested by commentators and adopted by courts in those cases.

2. Kell v. Henderson and analogous Wisconsin cases.

In the much discussed case of *Kell* v. *Henderson,*[28] the New York Appellate Division decided an ostensible true conflict case

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27. E.g., that New York's compensatory rule is the "better law." (See text at note *39* infra.) The decision of a New York trial judge in *Neumeier v. Kuehner,* 313 N.Y.S.2d 468, 63 Misc.2d 66 (1970) is contrary to the analysis advanced in the text.

28. 47 Misc.2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965) *affirmed,* 26 App.Div.2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966). The Appellate

in which the facts were precisely the reverse of *Babcock* v. *Jackson.* Though the decision was influenced by procedural considerations and the choice problem barely noticed, the case deserves careful analysis because a number of valuable commentaries have taken it for their theme.[29] Stephanie Kell, a minor, accepted Albert Henderson's invitation to go for a ride in a car owned by his mother, Helen Henderson. All three were domiciled in Ontario but the trip took the young couple into New York where Stephanie was seriously injured when the automobile left the highway and struck a bridge. Suit for damages having been brought in New York against the driver and owner, they moved at a late stage of the proceedings for leave to set up a defence based upon the Ontario anti-guest statute. The judge of first instance refused such leave and his decision was affirmed by the Appellate Division.

In order to fully develop the issues involved, let us assume that Mrs. Henderson, the automobile owner was insured, that the driver was guilty of ordinary negligence under New York law and that the New York court took judicial notice, not only of the Ontario anti-guest statute but of the Ontario domestic cases determining its application to marginal sets of facts.

What arguments might have been advanced for the application of the New York law? First, that New York's policy of compensating injured guest passengers should not be limited to New York domiciliaries but should extend to persons temporarily resident there and to transients such as Stephanie Kell. Second, that in allowing the car to leave the road and strike a bridge, the defendant driver had violated New York's admonitory rules governing the operation of motor vehicles on its highways and should therefore be subjected to civil liability. It is beside the point to urge that concern for their own safety, or the threat of criminal prosecution should have been a

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Division has more recently taken an exactly contrary view in *Orbuthnot* v. *Allbright,* 35 App. Div.2d 315, 316 N.Y.2d 391 (3d Dep't 1970) apparently relying upon dictum in the concurring opinion of Fuld, J. in *Tooker v. Lopez* cited note 22 *supra.*

29. See Trautman, *Kell v. Henderson; A Comment, 67* Colum. L. Rev. 468 (1967); Rosenberg, *Two Views on Kell v. Henderson, id* at 459; Leflar, *Conflicts Law: More on Choice Influencing Considerations* 54 Calif. L. Rev. 1584 at p. 1593; Baade, *Counter-Revolution or Alliance for Progress,* 46 Texas L. Rev. 141 at 170 (1967).

sufficient deterrent to careless drivers. The question is not what one may think should have been a sufficient deterrent but what New York law has prescribed. Thirdly, since the payment of medical expenses was one of the principal items of the compensation that New York law would have awarded, New York had a concern that such an award should be made to ensure that the New York doctors and hospitals were paid for their necessary and costly services. In short, the enforcement of the New York rule requiring the compensation of injured guest-passengers would have advanced a number of important New York policies.

How did the Ontario anti-guest statute relate to the present case? That statute had, as has been noted, two policies. Its policy of protecting Ontario insurance counsel from the potential hazards of collusive litigation was, of course, quite irrelevant to a case being litigated in New York.[30] But its second policy of shielding owners and drivers from all liability to their injured guest-passengers clearly extended to Mrs. Henderson because she was domiciled in Ontario. This contention on behalf of Mrs. Henderson is not affected by the assumed fact that she carried insurance. For even though she did carry insurance, the anti-guest statute protected her against the anxiety of being involved in a lawsuit (an experience most people dislike intensely), and the terrifying possibility that if a large judgment were entered against her, it might exceed the limits of the insurance coverage. Likewise, the statute protected her against the possibility that if judgment were to go against her, she might have to pay a higher premium for insurance in the future.

Thus the court was faced with a conflict between the policies of the divergent Ontario and New York rules. How should this conflict have been resolved? The court might have resolved it very simply by holding that since New York had a

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30. As pointed out in note *24 supra*, a complete analysis of Ontario policies would involve the recognition that one effect of the anti-guest statute was to protect insurers carrying on business in Ontario from the hazards of defending defendants who do not want to win. But since the insurer has by its contract agreed to be liable *if the insured is liable*, a New York judge would probably give scant consideration to Ontario's policy of protecting insurers as against New York's interest in allowing recovery.

substantial interest in the application of its law, a New York court ought to effectuate that interest. Indeed, there could be situations in which a New York court would have no other alternative.[31] But judges who have adopted the *Babcock* v. *Jackson* methodology have frequently exhibited reluctance to decide choice cases upon this ground alone. They have turned increasingly to the writings of certain commentators who have suggested several techniques for reconciling ostensible policy conflicts.

In the *Kell* case, a very comprehensive and persuasive argument, suggested by Trautman,[32] might have been made for giving a restrained construction to the Ontario statute and virtually eliminating the conflict. It is based upon a consideration of the Ontario domestic borderline cases construing the statute. In these cases the Ontario courts had to consider whether the statutory policy of conferring complete immunity upon owners and drivers for injury to their guest-passengers should prevail against the other policies of Ontario law requiring the compensation of injured persons. A careful study of these cases previously made by a Canadian legal scholar showed that Ontario judges had uniformly given the statute an extremely restricted construction. He had found that the courts had engaged in "a battle to eclipse"[33] the statute. The *Kell* case was

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31. E.g., a situation in which the legislative history of a statute indicated a strong commitment of the legislature to a particular policy. Perhaps this was the situation in *Kell* v. *Henderson;* see the remarks of Keating, J. in *Macey* v. *Rozbicki* (supra note *26*) concerning the compensation of persons injured in highway traffic accidents, 18 N.Y.2d 289 at 293.

32. See *op. cit.* note 29. The present author does *not* agree with Professor Trautman's suggestion that the statute does not have any policy to protect insurers or their counsel against collusion. Trautman also relies strongly upon the circumstances that in 1966 the Ontario legislature amended the statute by permitting a guest-passenger to recover for "gross negligence."

33. See Linden, *Comment,* 40 Can. Bar Rev. 284 (1962). At p. 292 he summarizes the judicial treatment of the statute thus: "Although the gratuitous passenger subsection has survived in Ontario without legislative amendment for twenty-seven years, it has not avoided judicial amendment. The courts have fought against the subsection and some success has been achieved. Various devices have been invented from time to time in order to mollify the full rigour of the subsection. Vicarious liability, the

analogous to these Ontario domestic cases in that the New York court had to decide whether the immunity-granting policy of the Ontario statute should prevail against several contrary policies of New York law requiring the compensation of Stephanie Kell. In the light of the Ontario decisions consistently restricting the scope of the statute in favor of domestic compensatory policies, the New York court would have been fully justified in giving it a restricted construction in favor of the several compensatory policies of New York law.[34]

Nothing has been said in the foregoing analysis concerning the impact of the *Kell* case and others like it upon the liability insurance rates charged to persons domiciled in Ontario. This matter the New York court should have ignored completely for two reasons. *First,* the New York court had no grounds whatever for thinking that one of the policies of the Ontario guest statute was the diminution of insurance rates. Indeed, the Ontario domestic decisions consistently restricting the operation of the statute constituted a strong indication that no such policy existed. *Second,* though the *Kell* case and others like it would have provided a tiny portion of the data used in the complex process of fixing rates for the various rating territories in Ontario, the only positive statement that could have been made about its impact is that it would either be very slight or possibly totally insignificant.[35]

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relationship of master and servant existing between the parties, the broad construction of 'the exception within the exception' ["a vehicle operated in the business of carrying passengers for compensation"] perhaps a shift in the onus of proof to the defendant, an express contract of carriage and now a contract of safe carriage as part of a contract of employment have all been used. These examples alone are evidence that subsection (2) of section 105 of the Ontario Highway Traffic Act is out of step with current Canadian policy and thought." In 1966 the subsection was amended to permit recovery for "gross negligence." See now R.S.O. 1970 c. 202 s. 132(3).

34. If in the case discussed in the text, the suit had been brought in Ontario the court would probably follow the rules derived from *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 at 28-29 which prohibit the enforcement of a cause of action not recognized by the domestic law of the forum. See *Gagnon* v. *Lecavalier* [1967] 2 O.R. 197, the decision of single judge dismissing a guest-passenger's action for damages sustained in Quebec whose law would have permitted recovery.

35. See Morris, *Enterprise Liability and the Actuarial Process: The Insignificance of Foresight* 554 at 574-76.

The foregoing theoretical analysis of *Kell* v. *Henderson* embodies the views of the author and other commentators as to how a court pursuing a policy-determined analysis might have decided this particular ostensible true conflict case. In *Heath* v. *Zellmer*,[36] the Supreme Court of Wisconsin (having already adopted the *Babcock* v. *Jackson* methodology),[37] delivered a very articulate and comprehensive opinion in a case involving the same pattern of facts and laws as *Kell* v. *Henderson*, with one highly significant additional fact. Two guest-passengers, domiciled in Indiana (which has one of the harsher types of anti-guest statute), were injured in a collision in Wisconsin (which has none). The car in which they rode was owned by an insured Indiana domiciliary and driven by his daughter with his permission; the other car was owned and driven by an insured Wisconsin domiciliary. The guest-passengers brought suit against the Wisconsin owner-driver and his insurer; in this suit, involving no question of guest liability, the Wisconsin owner-driver was obviously liable for ordinary negligence. He and his insurer then took proceedings to implead the driver (and insurer) of the Indiana car on the ground that she, having been guilty of ordinary negligence in the collision, was liable for contribution to pay any judgment obtained by the guest-passengers. These proceedings raised the choice of law issue: were the driver and insurer of the Indiana car liable to the Indiana guest-passengers for ordinary negligence under Wisconsin law or were they entitled to the protective immunity of the Indiana anti-guest statute?

To support the application of Wisconsin law, the court marshalled the three policy arguments itemized above to support the application of the law of the state of injury (New York) in *Kell* v. *Henderson*. In addition, the court emphasized a fourth Wisconsin policy, that of holding the drivers of the Wisconsin and Indiana cars to the same standard of ordinary negligence and so "spreading losses and assessing damages against all tortfeasors in proportion to their causal negligence." If Indiana law were allowed to give the driver of the Indiana car complete immunity, the entire burden of the damages suffered by the Indiana passengers would be thrown on the Wisconsin

36. 35 Wis.2d 578; 151 N.W.2d 664 (1967).
37. In *Wilcox* v. *Wilcox*, 26 2d 617; 133 N.W.2d 408 (1965).

driver "with no opportunity to seek contribution from their negligent host . . . even though it might be her negligence that was the principal cause of the accident."[38]

The court recognized the two-fold purpose of the Indiana anti-guest statute: to protect host drivers from liability in a situation where they had generously offered the guest a free ride and to prevent collusion in guest's suits against friendly insured hosts. The court noted that the latter policy was irrelevant to the instant case since it was not being litigated in an Indiana court. But the first policy clearly extended to the instant case and would have been frustrated if Wisconsin law were applied. How then should the conflict be resolved?

In *Kell* v. *Henderson,* the conflict between the New York law and the Ontario anti-guest statute could have been virtually eliminated because a prior study of the Ontario domestic cases had shown that Ontario judges had consistently restricted the operation of that statute. No such study of the Indiana domestic cases was available in *Heath* v. *Zellmer.* What was available was a pointed commentary on anti-guest statutes by an eminent conflicts scholar. Relying on earlier studies he had concluded that they were anachronistic and had, in recent years, been less rigorously applied and more severely criticized. "Current feeling is that they are both unfair to guests and contrary to the enterprise liability, spread-the-loss concept that prevails in the automobile tort area today."[39] In discussing an hypothetical case on all fours with *Kell* v. *Henderson,* he had suggested that the court of the state where the injury occurred should apply its law to grant recoverly because the foregoing considerations showed it to be "the better rule of law." The Wisconsin judges adopted this method for resolving the conflict with Indiana law, stating that their domestic rule was "a superior and better standard from a socioeconomic viewpoint, more consonant with present day thinking than the outmoded 'Model T' guest statute. . . ."[40] The court also emphasized its duty to advance the governmental interests of Wisconsin that would have been defeated by the application of the Indiana statute.

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38. 35 Wis. 2d 578 at 601.
39. Leflar, *op. cit.* note 29: 54 Calif. L. Rev. 1584 at 1595.
40. 35 Wis. 2d 578 at 604.

Why were the Wisconsin judges not content to rest their decision on the ground that several important Wisconsin policies required the application of its rule? The first and most obvious reason has already been discussed: use of the *Babcock* v. *Jackson* methodology has made judges so sensitive to the policies and concerns of other states that they are reluctant to reject them on the single and rigid ground that the court must prefer the policies of its own state. The suggestion that they should decide which was the better law strongly appealed to these judges because it enabled them to make an impartial, independent choice between the divergent rules of the forum and the other concerned state. That the policies of the forum have a primary claim upon its judges was not denied but neither was that primary claim allowed to exclude all other choice-influencing considerations.

A second explantion for the court's use of the better law argument may be found in the circumstance that the statute books of every state contain certain provisions that (like the anti-guest statutes) embody old-fashioned, out-moded views of social policy. Given a choice, in an ostensible true conflict case, between one of these anachronistic provisions from the statute-book of the forum and a more rational, modern rule of another state, some judges might seize the opportunity to recognize the anachronistic nature of the forum's provision and to enforce the more rational rule of the other state. The adoption of the better law approach in the *Heath* case opened the door to the possibility of using it under such circumstances.[41]

Conklin v. *Horner,*[42] decided nine months later by the Wisconsin Supreme Court, involved a guest passenger injured in a one-car accident in Wisconsin, without the additional

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41. The explicit use of the "better law" technique was effectively explained and justified by Leflar in two influential articles: *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L.Rev. 267 (1966) and *op. cit.* note 29. As these titles indicate, choice of the better law was one of *five* choice-influencing considerations affecting the decision of conflicts cases. Another relatively specific consideration was the advancement of the forum's governmental interests. The remaining *three* were more abstract and diffuse: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task.

42. 38 Wis.2d 468, 157 N.W.2d 579 (1968).

complication of two defendants. The host-driver and guest-passenger were both domiciled in Illinois whose anti-guest statute denied recovery to guests except for "wilful and wanton misconduct of the driver."[43] The defendant was insured. A majority of the court held that the Wisconsin standard of ordinary negligence should be applied. In support of this holding, the court marshalled the same three arguments used in *Heath* v. *Zellmer* and itemized in the discussion of *Kell* v. *Henderson.* It was unable to rely upon the *fourth* argument used in *Heath* v. *Zellmer,* emphasizing the injustice of throwing the entire burden of the guest-passengers' damages upon the Wisconsin domiciled driver of the second car. If the Wisconsin rule had not been applied, the entire loss would have been borne by the injured Illinois guest-passenger.

As in *Heath* v. *Zellmer,* the court noted that although one policy objective of the Illinois anti-guest statute was irrelevant, the statute still conflicted, to some extent, with Wisconsin's law and policy. To resolve this conflict, the court chiefly relied upon the same pair of arguments used in the *Heath* case. "The use of Wisconsin law will significantly advance the interests of the forum while its non-application would be detrimental to Wisconsin policy; and in addition, we select Wisconsin's law as the better law and reject that of Illinois as a creed outworn."[44] The court rested its decision to reject the Illinois anti-guest statute upon a *third* ground not considered in *Heath* v. *Zellmer.* Relying upon a commentarial survey of a line of Illinois cases, the court observed that in construing the words "wilful and wanton misconduct", the Illinois courts had consistently narrowed the operation of the anti-guest statute. Hence the court concluded that the conflict between the statute and the Wisconsin rule was not as great as a literal reading of the statute would indicate.

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43. Illinois Rev. S. c. 95½, s. 9-201.

44. 38 Wis.2d 468 at 485.

45. 38 Wis.2d 468 at 480. The commentarial survey *was* in 54 Nw U. L. Rev. 263 (1959).

3. The Cipolla and Schneider cases

In the much discussed case of *Cipolla* v. *Shaposka,*[1] the Supreme Court of Pennsylvania (which had previously adopted the *Babcock* v. *Jackson* methodology), encountered a true conflict problem arising from a pattern of facts and laws different from those we have discussed. Delaware had an anti-guest statute permitting recovery by a guest-passenger only for "intentional or wilful or wanton misconduct";[2] Pennsylvania had none. The plaintiff, domiciled in Pennsylvania, was injured in Delaware by the ordinary negligence of his host-driver who was domiciled in Delaware. The defendant was insured.

The argument for applying the Pennsylvania rule was clear and strong; the plaintiff called upon the courts of his home state to apply its compensatory rule for his benefit. The position of Delaware law was more complex. So far as the Delaware statute effectuated a policy of protecting insurance counsel against the hazards of collision, it was totally irrelevant to litigation in Pennsylvania. But so far as it was designed to protect Delaware host-drivers from liability to guests, (involving embarrassment and risk) it was directly relevant and deserved consideration.

What was the significance for Delaware law and policy of the fact that the injury occurred in that state? At first sight, the answer would seem to be: "absolutely none." The Delaware anti-guest statute had two policies, neither of which was specifically directed to collisions occurring in Delaware. The statutory policy of protecting Delaware citizens from liability would have been applicable to any collisions involving them as defendants, in Delaware or elsewhere. The policy of protecting insurance counsel from the hazards of collision was directed exclusively to litigation in Delaware courts. Nevertheless, closer analysis reveals certain other policies of Delaware law coming into play because the injury occurred there. Apart from its anti-guest statute, Delaware, like any state concerned with the enormous cost of traffic injuries, had three general policies. It had a policy of compensating persons injured on its highways; it had a policy of deterring careless drivers by imposing civil liability and it had a policy of ensuring the payment of

1. 439 Pa. 563, 267 A.2d 854 (1970).
2. Del. Code Ann., Tit. 21, sec. 6101(a).

therapeutic creditors for their costly and essential services. Had both parties been domiciled in Pennsylvania, an award of damages to the plaintiff would have advanced all three of these policies without subverting in the least the policies of the anti-guest statutes.[3] In the instant case, an award of damages would have subverted *one* of the policies of the anti-guest statute (protection of Delaware host-drivers), but it would also have advanced Delaware's three other policies and Pennsylvania's compensatory policy as well. Alternatively, a denial of recovery would have advanced one of the anti-guest statute policies (protection of Delaware host-drivers), but subverted the other three Delaware policies as well as that of Pennsylvania.

In a brilliant dissenting opinion, Mr. Justice Roberts urged the court to adopt the former alternative because a recent Delaware choice-of-law decision showed that "Delaware itself limits the scope of its policy and the protection it will give to its resident hosts."[4] In *Friday* v. *Smoot,*[5] a Delaware guest-passenger sued his Delaware host-driver for injuries sustained while they were driving in New Jersey, a state that has no anti-guest statute. The plaintiff relied upon the traditional place of injury formula; the defendant urged the court to adopt the *Babcock* v. *Jackson* methodology which would have brought both policies of the anti-guest statute into play in a case where both parties were Delaware citizens. But the Delaware court obviously had no desire whatever to apply its anti-guest statute. It rejected the *Babcock* v. *Jackson* methodology with the time-worn cliché that it might cause difficulty in other cases where the facts were different and followed the law of New Jersey. Had the Delaware judges been influenced solely by judicial conservatism, they could still have clung to the traditional system but used one of the system's escape devices to justify the application of the Delaware statute.[6] Their basic

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3. See text at note 26 *supra.* (parts 1 and 2) This point is made very cogently in *Beaulieu* v. *Beaulieu,* 265 A.2d 610 (Maine, 1970), a case on all fours with the case supposed in the text.

4. See 439 Pa. 563 at 576.

5. 211 A.2d 594 (1965).

6. E.g. they could have classified the Delaware anti-guest statute as a remedial rule, designed to limit the scope of the guest-passenger's remedy in Delaware courts. Or they could have classified it as a rule to regulated host-guest relationship established in Delaware between Delaware citizens.

motive seems clearly to have been a desire to restrict that statute's operation in interstate cases.

Mr. Justice Roberts also urged the court to resolve the ostensible conflict between Pennsylvania and Delaware policies by choosing the better law. To demonstrate that anti-guest statutes were anachronistic and regressive, he relied upon the criticisms of commentators and recent decisions of courts in states which had adopted them "construing them much more narrowly, evidencing their dissatisfaction with them."[7]

Unfortunately, the majority of the court ignored Mr. Justice Roberts' valuable suggestions for resolving the ostensible conflict of policies and made the extraordinary concession of enforcing the Delaware anti-guest statute. The principal ground of their opinion was a novel doctrine which they stated as follows: "It seems only fair to permit a defendant to rely on his home state law when he is acting within that state. . . . Inhabitants of a state should not be put in jeopardy of liability exceeding that created by their state's law just because a visitor from a state offering higher protection decides to visit there."[8]

The most obvious flaw in this argument is that it grossly distorts the significance of the fact that the plaintiff was injured in Delaware. The Delaware statute, as has been noted, had two policies neither of which was directed to injuries occurring in Delaware. Three other policies of Delaware law would actually have been advanced by an award of damages to the plaintiff. Yet the majority tried to pretend that the location of the injury in Delaware brought the policies of the guest statute into play and so justified the denial of recovery to the plaintiff. The second flaw in the majority's novel doctrine is that it abruptly rejects, without discussion, both the techniques for resolving policy conflicts in choice cases propounded by commentators, adopted by other courts, and carefully explained by the dissenting judge. Wasn't it important and relevant for the court to consider the restrictive construction put on the Delaware statute by the Delaware court in *Friday* v. *Smoot?* Wasn't it important and relevant for the court to consider that commentators had shown anti-guest statutes to be anachronistic and that judges in states where they prevailed had construed

7. 439 Pa. 563 at 577.
8. 439 Pa. 563 at 567.

them narrowly in domestic cases? The majority's answer to both these questions was apparently in the negative.

Prior to the decision of *Cipolla* v. *Shaposka,* the Supreme Court of Minnesota reached the opposite result in the almost identical case of *Schneider* v. *Nichols.*[9] North Dakota had an anti-guest statute requiring proof of "gross negligence"; Minnesota had none. The injured plaintiff guest was domiciled in Minnesota; the defendant driver was domiciled in North Dakota where the accident occurred. Having declined to apply the North Dakota anti-guest statute in a prior case exactly like *Babcock* v. *Jackson,*[10] the court held, in a unanimous opinion, that the facts distinguishing the present case from the earlier case did not justify the application of the North Dakota statute. They relied heavily upon Leflar's better law analysis of guest statutes as stated by Chief Justice Kenison in *Clarke* v. *Clarke:*[11] "Courts of states which did adopt them are today construing them much more narrowly evidencing their dissatisfaction with them . . . though still on the books they contradict the spirit of the times . . . Unless other considerations demand it we should not go out of our way to enforce such a law of another state as against the better law of our own state."[12]

Unfortunately, the court could not resist the temptation to bolster its reasoning by putting unnecessary and misleading emphasis on trivial and insignificant factual contacts with Minnesota. These trivial contacts were: (1) that the defendant driver, having changed his domicile from Minnesota to North Dakota about six months before the accident, was operating his car with Minnesota license plates and carrying a Minnesota driver's license: (2) that the trip began in Minnesota and would have ended there but for the injury which occurred only a few miles from the Minnesota boundary. No thoughtful student of judicial behavior seriously supposes that in a subsequent case where these trivial factors were not present the Minnesota judges would apply the anachronistic North Dakota statute to

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9. 280 Minn. 139, 158 N.W.2d 254 (1968).

10. *Kopp* v. *Rechtzigel,* 273 Minn. 441, 141 N.W.2d 526 (1966).

11. 107 N.H. 351, 222 A.2d 205 (1966).

12. 280 Minn. 139 at 146. The quoted passage appears in 107 N.H. 351 at 357.

the prejudice of a Minnesota citizen. The court was very blatantly making use of an unconvincing and much criticized device for resolving ostensible true conflict cases: the device of contact collecting. By appearing to rely in part upon these trivial contacts, the court spoiled an otherwise enlightening opinion and greatly weakened its usefulness as a precedential guide.[13]

4. Techniques of Reconciliation Used in the Anti-Guest Statute Cases: A Summary.

Despite some appearances to the contrary, the *Babcock* v. *Jackson* methodology is not a product of judicial parochialism designed to enable courts to justify resort to the law of the forum. On the contrary, it has made most judges who use it very sensitive to the interests of other states as expressed in the policies of their laws. Recognizing this judicial concern, modern commentators have suggested several techniques of reconciliation to assist the judges in deciding which of the ostensibly conflicting rules of law they should enforce. In commenting on *Babcock* v. *Jackson*, Brainerd Currie volunteered a series of general propositions for the purpose of finding a rule of decision which included the following:

"3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict."[14]

In his penetrating analysis of *Kell* v. *Henderson*,[15] Trautman advanced a persuasive argument for the New York court giving a restrained interpretation to the only relevant policy of the Ontario anti-guest statute that may be generalized as follows: If a certain statutory or non-statutory rule has consistently been given a restrained construction in domestic cases decided by the courts of the state where it prevails, a foreign court whose local rule and policy conflict with that rule

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13. In *Cipolla* v. *Shaposka*, the majority treated the *Schneider* case as turning chiefly upon the first of the trivial contacts noted above, and so proceeded to ignore the similarities of the two cases.

14. Comments on *Babcock* v. *Jackson*, 63 Colum. L. Rev. 1212 at 1242.

15. *Op. cit.* n. 29 *supra.* (parts 1 and 2)

in a choice case may properly give that rule a restrained construction. In *Conklin* v. *Horner,* the Wisconsin Supreme Court was able to make a limited use of this technique of reconciliation as one of its grounds for disregarding the Illinois anti-guest statute. And in *Cipolla* v. *Shaposka,* Mr. Justice Roberts (dissenting) extended this technique by using a Delaware choice-of-law case to demonstrate that Delaware judges did not want to see their anti-guest statute applied to an interstate case even though both parties were citizens of Delaware and both policies of the statute were involved.

In the same analysis of *Kell* v. *Henderson,* Trautman described another technique of reconciliation that has the support of two well-known older choice cases.[16] Suppose that in a case such as *Kell* v. *Henderson* (or the analogous Wisconsin cases), the state of the parties common domicile had repealed its anti-guest statute shortly after the injury occurred and before judgment had been rendered. This circumstance provides the strongest possible evidence that at the time when the injury occurred, the policies of the anti-guest statute were not held in high regard by the lawmaking authorities of the state where it prevailed. Though it was at that time technically in force, a consensus of disapproval and criticism must have been growing up which eventually provoked the legislature to change the law. On the basis of this evidence, the courts of *either* state would be justified in giving the statute a restrained construction as applied to the ostensible true conflict case supposed or, indeed, in any true conflict case involving the anti-guest statute. This construction does not, of course, give retroactive effect to the repealing statute. The repealing statute is simply used as evidence to show that at the time of injury, the policies of the anti-guest statute were not regarded as policies of special importance in the state where the statute was in force. The

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16. *Millikin* v. *Pratt,* 125 Mass. 374 (1878); *Dammert* v. *Osborn,* 140 N.Y.30, 35 N.E. 407 (1893) *rehearing denied.* 141 N.Y. 564, 35 N.E. 1088 (1894). In each of these cases the court was urged to enforce a statute of the forum, in an ostensible true conflict case, on the ground that the statute in question represented the public policy of the forum as declared by its legislature. In each case the court declined to do so for various reasons. One important reason was that the statute in question had been repealed *after* the facts had occurred.

repealing statute is used just as domestic cases might be used to justify a restrained construction of the anti-guest statute.

Of all the techniques for resolving ostensible true conflict cases, the most widely adopted has been Leflar's better law analysis. One obvious reason for this is its broad availability as compared with other techniques; it is not necessary to find in the law reports of the anti-guest statute state domestic or choice cases restricting the statute's operation. Prior to the appearance of Leflar's influential articles[17] certain commentators had voiced the abstract criticism that the better law analysis (sometimes called the result-selective approach), would make the decision of choice cases too subjective, too dependent upon the judges' personal preference for one state's policy over another.[18] Whatever the merits of this abstract criticism may be, as applied to the anti-guest statute cases, it clearly misses the target. It is an objective fact that these statutes are anachronistic because they were enacted at a time when many drivers were not insured and the prevailing sentiment that insurance ought to be available to pay the claims of all innocent victims of highway traffic accidents did not exist. It is an objective fact that some courts have silently protested against the injustice of these statutes by construing them as narrowly as possible.[19] Like the policy-determined state interest analysis that has brought it into favor as a technique of reconciliation, the better law analysis represents a trend toward greater realism in the decision of choice cases. There is no reason why judges should always indulge the polite fiction that one state's law is just as fair and well-adjusted to modern conditions as that of another. Where the domicile of one party or other facts of a case bring it within the policy range of the court's local rule, the better law analysis enables the judges to justify the choice of that rule without committing themselves to the rigid principle that in such cases the law of the forum must always prevail.

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17. *Op. cit.* n. 41 *supra* (parts 1 and 2).

18. See e.g., Currie, *Selected Essays in Conflict of Laws* (1963) at 153.

19. For the Ontario cases see note 33 *supra* (parts 1 and 2). For similar treatment of anti-guest statutes in other jurisdictions see 33 Rocky Mt. L. Rev. 374 at 392 (1961); Judicial Nullification of Guest Statutes, 41 So. Cal. L. Rev. 884 (1968).

5. The Marital Immunity; Introduction

In some states that have no anti-guest statutes (such as Wisconsin, Kentucky and New Hampshire), a wife or husband whose spouse's negligent driving has caused their injury in a one-car accident is entitled, like a guest passenger, to recover full compensation from the negligent spouse. Of course, such interspousal suits are only brought when the negligent spouse is insured. The insurer and the injured spouse are the real adversaries. The husband and wife go to court hand in hand, ready to brave the embarrassments of examination and cross-examination and to take the risk of increased future premiums because they want to recover compensation for the injured spouse's medical care and lost income. Insurance counsel naturally dislike defending and settling these suits but where they are permitted, counsel must bear the burden and do the best they can.[20]

On the other hand, there a number of states where the ancient common law marital immunity still remains in force with respect to personal torts. The persistence of this ancient doctrine as a bar to the compensation of highway traffic victims in the twentieth century requires a brief historical explanation. During the nineteenth century, state legislatures enacted statutes designed to emancipate married women from the overwhelming managerial powers conferred upon husbands by the eighteenth century common law. Speaking generally, these statutes empowered married women to acquire and dispose of real and personal property, *inter vivos* and by will, as if they were single. Moreover, they included litigation sections providing (in varying terms) that married women might sue and be sued in their own names as if they were single. Relying upon these litigation sections, married women who had become divorced or separated from their husbands brought suit against them for assaults, batteries or other personal torts committed before the divorce or separation.

20. See Cook, *What Law Governs Intrafamily Immunity?* 27 Ins. Counsel J. 143 (1960) at 144. "Such a suit, moreover, carries a clear message to the jury that the defendant is insured. Thus such a law suit becomes in reality a travesty on the court. It is not a genuine adversary proceeding between the adversaries of record. . . . The anomaly is further intensified by the aspect of the defence attorney's loyalty being directly contra to the interests of the defendant of record . . . ."

Prior to the year 1914,[21] it was the unanimous view of the courts that these litigation sections should be narrowly construed so as to leave the common law marital immunity in full force with respect to personal torts. The common cliché of these elderly opinions was that such suits, if permitted, would generate domestic discord and disrupt the harmony of the home. Strange as these words may sound in modern ears, it is not very difficult to recapture the thoughts of the judges of that day and generation who wrote them. They realized that certain types of husbands and wives would occasionally come to blows after which they would do one of two things: they would either go their separate ways or effect some kind of reconciliation, real or apparent. The judges feared that if they held out to the quarrelling wives the prospect of taking revenge upon their husbands by suing them for punitive damages, the wives might be thereby induced to choose the alternative of separation rather than that of reconciliation.

Whatever the merits of this tenuous argument may have been (after 1914 it was vigorously rejected by several courts),[22] it is completely irrelevant to the kind of suit that one spouse brings against the other today to recover compensation from the insurer. The spouses have no quarrel with each other. They are trying to establish a claim to compensation to recoup the family finances. Yet the older cases involving real and bitter quarrels still repose in the reports and may be cited for the principle (absurd when torn from its context) that interspousal suits disrupt the harmony of the home.

In the present day context of traffic injuries, the marital immunity operates like the anti-guest statutes to protect insurance counsel from the unpleasant duty of defending collusive lawsuits. Its effect upon the injured spouses is much harsher, however, than that of the anti-guest statutes upon injured guests. For the anti-guest statutes always permit recovery under some circumstances (wanton and willful misconduct, gross negligence, etc.), and have various other loopholes which the courts can exploit for the plaintiff's

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21. For discussion and citation of the nineteenth and early twentieth century cases see Hancock, *The Rise and Fall of Buckeye v. Buckeye*, 29 U.Chi. L.Rev. 237 at 238.

22. See *id.* at p. 240, footnote 17.

benefit.[23] But the marital immunity constitutes an absolute and inflexible bar to recovery by either spouse against the other for any personal tort.

When a husband and wife are involved in a two-car collision, the marital immunity can affect the obligations of other parties (and their insurers), as well. Suppose that in a marital immunity state a husband is injured in a two-car collision caused by the negligent driving of his wife and that of the other car's driver. The injured husband will, of course, have a cause of action against that driver. Since the wife's negligent driving partially caused the husband's injuries, it might be thought that she (or her insurer should contribute to the payment of the husband's damages. But since contribution is normally exacted only from persons directly liable to the injured party, the marital immunity precludes any claim to contribution and the entire burden of the husband's damages must fall upon the negligent driver of the other car.

6. The Marital Immunity; Choice of Law Cases.

Let us turn now to the choice of law cases decided by courts that have adopted a governmental interest, policy determined methodology. *Zelinger* v. *State Sand & Gravel Co.*,[24] decided in 1968 by the Wisconsin Supreme Court, is one of the most important decisions but some preliminary hypothetical examples will expedite our understanding of its unusual pattern of facts and laws. Wisconsin has abolished the marital immunity. Suppose that in a purely domestic case the wife's negligent driving has caused injury to herself and a minor child riding with her in a one-car accident. Though the wife has not harmed her husband's person, she has put him to some expense; under Wisconsin law she would be liable to him for his out of pocket expenses in providing medical care for her and the minor child and for the loss of their services and companionship. Suppose further that the wife's negligent driving has resulted in a two-car collision also partially due to the negligence of the owner-driver of the other car; under Wisconsin law the wife and the owner-driver of the other car would each be liable for

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23. See Linden, quoted in note 33, *supra* (parts 1 and 2)
24. 38 Wis.2d 98, 156 N.W.2d 466 (1968).

contribution to pay the husband damages. The amount of contribution would be based upon the comparative degree of negligence of each of the contributing parties.[25]

In the *Zelinger* case, the husband, wife and minor child were all domiciled in Illinois whose legislature in 1953 had taken the unusual step of embodying the marital immunity in a statute.[26] The wife-driver and minor child became involved in a collision in Wisconsin with a truck owned by a Wisconsin corporation. The husband brought suit against the Wisconsin corporation (and its insurer) for the costs of medical care for his wife and child and for the loss of their services and companionship. The defendants counterclaimed against the wife and her insurer for contribution as provided by Wisconsin law. By demurrer the wife and her insurer raised the defence that under Illinois law she could incur no liability to her husband and so could not be liable for contribution.

How did the Illinois statute relate to this case? Its function of protecting Illinois insurance counsel from having to defend collusive suits was not here involved for two reasons: the suit was not in Illinois and the litigation was not collusive. It was to the advantage of both spouses to throw the burden of the husband's loss upon the defendant corporation rather than the wife and her insurer. The Illinois statute would have protected the wife from liability and that protection would have benefitted her. On the other hand, two strong arguments favored the application of the Wisconsin rule. *First*, the wife's alleged negligence had violated Wisconsin's admonitory rules and the usual penalty of civil liability should have followed. *Second*, the Wisconsin rule imposing liability upon the wife benefitted the defendant corporation by compelling her to contribute to the compensation of the husband. If the Illinois statute had been applied, the entire burden of the husband's damages would have fallen upon the Wisconsin corporation or, in an analogous case, upon an individual defendant citizen of Wisconsin. The court held unanimously that the Wisconsin rule imposing a duty to contribute upon the wife should be enforced. Recognizing some element of conflict with the Illinois statute, the court tried to resolve this by holding that the

25. See 38 Wis. 2d 98 at 111.
26. Ill. Rev. Stat. ch. 68, sec. 1 (1959).

Wisconsin rule was the better law. The rule of marital immunity, it observed, was derived from the common law doctrine that a husband and wife were one person in the eyes of the law. While this was historically correct, the better law argument might have been strengthened by the further observation that the marital immunity operates even more harshly upon injured spouses and joint tortfeasors seeking contribution than does the anti-guest statute which the court had already rejected as anachronistic and unjust.[27]

For several years prior to the decision of the *Zelinger* case, the Wisconsin Supreme Court had utilized, in marital immunity choice cases, an escape device formula that enjoyed wide commentarial approval. This formula was completely rejected in the *Zelinger* case. It had its origin in the *Haumschild* case[28] decided in 1959, four years before the governmental interest methodology came to prominence in *Babcock* v. *Jackson.* In the *Haumschild* case, a wife sued her husband for negligently causing her injuries in a one-car accident in California where, at that time, the marital immunity still prevailed. Both spouses were domiciled in Wisconsin. Since California had no conceivable interest in the application of its marital immunity rule to a suit in Wisconsin between spouses domiciled there, the case should have been easy to decide. But the court was still under the spell of the traditional system which required the judges to either follow the place of injury formula or avoid it by adopting some equally simplistic and undiscriminating formula pointing to the law of Wisconsin. The court chose to adopt the alternative formula that the capacity of spouses to sue one another should be determined by the law of their domicile.

Though this crude, undiscriminating formula enabled the court in the *Haumschild* case to reach the correct result, its application to other types of cases compelled the courts to reach absurd results. In a case where a spouse domiciled in a marital immunity state was injured in Wisconsin by the combined negligence of the other spouse and a Wisconsin citizen, the domicile formula enabled the negligent spouse to throw the entire burden of the injured spouse's damages upon

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27. In *Heath* v. *Zellmer* and *Conklin* v. *Horner* discussed in Part 2.

28. *Haumschild* v. *Continental Casualty Co.*, 7 Wis.2d 130, 95 N.W.2d 814 (1959).

the Wisconsin citizen.[29] It would have prevented an injured spouse, temporarily resident in Wisconsin but domiciled in a marital immunity state, from obtaining compensation for injuries inflicted by the other spouse in Wisconsin.[30] Nevertheless, several commentators hailed the marital domicile formula as a sound rule[31] and the Reporter for the Restatement (Second) enshrined it in a Tentative Draft.[32] In the *Zelinger* case, it was discredited and abandoned by the court that had given it national prominence.

The *Zelinger* case is a very strong precedent for the situation in which the negligent spouse relies upon the marital immunity rule of the spouse's domicile to throw the entire burden of the injured spouse's damages on the negligent citizen of the state of injury. The type of case in which the injured spouse makes a direct claim against the negligent spouse based on the law of the state of injury can be distinguished in several respects.[33] But since persuasive arguments can be advanced for rejecting the marital immunity in *both* situations, it is more than likely that a court that has rejected it in one type of case will do so in the other.

An example of the direct claim type of case is provided by *Arnett* v. *Thompson*[34] decided in 1968 by the Supreme Court of Kentucky. That state had abolished the marital immunity but it still prevailed in Ohio as a common law rule. Though both spouses were domiciled in Ohio, the wife sued her husband for negligent driving causing her injuries in Kentucky. The most obvious concern of Kentucky was that therapeutic creditors

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

30. See the concurring opinion of Fairchild, J. in the *Haumschild* case 7 Wis.2d 130 at 144.

31. See Ehrenzweig, *Conflict of Laws* (1962) 581-83; Jayme, *Interspousal Immunity*, 40 Cal. L. Rev. 307 (1967); Felix, *Interspousal Immunity in Conflict of Laws*, 53 Cornell L. Rev. 406 (1968).

32. *Restatement of Conflict of Laws (Second)* Tent. Draft n. 9, sec. 390G (1964). See now *Restatement of Conflict of Laws (Second)* (1971) sec. 169. (Slightly less dogmatic.)

33. In the contribution situation (as distinguished from the direct interspousal suit situation), recognition of the marital immunity causes a hardship to the owner-driver of the second car and his insurer. There is no element of collusion between the spouses and the injured spouse derives no advantage from suing in the state of injury.

34. 433 S.W.2d 109 (1968).

domiciled there should be paid for their costly services to an injured transient. Assuming automobile liability insurance was available, giving a tort cause of action to the injured wife would ensure the payment of such Kentucky creditors. It could also have been contended that Kentucky had a humanitarian concern that persons injured on its highways should receive adequate compensation.

How did the Ohio immunity rule relate to the case? *Lyons* v. *Lyons,*[35] the latest Ohio decision had strongly emphasized the policy of preventing collusive lawsuits: this policy was irrelevant to litigation in Kentucky. The *Lyons* case had also emphasized the preservation of domestic harmony; this doctrine derived from the nineteenth century wife-beating cases, was likewise irrelevant to the present case, a friendly suit that involved no quarrel whatever between the spouses. The only relevant policy of the marital immunity rule was that of protecting the husband from liability. But since he apparently did not want that protection, that policy must have seemed to the judges to be one of little significance.

Unlike some of the courts whose decisions have been considered, the Kentucky court made little attempt to analyze the policies of the divergent rules or reconcile them. It simply announced that it would apply the Kentucky rule because the facts had sufficient contact with Kentucky to justify that result. Had the court adopted Trautman's suggestion that each state's domestic cases be examined, it would have discovered a very plausible ground for rejecting the Ohio rule. In the case of *Damm* v. *Elyria Lodge*[37] decided in 1952, the Supreme Court of Ohio had held that the marital immunity was no longer part of the law of that state,[38] marshalling against it judicial and commentarial criticisma. But the results reached in the *Damm*

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35. 2 Ohio 2d 243, 208 N.E.2d 533.

36. Again it should be noted that although Ohio may well have had a policy of protecting Ohio insurers from collusive suits, so long as Kentucky has a legitimate interest in holding the defendant liable, a Kentucky court is not likely to be persuaded to exonerate him merely to benefit his insurer. The insurance contract ought not to shield the insured person from liability.

37. 158 Ohio 107, 107 N.E.2d 337 (1952).

38. "In Ohio the Constitution and the pertinent statutes have the effect of so modifying the common law rule as to authorize the

case was also based upon an alternative ground; in *Lyons* v. *Lyons,* decided 12 years later, the Ohio Supreme Court held that this alternative ground was the true ground of the *Damm* case and, in effect, revived the marital immunity in Ohio. The opinion in the *Damm* case clearly indicated that the marital immunity did not enjoy a strong consensus of judicial support in Ohio. If the Supreme Court of Ohio did not strongly support it, why should the Kentucky judges have done so? The situation was akin to that of the Ontario anti-guest statute which had consistently received a restricted construction from the Ontario judges.

Slightly different from the *Arnett* case was *Purcell* v. *Kapelski,*[39] a panel decision of the Third Circuit Court of Appeals in a diversity suit litigated in New Jersey. Under the federal statute the court was, of course, obliged to decide the choice-of-law issue as a New Jersey state court would have decided it. A divorced wife claimed damages from her former husband for injuries caused by his negligent driving prior to the divorce. The accident occurred in New Jersey where the marital immunity had been judicially abolished. At the time of the injury, the spouses were married and domiciled in Pennsylvania where the marital immunity was embodied in a vague and elderly statute. Knowing that the New Jersey court had adopted the governmental interest methodology, a majority of the federal judges concluded, using that methodology, that a New Jersey court would have applied the New Jersey rule in the instant case. They stressed New Jersey's interest in securing the payment of its therapeutic creditors. Though the wife had been injured in a two-car accident, the owner and driver of the other car who were New Jersey citizens had been exonerated of all blame. The opinion pointed out, however, that had they been found negligent along with the husband, New Jersey's interest in securing to them a right of contribution against him would have required the rejection of the Pennsylvania marital immunity statute. In advancing this argument, the federal judges apparently assumed that the New Jersey court would not be likely to reject the marital immunity in the contribution

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maintenance of the action by the plaintiff against her husband. . . ." 158 Ohio 107 at 121.

39. 444 F.2d 380 (1971).

situation while recognizing it in suits involving only the two spouses.

Like the Kentucky state court, the federal court did not examine the Pennsylvania precedents to find some ground for holding that the Pennsylvania statute should not be extended to cover the present case. Had they done so, they would have found what they were looking for. In *Johnson* v. *People's First Nat's Bank,*[40] the Supreme Court of Pennsylvania had held that the Pennsylvania statute permitted a wife to sue her deceased husband's estate for injuries inflicted on her by his negligent driving. In support of this conclusion, the court had explained the policy of the statute in these words: "The tort of a husband or wife which visits injury upon the wife or husband results in a cause of action; by reason of public policy such cause of action cannot be enforced during coverture .... Death having terminated the marriage, domestic harmony and felicity suffer no damage from the allowance of the enforcement of the cause of action."[41] Thus the court held that the effect of the statute was merely to suspend the wife's cause of action during coverture. Though the *Johnson* case clearly indicated a narrowing of the statute's scope by the Pennsylvania court, as applied to the facts of the *Purcell* case, it went much further. Since the parties had been divorced *before* the action was filed, the *Johnson* case strongly suggested that the suit might have been maintainable in Pennsylvania. Certainly, it is hard to imagine that a New Jersey state court, having read the *Johnson* case, would feel obliged to take the policy of the Pennsylvania statute very seriously.

In sharp contrast with the two decisions last considered, is the 1966 decision of the Supreme Court of New Hampshire in *Johnson* v. *Johnson.*[42] Massachusetts had retained the marital immunity; New Hampshire had rejected it several decades earlier. The wife sued her husband for injuries sustained in New Hampshire; the spouses were domiciled in Massachusetts. Having discussed its previous decisions involving the marital immunity in choice cases and briefly noted certain differences between the rules and policies of the two states, the court

40. 394 Pa. 116, 145 A.2d 716 (1958).
41. 394 Pa. 116 at 121-22.
42. 107 N.H. 30, 216 A.2d 781 (1966).

concluded "that the interspousal law of Massachusetts has such a significant relationship to the issue in dispute as to overcome the preference we would ordinarily have for the application of New Hampshire law to determine the rights of persons negligently injured on New Hampshire highways."[43]

Since the important Massachusetts policy of protecting insurers and their counsel from collusive lawsuits had no application to a suit in New Hampshire, the decision raised an obvious question: what important Massachusetts policy was at stake that justified the abandoment of the New Hampshire rule? The court appears to have been seriously misled concerning the effect of the New Hampshire law upon the expectations of the Massachusetts insurer. "If the defendant garaged his car in Massachusetts, probably he had obtained insurance there and this insurance was doubtless written with the laws of Massachusetts primarily in view: the application of New Hampshire law would expose his insurer to a greater risk than it might reasonably have expected to run, given the Massachusetts local law and the trend towards the choice of the domicile's interspousal law in interstate cases."[44]

The most obvious observation prompted by this statement is that insurance actuaries, in fixing premiums, do not and could not take into account the potential application of particular rules of domestic law (such as the Massachusetts marital immunity rule) or of general choice-of-law principles. To make statistically reliable predictions of future losses, they must necessarily use a vast body of highway accident loss experience, including hundreds of claims that did not involve marital immunity at all. Thus the premium paid by the defendant would have been derived from a prediction (based on past loss experience) of the total losses expected to be incurred by all cars garaged in the same rating territory of Massachusetts, regardless of what rules of law might affect the possible outcome of individual lawsuits or the settlement of individual claims. The suggestion that the application of the New Hampshire rule would have exposed the insurer "to a greater risk than it might reasonably have expected to run"[45] was pure

43. 107 N.H. 30 at 33.
44. 107 N.H. 30 at 32-33.
45. *Ibid.*

fantasy. The injury to the plaintiff wife had, in fact, already been insured against as a future loss to be incurred by a car garaged in the rating territory where the defendant's car was garaged.

Had the court not been misled by erroneous commentarial speculations concerning the insurance rating process and the insurer's expectations,[46] it would probably have followed the New Hampshire rule. For, as the court rather vaguely recognized, New Hampshire had a strong humanitarian concern for the compensation of the plaintiff, injured upon a New Hampshire highway, and for her potential therapeutic creditors resident in New Hampshire. Even if the court had believed that there was some slight element of conflict between the policies of the two states, they could have justified enforcement of the New Hampshire rule as enforcement of the better law.[47] For the marital immunity is an obviously anachronistic doctrine of

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46. The court, at the conclusion of the statement quoted above cites Ehrenzweig, *Conflict of Laws* 582-83 (1962). On p. 581 Ehrenzweig concedes that insurers do not take particular rules of law into account in calculating premiums but contends that they could and should do do. In an article cited by Ehrenzweig, Morris, *Enterprise Liability and the Actuarial Process — The Insignificance of Foresight*, 70 Yale L.J. 554 (1961) it is conclusively demonstrated that such refined calculations would be utterly impossible and worthless for loss forecasting purpose. See Currie's review of Ehrenzweig's book in [1964] Duke L.J. 424 at 452.

In *Pryor v. Swarmer* 445 F2d 1272 a three judge panel of the Second Circuit Court of Appeals was also mislead by the fantastic notion that insurers, in calculating premiums, take into account particular rules of law favorable to them. The case involves a very real conflict between the Florida anti-guest statute, relied on by defendants who were domiciled there, and the law of plaintiff's domicile (New York) which allows recovery by guest passengers for ordinary negligence. The Court came to the astomishing conclusion that in such a case the New York Court of Appeals (whose action it was required to predict and follow) would have enforced the Florida anti-guest statute. In support of their curious conclusion the Court said "We think that we can safely assume that the Swarmer's insurance premiums were calculated *with Florida's guest statute in mind.* Thus Florida has a *strong interest* in protecting its insurer in the present case." *Id* at 1277 (Italics added).

47. The New Hampshire court adopted the "better law" analysis seven months after its decision in the *Johnson* case. See *Clark* v. *Clark*, 107 N.H. 351, 216 A.2d 781 (1966).

the medieval common law,[48] serving no rational purpose save one that was irrelevant in the *Johnson* case: the protection of insurers and their counsel from collusive lawsuits.

7. Erroneous Opinions and Constitutional Limitations

Though this article has chiefly focused on cases involving a real conflict between the divergent rules and policies of two states, attention will now be directed to a few erroneous opinions in cases not involving any such conflict. Discussion of these opinions will assist the analysis of true conflict cases because it will show that certain judges have been beguiled and misled by the same fallacious doctrines in both types of cases. Our discussion of the erroneous opinions in false conflict cases will also emphasize their vulnerability to constitutional attack, a subject that has received less attention than it deserves from courts and commentators.

In *White* v. *Kings*,[49] decided by the Supreme Court of Maryland in 1966, the pattern of facts and laws was similar to that of *Babcock* v. *Jackson*. A guest passenger domiciled in Maryland brought suit against his host-driver (also domiciled there) for injuries caused by the latter's negligent driving in the state of Michigan. Maryland had no anti-guest statute; that of Michigan required proof of gross negligence or willful and wanton misconduct. The judges were urged to adopt the *Babcock* v. *Jackson* methodology and decisions adopting it in other states were called to their attention. Nevertheless, the court enforced the Michigan anti-guest statute. It observed that the place of injury formula was "easy of application"[50] as compared with the methodology of the *Babcock* case and referred to cases in which judges using that methodology had encountered difficulties. The court decided to avoid such difficulties by rigid adherence to the place of injury formula.

What the Maryland court did not seem to realize was that its decision in *White* v. *King* was vulnerable to attack on

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48. Where the marital immunity has been embodied in a statute, of their common domicile, and the suit between the spouses is brought there the court may well feel itself bound to enforce the statute. See e.g., *McSwain* v. *McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

49. 244 Md. 348, 223 A2d 763 (1966)

50. 244 Md. 348 at 354.

constitutional grounds. In a series of cases going back to the turn of the century, the Supreme Court of the United States has evolved the doctrine that the Due Process Clause of the Fourteenth Amendment (concurrently with the Full Faith and Credit Clause), establishes limitations upon the power of state courts to enforce rules of their domestic law in interstate cases.[51] In two important landmark decisions,[52] involving the interstate coverage of Workmen's Compensation Acts (decided in 1935 and 1939 respectively), the Court made it very clear that when a state court enforces a rule of its domestic law in an interstate case, the Due Process Clause requires it to show that its state has a governmental interest in the enforcement of that rule, i.e., that the facts of the case are so related to that state as to bring it within the policy range of that rule. Moreover, these cases and subsequent cases involving torts and insurance contracts hold that when a state has a governmental interest in the enforcement of its rule, it may enforce that rule consistently with the Full Faith and Credit Clause even though another state also has a governmental interest in the application of its divergent rule.

Now if the Due Process Clause limits the power of a state to enforce rules of its own domestic law in interstate cases, it must certainly likewise limit its power to enforce the domestic rules of other states. It would be absurd for the Supreme Court to hold that the Constitution limited a state's power to enforce its own rules, yet gave it a power to enforce the rules of other states greater than that which they themselves enjoyed.[53] And in at least one decision,[54] the Supreme Court has accepted the proposition that the Due Process Clause limits the power of a state to apply another state's law.

In *White* v. *King,* the state of Michigan had no interest whatever in the enforcement of its anti-guest statute. So far as the statute implemented a policy of protecting host-drivers

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51. For a detailed discussion of the entire series of cases see Currie, Selected Essays on Conflict of Laws (1963) Ch. 2 entitled "The Constitution and the Choice of Law."

52. *Alaska Packers Ass'n v. Industrial Accident Commission,* 294 U.S. 532 (1935); *Pacific Employers Ins. Co. v. Industrial Accident Commission* 306 U.S. 493 (1939).

53. See Currie, *op. cit.* note 5 at 197 and 266.

54. Young v. Masci, 289 U.S. 253 (1933).

from liability, it was irrelevant because the defendant was domiciled in Maryland. So far as it implemented a policy of protecting insurers and their counsel from collusive litigation, it was also irrelevant because the litigation was in Maryland, on the other hand, had a very obvious interest in the enforcement of its rule which would have compensated an injured Maryland citizen for his injuries upon a showing of ordinary negligence. By enforcing Michigan's anti-guest statute in a case where that state had no interest in its enforcement, the Maryland court deprived the plaintiff of property without due process of law.

The decision in *White* v. *King* is also vulnerable to attack upon the ground that the Maryland court denied to the plaintiff the equal protection of its laws. Speaking generally,[55] the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits a state from discriminating against a particular class of persons without some adequate policy ground to justify such discrimination. In the common case where a Maryland guest-passenger had been injured in that state by the ordinary negligence of a Maryland host-driver, he was entitled to recover full compensation. Thus the effect of the decision in *White* v. *Kings* was to discriminate against a particular class of Maryland guest-passengers injured by the ordinary negligence of Maryland host-drivers for the sole reason that they had been injured in states that had enacted anti-guest statutes. How could such discrimination possibly have been justified? It surely could not have been justified upon the ground that analysis and comparison of the governmental interests of the respective states might present difficulties in future cases whereas the place ot injury formula was easier to apply. Presumably it might have been justified by a showing that Michigan, the state of injury, had a substantial interest in the application of its anti-guest statuted. But, as we have seen, no such showing was or could have been made. By its unjustifiable discrimination against a particular class of Mary-

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55. As compared with the Due Process and Full Faith and Credit clauses the impact of the Equal Protection clause upon choice of law decisions has received singularly little consideration by the Courts. For a suggestive and thoughtful exploration of this matter see Currie, *op cit.* note 51, Ch. 11 entitled Unconstitutional Discrimination in Conflict of Laws: Equal Protection.

land guest-passengers injured by the ordinary negligence of Maryland host-drivers, the Maryland court deprived them of the equal protection of the laws of that state.[56]

White v. *King* may be instructively compared with the Delaware case, *Friday* v. *Smoot,*[57] already discussed in Part 3. Delaware had an anti-guest statute permitting recovery only for "intentional or willful and wanton misconduct"; New Jersey had none. A guest-passenger domiciled in Delaware sued his host-driver, also domiciled there to recover for injuries caused by the defendant's ordinary negligence in New Jersey. The defendant urged the judges to adopt a governmental interest analysis hoping thereby to persuade them to enforce the Delaware anti-guest statute. But the court chose (for reasons that do not concern us here) to adhere to the place of injury formula and enforce the New Jersey rule requiring no more than ordinary negligence Although the opinion in *Friday* v. *Smoot,* like that in *White* v. *King,* rejects governmental interest analysis and adheres to the place of injury formula, it is much less vulnerable to constitutional attack. For though the court does not say so, the state of injury (New Jersey) whose rule permitting recovery for ordinary negligence was enforced, had a

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56. A type of case involving the marital immunity rule is open to constitutional attack along the same two lines suggested in the textual discussion of *White v. King.* In *Landers v. Landers* 153 Conn. 303 (1966) a wife sued her husband for damages sustained by her resulting from his negligent driving in Virginia. Both parties were domiciled in Connecticut whose domestic law would have given her a cause of action. But the court insisted upon applying Virginia's marital innumity rule and denied recovery. Since the husband was *not* domiciled in Virginia and the litigation did *not* take place there, no interest of Virginia was advanced by the decision. Since the court enforced a rule of Virginia law against the plaintiff in a case where Virginia had no interest in the enforcement of its rule the court deprived her of property without due process of law. Moreover *all* Connecticut wives who are injured by their husband's negligent driving within the state recover full compensation from their husbands' insurers. The Connecticut Court has harshly discriminated against those wives who happen to be so injured in marital immunity states without showing any sufficient justification therefore. Hence the court is depriving these injured wives of the equal protection of the law of Connecticut. The fact that the court believed itself to be following the majority rule scarcely seems a sufficient ground for harshly discriminating against a particular class of persons.

57. 211 A2d 594 (1965).

strong governmental interest in its enforcement. The requirement of the Due Process Clause that the state whose law was applied should have an interest in its application was therefore satisfied. While the decision clearly discriminated against Delaware host-drivers who had injured Delaware guest-passengers in a state having no anti-guest statute, this discrimination could presumably have been justified on the ground that the state of injury had a substantial interest in the application of its rule permitting recovery for ordinary negligence.

To say that the opinion in *Friday* v. *Smoot* is less vulnerable to constitutional attack than that in *White* v. *Kings* is not to say that it met the Supreme Court's requirements in every respect. The Supreme Court's decisions under the Due Process and Full Faith and Credit Clauses clearly require a court applying its domestic rule in an interstate case to demonstrate its interest by relating the facts to the policy of the rule. Though the Supreme Court has not explicitly applied this requirement to cases in which the court of one state has enforced the law of another, the argument is irresistible that the same demonstration should be made. The Delaware court ought to have spelled out New Jersey's interest in terms of the policy and effect of its rule as applied to the facts of the case.

Opinions in which judges have clung to the place of injury formula are not the only ones open to constitutional attack. Judge Breitel's dissent in the recent New York case, *Tooker* v. *Lopez*,[58] provides an obvious example. In that case, a father brought suit to recover damages for the wrongful death of his daughter. The plaintiff father, the deceased daughter and the defendant were all domiciled in New York. Plaintiff's pleadings charged that his daughter was killed while riding as a guest-passenger in a car owned by the defendant and driven by his daughter (also domiciled in New York) with his permission. Only ordinary negligence on the part of the defendant's daughter was alleged. Had the fatal accident occurred in New York, the defendant would have been clearly liable. New York had no anti-guest statute and its owner's liability statute would have made the defendant liable for his daughter's ordinary negligence in the use of his automobile. The accident did not,

58. 24 N.Y. 2d 569 249 N.E. 2d 394 (1969).

however, occur in New York; it occurred in the state of Michigan while the defendant and the defendant's daughter were temporarily in residence at a college there. The fatal journey was to have taken them from the college to a city in the state of Michigan. The sole question argued before the Court of Appeals upon the pleadings was whether the Michigan anti-guest statute, requiring proof of negligence or willful and wanton misconduct, should be enforced.

A majority of the court noted that New York had a very substantial interest in securing to the plaintiff, domiciled in that state, adequate compensation for the wrongful death of his daughter, also domiciled there. Consideration of the policies of the Michigan anti-guest statute clearly demonstrated that that state had no interest whatsoever in its application. They concluded that "New York has the only real interest in whether recovery should be granted and that the application of Michigan law would defeat a legitimate interest of the forum state without serving a legitimate interest of any other state."[59]

Strange as it may seem, Judge Breitel and two of his colleagues held in a dissenting opinion, that the Michigan anti-guest statute should have been applied. They did not, of course, rely upon the simplistic place of injury formula that had already been rejected in *Babcock* v. *Jackson.* Their argument, though somewhat diffuse, relied heavily upon the technique of collecting contacts; they stressed the fact that both the deceased guest-passenger and her host-driver were temporarily resident in Michigan, the fact that they entered into their relationship there and the fact that the trip was to begin and end in that state. The presence of these factual contacts with the state of Michigan is undeniable but when considered in the light of the two policies of the Michigan anti-guest statute, they are seen to be totally irrelevant. No rational or legitimate interest of that state could have been advanced by applying its anti-guest statute to persons[60] entering into a host-guest

59. 24 N.Y. 2d 569 at 576.

60. If the driver of the car in which the decedent was killed had survived and been sued, one might conceivably have made the rather fragile argument that Michigan had an interest in protecting her from liability because she was temporarily resident there. Whether New York's strong policy should yield to this tenuous Michigan policy would then become the crucial issue.

relationship there or contemplating a journey from one point in the state to another. The fact that the deceased guest passenger and her host driver were temporarily resident in Michigan was also insignificant for neither of them was even a party to the lawsuit.

Neither Judge Breitel nor the majority considered the constitutional implications of his dissenting opinion. In the light of the foregoing discussion, it would seem to be at least highly vulnerable to attack on two constitutional grounds. *First,* as has been explained, the Due Process Clause prohibits a state court from applying a rule of its own domestic law or that of another state when the state whose rule is applied has no governmental interest in the application of its rule. Since no interest of Michigan would have been advanced by the enforcement of its anti-guest statute, a decision to do so (as urged by Judge Breitel), would have deprived the plaintiff of property without due process of law. *Second,* since in an analogous but purely domestic New York case, the plaintiff would have recovered upon proof of ordinary negligence, a decision to apply the Michigan anti-guest statute requiring proof of gross negligence would have discriminated against his and all others similarly situated. Presumably this discrimination could have been justified by a showing that some legitimate interest of the state of Michigan was being advanced. As we have seen, no such showing was or could have been made. A decision to apply the Michigan anti-guest statute based upon a collection of insignificant contacts, would have been both arbitrary and pointless. It would therefore have deprived the plaintiff (a New York domiciliary suing another New York domiciliary) of the equal protection of the laws of New York.

8. Conclusions

In Part I, attention was directed to the question why the New York Court of Appeals decided to substitute governmental interests analysis for the traditional choice of law methodology in torts cases and why so many other state courts have followed its example. The point was there made that interest analysis has given the judges a more complete and realistic picture of the choice of law problem and has emancipated them from the simplistic place of injury formula with its distracting and

misleading escape devices. In Part 7 attention was directed to the question whether some of the opinions that have rejected interest analysis (or taken it too lightly) are not vulnerable to attack or constitutional grounds. Our conclusion was in the affirmative. Some opinions have violated the due process clause by enforcing a particular rule when the state whose rule was enforced had conceivable interest in such enforcement. They also appear to have violated the equal protection clause by pointless and unjustified discrimination against certain classes of injured persons.

It has been the chief purpose of this article to discuss the problem of finding techniques of reconciliation in ostensible true conflict cases. The first technique that was considered may be conveniently labeled "domestic construction analysis." When a judge is urged to enforce the anti-guest statute or marital immunity rule of another state in a case whose facts fall within the policy scope of a contrary rule of the forum, he should study the purely domestic cases decided by courts of the other state. If these cases evince a trend toward giving the anti-guest statute or marital immunity rule a restricted construction, the judge may conclude that he would be fully justified in giving it a restricted construction in the choice case before him.

The use of this technique in relation to anti-guest statutes has been fully considered. Though no employed in any of the marital immunity cases, it might have been used in two of them with devastating effectiveness. Had the Kentucky court, urged to apply the Ohio marital immunity rule in *Arnett* v. *Johnson,* looked more carefully into the Ohio decisions, it would have discovered that in the *Danm* case, the Ohio Supreme Court had all but abolished the marital immunity, only to revive it 12 years later in *Lyons* v. *Lyons.* Such judicial ambivalence towards the marital immunity on the part of Ohio judges would have lent strong support to its rejection by the Kentucky judges in favor of their own state's governmental interests. Similarly, had the New Jersey federal court, urged to enforce the Pennsylvania marital immunity statute in *Purcell* v. *Kapelski,* studied the Pennsylvania precedents, they would have found that, as construed by the Pennsylvania Supreme Court, that statute merely suspended the injured spouse's remedy during coverture. Since the litigating spouses in the *Purcell* case had been divorced, a New Jersey state court would have surely felt

justified in disregarding the Pennsylvania statute and implementing New Jersey's governmental interests.

The second reconciliation technique, "better law analysis," differs from "domestic construction analysis" in that the judge considers the anti-guest statute or marital immunity rule in a larger perspective. Instead of confining his attention to precedents of the state where the rule is in force, he will consider whether the rule is anachronistic in its origins, whether commentators tend to favor or oppose it in its modern context and whether courts in any of the states where it is in force have given it a restricted construction. The use of "better law" analysis in anti-guest statute choice cases has been fully considered.[61] Though it has as yet been little used in the marital immunity cases, its potential effectiveness there is very obvious. For the marital immunity is even more anachronistic than the anti-guest statute; the wife-beating cases that kept it alive through the late nineteenth and early twentieth centuries have nothing in common with the modern traffic accident suit between friendly, colluding spouses. In its modern context, its practical effect is precisely the same as that of an anti-guest statute – except that it operates more harshly as an absolute bar to any recovery.

Some of the opinions that have been considered reveal the use of two misleading and dangerous techniques of reconciliation that judges should be warned against. The first of these is the technique of contact collecting. A judge who resorts to contact collecting in an ostensible true conflict case tries to justify the application of one state's rule by calling attention to factual contacts with that state that are totally unrelated to the policies of the rule in question. A depressing example is the *Schneider* case where the Minnesota court, having very properly resolved to enforce Minnesota's ordinary negligence rule for the protection of an injured guest passenger domiciled in that state, proceeded to undermine and weaken its opinion as a precedential guide by stressing several absurdly irrelevant and insignificant contacts with Minnesota.

The second misleading and dangerous technique of reconciliation that judges should eschew may be conveniently labeled the technique of using "narrow neutral principles." The

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61. In Parts 2, 3 and 4.

chief objection to this technique is that it involves the implicit assumption that anti-guest statutes and the marital immunity must be treated, even in true conflict cases, as if they were just as fair and well-adjusted to modern conditions as the rules with which they are in conflict. Or, to state the objection in a different way, the "narrow neutral principles" technique seems to be completely inconsistent with the use of *either* of the two other techniques herein considered.

The inconsistency between the narrow principles technique and the two other techniques is aptly illustrated by the clash of judicial opinions in *Cipolla* v. *Shaposka.*[62] In that case, a majority of the Pennsylvania Supreme Court adopted a narrow, neutral principle, namely that a negligent driver, domiciled in an anti-guest statute state who had injured a guest passenger in that state (here, Delaware), should be entitled to the protection of the anti-guest statute, even though the injured guest passenger was domiciled in a state having no such statute (here, Pennsylvania). Contrariwise, the dissenting judge used both the other two techniques of reconciliation to justify the application of the Pennsylvania rule. He showed that in a recent choice case the Delaware Supreme Court had given its anti-guest statute a very restricted construction. Moreover, he argued that since anti-guest statutes had been criticized as anachronistic by commentators and restrictively construed in recent domestic and choice cases, the Pennsylvania rule was the better law.

To these arguments the majority made no reply whatever. By adopting a narrow neutral principle they had, in effect, accepted the implicit assumption that all domestic rules of law must be treated as standing upon an equal footing, even in true conflict cases. It would thus have appeared improper and irrelevant to consider whether Delaware courts had restrictively construed their anti-guest statute. It would have appeared even more improper and irrelevant to have inquired which was the better law. On the other hand, the domestic construction and better law techniques are not so unrealistic and they explicitly raise these very questions.

Judges who are attracted by the technique of narrow neutral principles should consider the discouraging experience

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62. 439 Pa. 563, 267 A2d 854 (1970).

of the Supreme Court of Wisconsin with its use. In the *Haumschild* case,[63] decided in 1959, that court adopted a seemingly harmless, relatively narrow principle. Its operation was confined to cases where interspousal tort liability was alleged; it held that this narrow issue should be determined by the law of the spouses' domicile. This principle had strong commentarial support, both before and after its adoption. For 8 years, the Wisconsin courts loyally adhered to it, even when it operated to the obvious disadvantage of Wisconsin citizens. But it could not long endure the realism of governmental interest analysis. In the *Zelinger* cases of 1968,[64] this narrow neutral principle was reconsidered and unanimously rejected.

Use of the better law analysis suggests the possibility that a thoughtful, well-reasoned opinion in a true conflict case involving the marital immunity rule or anti-guest statute of a sister state might create a climate of opinion in that state that would lead to a re-evaluation of the rule or statute in question. Many state court judges and legislators take pride in the fairness and progressiveness of their states' laws; they would not want any of them to be regarded as anachronistic or as "a creed outworn."[65] The marital immunity would be particularly vulnerable to such criticism. In most of the states where it remains in force, it has only the status of a common law rule. A pointed but persuasive criticism by a respected sister-state judge might well provide the occasion for its reconsideration and rejection as anachronistic common law.

Thus, the continued use of the better law technique in true conflict cases may well serve as a modest stimulant to thr progressive abandonment of such outmoded and unsatisfactory domestic rules as the anti-guest statutes and the marital immunity.

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63. 7 Wis.2d 130, 95 N.W.2d 814 (1959).

64. 38 Wis.2d 98, 156 N.W. 2d 466 (1968).

65. The Wisconsin Supreme Court's comment on the Illinois anti-guest statute. See 38 Wis. 2d 468 at 485.