COMMENT

BABCOCK v. JACKSON: A POSSIBLE SOLUTION TO CONFLICTS CONFUSION IN WISCONSIN

While on an Ontario vacation in September, 1960, William Jackson lost control of his automobile causing it to leave the road and crash into a stone wall. Jackson's guest, Miss Georgia Babcock, was injured. Both parties were from Rochester, New York. When Miss Babcock returned home, she brought suit against Jackson.[1] Jackson moved to dismiss the complaint. He contended that the case presented a choice-of-law problem to be resolved by the law of Ontario, the place of the wrong.[2] Accepting this contention, the New York Supreme Court applied the Ontario Highway Traffic Act which bars a guest from suing his host[3] and granted the motion to dismiss.

On appeal, the Appellate Division affirmed.[4] But the Court of Appeals, two judges dissenting, reversed, denying the motion to dismiss.[5] In reaching its decision, the Court of Appeals took a unique approach to the choice-of-law problem. Instead of applying the rule that the law of the place of the wrong governs, the court analyzed the case in terms of the "significant contacts" involved. The only issue presented was whether the guest, Miss Babcock, was to be allowed a cause of action against her host, Jackson. The incidents of this particular host-guest relationship were centered completely in New York, for the case involved "injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed, and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there."[6] Thus, New York law,

---

[1] Jackson died before the case reached court and his executrix was substituted as the defendant.

[2] RESTATEMENT, CONFLICT OF LAWS § 378 (1934); GOODRICH, CONFLICT OF LAWS § 94 (3rd ed. 1949).

[3] The Highway Traffic Act in ONT. REV. STAT. Ch. 172, § 105(2) (1960) states:

> "Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not 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 on to, or alighting from the motor vehicle."

See also, The Negligence Act in ONT. REV. STAT. Ch. 261, § 2(2) (1960).

[4] Babcock v. Jackson, 17 App. Div.2d 694, 230 N.Y.S.2d 114 (4th Dept. 1962) (memorandum decision, dissenting opinion by Halpern, J.); 12 BUFFALO L. REV. 359 (1963).

[5] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (Van Voorhis and Scilleppi, J.J., dissenting), 63 COLUM. L. REV. 1212, 32 FORDHAM L. REV. 158, 77 HARV. L. REV. 355, 79 L. Q. REV. 1362, 47 MARQ. L. REV. 359, 49 VA. L. REV. 1362.

[6] *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

rather than Ontario law, was applied and the case was remanded for trial.

The conflict of laws analysis used in *Babcock v. Jackson,* has been variously characterized as the "significant contacts" or "center of gravity" test.[7] Prior to this case it had been applied only in conflicts cases involving contracts problems.[8] This comment will explore the ramifications of applying the "significant contacts" test to tort problems. Further, the methodology of "contacts" analysis will be defined and its applicability to Wisconsin law explored.

THE VESTED RIGHTS DOCTRINE

The "significant contacts" test has developed mainly as a reaction to the highly conceptualistic and mechanical approach to conflicts found in the *Restatement*[9] and the works of Professor Joseph H. Beale.[10] Starting from the assumption that all legitimate personal and property interests must be protected legally, Beale conceived of a framework of rights created by the law to protect all such interests.[11]

Rights to protect interests are created (or vested) by the law of the particular sovereignty within which the interest is recognized and enjoyed. A sovereignty can enforce only its own law, but a particular case brought in a particular state may depend on rights created elsewhere. When the law of the forum is not the law creating the protective rights, a conflict of laws problem is presented. The law of conflict of laws must then "determine the place where a right arose and the law that created it. . . ."[12] Once that law is ascertained it must be applied to decide the case, for the forum has created no substantive rights relevant to the particular case. The forum decides the case not by enforcing its own law, but by giving effect to the foreign-created right through its law of conflict of laws.[13]

A tort is a violation of a personal interest and the rights created to protect that interest. The place of the tort is the place where

---

[7] *Id.* at 479, 191 N.E.2d at 282, 240 N.Y.S.2d at 747; Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99, 101, 50 A.L.R.2d 246, 251 (1954); Annot., 50 A.L.R.2d 254, 260 (1954).

[8] *E.g.,* Bowles v. Zimmer Mfg. Co., 277 F.2d 868, 76 A.L.R.2d 120 (7th Cir. 1960); Zogg v. Penn Mut. Life Ins. Co., 276 F.2d 861 (2d Cir. 1960); Pat J. Murphy, Inc. v. Drummond Dolomite, Inc., 214 F. Supp. 496 (E.D. Wis. 1963); Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65, 87 A.L.R.2d 1301 (1961); Wojciuk v. United States Rubber Co., 19 Wis.2d 224, 122 N.W.2d 737 (1963); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R.2d 246 (1954); Estate of Knippel, 7 Wis.2d 335, 96 N.W.2d 514 (1959); Annot., 50 A.L.R.2d 254 (1954).

[9] RESTATEMENT, CONFLICT OF LAWS (1934) (hereafter cited as RESTATEMENT).

[10] BEALE, THE CONFLICT OF LAWS (1935) (hereafter cited as BEALE).

[11] 1 BEALE §§ 8A. 6, 8A. 7.

[12] *Id.* § 8A. 7.

[13] RESTATEMENT §§ 1, 5.

the interest-protecting right was violated.[14] Specifically, it is the place "where the last event necessary to make an actor liable for an alleged tort takes place."[15] Since redress of a tort requires the creation (or vesting) of a right to such redress, "the law of the place of the wrong determines whether a person has sustained a legal injury."[16] If the law of the place of the wrong recognizes no cause of action for the alleged wrong, no recovery for the wrong may be had elsewhere.[17]

While the "vested rights" doctrine is hard to express,[18] it is easy to apply. The *Restatement* rules make choice of law automatic. But this mechanical automatism has dictated many hard results. Faced with a case involving a tort occurring in a foreign state, the forum court must theoretically apply the law of that state, no matter how unsatisfactory the result will be in terms of its own law.

Unlike American courts, wedded to the *Restatement,* English courts never lost control of cases before them involving conflicts problems. The English courts allow recovery for foreign torts if the act is actionable in the forum and not justifiable where committed.[19]

American forums, in order to gain some flexibility through use of their own law, have had to resort to diverse techniques to avoid the mechanical rules of the *Restatement.* Since the *Restatement* recognizes that the forum court must apply its own procedural law,[20] courts have often characterized foreign problems before them as procedural and thus subject to the law of the forum.[21] Or courts

---

14 2 BEALE § 377.2.

15 RESTATEMENT § 377.

16 *Id.* § 378; 2 BEALE § 378.2.

17 RESTATEMENT § 384.

18 *Compare* Mr. Justice Holmes' statement of the doctrine in Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904):

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio,* which, like other obligations, follows the person and may be enforced wherever that person may be found."

with the statement by Judge Learned Hand in Guinness v. Miller, 291 Fed. 769, 770 (S.D.N.Y. 1923):

> ". . . no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."

19 GOODRICH, CONFLICT OF LAWS § 92 (3rd ed. 1949); *accord,* McLean v. Pettigrew, [1945] 2 D.L.R. 65 (Can.); *cf.* STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 180 (3rd ed. 1963); *contra,* 2 BEALE § 278.5.

20 RESTATEMENT §§ 584, 585.

21 *E.g.,* Bodenhagen v. Farmers' Mut. Ins. Co., 5 Wis.2d 306, 92 N.W. 2d 759 (1958), *withdrawn on rehearing,* 5 Wis.2d 310a, 95 N.W.2d 822 (1959); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162 (1953).

have refused to apply foreign law as being against the public policy of the forum.[22] In some cases courts have even characterized tort problems as contract problems in order to avail themselves of a conflicts rule for contract which would allow the forum to apply its own law.[23]

THE REACTION TO VESTED RIGHTS: THE "SIGNIFICANT CONTACTS" TEST

The vested rights doctrine has provided neat, logical jurisprudence. However, conflicts cases applying this doctrine are decided not by the law and policy most appropriate to each particular case, but by the law and policy of the vested rights doctrine. Thus in a case involving a collision in Saudia Arabia between a car driven by an American citizen and a truck owned by an American corporation the court was compelled to grant defendant's motion to dismiss on the ground that plaintiff had not pleaded a cause of action under Arabian law. Although the American law was clearly relevant, the vested rights doctrine precluded its application to the case.[24]

The Significant Contacts Test

Frustration with such results has led to revolt against the vested rights doctrine. Many courts no longer are content to avoid hard results by resort to exceptions to the established rules or unique characterization of particular cases.[25] Instead courts are seeking new methods to deal with conflicts problems. The "significant contacts" test is such a method. This test was pioneered by the New York Court of Appeals in a contract case, *Auten v. Auten*.[26] An English wife brought suit against her errant spouse in New York to compel performance of a support agreement concluded in New York at the time when the couple separated. The wife had sought to compel performance by bringing an English divorce action. The husband contended that this constituted a repudiation of the support agreement under New York law.[27] The wife countered that

---

22 RESTATEMENT § 612; Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) (Cardozo, J.); International Harvester Co. v. McAdam, 142 Wis. 114, 124 N.W. 1042, 26 L.R.A. (N.S.) 774 (1910).

23 Levy v. Daniels' U-Drive, 108 Conn. 333, 143 Atl. 163, 61 A.L.R. 646 (1928); Dyke v. Erie Ry., 45 N.Y. 113 (1871).

24 Walton v. Arabian American Oil Co., 233 F.2d 541 (2d Cir. 1955), *cert. denied*, 352 U.S. 872 (1956).

25 *E.g.*, Richards v. United States, 369 U.S. 1 (1962); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946); Jansson v. Swedish American Line, 185 F.2d 212, 30 A.L.R.2d 1385 (1st Cir. 1950); W. H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945); Swift & Co. v. Bankers' Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1939); Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp. 4 (Sup. Ct. 1936).

26 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R.2d 246 (1954).

27 The husband contended New York law should apply both because New York was the place of contracting, RESTATEMENT § 332 (f), and because New York, the residence of the wife's trustee, was the place of performance, RESTATEMENT § 358.

under the law of England there was no repudiation. The agreement was enforced, for the court found that English law should control. In making its choice of law the court relied not on traditional analysis,[28] but rather on an analysis of the "significant contacts" involved. Studying the facts, the court concluded that the law of England was most intimately concerned with the dispute:

> In short, then, the agreement determined and fixed the marital responsibilities of an English husband and father and provided for the support and maintenance of the allegedly abandoned wife and children who were to remain in England. It merely substituted the arrangements arrived at by voluntary agreement of the parties for the duties and responsibilities of support that would otherwise attach by English law.[29]

On the other hand, New York was the place where the parties had contracted and the place where the wife's trustee had his office. These contacts were found to be fortuitous and not significant.

The "contacts" test offers a fresh new approach to conflicts problems. No longer confined to the mechanical rules of the *Restatement,* the "contacts" court is free to analyze all aspects of the case bearing on the result. Results are the hallmark of the "contacts" test as contrasted to logical doctrine, the hallmark of the vested rights theory. The "contacts" test represents a radical break with the traditional approach to conflicts law because of its concern with reaching results in accordance with the law and policy most applicable to the particular case.

The Quest for an Analytical Method

The application of the "contacts" test to a tort problem was presaged by a voluminous literature.[30] However, one thing be-

---

[28] However, the court found, as an alternative ground for its holding, that England was the place of performance and thus English law should govern. Auten v. Auten, 308 N.Y. at 161-62, 124 N.E.2d at 102, 50 A.L.R. 2d at 251-52; RESTATEMENT § 358.

[29] Auten v. Auten, 308 N.Y. at 162, 124 N.E.2d at 103, 50 A.L.R.2d at 252.

[30] *E.g.,* Childres, *Toward the Proper Law of the Tort,* 40 TEXAS L. REV. 336 (1962); Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L. J. 1; Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L. J. 171; Currie, *The Constitution and The Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9 (1958); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws,* 10 STAN. L. REV. 205 (1958); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws,* 58 MICH. L. REV. 637 (1960); Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurance Laws,"* 69 YALE L. J. 595 (1960); Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason versus the Restatement,* 23 U. CHI. L. REV. 474 (1956); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays,* 56 YALE L. J. 1155 (1947); Morris, *The Proper Law of a Tort,* 64 HARV. L. REV. 881 (1951); Stumberg, *"The Place of the*

comes clear when the decision in *Babcock* is read against the background of this literature: the precise meaning of the test is unclear and its methodology is uncertain. The central question is what are "contacts" and how are they to be analyzed. This question has had various answers. At least one court has conceived of "contacts" as factual incidents belonging to one state or another.[31] Under this court's approach, each case presents an unique admixture of such incidents. It remains for courts to isolate the respective incidents belonging to each state and total up the score. To make the game more interesting some incidents are pronounced "significant" and thus more important. The more "significant" a state's "contacts," the higher its score. The state with the most "significant contacts" wins and is allowed to apply its substantive law to decide the case.

This approach, mixing quantitative with qualitative analysis, has been characterized as mystical: "The pronouncement that the 'contacts' with state X are the more significant has a mystical sound, as if the supreme authority had pronounced the true nature of things.[32] What is required—and what is not entirely clear from the cases—is a "contacts" methodology. The American Law Institute in *Restatement (Second), Conflict of Laws*[33] adopts a "contacts" approach. But the method of analysis proposed does not differ much from that of the first *Restatement.* Although some flexibility is introduced, the most important and determinative contact continues to be the place of the wrong.[34] The main distinction between the old and new restatements is that *Restatement (Second)* does not invariably apply the place-of-the-wrong rule.[35] There are "contacts" other than the place of the wrong, recognized by *Re-*

Wrong": Torts and the Conflict of Laws, 34 WASH. L. REV. 388 (1959); Weintraub, *A Method for Solving Conflict Problems—Torts,* 48 CORNELL L. Q. 215 (1963).

[31] Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65, 87 A.L.R.2d 1301 (1961); Currie, *Conflict, Crisis and Confusion in New York, supra* note 30, at 39-52.

[32] Currie, *Conflict, Crisis and Confusion in New York, supra* note 30, at 40.

[33] RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 379, 379a (Tent. Draft No. 8, 1963) (hereafter cited as RESTATEMENT [SECOND]).

[34] *Id.* § 379, comment b at p. 4; *cf. Id.,* § 379a, illustration 1 at pp. 19-20.

[35] *Id.* § 379:

> "(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.
>
> (2) Important contracts that the forum will consider in determining the state of most significant relationship include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct occurred,
>
> (c) the domicil, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort and the relevant purposes of the tort rules involved."

statement (Second), which, by themselves or taken with other "contacts," compel a result different from that required by the place-of-the-wrong "contact." In certain cases the court may reach a result by invoking the law and policy raised by these other "contacts."

Although *Babcock* cites the *Restatement (Second)* favorably,[36] the court does not appear to be utilizing *Restatement (Second)* methods. But neither does it invoke the "contacts" test in the mystical sense. Instead the court, although it uses "significant contacts" terminology, seemingly resolves the issue of the host's liability according to a method called by at least one writer the "governmental interests" analysis.[37] In a way this terminology also can be confusing. Cases such as *Babcock* involve clashing individual interests. The "governmental interests" analysis recognizes this. "Governments" are not favored and individuals disfavored. What the "governmental interests" analysis does is put the clash of individual interests in the context of the various legal policies involved. The assumption is that the competing interests of the individuals in a particular case may be defined in terms of the legal policies of the various jurisdictions involved in the dispute.

Terminology—"significant contacts," "governmental interests," or whatever—aside, the New York court in *Babcock* was seeking a more policy-oriented methodology for solution of choice-of-law problems. However, the New York method is not entirely clear after *Babcock.* Certainly there is difference of opinion as to what method the case actually portends.[38] To more clearly focus on *Babcock,* however, it will be useful to analyze the case in terms of one of the more clearly developed policy-oriented conflicts methodologies: the "governmental interests" analysis.

Babcock Analyzed in Terms of "Governmental Interests"

The analysis begins with the facts: individuals and events. The issues over which the facts are in conflict must be clearly delineated. Then, when the issues are clear, they can be solved by the law of the state most intimately concerned. As to a particular issue there may be no "true" conflict. "A conflicts problem does not arise merely because a statement of the facts of the case requires mention of two states."[39] To determine whether there is a conflict over a particular issue the law of the states involved must be analyzed.

---

[36] Babcock v. Jackson, 12 N.Y.2d at 481-82, 191 N.E.2d at 283-84, 240 N.Y.S.2d at 749-50.

[37] This particular term is Professor Currie's. See his articles *supra* note 30 and Weintraub, *supra* note 30.

[38] Compare the views of several prominent academic writers presented in *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212 (1963).

[39] Currie, *Conflict, Crisis and Confusion in New York, supra* note 30, at 38.

For sake of convenience and in furtherance of judicial duty, the forum court should begin with an analysis of the applicability of its own law and policy to each particular issue over which the parties are in dispute.[40] Applying the traditional judicial methods of construction and adjudication the forum court should "adjudicate" each issue to determine whether the law of the forum furnishes "a reasonable basis for the [forum's] assertion of an interest in applying the policy embodied in its law."[41] The forum court should apply forum law if only the forum state has a policy interest in resolving the problem.[42] If only the foreign state has a policy interest, the forum court should apply foreign law.[43]

A "true" conflict exists when the forum state and the foreign state have conflicting policy interests. In such a case, the respective policy interests should be weighed to determine the result. When such interests are in equipoise, the forum court should apply forum law, giving effect to forum policy.[44] The forum court in such cases is justified in choosing its own law both on the ground that forum law is the law it knows best and on the ground that a forum court is obligated to effect forum law.[45]

Judging by a "governmental interests" analysis, the New York Court of Appeals was fully warranted in applying New York law to the solution of the *Babcock* case. The sole issue involved was whether the guest was to be allowed to sue her host. Once this issue was isolated it was clear there was no "true" conflict. With respect to the host-guest issue New York policy interests alone were involved. The parties were New York residents and their relationship was centered in New York.[46] New York's long-standing public policy against any limitation of a guest's right of action against his host was effected.[47]

---

[40] Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws, supra* note 30; Currie, *Notes on Methods and Objectives in the Conflict of Laws, supra* note 30.

[41] Currie, *Conflict, Crisis and Confusion in New York, supra* note 30, at 39-40; see Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws, supra* note 30.

[42] See Babcock v. Jackson, *supra* note 5.

[43] See Auten v. Auten, *supra* note 7.

[44] Pearson v. Northeast Airlines, 199 F. Supp. 539, *motions after trial denied*, 201 F. Supp. 45 (S.D.N.Y. 1961), *rev'd on appeal*, 307 F.2d 131, *rev'd on rehearing en banc*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963) (holding forum may constitutionally apply its law in a "true" conflict case); See Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); see generally Carpenter, *Conflicts: Concurrent Legislative Jurisdiction in Determining Tort Liability*, 45 MARQ. L. REV. 1 (1961); Currie, *The Constitution and The Choice of Law, supra* note 30.

[45] Currie, *Conflict, Crisis and Confusion in New York, supra* note 30, at 38.

[46] Babcock v. Jackson, 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S. 2d at 750 (1963).

[47] *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751-52.

Unfortunately the court did not confine its consideration to the host-guest issue. Since the case was only at the pleading stage when it reached the Court of Appeals, the question of what standard of care Mr. Jackson would be held to was not before the court. Yet, although the court recognized the clear policy of New York law that a host be held to a duty of ordinary care toward his guest,[48] it declared that this duty should be resolved by the law of Ontario: "Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling. . ."[49] Moreover, the court implied that the issue of what action constitutes negligence also would be decided by the law of the place of the wrong:

> Where the defendant's exercise of due care in the operation of his automobile is an issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.[50]

The conclusions of the *dicta* may be sound. But, unlike the holding, the *dicta* did not rest on a "governmental interests" analysis. Thus, it is not clear whether the court really intended a new method of conflicts analysis.

Judge Van Voorhis in dissent[51] seized on the apparent inconsistency between these *dicta* regarding the standard of conduct and negligence issues and the holding on the host-guest issue. For the dissenting judges this inconsistency demonstrated the difficulty of uniformly applying the "contacts" analysis to various factual situations. Admittedly, difficulty of application is a substantial criticism of the "contacts" analysis. But the dissent was not primarily concerned with the majority's confusing implementation. Rather, the dissent disapproved the court's abandonment of the traditional vested rights doctrine. Thus, they characterized the holding of the majority as no less than an extraterritorial application of New York law.[52]

Unsettled Questions

Clearly the issues of standard of conduct and negligence might be decided by the law of Ontario. But, if these issues were raised

---

[48] *Ibid.*

[49] *Ibid.; but see Id.* at 484, n. 14, 191 N.E.2d at 285 n. 14, 240 N.Y.S.2d at 751 n. 14:

> "It of course follows from our decision herein that, given the facts of the present case, the result would be the same and the law of New York applied where the foreign guest statute requires a showing of gross negligence."

[50] *Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

[51] *Id.* at 485, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

[52] *Id.* at 486-87, 191 N.E.2d at 286-87, 240 N.Y.S.2d at 753-54.

by the parties and a choice-of-law selection was required for their solution, the determination of governing law should be made to depend on the same kind of analysis used to select the law governing the host-guest issue. What is revolutionary about *Babcock* is its willingness to make choice-of-law selections on the basis of an analysis of *each* issue raised by the parties requiring a choice of law for its determination. Conceivably, in a particular case the facts could raise issues which would have to be resolved by the laws of several jurisdictions.[53]

As a consequence of the majority *dicta* and the dissent in *Babcock*, the thrust of the decision is somewhat blunted. The dissenting judges found the vice of extraterritoriality in the resolution of the host-guest issue by New York law. But the issue clearly (if the above analysis is accepted) was a New York issue correctly decided by New York law.

The majority *dicta* could mean the holding was meant not to establish a new method of conflicts analysis, but rather was meant to establish a new conflicts rule concerning host-guest causes of action within the framework of traditional conflicts jurisprudence. There is similar confusion in Wisconsin conflicts law. If courts are going to apply the *Babcock* analysis to issues other than host-guest causes of action, this confusion must be recognized and the *Babcock* analysis clarified.

THE WISCONSIN TREND

Haumschild v. Continental Casualty Co.[54] indicates a possible trend in the conflicts law of Wisconsin. This trend parallels that established by the New York court in *Babcock* in that the Wisconsin court demonstrated similar policy-oriented concern with a conflict of laws problem. There is not a complete parallel between *Babcock* and *Haumschild*, however, for the Wisconsin court quite explicitly refused to renounce the place-of-the-wrong rule.[55] Yet, read broadly, *Haumschild* with its policy-oriented approach threatens the basic premises of the place-of-the-wrong rule.

Haumschild overruled a long line of precedent[56] holding that the law of the place of the wrong governed the existence of spouse immunity from tort liability. The court decided that this immunity

---

[53] See contribution by Professor Leflar, *supra* note 38, at 1247.

[54] 7 Wis.2d 130, 95 N.W.2d 814 (1959).

[55] *Id.* at 140, 95 N.W.2d at 819.

[56] Hansen v. Hansen, 274 Wis. 262, 80 N.W.2d 230 (1956); Scholle v. Home Mut. Cas. Co., 273 Wis. 387, 78 N.W.2d 902 (1956); Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952) (reasoning, but not result overruled); Garlin v. Garlin, 260 Wis. 187, 50 N.W.2d 373 (1951); Nelson v. American Employers' Ins. Co., 258 Wis. 252, 45 N.W.2d 681 (1951) (reasoning, but not result overruled); Bourestom v. Bourestom, 231 Wis. 666, 285 N.W. 426 (1939); Forbes v. Forbes, 226 Wis. 477, 277 N.W. 112 (1938); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

should be considered an issue of family law rather than tort law and therefore its existence should be decided by the law of the spouses' domicile:

> We are convinced that, from both the standpoint of public policy and logic, the proper solution of the conflict-of-laws problem, in cases similar to the instant action, is to hold that the law of the domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship.[57]

Since *Wait v. Pierce*[58] Wisconsin has not recognized spouse immunity in tort cases. In *Haumschild* the court applied this policy in favor of a Wisconsin wife injured in California as a result of her husband's negligence. But the result did not follow from the analysis of the applicability of the respective policy interests of California and Wisconsin. Instead, the case was decided by a newly formulated choice-of-law rule:

> After most careful deliberation, it is our considered judgment that this court should adopt the rule that, whenever the courts of this state are confronted with a conflict-of-law problem as to which law governs the capacity of one spouse to sue the other in tort, the law to be applied is that of the state of domicile.[59]

Thus, a new choice-of-law rule, not the holding, was the result of the analysis of the conflicting policy interests.

The adoption, of a new choice-of-law rule rather than a "governmental interest" approach has been criticized:

> The danger of *Haumschild's* articulating a choice-of-law rule in lieu of, instead of as a result of, such a policy-centered analysis is that the rule will be applied in a deceptively analogous situation in which it will produce results as unjust and irrational as those it displaced.[60]

---

[57] 7 Wis.2d at 137, 95 N.W.2d at 818. A similar conclusion regarding tort immunities was reached in Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955) (parent-child immunity); Thompson v. Thompson, 193 A.2d 439 (N.H. 1963) (spouse immunity); Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958) (spouse immunity); Pittman v. Deiter, 10 Pa. D & C 2d 360 (C.P. Phila. 1957) (spouse imunity); Bodenhagen v. Farmers' Mut. Ins. Co., 5 Wis.2d 310a, 95 N.W.2d 822 (1959) (spouse immunity).

The American Law Institute has adopted this conclusion in RESTATEMENT (SECOND) § 390g: "Whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicil."

Contra, Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Robinson v. Gaines, 331 S.W.2d 653 (Mo. 1960).

[58] 191 Wis. 202, 209 N.W. 475 (1929).

[59] 7 Wis.2d at 138, 95 N.W.2d at 818.

[60] Weintraub, *supra* note 30, at 219.

Mr. Justice Fairchild, concurring in *Haumschild*, joined by Mr. Justice Brown, 7 Wis.2d at 142, 95 N.W.2d at 820, was unwilling to adopt a

The aptness of this criticism is borne out by an examination of the reasoning and result in *Haynie v. Hanson.*[61] Mr. and Mrs. Haynie, Illinois residents travelling in Wisconsin, were involved in a two-car accident with Kenneth Hanson, a Wisconsin resident. Mrs. Haynie sued Hanson and his insurance carrier. Hanson answered, denying any negligence on his part. By cross-complaint he impleaded Mr. Haynie and his insurance carrier, charging Haynie with negligence and, in the event both he and Haynie were found negligent, asking for contribution. Haynie moved for summary judgment of the cross-complaint on the ground that his wife was barred by Illinois law from suing him and therefore he could not be held liable for contribution. The trial court granted summary judgment and Hanson appealed. The Wisconsin Supreme Court affirmed,[62] refusing to distinguish the case on either its facts or policy from *Haumschild.* The court reached its result by applying the law of the domicile, commenting that "if the appellant's position were adopted it would mean that Mrs. Haynie could not sue her husband in her own State of Illinois, but she could do so in Wisconsin."[63]

There was no analysis of the conflicting interests involved in *Haynie.* Instead the court held to the convenient and traditional conflicts method: it mechanically applied a general choice-of-law rule.[64] The court was concerned that appellant's position would

---

new choice-of-law rule because the court had not had benefit of briefs or arguments on this point. He concurred on the ground that California's spouse immunity was not a tort immunity, but rather was a status immunity, and hence was not applicable to a tort problem. Moreover, in the course of his opinion he expressed some misgivings about the choice-of-law rule adopted by the court, *Id.* at 144-45, 95 N.W.2d at 821-22:

> "If we deem it necessary and proper at this stage to reject a well-settled rule of law, should we limit ourselves to all the implications of the rule that the availability of the defense of immunity is to be governed by the law of the domicile? If we have a free choice of what the law is to be henceforth might not the public policy of Wisconsin be better served by some other alternative? One possible alternative is that the availability of the defense of family immunity will be determined by the law of the forum. . . .
>
> Another possible alternative would be that the forum state when faced with the question of immunity choose the law of whichever state (locus or domicile) conforms more closely to its own. . . .

[61] 16 Wis.2d 299, 114 N.W.2d 443 (1962).

[62] *Id.* (Fairchild, J., dissenting without opinion).

[63] *Id.* at 302, 114 N.W.2d at 445; *accord,* Pirc v. Kortebein, 186 F. Supp. 621 (E.D. Wis. 1961).

[64] But see Fairchild, *Recent Developments in the Area of Torts,* 46 MARQ. L. REV. 1, 2-3 (1962) where Mr. Justice Fairchild comments on the Haynie decision:

> "The court rejected an argument that public policy required application of Wisconsin law, permitting tort liability of husband to wife, in order to afford the right of contribution to the Wisconsin driver. Such application by the forum state of its own substantive law would fulfill the requirements of the doctrine of choice of law propounded by Professor Brainerd Currie, although it would not conform with more generally accepted rules."

create the anomaly of an Illinois wife maintaining a suit against her husband in Wisconsin which she could not maintain at home. But the wife was not suing her husband here. The sole issue was whether Hanson could have contribution from Haynie. Thus the policy underlying the Illinois immunity doctrine—"prevention of domestic discord and avoidance of collusive suits"[65]—was not in question. However, Hanson had an interest in contribution based on the clear Wisconsin policy providing for contribution between tortfeasors apportioned according to fault.[66] The court never considered this relevant Wisconsin policy and, as a result, the "decision denied Wisconsin's strong interest without advancing any interest of Illinois."[67]

Although the court in *Haumschild* made its choice of law on the basis of relevant policy considerations, the *Haumschild* precedent was of no use to the court in *Haynie*. The reason is clear: *Haumschild* was cast too explicitly in terms of the place-of-the-wrong rule. This hesitancy to finally dispose of the place-of-the-wrong rule limits substantially the effect of the *Haumschild* decision.[68] Though Wisconsin policy will usually be applied to resolve the narrow issue of spouse immunity, broader issues will still be left to the place of the wrong. That a wife is not to be barred from suing her host-husband for his negligence in California does not mean she is home free. There is still the California guest statute under which

---

[65] Weintraub, *supra* note 30, at 219; *cf.* Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952).

[66] Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962).

[67] Weintraub, *supra* note 30, at 219; RESTATEMENT (SECOND) § 390g, comment c. rejects the *Haynie*, *supra* note 61, and *Pirc*, *supra* note 63, decisions:

> "The rule of this Section does not apply when the action is not between members of the same family. So, the rule is inapplicable when an injured spouse brings suit against a third person, and he in turn seeks contribution from the other spouse on the ground that the latter was partly responsible for the injury. In this situation the state of the family domicil does not have the same interest in determining the question of immunity as it does when the suit is between members of the family, unless, perhaps, the third person is also domiciled in that state. In these circumstances, the question of immunity should be determined by the law selected by application of the rule of sec. 379."

[68] The Wisconsin court is not the only court to be ambivalent in this respect. After adopting the *Haumschild* rule as to spouse immunity, the New Hampshire court expressed ". . . no doubt that the law of the jurisdiction where a tort is committed should continue to determine the applicable standard of care." Thompson v. Thompson, 193 A.2d 439, 441 (N.H. 1963). Other courts, while abolishing the place-of-the-wrong rule for both spouse, Pittman v. Deiter, 10 Pa. D & C 2d 360 (C.P. Phila. 1957), and parental, Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955), immunities have also indulged in discussion implying the applicability of foreign law to the determination of other issues.

the wife cannot recover unless she proves her husband guilty of "wilful misconduct."[69]

There is a similar lack of clarity in *Haumschild* and *Babcock*. It is uncertain whether or not the cases stand as indications of a trend away from the place-of-the-wrong rule and toward some policy-centered analysis. The courts may have only formulated rules to fit particular facts. Thus, *Haumschild* and, less certainly, *Babcock* may have only created exceptions to the place-of-the-wrong rule.[70] But these cases are susceptible to a broader interpretation. They could indicate that the respective courts will, when faced with an appropriate case, apply a "governmental interests" analysis to conflicts problems. The California court seems to be following this trend.[71]

CONCLUSION

It would be unfortunate if *Babcock* were read as doing no more than establishing an "exception" to the place-of-the-wrong rule. Seemingly all the Wisconsin court did in *Haumschild* was establish such an "exception." This is still the mechanical jurisprudence of the vested rights doctrine. Clearly in both *Babcock* and *Haumschild* the respective courts were concerned with applying their own state's policy in situations where that policy was obviously applicable. If courts desire to achieve policy-oriented results in conflicts cases, they must approach the cases with policy-oriented methods.

Wisconsin must discard the *Haumschild* approach for choice-of-law problems and must take up and expand the *Babcock* approach if Wisconsin residents are to be able to rely on Wisconsin tort policy. In the automobile accident field Wisconsin has many unique rules. Although a Wisconsin host is liable to his guest for ordinary negligence,[72] Wisconsin consistently has applied the law of the place of

---

[69] CAL. VEHICLE CODE § 403, CAL. STAT. 1935, ch. 27 (now CAL. VEHICLE CODE § 17158).

Mr. Justice Fairchild, concurring in *Haumschild*, perceived the guest statute problem, 7 Wis.2d at 144, 95 N.W.2d at 821:

> "It is to be remembered, however, that under the law of many states a wife will have no cause of action for simple negligence of her husband because she will be a gratuitous guest. The fact that she and her husband are domiciled in Wisconsin and that they are on a family trip which began in Wisconsin will not exempt her from the principle of tort law. Thus the purely practical benefit to Wisconsin people which might appear at first blush to arise from the new rule will be limited."

See Comment, 44 MARQ. L. REV. 547, 554-55 1961).

It is interesting to note that plaintiff-wife in *Haumschild* cast her theory of recovery in terms of ordinary negligence, Brief (Appendix) for Plaintiff-Appellant (Complaint), pp. 110-11.

[70] RESTATEMENT (SECOND) § 379, comment c. at p. 8.

[71] Bernkrant v. Fowler, 55 Cal.2d 588, 360 P.2d 906, 12 Cal. Reptr. 266 (1961); see also White v. Motor Vehicle Acc. Indem. Corp., 39 Misc.2d 678, 241 N.Y.S.2d 566 (Sup. Ct. 1963).

[72] McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis.2d 374, 113 N.W.2d 14 (1962).

the wrong in host-guest cases where Wisconsin residents were involved in foreign accidents.[73] The results have been far from consistent with Wisconsin policy[74] and, in many cases, have not even been consistent with one another.[75]

Moreover, Wisconsin has unique rules concerning contributory negligence and assumption of risk. Contributory negligence is not a complete bar, but defendant may have plaintiff's negligence compared with his and the damages reduced accordingly.[76] The defense of assumption of risk has clearly been abolished.[77] These rules represent unique Wisconsin policies developed by both court and legislature. Yet, because of the place-of-the-wrong rule, these policies do not cover Wisconsin motorists traveling outside the state.

Babcock v. Jackson represents a fresh approach to conflicts problems which permits a court to effect its own tort policy. In appropriate cases, especially those involving Wisconsin motorists, adoption of the *Babcock* method would permit a broader and more consistent application of Wisconsin tort law. The utility of the *Babcock* approach merits serious consideration by the Wisconsin court.

DAVID J. HASE

---

[73] Gridley v. Cardenas, 3 Wis.2d 623, 89 N.W.2d 786 (1958) (involving a private aircraft); Oehler v. Allstate Ins. Co. 2 Wis.2d 656, 87 N.W.2d 289 (1958); Urban v. Chars, 1 Wis.2d 582, 85 N.W.2d 386 (1957) (no authority cited); Fyksen v. Fyksen, 267 Wis. 542, 66 N.W.2d 150 (1954) (no authority cited); Rohr v. Employers' Liab. Assur. Corp., 243 Wis. 113, 9 N.W.2d 627 (1943) (no authority cited); Hutzler v. McDonnell, 239 Wis. 568, 2 N.W.2d 207 (1942) (applied law of forum to assumption of risk issue); Switzer v. Weiner, 230 Wis. 599, 284 N.W. 509 (1939) (no authority cited).

See Jensen v. Jensen, 228 Wis. 77, 279 N.W. 628 (1938) (foreign common law assumed same as Wisconsin common law); Schmidt v. Leuthener, 199 Wis. 567, 227 N.W. 17 (1929) (choice-of-law issue involved, but not raised).

[74] *E.g.*, Fyksen v. Fyksen, *supra* note 73 (denying recovery to guest on basis of Ohio guest statute).

[75] *Compare* Oehler v. Allstate Ins. Co., *supra* note 73 *with* Urban v. Chars, *supra* note 73 (differing results on very similar facts).

[76] WIS. STAT. § 331.045 (1961); see Rohr v. Employers' Liab. Assur. Corp., *supra* note 73 (plaintiff forced to plead gross negligence to avoid contributory negligence bar).

[77] Theisen v. Milwaukee Auto. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962); McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis.2d 374, 113 N.W.2d 140 (1962).