ARKANSAS' NEW CHOICE OF LAW RULE FOR INTERSTATE TORTS: A CRITIQUE OF *WALLIS*, *WILLIAMS*, AND THE "BETTER RULE OF LAW"

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The development of Arkansas' modern response to the problem of resolving interstate torts begins with *Wallis v. Mrs. Smith's Pie Co.*[1] In *Wallis*, Arkansas residents sued in Arkansas for injuries suffered in Missouri when a truck driven by a Pennsylvania resident struck their car from behind. Defendant, a foreign corporation with its principal place of business in Pennsylvania and authorized to do business in Arkansas, was the registered owner of the truck. The Arkansas Supreme Court recounted the accident as follows:

> [Plaintiffs] had been traveling about an hour when they ran into a heavy snowstorm. Because of the accumulation of ice and snow, the right lane of the interstate on which they were traveling had become hazardous and so [the plaintiff-driver] pulled into the left lane which he thought was in better condition.
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> [The defendant's driver] had been following a furniture van in the right lane of the highway for about five miles. Immediately before the accident [defendant's truck] changed into the passing lane and struck [plaintiffs' car] from the rear. At the time of the accident the truck was traveling approximately 50 miles per hour while [the car] was traveling at a speed of about 20 to 35 miles per hour.[2]

A major consideration in the case was the effect of a Missouri rule of the road, in force at the time of the accident, that required "automobiles to travel in the right-hand lane of a highway having two or more lanes of traffic proceeding in the same direction except under

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1. 261 Ark. 622, 550 S.W.2d 453 (1977); *see* 1 U.A.L.R. L.J. 103 (1978).
2. 261 Ark. at 623-24, 550 S.W.2d at 454.

certain specified conditions not applicable [to this accident]."[3] Defendant sought and received from the trial judge instruction on the Missouri statute[4] together with a judicial gloss that "[a] violation of this statute is negligence."[5] This placed defendant in an ideal position to benefit from Missouri's contributory negligence law.[6] Plaintiffs, of course, sought to avail themselves of Arkansas' law on comparative negligence.[7] The Arkansas Supreme Court held that the Arkansas comparative fault statute,[8] rather than Missouri's contributory negligence statute,[9] would determine the consequences of an Arkansas resident-plaintiff's negligence in Missouri.[10] Prior to the *Wallis* decision, Arkansas had applied the law of the place of the accident (*lex loci delicti*) to interstate torts.[11]

Wallis places Arkansas among those states rejecting the mechanical choice of law rule advocated by the first *Restatement*,[12] which its princi-

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3. *Id.* (citing MO. ANN. STAT. § 304.015(6) (Vernon Supp. 1973)):

> All vehicles in motion upon a highway having two or more lanes of traffic proceeding in the same direction shall be driven in the right hand lane except when overtaking and passing another vehicle or when preparing to make a proper left turn or when otherwise directed by traffic markings, signs or signals.

4. *Id.* at 624-25, 550 S.W.2d at 454.

5. *Id.* Leflar similarly concludes that "by Missouri law plaintiff was negligent also because he was violating the Missouri statute by driving in the wrong lane." Leflar, *Conflict of Laws: Arkansas, 1973-77*, 32 ARK. L. REV. 115 (1978).

6. "In pleading to a proceeding, a party shall set forth affirmatively . . . contributory negligence . . . ." MO. ANN. STAT. § 509.090 (Vernon 1952).

7. 261 Ark. at 624, 550 S.W.2d at 454. The Arkansas comparative fault statute in force at the time of the accident reads:

> 1. The word "fault" as used in this Act includes negligence, wilful and wanton conduct, supplying of a defective product in an unreasonably dangerous condition, or any other act or omission or conduct actionable in tort.
>
> 2. Fault chargeable to a party claiming damages shall not bar recovery of damages for any injury, property damage, or death where the fault of the person injured or killed is of less degree than the fault of any person, firm, or corporation causing such damages.
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> 3. In all actions for damages for personal injuries or wrongful death or injury to property, fault chargeable to a claiming party shall not prevent a recovery where any fault chargeable to the person so injured, damaged, or killed is of less degree than any fault of the person, firm, or corporation causing such damage; provided, that where such fault is chargeable to the person injured, damaged, or killed, the amount of recovery shall be diminished in proportion to such fault.

1973 Ark. Acts No. 303, §§ 1-3 (repealed 1975 Ark. Acts No. 367, §§ 1-3 (current version at ARK. STAT. ANN. §§ 27-1763 to 1765 (Supp. 1977)).

8. *Id.*

9. MO. ANN. STAT. § 509.090 (Vernon 1952); *see* note 6 *supra*.

10. 261 Ark. at 632, 550 S.W.2d at 458.

11. McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 891 (1966). *Compare id.*, *with* Turkey Express, Inc. v. Skelton Motor Co., 246 Ark. 739, 439 S.W.2d 923 (1969).

12. RESTATEMENT OF CONFLICT OF LAWS § 384 (1934).

pal author Joseph H. Beale[13] grounded on concepts of territoriality[14] and vested rights.[15] As others discredited Beale's theories,[16] and courts avoided them through the escape devices so familiar to every conflicts student,[17] choice of law came to rest on considerations other than the place of the wrong.[18]

Professor Brainerd Currie developed a method of interest analysis that invited identification of competing governmental policies implicit in conflicting laws.[19] He distinguished true conflicts from false conflicts: A true conflict exists where two jurisdictions have identifiable policies that would be furthered by application of their respective laws. In a false conflict, one state has no claim (or a spurious claim) for the application of its law and the other state has a legitimate claim. Another category is the "unprovided-for" case in which an examination of interests and policies does not yield a solution because a disinterested forum is unable to choose between competing policies in which it has no stake.[20]

Recently, scholars have devoted significant effort to the articulation

13. *See* J. BEALE, CONFLICT OF LAWS (1935).

14. *E.g.*, RESTATEMENT OF CONFLICT OF LAWS § 384 (1934): "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."

15. *E.g.*, Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). *See also* Babcock v. Jackson, 12 N.Y.2d 473, 477-78, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746 (1963) (the traditional approach "had its conceptual foundation in the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law").

16. *E.g.*, W. COOK, THE LOGICAL AND LEGAL BASIS OF CONFLICT OF LAWS (1949). "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual produce of another." Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 966 (1958), *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 6 (1963). *See also* E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947).

17. *E.g.*, University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936) (renvoi); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (characterization).

18. *See* Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

19. *See* B. CURRIE, *supra* note 16.

20. For summaries of Currie's methodology, see R. CRAMTON, D. CURRIE, & H. KAY, CONFLICT OF LAWS 221-24 (2d ed. 1975); W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 469-71 (7th ed. 1978); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and Reformulation*, 25 U.C.L.A. L. REV. 181, 186-90 (1977). Several commentators have criticized Currie's methods. *See, e.g.*, R. LEFLAR, AMERICAN CONFLICTS LAW 185-89 (3d ed. 1977); Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847 (1967); Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967). *See also* A. EHRENZWEIG, CONFLICT OF LAWS 5 n.17, 16 n.18, 315, 348 (1962); W. REESE & M. ROSENBERG, *supra*, at 472-73.

and refinement of factors, as distinguished from interests and policies, to weigh in the resolution of choice of law questions. Building on the nine factors that Cheatham and Reese identified in 1952,[21] Professor Yntema developed seventeen considerations reducible to two primary groupings—security and comparative justice.[22] The factors receiving the greatest measure of judicial approbation,[23] however, have been the five "choice-influencing considerations"[24] first announced in 1966[25] by Professor Robert Leflar and developed in a series of articles[26] and in his treatise, *American Conflicts Law*.[27] The five factors Leflar stressed as significant are: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interest, and (5) application of the "better rule of law."[28]

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21. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). Listed in order of importance they are: (1) the needs of the interstate and international system; (2) application of local law unless there is good reason for not doing so; (3) effectuation of the purpose of the relevant local rule in determining a question of choice of law; (4) certainty, predictability, uniformity of results; (5) protection of justified expectations; (6) application of the law of the state of dominant interest; (7) ease in determination of applicable law, convenience of the court; (8) the fundamental policy underlying the broad local law field involved; and (9) justice in the individual case. *Id.*.

Professor Reese subsequently added a tenth policy: "The court must follow the dictates of its own legislature, provided these dictates are constitutional." Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 682 (1963).

22. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957). For example, Yntema includes uniformity of legal consequences, minimization of conflicts of law, predictability of legal consequences, the reasonable expectations of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the "stronger" law, cooperation among states, respect for interests of other states, justice of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, utility, homogeneity of national law, and recourse to the *lex fori*. *Id.*

23. R. LEFLAR, *supra* note 20, at 103-07, 138.

24. *See* Tiernan v. Westext Transp., Inc., 295 F. Supp. 1256 (D.R.I. 1969); Satchwill v. Vollrath Co., 293 F. Supp. 533 (E.D. Wis. 1968); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

25. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966) [hereinafter cited as Leflar, *More on Choice*].

26. *See* Leflar, *supra* note 5, at 14-16; Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROB. 10 (1977); Leflar, *True "False Conflicts,"* Et Alia, 48 B.U.L. REV. 164 (1968) [hereinafter cited as Leflar, *True "False Conflicts"*].

27. R. LEFLAR, *supra* note 20.

28. *Id.* at 193-95, 205-19. Leflar's list has proven more acceptable to judges than has the sophisticated functional analysis approach of Arthur von Mehren and Donald Trautman, A. VON

The decision of the Arkansas Supreme Court in *Wallis* to lay aside the territorial principle in favor of "a more flexible approach"[29] came as no surprise. The 1966 decision in *McGinty v. Ballentine Produce, Inc.*[30] indicated that the court would reexamine the question of appropriate choice of law rules for interstate torts when it found a stronger case on its facts. And in the interim, Professor Leflar suggested that the court adopt a new rule:

> It can be assumed that the Arkansas Court will reexamine its outmoded torts-conflicts rule carefully when a new case presents the issue squarely. No vested interests arising from reliance on the old choice-of-law rule can possibly exist. There is no reason why a wiser rule based upon the relevant choice-influencing considerations should not be announced when the opportunity occurs.[31]

In *Wallis*, the court did not neglect the opportunity to approve a choice of law rule based upon Leflar's analysis. There is some question, however, whether *Wallis* was the proper vehicle for changing Arkansas' torts conflicts rule, indeed whether *Wallis* even presented the issue squarely. *Wallis* was exceptional because of the court's uncritical adoption of Leflar's theory under the facts of the case without reference

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MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965), which "requires, for an informed choice of law, an examination of the purposes of the [implicated states'] rules vying for application and a determination whether those purposes would be effectuated by application in the case before the court." Gorman, Book Review, 115 U. PA. L. REV. 288, 290 (1966). Nor have the views of Russell Weintraub, who analyzes various conflict of laws issues with respect to domicile, jurisdiction, family law, torts, contracts, property, and constitutional limitations, found wide acceptance. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971); *Conflict of Laws Round Table: A Symposium*, 57 IOWA L. REV. 1219 (1972). Cavers' "principles of preference" have met with a similar fate. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

> Professor Cavers had admitted to greater confidence in the idea that principles of preference are necessary than in the particular formulation he has advanced. He is satisfied that as courts consciously strive for principled decisions and as precedents accumulate, better principles and a more just choice of law process will evolve.

W. REESE & M. ROSENBERG, *supra* note 20, at 476-77. Nor have Professor Twerski's views been widely adopted. *See* Sedler, *supra* note 20, at 204-08. Twerski calls his approach to interest analysis in choice of law decisions the "new and enlightened territorialism." *Id.* at 204 (citing Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971)). Its essence "is that choice of law decisions should be made with reference to the place where legally significant events occurred rather than with reference to the policies and interests reflected in the laws of the involved states." *Id. See also* Twerski, *To Where Does One Attach the Horses*, 61 KY. L.J. 393, 399-400, 407-10 (1972); Twerski, Book Review, 61 CORNELL L. REV. 1045, 1046 n.12 (1976).

29. 261 Ark. at 627, 550 S.W.2d at 456.

30. 241 Ark. 533, 408 S.W.2d 891 (1966); *see* R. CRAMTON, D. CURRIE, & H. KAY, *supra* note 20, at 247.

31. Leflar, *Conflict of Laws: Arkansas, 1969-72*, 27 ARK. L. REV. 1 (1973).

to the content of foreign as well as forum law.[32] A careful inquiry into Missouri law shows that the Arkansas Supreme Court need never have reached the conflict of laws issue.

In applying Arkansas law, the court ignored the content of applicable Missouri law on the questions whether plaintiffs were negligent and whether Missouri law permitted recovery by contributorily negligent plaintiffs. Thus an examination of the legal status of the parties under Missouri law reveals that although the applicable Missouri statute required a driver on a road with more than two lanes to drive in the right lane,[33] Missouri courts have held that compliance may be excused under certain circumstances,[34] the existence of which is a question of fact for the jury.[35]

The importance of this excuse from strict compliance with the statute, ignored in *Wallis*, is illustrated by a strikingly similar Missouri case. In *Calvert v. Super Propane Corp.*,[36] plaintiff's decedent was driving across the center line on the left side of an icy two-lane road in violation of a Missouri rule of the road.[37] The Missouri Supreme Court held that the violation did not constitute contributory negligence as a matter of law:

> Upon finding these facts the jury could have concluded that deceased was not negligent in following the single, two-lane track that *everybody* on this county road was using, and that if the soft, wet snow on either side of the traveled track were used it would be more hazardous to deceased's safety than the traveled portion. Whether deceased did what any reasonable

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32. Under Professor Leflar's approach to determining conflict of laws, "[a] state's 'governmental interest' in a set of facts can be analyzed only by reference to the content of competing rules of law." Leflar, *More on Choice*, *supra* note 25, at 1587.

33. 261 Ark. at 624-25, 550 S.W.2d at 454 (quoting Mo. ANN. STAT. § 304.015(6) (Vernon Supp. 1973)). *See* note 3 *supra*.

34. Hladyshewski v. Robinson, 557 F.2d 1251 (8th Cir. 1977); German v. Kansas City, 512 S.W.2d 135 (Mo. 1974).

35. *See* German v. Kansas City, 512 S.W.2d 135, 148 (Mo. 1974).

> There is no question that at the time of the collision plaintiff was driving westerly in a lane intended for eastbound traffic. However, it has been demonstrated that plaintiff made a submissible case on whether he was deluded, misled and deceived into driving in a lane he thought proper for west-bound traffic; and thus *it was for the jury to say whether plaintiff had a valid excuse for his violation.*

Id. (emphasis added). The court in *German* cited Rice v. Allen, 309 S.W.2d 629 (Mo. 1958), Tener v. Hill, 394 S.W.2d 425 (Mo. App. 1965), and Wines v. Goodyear Tire and Rubber Co., 246 S.W.2d 525 (Mo. App. 1952), and distinguished Roach v. Lacho, 402 S.W.2d 344 (Mo. 1966).

36. 400 S.W.2d 133 (Mo. 1966).

37. *Id.* at 137 (quoting Mo. ANN. STAT. § 304.015(2) (Vernon Supp. 1973) ("Upon all public roads or highways of sufficient width a vehicle shall be driven upon the right half of the roadway . . . .")).

> man would have done . . . was for the jury to determine under all of the facts and circumstances.[38]

Under Missouri law, therefore, the *Wallis* jury, if properly instructed, could have found that defendant's driver was negligent[39] and that under the circumstances plaintiff was not negligent in driving in the left lane to avoid an accumulation of ice and snow in the right lane. Fairly viewed, Missouri law was favorable to plaintiff.[40]

On appeal to the Arkansas Supreme Court, appellant challenged the trial judge's instruction by raising the question whether the trial court had erred in instructing on Missouri law absent proof in the record. The court held as a procedural matter that there was adequate notice under the Arkansas Uniform Interstate and International Procedure Act.[41] What was objectionable, of course, was not the notice given but rather the instruction itself, *i.e.*, the trial judge's erroneous conclusion that "violation of [the Missouri] statute is negligence."[42] That instruction foreclosed the issue of excuse or justification, which Missouri law would have treated as a matter for jury determination.[43]

In addition to the argument that plaintiff was not negligent and therefore not barred from recovery under Missouri law, there is the equally powerful excuse of last clear chance.[44] The doctrine, known in Missouri as the humanitarian doctrine,[45] has been liberalized and ex-

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38. 400 S.W.2d at 137. Arkansas courts treat the violation of a statute as evidence of negligence. *See, e.g.*, Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977); Duckworth v. Stephens, 182 Ark. 161, 30 S.W.2d 840 (1930).

Missouri courts treat the unexcused violation of a statute as negligence per se. *See, e.g.*, Sayers v. Haushalter, 493 S.W.2d 406 (Mo. 1973); Vanasse v. Plautz, 538 S.W.2d 928 (Mo. App. 1976); Bidleman v. Morrison Motor Freight, Inc., 273 S.W.2d 745 (Mo. App. 1954).

39. The truck was traveling approximately 50 miles per hour, the Wallis' vehicle, 20 to 35 miles per hour. Note further that "[t]he Missouri state trooper investigating the accident testified the roads were so slick his car slid past the accident." 261 Ark. at 624, 550 S.W.2d at 454.

40. *See* notes 33-38 *supra* and accompanying text. The plaintiff's mother, who failed to establish error in the record of her cause of action on appeal would likewise be free of negligence, imputed or otherwise, and entitled to recover.

41. ARK. STAT. ANN. § 27-2504 (Supp. 1977). *Cf.* Turkey Express, Inc. v. Skelton Motor Co., 246 Ark. 739, 439 S.W.2d 923 (1969) (inadequate objection).

42. 261 Ark. at 624, 550 S.W.2d at 454.

43. *See* text accompanying note 39 *supra*.

44. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 427-33 (4th ed. 1971).

45. Price v. Nicholson, 340 S.W.2d 1 (Mo. 1960); Miller v. St. Louis Pub. Serv. Co., 375 S.W.2d 641, 642 (Mo. App. 1964). *See also* Elser v. Safeway Stores, Inc., 585 F.2d 903 (8th Cir. 1978) (per curiam); Brown v. Gamm, 525 F.2d 60 (8th Cir. 1975).

> The great exception [to the rule of "no recovery" by inattentive plaintiffs] is Missouri, which has evolved a rather marvelous so-called "humanitarian doctrine," fearful and wonderful in its ramifications, which allows recovery. It appears to have begun as a distinction between a defendant operating a dangerous machine, such as a railroad train

tended to excuse plaintiff's negligence in cases where the defendant should have, but did not in fact discover plaintiff's peril.[46] Therefore, the *Wallis* court's finding that "Missouri follows the doctrine of contributory negligence which is a complete defense to any action brought by a negligent plaintiff"[47] is an inaccurate and incomplete interpretation. In fact, Missouri has substantially ameliorated "the evils of [its] harsh rule of contributory negligence."[48]

Wallis would appear to be a compelling case for the application of Missouri's humanitarian doctrine. Plaintiffs were in the left lane of a four-lane highway when defendant's truck "changed into the passing lane and struck [plaintiffs' car] from the rear."[49] Arguably, the truck driver had the last clear chance to avoid injury and under Missouri law

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or an automobile, and a plaintiff who was not, and to have become transformed instead into a doctrine favoring the plaintiff where both parties were equally, and similarly, at fault. Unquestionably it represents an attempt to stress the greater importance of human safety over the convenience and financial interests of defendants; but its application has been marked by such great confusion, and so many appeals, that no other court has been tempted to follow the Missouri cases.

W. PROSSER, *supra* note 44, at 431-32. Notwithstanding its difficulty of application, Missouri's rule, for conflict of law purposes, should be entitled to correct ascertainment and consideration by foreign courts. The issue is its application, not its adoption, by the forum courts. *See* Price v. Nicholson, 340 S.W.2d 1 (Mo. 1960); Miller v. St. Louis Pub. Serv. Co., 375 S.W.2d 641 (Mo. App. 1964).

46. One commentator distinguishes last clear chance from "humanitarian" cases as follows:

Case No. 1—The peril to plaintiff's person, property, or both results from physical helplessness caused by plaintiff's lack of care. Defendant actually discovers the peril in time, thereafter, with safety to himself, to avoid damage to plaintiff by the exercise of care. This is a simple last clear chance case. . . . *Case No. 2*—The facts are the same as in *Case 1*, except that the defendant does not actually discover the peril, but in the exercise of care he should have discovered it in time to avoid damage, by the exercise of care and with safety to himself. As in *Case 1*, a majority of courts permit plaintiff to recover for personal injury or property damage under the last clear chance rule. . . . *Case No. 3*—The peril to plaintiff's person, property or both, results from plaintiff's negligent inattentiveness (obliviousness in Missouri judicial parlance). Defendant (as in *Case 1*) actually discovers the peril, in time, thereafter to avoid damage to the plaintiff by the exercise of care. This is a last clear chance case. It is not a humanitarian case. . . . *Case No. 4*—The injured person, his property, or both, are in a position of imminent peril as a result of his negligent inattentiveness (obliviousness). The injured party could extricate himself from his peril by his own efforts, if he were aware of his peril and used care. The defendant or party against whom claim for damages is made does not actually discover the peril of the injured party. Nevertheless, in the exercise of care the party causing injury should have discovered the peril in time thereafter with safety to himself by the use of care to have avoided injury to the plaintiff. In other words the party causing the injury is also inattentive (oblivious). The Missouri courts permit recovery by the injured party in this case; and in this respect are more liberal than courts of other jurisdictions.

Becker, *The Humanitarian Doctrine*, 15 MO. L. REV. 359, 360 (1959).

47. 261 Ark. at 627, 550 S.W.2d at 455 (citation omitted).

48. Miller v. St. Louis Pub. Serv. Co., 375 S.W.2d 641, 646 (Mo. App. 1964).

49. 261 Ark. at 624, 550 S.W.2d at 454.

he would be liable regardless of whether he saw plaintiffs' car.[50]

The applicability of Missouri's humanitarian doctrine hinges on satisfaction of the five tests set forth in *Banks v. Morris & Co.*:[51]

> (1) Plaintiff was in a position of peril; (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury to himself or others; (4) he failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof plaintiff was injured.[52]

Although the facts suggest plaintiff might have prevailed under Missouri's humanitarian doctrine, the certainty of that result is not of immediate importance. Fuller evidence was needed on, for example, the third *Banks* test of whether defendant's employee could have avoided the collision without injury to himself. What is important is that the *Wallis* court ignored the availability of a defense to contributory negligence. This omission, like the false assumption that Missouri always treats the violation of a statute as negligence per se, removes *Wallis* from the false conflict[53] category. Viewed as a false conflict, Arkansas has an interest in applying its comparative fault statute to a resident plaintiff; Pennsylvania, defendant's principal place of business,[54] which also follows comparative fault, may have an interest;[55] but Missouri's only interest is as the situs of the accident, which gives it no claim to enforce an anti-recovery rule.[56] Missouri's rule, however, does not foreclose a negligent plaintiff's recovery. Instead, *Wallis* presents only an apparent true conflict or apparent conflict[57] in which two rules of

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50. *See* note 3 *supra*.

51. 302 Mo. 254, 257 S.W. 482 (1924).

52. *Id.* at 257, 257 S.W. at 484. For a detailed discussion of the application of the tests, see Epple v. Western Auto Supply Co., 548 S.W.2d 535, 540-43 (Mo. 1977).

53. Leflar's reservations about the term "false conflict," Leflar, *True "False Conflicts," supra* note 26, at 169, are recognized, but not shared by this author.

54. 261 Ark. at 623, 550 S.W.2d at 454.

55. *Id.* at 632, 550 S.W.2d at 458.

56. *See* B. CURRIE, *supra* note 16, at 144-45 (situs of injury has an interest in applying a liability rule to meet medical and other expenses occasioned by the accident). *Compare* Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (Missouri has no interest in applying its limitation of damages to a wrongful death action based on a Missouri accident involving Ohio and California residents).

57. Currie's theory, *see* note 56 *supra*, recognized an apparent conflict "in effect, a false conflict, calling for application of the law of the only state found to have an interest." *See also* R. CRAMTON, D. CURRIE, & H. KAY, *supra* note 20, at 221-24; Sedler, *supra* note 20, at 188. Other scholars have recognized the phenomenon, but have labeled it differently. *See, e.g.*, Leflar, *True "False Conflicts," supra* note 26, at 171 (citations omitted):

> The term "false conflicts" and its correlations do have application which can be truly

recovery governing the consequences of negligence are juxtaposed—Missouri's version of contributory negligence and Arkansas' rule of comparative fault—rules that are in operation quite similar, both permitting a negligent plaintiff to recover, but achieving that result by differing legal mechanisms.

Under Arkansas' Uniform Interstate and International Procedure Act,[58] the trial judge is to determine forum law, and his determination is subject to appellate review.[59] It is fairly apparent why the Uniform Act permits consideration by the court of "any relevant material or source . . . whether or not submitted by a party or admissible under the rules of evidence."[60] An accurate assessment of the law may require a full inquiry not only into statutes, but also into the construction given them by foreign courts[61] and, in some instances, the interpretive assistance of those versed in foreign law.[62]

Although the Commissioners' Comment to section 4.02[63] indicates

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useful in the choice-of-law area. The term can describe cases in which there is no conflict of laws, that is, cases in which the laws of the two or more involved jurisdictions are the same, or would produce the same results in the case being litigated. In that situation there is no need to make a choice between the laws of different states. The result is the same under either law. At least it ordinarily ought to be.

Cf. R. WEINTRAUB, *supra* note 28, at 39 ("Only one state will appear to have any 'interest' in having its law applied, and its law should, therefore, be applied. The apparent conflict of laws is a 'false' conflict.").

An example of an apparent true conflict is presented by Kryger v. Wilson, 242 U.S. 171 (1916), a case usually considered in conflicts courses under the subject of constitutional limitations on choice of law. *Kryger* involved cancellation of a contract to purchase land in North Dakota that was entered into in Minnesota. The Supreme Court upheld the application of situs law in a cancellation and forfeiture proceeding in North Dakota. As Professor Brainerd Currie demonstrates, "[in *Kryger*] the law of Minnesota was substantially the same as that of North Dakota." B. CURRIE, *supra* note 16, at 268-69 (emphasis omitted). In ordinary conflicts theory *Kryger* thus illustrates an apparent true conflict; the implicated state laws differing only with respect to the nature of the notice required. *Compare id., with* R. WEINTRAUB, *supra* note 28, at 387, in which Professor Weintraub incorrectly refers to the situs of the land and the forum state as North Carolina.

58. ARK. STAT. ANN. §§ 27-2501 to 2507 (Supp. 1977).

59. *Id.* § 27-2504(C).

60. *Id.* § 27-2504(B).

61. Rice v. Metropolitan Life Ins. Co., 152 Ark. 498, 238 S.W. 722 (1922) (construction of applicable Oklahoma law grounded on statutes and judicial interpretation). *See also* ARK. STAT. ANN. § 28-109 (1962).

62. *Cf.* Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 524, 249 S.W.2d 994, 996 (1952) ("In our library we have the statutes and decisions of every other state, and it seldom takes more than a few hours to find the answer to a particular question.").

63. The parallel Arkansas statute is ARK. STAT. ANN. § 27-2504(B) (Supp. 1977) ("In determining the law of any jurisdiction or governmental unit thereof outside this State, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence.)."

the Act does not shift the burden of discovering foreign law upon the court,[64] sua sponte inquiry is desirable where the parties make an incomplete or erroneous presentation. The requirement of a reasonable level of inquiry should perhaps be addressed legislatively in amendments to the Act or, alternatively, by rule in the practice of trial judges and the Arkansas Supreme Court. One implication of *Wallis* is that public law questions such as choice of law rules are not always satisfactorily articulated in private litigation.[65]

In *Wallis*, the court purports to adopt the Leflar methodology, which calls for a choice of law determined by applying five "choice-influencing considerations."[66] The court's method, however, is eclectic,[67] drawing variously on the "significant relationship" test of the second *Restatement*[68] to displace the law of the situs (Missouri) and on Professor Leflar's analysis to determine the rule of recovery to apply (Arkansas).[69]

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64. Commissioners' Comment, UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT § 4.02:

> The fear that a court might surprise the litigants with a decision based on its own research seems more apparent than real. Should the court come upon material that diverges substantially from that presented by the parties, it should, at least in the normal case, inform them of the fruits of its research.
>
> . . . .
>
> In the event that the court cannot or does not wish to engage in its own research, it is free to insist on a complete presentation of the issues of foreign law by counsel.

See also American Physicians Ins. Co. v. Hruska, 244 Ark. 1176, 1185, 428 S.W.2d 622, 627 (1968) ("an instruction cannot be questioned on appeal in the absence of an objection").

65. Professor Ehrenzweig makes the same point in rejecting interest analysis. A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 63 (1974).

66. *See generally* R. LEFLAR, *supra* note 20, at 281; Leflar, *supra* note 26; Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 ARK. L. REV. 199 (1974); Leflar, *More on Choice*, *supra* note 25. "In essence, [Leflar's list of choice-influencing considerations] is a recognition of the freedom judges have in making choice of law decisions, as well as an exhortation of them not only to be frank about stating the considerations actually used, but to reach results compatible with those considerations." Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 214 (1969).

67. *See* R. LEFLAR, *supra* note 20, at 222, 274. "[T]he new law of choice of law . . . in practice is turning out to be an amalgamation of most of the realistic new ideas developed by conflicts scholars." *Id.* at 222 (citing Westmoreland, *Survey and Evaluation of Competing Choice of Law Methodologies: The Case of Eclecticism*, 40 MO. L. REV. 407 (1975)).

68. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971):

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.

69. *See* 261 Ark. at 628-29, 550 S.W.2d at 459 (apparently adopting the analytic framework of Sabel v. Pacific Intermountain Express Co., 36 Colo. App. 60, 536 P.2d 1160 (1975) ("rules of conduct"-"rules of recovery")).

A difficulty with the court's analytic approach is that the choice-influencing considerations and the "better rule of law" in particular are better suited to the solution of false (and true) conflicts than to apparent true conflicts. An apparent true conflict exists when two jurisdictions have strong interests in the application of their respective laws, which do not differ materially (the conflict is thus apparent and not real). Unfortunately, the *Wallis* court obscured this distinction between false and true conflicts on one hand and apparent true conflicts on the other by relying solely on false conflicts cases. For example, in *Babcock v. Jackson*,[70] Ontario's guest statute would have absolutely precluded recovery for a New York guest injured in Ontario in a car driven by a New York host. Ontario had no claim for application of its harsh law precluding recovery, and New York, where the parties resided, had a strong interest in permitting recovery. The case, therefore, presented a classic false conflict. In *Babcock*, as in the remaining cases cited in *Wallis*,[71] the "better rule of law" can be applied to reach an apparently satisfactory result because each presented a false conflict.

What the "better rule of law" neither identifies nor properly resolves is the *Wallis* factual situation under an accurate view of Missouri law, where two systems or rules are only in apparent conflict and where they function to solve like problems in such similar fashion that the forum law cannot properly be called better than its counterpart foreign law. As will be seen, this inutility of the fifth choice-influencing consideration caused substantial problems for the Arkansas Supreme Court in its first conflicts case after *Wallis*.

Before turning to that case, it is necessary to clarify the role of Missouri's rule of the road in the solution of *Wallis*' conflicts issue. The problem contains two rules: Missouri's rule of the road, which determines negligence, and another rule (Missouri's? Arkansas'? Pennsylvania's?) governing the consequences of negligence, *i.e.*, a rule of recovery. One rule, Missouri's highway law, is not in conflict. The other, the rule of recovery, is a conflicts issue, but the court need not have reached it, as the discussion above indicates. Missouri's rule of the road is not selected because it is part of the *lex loci delicti*,[72] which

70. 12 N.Y.2d 473, 191 N.E. 279, 240 N.Y.S.2d 743 (1963).

71. Sabell v. Pacific Intermountain Express Co., 36 Colo. App. 60, 536 P.2d 1160 (1975); Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 221 N.W.2d 665 (1974); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1968); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968).

72. *But see* RESTATEMENT OF CONFLICT OF LAWS § 380(2) (1934):

the Arkansas Supreme Court criticized as a choice of law method by citing *Babcock*.[73] Yet the court's conclusion may at first blush suggest just that: "Missouri rules of the road are applicable to questions of al-

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[W]here by the law of the place of wrong, the liability creating character of the actor's conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by statute or judicial decisions of the law of the place of the actor's conduct, such application of the standard will be made by the forum.

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 157 & Comment (c) (1971) appears to foresee the displacement of a local standard of care in some limited instances:

(1) The law selected by application of the rules of § 145 ["The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . ."] determines the standard of care by which the actor's conduct shall be judged.

(2) The applicable law will usually be the local law of the state where the injury occurred.

. . . .

c. *Application of Precise Standard.* The forum will apply any precise standard of care that is prescribed by the applicable law in determining whether or not the actor was negligent. Such a precise standard of care may be established by a statute or ordinance. If, for example, the actor's conduct involved a violation of a criminal statute, the applicable law will determine (1) whether a tort standard of care can appropriately be derived from the particular enactment and, if so, (2) whether the necessary conditions for doing so have been met, such as that the plaintiff belongs to the class of persons the statute was designed to protect and that the harm which occurred was of the sort the statute was designed to prevent. The applicable law will also determine whether violation of such a statute or ordinance is conclusive evidence of negligence or prima facie evidence of negligence or merely some evidence of negligence which the jury is free to accept or reject as it sees fit. Such a precise standard of care may also be established by common law rule. So, if by common law rule in the state of the applicable law a motorist is negligent as a matter of law if he crosses a railroad track without stopping, looking and listening, the court will charge the jury to this effect, even though under the local law of the forum the question whether the motorist was negligent in failing to stop, look and listen would be for the jury to decide. In determining, on the other hand, whether the motorist did in fact stop, look and listen, the court will apply its own rules of evidence and its own judicial procedures.

See Gillespie v. Lawton, 234 F. Supp. 821 (D. Conn. 1964) (New York plaintiff, Connecticut defendant, accident in Rhode Island). In *Gillespie*, both the statute in the defendant's jurisdiction and the statute of the state where the accident occurred required that motor vehicles have adequate brakes. In Connecticut such a failure was negligence as a matter of law, which would support, absent factual issues of proximate cause and contributory negligence, a motion for summary judgment on the issue of liability. Turner v. Scanlon, 146 Conn. 149, 148 A.2d 334 (1959); Hamill v. Smith, 25 Conn. Supp. 183, 199 A.2d 343 (Super. Ct. 1964). Rhode Island did not treat the question as negligence per se, but rather as a question for the jury. Gillespie v. Lawton, 234 F. Supp. 821, 823 (D. Conn. 1964); Kenyon v. Murray, 90 R.I. 423, 159 A.2d 376 (1960). The court denied summary judgment and applied Rhode Island law treating the question as one for the jury.

73. [T]he vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act. "The vice of the vested rights theory," it has been aptly stated, "is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved [citation omitted]." More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues.

leged negligence in the actual driving of the vehicle. At the time of the accident, the parties were traveling the highways of Missouri and were under a duty to obey the traffic laws in force there."[74] Nor is it an exercise of depecage,[75] applying different states' laws to different issues. Instead, the rule of the road serves as datum[76] "to the factual question of whether the party's conduct was negligent rather than to whether substantive liability will be imposed."[77] Where foreign law serves only as datum, there is no conflicts issue,[78] but a court must still properly ascertain its content.

Since the decision in *Wallis*, the Arkansas Supreme Court has again had an opportunity to address choice of law issues in an interstate tort case. *Williams v. Carr*[79] illustrates the problems inherent in applying the *Wallis* decision and its unreliability as a model for the resolution of some interstate torts conflicts problems. In *Williams*, two persons were killed when a tractor trailer crossed the median on an interstate highway in Arkansas and struck them while they were standing in the roadway discussing a prior accident with investigating officers. The parties were residents and citizens of Tennessee, and both vehicles were li-

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12 N.Y.2d at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746, *quoted in* Wallis v. Mrs. Smith's Pie Co., 261 Ark. at 626-27, 550 S.W.2d at 456.

74. 261 Ark. at 632, 550 S.W.2d at 458. *See also id.* at 633, 550 S.W.2d at 459 ("this cause is reversed and remanded as to Thomas Jeff Wallis with directions . . . to apply the Missouri law as to the 'rules of the road' ").

75. *See, e.g.*, Nelson v. Eckert, 231 Ark. 348, 329 S.W.2d 426 (1959) (Arkansas statute of limitations, Texas survival rule). *Nelson* is criticized in Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); R. WEINTRAUB, *supra* note 28, at 51. *See also* Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973); von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974); Weintraub, *Beyond Depecage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code*, 25 CASE W. RES. L. REV. 16 (1974); Wilde, *Depecage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329 (1968).

76. Currie distinguished "(1) the purpose of finding a rule of decision, and (2) all other purposes, including that of finding some datum made relevant by a rule of decision supplied by the law of the forum." Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 756 (1963).

77. Sedler, *Rules of Choice of Law Versus Choice of Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1004 n.131 (1978).

78. One of the major differences between cases involving a reference to foreign law for the purpose of establishing a datum point and for the purpose of finding a rule of decision is that in the datum point cases, typically, there is no potential conflict of policy and interest with another state.

. . . .

Indeed, such have been the blandishments of the traditional system of conflicts analysis that the forum may not realize that no true conflict of interests is involved.

Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CALIF. L. REV. 47, 63 (1963).

79. — Ark. —, 565 S.W.2d 400 (1978).

censed and registered there.[80] The case was tried to a jury apparently under a comparative fault instruction,[81] and the jury found that plaintiff and defendant were equally responsible for the accident.[82] On appeal, the Arkansas Supreme Court reversed and remanded the case for retrial.

Although *Williams* presents a false conflict, a comparison to a true conflict that has been analyzed under the Leflar model demonstrates the problem with attempting to resolve it by reference to the choice-influencing considerations. In *Kell v. Henderson*,[83] perhaps best thought of as a counterpart case to *Babcock*, two Ontario residents, host and guest, were involved in an accident in New York. The New York court applied New York law to permit recovery when Ontario law would have denied it. In an article subsequent to the decision, Professor Leflar reanalyzed *Kell* in light of the five choice-influencing considerations,[84] approved of its result, and noted New York's special "status as a justice administering state . . . strongly concerned with seeing that persons who come into the New York courts to litigate controversies with substantial New York connections have these cases determined according to rules consistent with New York concepts of justice, or at least not inconsistent with them."[85] *Kell* is followed and said to be on all fours with a Minnesota case, *Milkovich v. Saari*,[86] which expressly applied the "better rule of law." Both *Kell*[87] and *Milkovich* were true conflicts. Both Ontario and the forum in each case had relevant policies to vindicate by application of their respective laws.

Professor Leflar's observation in his 1966 analysis of *Kell*[88] offers a further clue to the problem of discerning the better law when two states have only slightly differing approaches to a rule of recovery:

[An interest in adjudicating] according to rules consistent with [the fo-

80. *Id.* at —, 565 S.W.2d at 401 nn.1 & 2.

81. ARK. STAT. ANN. § 27-1730.1 (1962). *See* Sunday v. Burk, 172 F. Supp. 722 (W.D. Ark. 1959) (where both parties were equally negligent, neither can recover).

82. — Ark. at —, 565 S.W.2d at 402.

83. 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966).

84. Leflar, *More on Choice*, *supra* note 25, at 1593-95.

85. *Id.* at 1594.

86. 295 Minn. 155, 263 N.W.2d 408 (1973) (Ontario host and guest, injury in Minnesota; Ontario requires a showing of gross negligence, Minnesota, ordinary negligence). *See* Sedler, *supra* note 77, at 1007.

87. *See* Trautman, *A Comment*, 67 COLUM. L. REV. 465, 467 (1967).

88. Leflar, *More on Choice*, *supra* note 25, at 1593-94.

> rum's] concepts of justice, or at least not inconsistent with them . . . will not manifest itself clearly *if the out-of-state rule does not run contrary to some strong socio-legal policy of the forum*, but it will become a major consideration if there is such a strong opposing legal policy.[89]

What kind of conflict is present in *Williams*, a true conflict, a false conflict, or an apparent true conflict? The question is basic since the propriety of permitting nonresident plaintiffs and defendants to avoid foreign law in an Arkansas forum depends on whether Tennessee's contributory negligence law is analogous to the odious Ontario guest statute in *Kell* and *Milkovich*. *Williams* presents a false conflict. Arkansas has no interest to vindicate by applying its law to Tennessee residents who are adequately provided for under their law. This invites, in turn, a consideration of the facts of *Williams* in light of Tennessee law.

The accident litigated in *Williams* occurred in Arkansas. As in *Wallis*,[90] the court applied "the rules of the road of the state where the tortious conduct occurred . . . ."[91] Again, as in *Wallis*, the implicated jurisdictions had different rules of recovery: Tennessee follows the common law standard of contributory negligence.[92] Further, Tennessee law distinguishes between proximate contributory negligence, which bars recovery, and remote contributory negligence, which only mitigates damages.[93] Whether plaintiff's negligence is proximate or remote is usually a jury question,[94] and when an issue of proximate contributory negligence has been resolved in plaintiff's favor, and thus presents no bar to recovery, there remains the possible issue of remote contributory negligence.

The Tennessee Supreme Court approved the following content for a charge on the issue of proximate-remote contributory negligence:

> [Remote contributory negligence is] that negligence which is too far removed as to time or place, or causative force, to be a direct or proximate cause of the accident. We suggest that an appropriate charge would state the foregoing definition and add: "If you find the plaintiff guilty of such

89. *Id.* at 1594 (emphasis added).

90. 261 Ark. at 633, 550 S.W.2d at 458.

91. —Ark. at—, 565 S.W.2d at 404.

92. *See* Street v. Calvert, 541 S.W.2d 576 (Tenn. 1976). *See also* Wade, Crawford, & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present, and Future*, 41 TENN. L. REV. 423 (1974).

93. Perry v. Gulf, M. & O. R.R., 502 F.2d 1144 (6th Cir. 1974).

94. McClard v. Reid, 190 Tenn. 337, 229 S.W.2d 505 (1950).

remote contributory negligence, you must reduce the recovery which you would otherwise award, in proportion to plaintiff's contribution to the injury."[95]

In this setting, the determination by the *Williams* majority that plaintiffs' decedents were free from negligence as a matter of law[96] presents a complication that is only partially suggested by the dissent.[97] A finding of plaintiffs' freedom from negligence will not only deprive defendants[98] of a defense but also of a possible reduction of damages since applying Tennessee law could lead to a finding of insufficient fault to bar recovery (*i.e.*, that the fault was remote and not proximate) or that plaintiffs' negligence should reduce the recovery.[99] The majority holding, in apparent disregard of the nuances of Tennessee law, now renders its application on remand difficult, if not impossible.[100]

The most troubling part of the *Williams* opinion is its handling of the choice of laws governing recovery[101] as compared with the rule appli-

95. Street v. Calvert, 541 S.W.2d 576, 585 (Tenn. 1976).

96. —Ark. at —, 565 S.W.2d at 403.

97. *Id.* at —, 565 S.W.2d at 405 (Smith, J., dissenting).

98. On remand there will be an additional defendant because the Arkansas Supreme Court reversed a directed verdict on whether one defendant was an agent of another defendant. *Id.*

99. For a summary of three questions for the jury presented under Tennessee law, see Wade, Crawford, & Ryder, *supra* note 92, at 440 (citations omitted):

> First, it is a question for the jury whether plaintiff's conduct amounts to negligence at all. Of course, this question may be resolved as a matter of law by the judge if he finds that reasonable men would not differ.
>
> Second, the jury must decide the nature of the causal relationship which exists between the contributory negligence and the injury. Plaintiff's negligence may be found to be proximate, or remote, or irrelevant. It is normally for the jury to make the determination. Some cases seem to hold that in all instances of contributory negligence the jury must be instructed on remote contributory negligence and thus be given the opportunity to mitigate damages on that basis. The position occasionally is taken that there need be no instruction on remote contributory negligence if the jury could not reasonably have found the negligence to be remote, and directed verdicts have often been granted because of plaintiff's contributory negligence.
>
> Finally, of course, if the jury finds that there is contributory negligence which is remote, then it must determine the amount of mitigation of damages. This question is peculiarly the province of the jury and the courts will not lightly overturn a jury award. It should be noted, however, that if the jury finds that there is remote contributory negligence, it must reduce the damages by some amount; in this it has no discretion. It is reversible error for the court to fail to make this clear to the jury.

100. Justice Smith's dissent in *Williams* presents a succinct review of the issues. — Ark. at —, 565 S.W.2d at 405-06 (Smith, J., dissenting): "Since the jury might believe that the decedents carelessly remained too long in a place of danger, which actually contributed to their death, I cannot agree that the issue of their possible negligence has no place in the case." *See also* note 94 *supra*.

101. —Ark. at —, 565 S.W.2d at 404 ("the trial court committed error in not applying Tennessee's substantive law inasmuch as both appellants-plaintiffs and appellees-defendants are residents of the State of Tennessee").

cable to conduct on the highways.[102] Although ostensibly adhering to the concept of choosing a "rule based on the 'most significant relationship' as affected by the [five] choice-influencing considerations,"[103] the court adds the following cryptic dictum: "[H]owever the parties may elect to be governed by both Arkansas' substantive law and rules of the road."[104] Application of Arkansas law is justifiable only if Arkansas and Tennessee legal policies are in substantial conflict, *i.e.*, if they can be said to resemble the guest statute-ordinary negligence conflict of *Kell* and *Milkovich*. Indeed, the ameliorating factors, such as last clear chance[105] and the distinction between remote and proximate contributory negligence, suggest a system that "does not run contrary to some strong socio-legal policy of the forum,"[106] and therefore Arkansas law should not be available even at the parties' election. In *Williams*, Arkansas had no interest save perhaps in its rule of the road.[107] It had only its "fairer and more economically equitable standard of liability,"[108] which is not so strikingly superior as to be "better" than the Tennessee law it should be applying to the Tennessee parties.

It is regrettable that *Wallis* and *Williams* were the first two cases attempted under Professor Leflar's analysis. *Wallis* was born of legal mistake. Not only does the court's approach defy Leflar's procedure—"A state's 'governmental interest' in a set of facts can be analyzed only by reference to the content of the competing rules of law"[109]—but it reaches a choice of law effected in a legal vacuum—a conflict of laws hardly ripe for judicial resolution. *Williams* com-

102. *Id.* "[T]he rules of the road of the state where the tortious conduct occurred are applied." The distinction between rules of conduct and rules of recovery is apparently approved in *Wallis* by adoption of the former's use in Sabell v. Pacific Intermountain Express Co., 36 Colo. App. 60, 536 P.2d 1160 (1975). 261 Ark. at 633, 550 S.W.2d at 459.

103. — Ark. at —, 565 S.W.2d at 404.

104. *Id.*

105. "We adopt [the RESTATEMENT (SECOND) OF TORTS §§ 479, 480] as the law in Tennessee governing last clear chance and overrule all the cases in conflict with the principles contained therein." Street v. Calvert, 541 S.W.2d 576, 583 (Tenn. 1976). For the text of the adopted provisions, see *id.* at 583-84.

106. Leflar, *More on Choice*, *supra* note 25, at 1594. *See also* von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975): "An approach in terms of 'the better rule of law' probably complicates the problem [of principled, comprehensible, and noninvidious solutions to choice of law questions] even further, unless general agreement were to exist on the standards by which superiority was to be judged." *Id.* at 952-53.

107. *Cf.* Mitchell v. Craft, 211 So. 2d 509, 514 (Miss. 1968) ("A primary consideration in determining applicable law is the advancement of the forum's governmental interests.").

108. 261 Ark. at 629, 550 S.W.2d at 457.

109. Leflar, *More on Choice*, *supra* note 25, at 1587.

pounds the error of *Wallis* by failing to see the limits of "the better rule of law" and commending its application where it does not yield a just result.

Admittedly, *lex loci delicti* has led to harsh results for Arkansas plaintiffs,[110] and this may have induced the *Wallis* court to lay it aside.[111] But *Wallis* was not the appropriate case for adopting a new choice of law rule. And *Williams*, which purported to follow *Wallis*, not only lacks the coherent methodology on which practitioners must rely, but also in its improvident dictum about electing Arkansas' substantive law illustrates one of the major limitations of the "better rule of law."

Given the inauspicious beginnings of modern conflicts analysis in Arkansas, perhaps state and federal courts[112] should view *Wallis* as merely having adopted a rule of flexibility in choice of law in interstate torts rather than a particular method or theory of choosing.[113] *Wallis* did not present a proper case for adopting the new rule, and its foundation on an erroneous view of foreign law is likely to have serious repercussions on Arkansas' choice of law development unless future cases avoid its pitfalls and those of *Williams*, which followed its uncertain beginnings.

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110. *See* Wheeler v. Southwestern Greyhound Lines, Inc., 207 Ark. 601, 182 S.W.2d 214 (1944) (wrongful death action barred by Missouri's one-year statute of limitations where injury occurred in Missouri, and death occurred in Arkansas whose two-year statute of limitations would have permitted the action); Logan v. Missouri Valley Bridge and Iron Co., 157 Ark. 528, 249 S.W. 21 (1923) (Oklahoma workman's compensation was exclusive remedy for injury occurring in Oklahoma when Arkansas did not preclude recovery in tort).

111. Territorialism has persisted and acquired new proponents and modern dress. *E.g.*, D. CAVERS, *supra* note 28; Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971). The territorialist position is considered along with the other major modern alternative to interest analysis—narrow, policy-based rules—in Sedler, *supra* note 20, at 204-16.

112. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (conflicts rules applied in federal court must conform to those prevailing in state court).

113. Particularly apt is Ehrenzweig's caveat against theories as sources of law. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965); *see* R. CRAMTON, D. CURRIE, & H. KAY, *supra* note 20, at 304.

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