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THE MIRROR IMAGE CONFLICTS CASE

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Since the 1969 decision of the Missouri Supreme Court in *Kennedy v. Dixon*,[1] adopting for Missouri the *Restatement (Second) of Conflict of Laws* approach to tort choice-of-law cases, only two Missouri cases have raised what can be characterized as difficult tort choice-of-law problems.[2] One of these cases, *Griggs v. Riley*,[3] presented the Mis-

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1. 439 S.W.2d 173 (Mo. 1969) (en banc).

2. Indeed, Missouri state courts have had only eight opportunities to cite *Kennedy*. Of these, only Griggs v. Riley, 489 S.W.2d 469 (Mo. App. 1972), and State *ex rel.* Broglin v. Nangle, No. 34812 (Mo. App., July 10, 1973), presented significant conflicts problems. The main issue in *Broglin* was whether the then-existing Missouri limitation on wrongful death damages, Law of Aug. 2, 1967, [1967] Mo. Laws 664 (repealed 1973), or the Texas no-limit statute, TEX. REV. CIV. STAT. art. 4677 (1952), was to apply to a death that occurred in Texas. The court identified the relevant contacts as the place of conduct and injury (Texas), the residence of plaintiff and plaintiff's decedent (Missouri), the place of defendant's incorporation (Missouri), and the defendant's principal place of business (Texas). In evaluating these contacts, the court concluded that Texas had the most significant relationship. This decision was affirmed by a unanimous Missouri Supreme Court. State *ex rel.* Broglin v. Nangle, No. 58452 (Mo., June 24, 1974). I agree that Texas law was properly applied, but on the basis of Missouri's anachronistic limitation that had been repealed prior to the decision in *Broglin*. In terms of "state interests," neither state had a strong interest in having its law applied. Texas had no interest in providing compensation to beneficiaries in Missouri, *see* Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), nor in regulating the defendant's conduct, since "[l]imitations of damages for wrongful death . . . have little or nothing to do with conduct." Reich v. Purcell, 67 Cal. 2d 551, 556, 432 P.2d 727, 730-31, 63 Cal. Rptr. 31, 34-35 (1967). Missouri's interest was in protecting the defendant from excessive liability, but in reality

souri Court of Appeals for the St. Louis District with a factual situation that, when considered by courts of other jurisdictions, has evoked widespread commentary and produced divergent results. The situation arises when a guest and host from an immunity jurisdiction are involved in an accident in a no-immunity jurisdiction. At first glance, the case appears to present merely the "mirror image"[4] of the now-classic "false conflict" case, in which a guest and host from a no-immunity jurisdiction are involved in an accident in an immunity jurisdiction. This Article will examine in detail the competing policies at work in the "mirror image" case, using *Griggs* as the basic fact pattern and analyzing the method of resolution proposed by the *Restatement (Second).*

I. A BRIEF HISTORY

Conflicts law during the past ten years has been in a state of revolution. The conflicts literature written and cases decided since the 1963 landmark decision of the New York Court of Appeals in *Babcock v. Jackson*[5] that the substantive law of the place of the wrong (lex loci delicti) is not invariably to be applied in tort cases are extensive.[6] *Babcock* presented the New York court with the simplest of conflicts issues. The defendant-host and plaintiff-guest, both residents of New York, were involved in a one-car accident in Ontario during a weekend trip that began and was to end in New York. Ontario at that time had a statute that prohibited recovery by a guest against his host.[7] New York had no guest statute. Finding that Ontario had no interest in having its statute applied but that New York had a substantial interest in having its resident guest recover from her New York host,[8] the

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no Missouri defendant was in the suit since most of the defendant's activities were in Texas. Thus pure interest analysis fails to solve the case. *See generally* Symposium, *Neumeier v. Kuehner: A Conflicts Conflict,* 1 HOFSTRA L. REV. 93 (1973) (comments by five authors).

3. 489 S.W.2d 469 (Mo. App. 1972).

4. *See* Trautman, *Two Views on Kell v. Henderson: A Comment,* 67 COLUM. L. REV. 465, 466 (1967).

5. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

6. *See, e.g.,* cases cited notes 13-15 *infra; Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212 (1963). Prior to *Babcock,* American courts almost invariably applied the law of the place of the wrong to substantive tort issues. This traditional rule of lex loci delicti is set out in RESTATEMENT OF CONFLICT OF LAWS §§ 377-83 (1934).

7. ONT. REV. STAT. c. 172, § 105(2) (1960).

8. 12 N.Y.2d at 482-83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51.

court held that New York law was to be applied to the guest-host issue and that the Ontario statute was not assertable as a defense.[9] Since that decision, New York has had a tumultuous conflicts experience, shifting from a contact-counting approach with some vestiges of territorialism[10] to a pure interest analysis,[11] and now apparently to a middle ground.[12]

Since 1963 about twenty other jurisdictions have abandoned the rule of lex loci delicti in conflicts analysis and have, in most cases, adopted the analyses proposed by the *Restatement (Second)*[13] or by Professor

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

10. In Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), the court held that the law of Colorado, not New York, governed the guest-host issue even though both parties were from New York, since they had "come to rest" in Colorado for the summer, the relationship was formed in Colorado, and the situs of the accident (Colorado) was not fortuitous. In Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966), the court applied New York law and unconvincingly distinguished *Dym* on the grounds that in *Macey* a New York guest injured in Ontario in a car driven by a New Yorker was only temporarily in Ontario and that the relationship between the parties, two sisters, was formed in New York.

11. In Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), the court concluded that New York law governed a one-car collision in Michigan in which two New York girls, the driver and a guest, were killed, even though the girls were students at Michigan State University and had met there. *Tooker* seemingly marked the end of the precedential effect of *Dym*.

12. The latest major case from New York, Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), answered an intriguing issue left open in *Tooker*. In the car in *Tooker* was another passenger, identified as a Michigan resident. A favorite professor's ploy has been to ask, after a discussion of *Tooker*, what would be the result in a suit by the Michigan passenger against the New York driver. In *Neumeier* an Ontario guest was killed in Ontario while riding with a New York host. In a suit in New York to recover wrongful death damages, the Ontario guest statute was held to be a good defense. The *Neumeier* court found unnecessary to the *Tooker* decision Judge Keating's sweeping statement that the New York legislature, by not enacting a guest statute and requiring comprehensive liability insurance, "has evinced commendable concern not only for residents of this State, but residents of other States who may be injured as a result of the activities of New York residents." 24 N.Y.2d at 577, 249 N.E.2d at 399, 301 N.Y.S.2d at 526. Instead, the court found no reason to set aside Ontario's policy of protecting the host against his guest. *See generally* Symposium, *supra* note 2.

13. *See* Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); First Nat'l Bank v. Rostek, 514 P.2d 314 (Colo. 1973); Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); Fuerste v. Bemis, — Iowa —, 156 N.W.2d 831 (1968); Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971); DeFoor v. Lematta, 249 Ore. 116, 437 P.2d 107 (1968); Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970).

Leflar,[14] or variations of Professor Currie's analysis.[15] Central to each of these methods is identification of the interests of those states that have some factual connection to the incidents of litigation.[16] These interests are not easily identified, as the New York courts have discovered,[17] and the problems encountered when two or more states have interests that would be substantially advanced by application of their law, or impaired by application of the law of another jurisdiction, have led other courts in the years since *Babcock* to reject proposals to resolve choice-of-law problems by any method other than lex loci delicti.[18]

II. "SIGNIFICANT CONTACTS" COMES TO MISSOURI

In *Kennedy v. Dixon*[19] the Missouri Supreme Court was presented

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14. *See* Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Brown v. Church of Holy Name of Jesus, 105 R.I. 322, 252 A.2d 176 (1969); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

15. *See* Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Witherspoon v. Salm, 142 Ind. App. 655, 237 N.E.2d 116 (1968), *rev'd on other grounds*, 251 Ind. 577, 243 N.E.2d 876 (1969); Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973); Pfau v. Trent Alum. Co., 55 N.J. 511, 263 A.2d 129 (1970); Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

It should be emphasized that the decisions cited here and in notes 13 & 14 *supra* are not watertight compartments and that courts tend on occasion to lump the different analyses together. *See* Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 270 (1972) [hereinafter cited as Leflar, *Torts Provisions*].

16. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6(2)(b), (c) (1971) [hereinafter cited as RESTATEMENT (SECOND)]; B. CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183-84 (1963) [hereinafter cited as CURRIE]; R. LEFLAR, AMERICAN CONFLICTS LAW 251-54 (1968) [hereinafter cited as LEFLAR].

17. *See* notes 5-12 *supra* and accompanying text.

18. McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 891 (1966); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Friday v. Smoot, 54 Del. 488, 211 A.2d 594 (1965); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967); McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); Cook v. Pryor, 251 Md. 41, 246 A.2d 271 (1968); Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969); Cherokee Labs., Inc. v. Rogers, 398 P.2d 520 (Okla. 1965); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964); Heidemann v. Rohl, 86 S.D. 250, 194 N.W.2d 164 (1972); Winters v. Maxey, 481 S.W.2d 755 (Tenn. 1972); Marmon v. Mustang Aviation Co., 430 S.W.2d 182 (Tex. 1968).

Mississippi seemed to backpeddle to a lex fori approach in McNeal v. Administrator of Estate of McNeal, 254 So. 2d 521 (Miss. 1971), after first following the significant contacts approach of the *Restatement (Second)*. *See* note 13 *supra*. *See also* Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968) (lex fori).

19. 439 S.W.2d 173 (Mo. 1969) (en banc).

with facts essentially the same as those of *Babcock*. In *Kennedy* plaintiff-guest Mrs. Kennedy took an automobile trip to New York with her neighbors, the Toweys. All were residents of Missouri. The trip to New York was uneventful but on the return, while Mrs. Towey was driving, the Towey car was involved in a collision in Indiana. Mrs. Towey was killed and Mrs. Kennedy was injured. Mrs. Kennedy brought suit in Missouri against the administrator of Mrs. Towey's estate, in part on the theory that the Indiana guest statute[20] was inapplicable and that Missouri law, which does not recognize any special limits on liability arising out of the guest-host relationship, applied.

The *Kennedy* court recognized that Missouri for many years had applied the lex loci delicti rule in tort conflicts cases.[21] The court noted that although the rule had come under increasing criticism because of its sometimes harsh and inflexible applications,[22] it had the advantages of certainty and ease of application.[23] But faced with the choice of retaining or rejecting lex loci delicti, the court abandoned the rule in favor of the rule now embodied in section 145 of the *Restatement (Second)*:

> (1) 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 under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
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> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, 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.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Not specifically referred to by the court (except within its quotation of section 145) is section 6 of the *Restatement (Second)*, which contains the generally applicable choice-of-law principles that are the

20. IND. ANN. STAT. § 47-1021 (1965).

21. 439 S.W.2d at 180. *See* Comment, *Changes in Tort Conflict of Laws in Missouri*, 37 MO. L. REV. 268, 273 (1972).

22. *See* cases cited notes 13-15 *supra*.

23. 439 S.W.2d at 180-81.

heart of the analysis under the *Restatement (Second)*:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Although it did not specifically examine section 6, the *Kennedy* court correctly observed that it is not the quantity but the quality of contacts that is determinative under section 145 of the *Restatement (Second)*.[24] Thus, even though the relevant conduct, accident, and injury occurred in Indiana, those contacts were important only in determining whether Mrs. Towey observed what are usually referred to as "rules of the road," and did not have a significant bearing on the legal effect to be given to the guest-host relationship.[25] On the other hand, Missouri was both the domicile of the parties and the place where the relationship of the parties was "centered." These latter contacts were of critical importance to the court, for Missouri "has a decided interest in having Missouri citizens who ride as passengers protected from negligent injury by Missouri hosts."[26] This analysis led the court to conclude that when a Missouri host is sued by a Missouri guest for injuries received outside Missouri on a trip that originated in Missouri, the guest-host issue is to be determined by Missouri law rather than the law of the place of injury.[27]

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24. *Id.* at 184.
25. *Id.* at 185.
26. *Id.*
27. *Id.* A further caveat is appropriate regarding the decision of the *Kennedy* court. Two justices concurred in the opinion, two dissented, one did not participate, and one concurred solely on the ground that on the particular facts presented he would find that Indiana's guest statute violated Missouri's public policy. Thus only three of the seven justices actually voted to adopt the *Restatement (Second)* approach. The

Kennedy is subject to an interpretation that the court analyzed the contacts not by the method posited by the *Restatement (Second)* but by pure interest analysis.[28] The court's implicit reference to section 6,[29] however, supports the conclusion that the method adopted was indeed that of the *Restatement (Second).* Of particular importance in reaching this conclusion are sections 6(2)(b) and (c), which require a court to determine the relevant policies of the forum and of other interested states. Although this policy determination is not conclusive, it is of utmost importance in a tort case.[30] Since this basic analysis was used by the *Kennedy* court, it is proper to conclude that Missouri tort cases are to be decided using the method proposed by the *Restatement (Second).* Moreover, the court's conclusion takes a twist that, although stated in a misleading way, is in accord with the *Restatement (Second)* method. The court speculated that situations might arise in which "it will be difficult to establish clearly that a particular state has the most significant relationship as to a particular issue or issues. If and when such situations arise, then the trial court should continue, as in the past, to apply the substantive law of the place of the tort."[31] Despite *Kennedy*'s admonition that a court should not abdicate its obligation to determine which state has the most significant relationship,[32] this language is susceptible to the interpretation that in a difficult case a court is justified in throwing up its hands and simply applying the rule of lex loci delicti. A better interpretation is that Missouri courts are merely to follow the specific rules of the *Restatement (Second)* applicable to guest-host cases; sections 146 and 159 of the *Restatement (Second),* which state the rules to be followed in cases involving personal injuries and the duty owed the injured party, both state that the applicable law will usually be the law of the jurisdiction where the injury occurred, unless some other jurisdiction has a more significant relationship to the occurrence and the parties.[33]

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unanimous decision in State *ex rel.* Broglin v. Nangle, No. 58452 (Mo., June 24, 1974), would seem to put this caveat to rest. *See* note 2 *supra.*

28. *See* Comment, *supra* note 21, at 280.

29. 439 S.W.2d at 181. *See* text accompanying note 24 *supra.*

30. *See* Part IV *infra.*

31. 439 S.W.2d at 185.

32. *Id.*

33. These more specific rules in the sections following § 145 of the *Restatement (Second)* are said to create a "weak presumption" in favor of the place of the wrong. Reese, *The Kentucky Approach to Choice of Law: A Critique,* 61 KY. L.J. 368, 373 (1973) [hereinafter cited as Reese, *Kentucky Approach*].

III. GRIGGS V. RILEY: MISSOURI APPLIES THE RESTATEMENT (SECOND)

As a state whose two largest cities border on other states,[34] Missouri was destined to be presented with difficult choice-of-law issues. The first major decision after *Kennedy* that attempted to apply the *Restatement (Second)* approach was that of the Missouri Court of Appeals in *Griggs v. Riley*,[35] the facts of which raise many of the major issues discussed by courts and commentators in current conflicts literature. Although the *Griggs* court did a commendable job of analyzing the issues, its opinion and decision are subject to serious question. The facts in *Griggs* that the court found important may be briefly capsulized. As the court noted, the facts appear to be just the opposite of those of *Kennedy*. Plaintiff-guest Griggs was injured while riding as a passenger in an automobile operated by defendant-host Riley. Riley's car was struck in St. Louis, Missouri, by a car driven by Martin, a Missouri resident joined as a co-defendant. At the time of the accident both Griggs and Riley were residents of Illinois, and Illinois law barred recovery by a guest for the ordinary negligence of his host.[36] Missouri has never had a guest statute.

The court could have applied Missouri law on the ground that nothing in *Griggs* was different from *Kennedy* except that suit was brought in the state of the accident instead of the state of the common domicile of the guest and host. Instead, the court found that *Griggs* presented a "true" conflict—one in which both Illinois and Missouri were interested in the outcome—rather than a "false" conflict as in *Kennedy*, in which only one state (Missouri) was concerned with the determination of the Missouri defendant's liability or the Missouri plaintiff's recovery.[37] To reach this conclusion, the court found that Missouri's

34. On the east, St. Louis borders on Illinois; on the west, Kansas City borders on Kansas. To the southwest, Springfield is only about fifty miles from Arkansas.

35. 489 S.W.2d 469 (Mo. App. 1972).

36. Law of July 9, 1935, § 42-1, [1935] Ill. Laws 1221 (repealed 1971).

37. 489 S.W.2d at 471-72. Professor Reese distinguishes a "false" from a "true" conflict as follows:

> If the policy underlying only one of these rules would be furthered by the rule's application, the state having this rule is obviously the state of greatest concern and this is the rule that should be applied. If, on the other hand, the policies underlying the rules of two or more states would each be furthered by their rule's application, the court will be faced with the unenviable task of determining which of the states involved has the greatest concern in the application of its rule.

Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 316 (1972)

policy, represented by its absence of a guest statute, is "to compensate victims of negligent driving regardless of any host-guest relationship."[38] Implicitly, the court determined that this policy applies even to an Illinois guest-host pairing. Balanced against this Missouri interest was the Illinois policy at the time of the accident "to protect gratuitous hosts from suit by ungrateful guests."[39] The court indicated that had it felt free to determine the issue on this basis alone, it would have held that the Illinois interest was not strong enough to outweigh the Missouri interest.[40] Bound by *Kennedy*, however, the court embarked on the relatively uncharted seas of the *Restatement (Second)*.[41]

The court noted initially that sections 145 and 6 of the *Restatement (Second)* provide the guiding principles for determination of the choice of law.[42] Looking first to section 145, the court found that the place of the accident (and inferentially the place of conduct) was immaterial as merely fortuitous, leaving the residence of the parties and the place where the relationship was centered, sections 145(2)(c) and (d), as the critical contacts.[43] Evaluating those contacts in light of sections 6(2)(a) through (g), the court decided that only subsections (b) and (c), which focus on the relevant policies of the forum and of other interested jurisdictions, were important in this factual situation.[44] Of the other subsections, (a), the needs of the interstate system, (d), protection of justified expectations, (e), certainty, predictability, and uniformity of result, and (f), the basic policies of the field, were found unimportant in negligence actions; subsections (g), ease in the determination of the law applied, and (f) were said

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[hereinafter cited as Reese, *Choice of Law*]. *Cf.* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 203 (1971) [hereinafter cited as WEINTRAUB, COMMENTARY].

38. 489 S.W.2d at 472.

39. *Id.* The cases cited, Summers v. Summers, 40 Ill. 2d 338, 239 N.E.2d 795 (1968), and Davidson v. Pugh, 1 Ill. App. 3d 670, 274 N.E.2d 205 (1971), clearly support this conclusion. For example, in *Davidson* the court said: "The rationale of the Act is that there should be a difference between the liability of the person who, out of the generosity of his heart, renders gratuitously some service to his fellow traveler as opposed to one who renders such services for hire." *Id.* at 675-76, 274 N.E.2d at 208.

40. 489 S.W.2d at 472.

41. *See generally* Leflar, *Torts Provisions*; Peterson, *Developments in American Conflict of Laws: Torts*, 1969 U. ILL. L.F. 289, 316-20.

42. 489 S.W.2d at 472-73.

43. *Id.* at 473.

44. *Id.*

always to be subservient to the achievement of "desirable" results.[45]

In determining whether the policies of Missouri or Illinois were to prevail, the *Griggs* court uncovered two additional considerations that tipped the balance. First, the court reasoned that since the accident was a two-car collision that involved a Missouri co-defendant (Martin) in the second automobile, Missouri had an interest in protecting his rights under its contribution statute[46] against Riley, the Illinois driver. Application of the Illinois guest statute would "obviate that right."[47] Having bolstered Missouri's interests, the court turned to Illinois' interest in protecting hosts from the ingratitude of their guests. Rather than giving that interest full extraterritorial force, the court found that Illinois courts had historically applied the rule of lex loci delicti in guest-host cases even when Illinois residents were concerned, and maintained that Illinois would continue to follow that rule even though it has applied the *Restatement (Second)* in other situations. Thus an Illinois court would have applied Missouri law if *Griggs* had been brought in Illinois. On that reasoning, the court concluded that it was "not constrained to afford Illinois hosts greater protection than Illinois courts would afford them, particularly when to do so conflicts with the policy of this state."[48] Thus, despite its initial evaluation, the court found that *Griggs* in effect presented a "false" conflict, with Missouri having the only significant interest in the outcome, and held that the trial court had not erred in applying Missouri law.[49]

IV. Abdication, Usurpation, or Modern Adjudication?

The result in *Griggs* is perhaps more startling today than it would have been fifteen years ago when lex loci delicti was still the prevailing method of conflicts analysis. But to persons indoctrinated with "significant contacts" and other modern approaches to choice of law, the result must cause some concern. After all, the most significant contacts in *Griggs* were apparently with Illinois, not Missouri, since both the guest and host were domiciled in Illinois, the relationship

45. *Id.*

46. Mo. Rev. Stat. § 537.060 (1969).

47. 489 S.W.2d at 473.

48. *Id.* at 474.

49. Alternatively, the *Griggs* court considered its result to be in accord with *Kennedy*'s "escape valve," which allows the law of the place of the wrong to apply when it is difficult to determine the state of most significant relationship. *See* text accompanying notes 31-33 *supra.*

was formed there, the car was presumably garaged and insured there, and all other contacts were in Illinois except the place of the injury and the forum. Although under section 146 of the *Restatement (Second)* the place of injury is usually determinative,[50] and a comment to that section further suggests that when the places of conduct and injury coincide the law of that state will usually be applied,[51] section 146 must be considered in connection with section 156, which concerns the determination of the applicable law regarding the tortious nature of the actor's conduct.[52] A comment to section 156 suggests that in the situation presented in *Griggs*, the "local law of . . . the state where the parties are domiciled [Illinois], may be applied to determine whether [Riley] is entirely immune from tort liability to [Griggs] because of the guest-passenger relationship or is liable to [Griggs] only for gross negligence."[53] A comparison may be made to intrafamily immunity problems, which are usually determined by the local law of the common domicile of the parties.[54] Thus the *Restatement (Second)* points both ways on the resolution of the *Griggs* problem, the general rules pointing toward Missouri but the comments pointing toward Illinois, and the court was thrown back, as it considered itself to be, on the choice-of-law principles of section 6.[55]

A. *Analysis of Section 6*

The principles of section 6 are by no means an exhaustive list of the considerations that might be taken into account in deciding a con-

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50. RESTATEMENT (SECOND) § 146 provides:

> 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 under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

51. *Id.*, comment d.

52. *Id.* § 156 provides:

> (1) The law selected by application of the rule of § 145 determines whether the actor's conduct was tortious.
>
> (2) The applicable law will usually be the local law of the state where the injury occurred.

53. *Id.*, comment f.

54. *See* Reese, *Kentucky Approach* 374 (on interspousal immunity the *Restatement (Second)* is "quite precise, since it calls for the usual application of the local law of the state of the parties' domicile on the ground that this state will almost invariably be the state of greatest concern").

55. *See* text following note 23 *supra*.

flicts case.[56] Neither is the list an original compilation, having had its genesis in Cheatham and Reese's 1952 article which set out nine considerations.[57] With some revision, and deletion of the policy that a court should apply local law in the absence of a good reason for not doing so and of the policy of justice in the individual case, the *Restatement (Second)* list was formed.[58] Leflar's now famous list of five considerations is, as he freely admits, simply a further reduction of Cheatham and Reese's nine.[59] In light of this development, Cheatham and Reese's original explanation of their considerations should carry weight in interpreting section 6.

The Missouri Court of Appeals' first consideration of sections 145 and 6 was a disaster. The court initially limited the important contacts of section 145 to subsections (c) and (d), the domicile of the parties and the place where the relationship was centered.[60] If this limitation were proper, the court should simply have stopped and rendered judgment for the defendant, since both contacts were with Illinois and, regardless of how those contacts were evaluated, the result would have had to favor the application of Illinois law. The court's further observation that the place of the accident and conduct was fortuitous[61] seems relevant, but also points in favor of the defendant. The importance of these Missouri contacts, which the court eventually found overwhelming, was initially ignored but was later recognized when the court, without saying so, evaluated the contacts in light of section 6 and the policies of Missouri to which the court thought the contacts gave rise.

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56. *See, e.g.*, Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957) (lists seventeen considerations).

57. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

58. The reader should remember that Willis L.M. Reese was also the reporter for the *Restatement (Second)*. For further analysis of the initial drafts of the *Restatement (Second)*, see Reese, *Conflict of Laws and the Restatement (Second)*, 28 LAW & CONTEMP. PROB. 679 (1963).

59. LEFLAR 244. His considerations are:

(a) predictability of result
(b) maintenance of interstate and international order
(c) simplification of the judicial task
(d) advancement of the forum's governmental interests
(e) application of the better rule of law

Id. at 245.

60. 489 S.W.2d at 473.

61. *Id.*

In evaluating the contacts, the *Griggs* court dismissed some of the section 6 principles as being of little value in the context of the case.[62] To a large extent I agree. First, section 6(2)(d) admonishes a court to protect "justified expectations." In a contract or will case this consideration might assume insurmountable importance, but, as the comments to the *Restatement (Second)* suggest, negligence cases by definition involve acts committed without consideration of the legal consequences of the acts; thus there are "no justified expectations to protect, and this factor can play no part in the decision of a [tort] choice-of-law question."[63] To a lesser extent, the same general analysis applies to section 6(2)(f), which encourages certainty, predictability, and uniformity of result. As the comments note, these considerations are more important in areas of planned activity, such as contracts, land transactions, and wills, but are of some importance in "all areas of the law."[64] These values can certainly be carried too far, as some of the more extreme examples of the application of lex loci delicti demonstrate,[65] but since section 6(2)(f) also carries with it an admonition to discourage forum shopping, the *Griggs* court should have been more concerned than it was about insulating the result from the choice of the forum.[66] Admittedly, Missouri was a logical place for the litigation, but, except for the claim against Martin, Illinois would have been the likely choice.

Section 6(2)(g), which advocates "ease in the determination and application of the law to be applied," is a third pervasive consideration too readily dismissed by the *Griggs* court. If, as advocated by Leflar,[67] this consideration may be broadened to include the tempering of the substance-procedure problem from the hodge-podge of rules, subrules, and exceptions that now exists (for example, in the statute of limitations area), its general application would be even more profound. But even limited to a consideration of the ease afforded by the choice-of-law rule itself, the ability of a court to handle its choice-of-law rule or analysis in an expeditious manner is a relevant consid-

62. *Id.*

63. RESTATEMENT (SECOND) § 6, comment g.

64. *Id.*, comment i.

65. *See, e.g.*, Alabama Great S.R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892).

66. *See also* Maier, *Coordination of Laws in a National Federal State: An Analysis of the Writings of Elliott Evans Cheatham*, 26 VAND. L. REV. 209, 254-55 (1973) (suggesting that certainty and predictability are also important in aiding practicing lawyers to advise clients properly of their chances of success in litigation).

67. *See* LEFLAR 250.

eration, even in a negligence action. *Griggs* affords an example of the problem of an absence of definitive guidelines for the resolution of concrete cases that may eventually be avoided by additional emphasis on this consideration.[68] After *Griggs*, Missouri trial courts in cases with the same basic facts as *Griggs* will have little guidance, since the slightest change in those facts—for example, the absence of a second defendant in a one-car accident—may completely change the result.

Section 6(2)(a), maintenance of interstate and international relations, was rejected by the *Griggs* court as having "little impact."[69] Generally, this position is correct, but in the context of *Griggs* the court might have considered more fully the possibility that Illinois would be so offended by what it might consider an unjustified intrusion by Missouri into essentially local Illinois problems as to invite "later retaliation in kind."[70] The respective interests of Illinois and Missouri will be analyzed later,[71] but it is arguable that Missouri's interest is so minimal as to be completely overriden by that of Illinois. If this argument is accepted, the *Griggs* result constitutes an "officious interference"[72] with Illinois affairs, and the favor may be returned at the first opportunity.

Lastly, the *Griggs* court appears to have rejected as unhelpful section 6(2)(e), which requires the court to examine "the basic policies underlying the particular field of law." The comment to this section casts a different light on the consideration than that derivable from studying Cheatham and Reese's earlier work. The *Restatement (Second)* comment emphasizes exclusively the basic policies of the particular field of law,[73] rather than "the fundamental policy underlying the broad local law field involved."[74] The comment suggests that this consideration is helpful in resolving conflicts between minor variations of different states' laws: for example, slight differences in the rate of interest that constitutes usury, although the basic policy of preventing usury is the same in both states.[75] The *Restatement (Second)*

68. *See generally* Reese, *Choice of Law*.
69. 489 S.W.2d at 473.
70. LEFLAR 249.
71. *See* text accompanying notes 81-143 *infra*.
72. *Cf.* WEINTRAUB, COMMENTARY 246.
73. RESTATEMENT (SECOND) § 6, comment h.
74. Cheatham & Reese, *supra* note 57, at 978.
75. RESTATEMENT (SECOND) § 6, comment h.

test, if used, is obviously of no help in situations in which policy differences are as basic and evenly divided among the states as the presence or absence of guest statutes in *Griggs*.[76] On the other hand, the Cheatham-Reese proposal of furthering general policy in a broad area of law might have helped to tip the balance toward the application of Missouri law, since the trend in tort cases generally is toward liability.[77] But as the *Restatement (Second)* is presently formulated, the *Griggs* court properly rejected section 6(2)(e) as unhelpful.

In the court's view, the case ultimately came down to a conflict between section 6(2)(b), the relevant policies of the forum, and section 6(2)(c), the relevant policies of Illinois. Missouri had an interest in compensating victims of negligent driving, regardless of the guest-host relationship, and in protecting Missourian Martin, the driver of the other car, by allowing him the opportunity for contribution from Riley.[78] The Illinois interest was to protect gratuitous hosts from suits

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76. In a recent article, Professor Weintraub lists twenty-six states that retain a guest statute. Weintraub, *Finding a Substitute for the Place-of-Wrong Rule: The Kentucky Experience*, 61 KY. L.J. 419, 425 n.19 (1973). Illinois has since amended its statute to prevent recovery only by hitchhikers. Law of Sept. 8, 1971, § 1, [1971] Ill. Laws 2716, *amending* ILL. ANN. STAT. ch. 95½, § 10-201 (Smith-Hurd 1971). A Massachusetts statute has eliminated a judge-created rule, *see* Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917), requiring a showing of more than ordinary negligence by a host for recovery. MASS. GEN. LAWS ANN. ch. 231, § 85L (Supp. 1973). Georgia still retains its court-made rule requiring the guest to show more than ordinary negligence. *See* Hennon v. Hardin, 78 Ga. App. 81, 50 S.E.2d 236 (1948). The California guest statute was recently held unconstitutional, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), as was that of Kansas, Henry v. Bauder, — Kan. —, 518 P.2d 362 (1974).

77. *See* Reese, *Kentucky Approach* 372: "[O]ne of the most basic purposes of tort law is to provide compensation to a plaintiff for his injuries. And surely at least one of a judge's objectives in a choice of law case should be to further the basic policies underlying the particular field of law that is involved." Professor Reese recently suggested that "the time may have come when it is recognized that [compensation of the victim] is the basic policy underlying at least the area of unintentional torts." Reese, *Choice of Law* 333. *See also* WEINTRAUB, COMMENTARY 204 (advocating an examination of the trend toward liability in tort as a means of resolving "true" conflict cases).

A word of warning is appropriate here. This consideration is not the same as Leflar's "better rule" approach, *see* LEFLAR 254-59, since it does not necessarily involve a subjective evaluation of the wisdom of the opposing rules. It is more accurately an objective standard, which does not raise questions of "comparative jurisprudence." *See* D. CAVERS, THE CHOICE OF LAW PROCESS 86 (1965) [hereinafter cited as CAVERS]; Seidelson, *Interest Analysis: For Those Who Like It and Those Who Don't*, 11 DUQUESNE L. REV. 283, 307 (1973); *cf.* WEINTRAUB, COMMENTARY 206-07 (third consideration in breaking a true conflict—"anachronism").

78. 489 S.W.2d at 473.

by ungrateful guests.[79] The court then undercut the applicability of that interest to the case, concluding that since Illinois would not apply its guest statute extraterritorially, Missouri should not protect Illinois residents to a greater extent than Illinois would.[80]

B. *Identification of Interests*

The *Griggs* court's identification and evaluation of the interests of the two states is subject to serious question. It is submitted that the court misconstrued the Illinois tort choice-of-law rule, erroneously used its conception of that rule to diminish Illinois' interest in the case, overemphasized the Missouri interest in compensating the plaintiff, and misapplied any possible Missouri interest in contribution for Martin.

1. *Illinois Interests*

The Missouri court interpreted Illinois law as retaining the rule of lex loci delicti and used that interpretation to support a lessening of Illinois' interest in the case. Even assuming for the moment the propriety of relying on a territorially oriented choice-of-law rule to evaluate interests, the *Griggs* court, by overlooking the significant decision in *Ingersoll v. Klein*,[81] misconstrued Illinois choice-of-law developments. In *Ingersoll* the Illinois Supreme Court considered a damage action based on Iowa law for a death that occurred in Iowa, although the residence of the decedent and all other interested parties was Illinois. The court dismissed the case, holding that Illinois law was applicable. The court reasoned that the "[r]ealization of unjust and anomalous results which may ensue from an application of *lex loci delicti* leads us to believe that a 'most significant contacts' rule best serves the interests of the State and the parties involved in a multi-state tort action. The record in this case clearly establishes that Illinois has the most significant contact with the action."[82] It is difficult to see how any court could read *Ingersoll*, which states clearly that the rule of section 146 is to be followed in tort cases,[83] as less than a rejection

79. *Id.* at 472.
80. *Id.* at 474.
81. 46 Ill. 2d 42, 262 N.E.2d 593 (1970).
82. *Id.* at 47, 262 N.E.2d at 596.
83. *Id.* at 46-47, 262 N.E.2d at 595. *See* Leflar, *Conflict of Laws*, in 1971/72 ANN. SURVEY AM. L. 1, 13 (1973) ("the [*Ingersoll*] court's rejection of the lex loci delicti rule was explicit").

of lex loci delicti. The cases relied upon by the *Griggs* court[84] were all decided prior to *Ingersoll* except one,[85] which expressly relied upon *Ingersoll*'s "more significant relationship" approach as an alternative method for applying Illinois law.[86] The only possible exception to *Ingersoll*'s rejection of lex loci delicti must be inferred from *Graham v. General U.S. Grant Post No. 2665, V.F.W.*,[87] which held that Illinois' dram shop act[88] was not to be applied extraterritorially, not because of any continued vitality of the vested rights theory, but because of prior consistent constructions of the act by the court not overruled by the legislature and the harsh nature of the Illinois act.[89] Whether Justice Kluczynski, the author of both *Graham* and *Ingersoll*, and the rest of the court would apply the reasoning of *Graham* to the extraterritorial application of the Illinois guest statute in a guest-host situation may be uncertain, but the question is not as free of difficulty as the *Griggs* court suggested. Indeed, most indications are that the Illinois court would not so apply *Graham*'s reasoning.

A more serious issue is raised by the *Griggs* court's lessening of Illinois' interest by reliance on its determination that Illinois would not apply its local law in a *Griggs*-type case; since Illinois would have had no interest in the outcome of the case had it been brought in Illinois, the court reasoned, Missouri will not supply an interest. This approach appears to be nothing more than an application of the admonition not to be more Roman than the Romans. Professor Weintraub has suggested a completely different approach to the problem.[90]

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84. Graham v. General U.S. Grant Post No. 2665, V.F.W., 43 Ill. 2d 1, 248 N.E.2d 657 (1969); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Aurora Nat'l Bank v. Anderson, 132 Ill. App. 2d 217, 268 N.E.2d 552 (1971); Drengberg v. Gerke, 88 Ill. App. 2d 368, 232 N.E.2d 145 (1967).

85. Aurora Nat'l Bank v. Anderson, 132 Ill. App. 2d 217, 268 N.E.2d 552 (1971).

86. The court also relied on a characterization of the issue as one of family law to be determined by the law of the parties' domicile. *Id.* at 220, 268 N.E.2d at 554. *See also* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

87. 43 Ill. 2d 1, 248 N.E.2d 657 (1969).

88. ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1974).

89. 43 Ill. 2d at 5, 248 N.E.2d at 660. *See* Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968) (refusing to switch to the "most significant contacts" approach in wrongful death case because of almost 100 years of not applying the Texas statute to deaths occurring outside state). *See also* State *ex rel.* Broglin v. Nangle, No. 58452 (Mo., June 24, 1974).

90. WEINTRAUB, COMMENTARY 207-08; Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 243-44 (1963).

Weintraub basically follows the Currie approach to conflicts, dividing the cases into "true" and "spurious" conflicts, that is, cases in which states' interests clash substantially and those in which the law of only one state is rationally applicable.[91] He is concerned, however, with Currie's forum-oriented method of analysis that applies the law of the forum to resolve a true conflict.[92] So Weintraub has proposed four "tie-breakers" designed to help reach more rational solutions in true conflict cases. Only the fourth tie-breaker, consideration of the choice-of-law rules of the contact states, is presently relevant. No comparison to the "renvoi" concept is intended;[93] rather, Weintraub proposes that in some situations a court, by construing the non-forum state's choice-of-law rule, may discover the true nature of that state's interest. To illustrate, suppose that a husband and wife from *X*, a common law property state, are involved in an accident in *Y*, a community property state. *X* allows a wife to sue her husband; *Y* does not. Initially, both states appear to have a substantial interest in the case, *X* in allowing the wife to recover and *Y* in either preventing collusive suits or preventing the husband from profiting by his own wrong; apparently a true conflict exists. According to Weintraub, however, the conflict dissolves if the purpose of *Y*'s rule is to prevent the husband from profiting from his own wrongdoing, because the wife's recovery for an accident in *Y* would be community property, but in a multi-state case *Y* would not consider the *X*-wife's recovery community property and would permit the suit.[94] Thus far, the analysis appears useful only in determining whether a true conflict exists. But Weintraub asserts that "[u]sing another state's choice-of-law as a guide to the purposes underlying that state's domestic law and whether that state is 'interested' in applying its domestic law to the interstate problem being decided, may, however, be misleading if that choice-of-law rule is a rigid, territorial rule, such as place-of-wrong, and is not keyed to the policies underlying that state's tort rules."[95] In other words, Weintraub's fourth tie-breaker is useful only if both the forum and the other jurisdiction engage in interest analysis.

Weintraub's rejection of territorially oriented choice-of-law rules

91. WEINTRAUB, COMMENTARY 201-02; *see* CURRIE 177.
92. WEINTRAUB, COMMENTARY 203; *see* CURRIE 184.
93. *See In re* Annesley, [1926] Ch. 692.
94. WEINTRAUB, COMMENTARY 208.
95. *Id.* (footnote omitted).

as an aid in deciding a true conflicts case is sharply rejected by Professor Seidelson.[96] Seidelson, like Weintraub, would not use the foreign choice-of-law rule as an exclusive means of deciding cases, but simply as an "enhancer" or "diminisher" of a concerned state's interest.[97] Seidelson argues that if a state has retained lex loci delicti for its "presumed advantages, it has evidenced the degree of its interest in [its own] domiciliary, like it or not."[98] Thus, in a case like *Griggs*, the Missouri court would be correct in concluding that Illinois, if it has retained lex loci delicti, has expressed disinterest in having its law applied to a Missouri accident even if two Illinois citizens are involved.

Weintraub probably has the better of this disagreement. If Illinois had retained (although it has not)[99] lex loci delicti as its tort choice-of-law rule, that retention should not be interpreted as an indication of the value Illinois places on having its local law applied by other courts. Instead, Illinois courts, for whatever reason—devotion to stare decisis,[100] fear of the difficulties of interest analysis and the confusion it has caused elsewhere,[101] or love of a perceived certainty and predictability in the law—would have found the values of lex loci delicti to be at least equal to proving Illinois' interest in having its law applied in those situations in which the outcome will otherwise be detrimental to the values and interests of Illinois and its citizens. After all, the stated purpose of interest analysis is to reach just and rational results, rather than arbitrary and irrational ones.[102] It is thus hard to justify the use of what would, by "modern" thinkers, be considered irrational rules.[103] There is no need for the forum to impose on the parties the petrified conflicts analysis of the parties' home state.

Thus, in construing Illinois law the Missouri court erred on two grounds: (1) by characterizing Illinois as still following a "shrunken" rule of lex loci delicti; and (2) by using that characterization to discard what might otherwise have been a significant Illinois interest—the protection of its hosts from the ingratitude of their guests.

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96. Seidelson, *supra* note 77.
97. *Id.* at 292.
98. *Id.* at 291.
99. *See* text accompanying notes 81-89 *supra.*
100. *See* Abendschein v. Farrell, 382 Mich. 510, 514, 170 N.W.2d 137, 140 (1969).
101. *See* notes 10-12 *supra.*
102. *See, e.g.,* LEFLAR 265; WEINTRAUB, COMMENTARY 203.
103. *See* Pfau v. Trent Alum. Co., 55 N.J. 511, 520, 263 A.2d 129, 137 (1970).

2. *Missouri Interests*

Equally disturbing in *Griggs* is the court's implicit recognition of a strong Missouri interest in providing recovery to the plaintiff.[104] The first consideration in evaluating the court's reasoning is whether Missouri may properly extend an interest in seeing guests recover to situations in which neither the host nor the guest is a Missouri resident. As a matter of constitutional law, the state of injury may apply its law in litigation concerning an injury that occurred within its boundaries.[105] In a case like *Griggs*, there are three Missouri interests that may be forwarded to support application of Missouri law, putting aside for the moment the problem of the other driver-defendant. First, the state of injury may have an interest in preventing the victim from becoming a public charge, in providing funds for payment of his medical creditors, and generally in expressing its interest in compensating the injured.[106] But the injured party may be wealthy or may leave the jurisdiction immediately without incurring medical expenses.[107] None of these possible interests is supportable on the stated facts in *Griggs*.[108] Secondly, the state of injury may have an interest in regulating the conduct of the defendant-host.[109] As the Supreme Court of New Hampshire has pointed out, however, it makes little sense to speak of conduct regulation when the driver endangers himself as well as his passengers by his misconduct; his self-interest is probably a bet-

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104. 489 S.W.2d at 472.

105. *See* Carroll v. Lanza, 349 U.S. 408 (1955); Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); *cf.* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

106. Tooker v. Lopez, 24 N.Y.2d 569, 576, 249 N.E.2d 394, 399, 301 N.Y.S.2d 519, 524 (1969), *apparently overruled on this point by* Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); Milkovich v. Saari, 295 Minn. 155, 162, 203 N.W.2d 408, 414 (1973); Conklin v. Horner, 38 Wis. 2d 468, 471, 157 N.W.2d 579, 582 (1968); WEINTRAUB, COMMENTARY 219-20; Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 71 (1959); Sedler, *Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents*, 61 KY. L.J. 378, 382 (1973); Trautman, *supra* note 4.

107. WEINTRAUB, COMMENTARY 219.

108. The case is silent, but the plaintiff's attorney told me that Griggs incurred $100 in medical expenses in Missouri before he was transferred to a hospital in Illinois. The attorney said he was certain the bill had been paid before trial. Interview with Mr. Ray Marglous, in St. Louis, Mo., Mar. 6, 1974. The "general interest" concept is discussed in text accompanying note 124 *infra*.

109. *See* Conklin v. Horner, 38 Wis. 2d 468, 476, 157 N.W.2d 579, 586 (1968); WEINTRAUB, COMMENTARY 220; Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEXAS L. REV. 141, 171 (1967).

ter regulator than potential liability to his guests.[110] Finally, the Missouri court might assert an interest in Missouri's capacity as the forum.[111] But a guest-host issue involves neither the integrity of the judicial process nor the ease of application of another state's law; thus the interest fails. There appears, therefore, no compelling reason why Missouri in *Griggs* should extend its concern for guests to non-residents.

Yet, in a growing number of jurisdictions similar interests have been held sufficient to control the outcome of the choice-of-law issue. In *Milkovich v. Saari*,[112] a recent Minnesota case, the plaintiff-guest and defendant-host and -owner were all Ontario residents on a one-day shopping trip to Minnesota. The plaintiff, injured when the car she occupied went off the road, was hospitalized in Minnesota.[113] Applying Leflar's five "choice-influencing considerations,"[114] the court had no problem applying Minnesota law after finding that Minnesota had an interest as a "justice administering state" and, furthermore, that its law was the "better law."[115] Similarly, in *Summers v. Interstate Tractor & Equipment Co.*[116] the Ninth Circuit, interpreting Oregon conflicts law,[117] held that the law of Washington, the place of the death of the plaintiff's intestate, controlled, even though the decedent had been domiciled in Oregon and the defendant was an Oregon corporation with its principal place of business there. That Washington was both the site of a construction project operated by the defendant and the place of the decedent's death gave Washington "a substantial interest in the application of its law to this case."[118]

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110. *See* Johnson v. Johnson, 107 N.H. 30, 32, 216 A.2d 781, 783 (1966); Comment, *Most Significant Contacts Method: An Empirical Analysis*, 25 VAND. L. REV. 575, 585 (1972).

111. WEINTRAUB, COMMENTARY 221.

112. 295 Minn. 155, 203 N.W.2d 408 (1973), *noted in* 58 MINN. L. REV. 199 (1973).

113. But all hospital bills had been paid prior to institution of suit. 58 MINN. L. REV. 199, 201 n.16 (1973).

114. LEFLAR 245; Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 279 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586-88 (1966).

115. 295 Minn. at 167, 203 N.W.2d at 417.

116. 466 F.2d 42 (9th Cir. 1972).

117. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

118. The court was also influenced by the repeal of Oregon's limitation, Ch. 437, [1961] Ore. Laws 722 (repealed 1967), which was not technically effective as of the date of death. *See* text accompanying notes 170-78 *infra*.

The problem in concluding that the interests of the state of injury should control in that state's courts are aptly illustrated in *Conklin v. Horner*,[119] a leading case. All parties to a one-car Wisconsin accident were residents of Illinois and were on a trip that began and was to end in Illinois. The guests sued their host, who asserted as a defense the Illinois guest statute, which barred recovery for the simple negligence of a host.[120] The Wisconsin Supreme Court concluded that a "serious conflict"[121] existed between Wisconsin's law permitting full recovery and Illinois' statute, since Wisconsin wished to see the guests compensated and to deter negligent conduct.[122] To resolve the conflict, the court turned to the "better law" approach, concluded that Illinois law was "anachronistic," and applied Wisconsin law.[123] It is difficult to criticize this result more forcefully than has Professor Weintraub, an early advocate of interest analysis:

> At the heart of the analysis in *Conklin* is the court's finding that Wisconsin had policies that would be significantly defeated if Illinois law were applied—compensation of the injured, protection of taxpayers and medical creditors, and deterrence of negligent driving. It is submitted that Wisconsin had only an officious and hypothetical interest in applying any of these policies. As for compensation of the injured guest, Illinois should have been permitted to strike what it considered the

119. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

120. Law of July 9, 1935, § 42-1, [1935] Ill. Laws 1221 (repealed 1971).

121. 38 Wis. 2d at 477, 157 N.W.2d at 583.

122. *Id.* at 480, 157 N.W.2d at 585-86.

123. *Id.* at 483, 157 N.W.2d at 586. The Wisconsin Supreme Court has recently had the opportunity to apply its choice-influencing considerations in a case similar to *Conklin* but outside the guest-host or interspousal immunity areas. In Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973), the court was faced with a conflict between Wisconsin and Ohio law on the issue of whether an employee could recover, in addition to a workman's compensation award, damages from a fellow servant in an independent suit. Ohio by statute prohibits an independent suit. OHIO REV. CODE ANN. § 4123.741 (Page 1954). Wisconsin by judicial decision allows it. Zimmerman v. Wisconsin Elec. Power Co., 38 Wis. 2d 626, 157 N.W.2d 648 (1968). The plaintiff and his fellow servant, both residents of Ohio, were on a business trip to Wisconsin when they were involved in a collision with a Wisconsin resident. Contrary to *Conklin*, the *Hunker* court found no substantial interest in applying Wisconsin law to regulate conduct and, since the plaintiff had received his workman's compensation award, no overwhelming need to see that the plaintiff was not denied recovery entirely, as would have been the result in *Conklin* if Illinois law had applied. On the critical "better law" consideration, the court was forced to conclude that the trend in the law, if any, was toward Ohio's handling of the problem, that it was certainly not a "creed outworn," and that neither law was unmistakedly "better." On this reasoning, the court held Ohio law applicable.

proper balance between a desire to compensate the guest and protection of the host and buyers of liability insurance. It was Illinois, not Wisconsin, that, in all likelihood, would have to live with the social consequences of striking this balance one way or the other. The desire to assure compensation to public and private agencies that have rendered aid to the injured guest is understandable and laudable. Unless these agencies are Wisconsin agencies that will not be compensated unless the guest is permitted to recover against the host, however, Wisconsin's policy of compensation to medical and other creditors of the victim is either too officious or too hypothetical to compete with the policies underlying the Illinois guest statute. The third Wisconsin "interest," that of deterring negligent driving in Wisconsin, was well rebutted by the Supreme Court of New Hampshire when that court wisely decided to apply the law of the marital domicile, Massachusetts, not the law of the place of injury, New Hampshire, to prevent a Massachusetts wife from suing her Massachusetts husband for negligence: "Recognition of the Massachusetts immunity will not render Massachusetts drivers less careful on our highways since their own and their wives' safety will still be jeopardized by carelessness on their part." And, the New Hampshire court might have added, Massachusetts drivers will still be subject to New Hampshire criminal law for violations of New Hampshire's rules of the road.[124]

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124. WEINTRAUB, COMMENTARY 246 (footnote omitted), *quoting* Johnson v. Johnson, 107 N.H. 30, 32, 216 A.2d 781, 783 (1966).

Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968), presented the same basic fact pattern as *Griggs*, with Ohio parties injured in Kentucky, and Ohio (but not Kentucky) having a guest statute. In commenting on *Arnett*, Professor Reese observed:

> [I]t seems reasonably clear that the *Restatement (Second)* would call for a result different from that reached by the Kentucky Court in *Arnett* . . . . Ohio clearly had the greater, if not the only, interest, and under the *Restatement (Second)*, and Section 6 in particular, this would be an important factor favoring application of Ohio law.

Reese, *Kentucky Approach* 373-74. Professor Sedler disagrees slightly with both Weintraub and Reese, asserting that a case like *Griggs* is "not necessarily" a false conflict. He states that:

> When two parties from an immunity state are involved in an accident in a recovery state, their home state likewise has an interest in applying its own law to immunize its resident defendant and his insurer. But here . . . the state of injury may also have an interest in applying its law allowing recovery in favor of a non-resident plaintiff.

Sedler identifies the interests of the state of injury as preventing the plaintiff from becoming a public charge, paying off hospital and medical creditors, and effecting the state's general compensatory policy. Sedler concludes, however, that

> any interest on the part of the state of injury in allowing recovery in this situation is more theoretical than real. In this day and age the injured plaintiff will get back home, and the only state concerned with his welfare is his home state. If that state denies recovery in order to protect the defendant and his

I suggest that Weintraub's criticisms, coupled with those of Reese and Sedler,[125] reveal that conflicts law in the United States has turned topsy-turvy. For many years, conflicts scholars have attacked the courts unmercifully for their adherence to lex loci delicti.[126] Now that

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insurer, the state of injury should defer to that policy.

Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 133-34 (1973) (footnotes omitted). *See* Sedler, *supra* note 106, at 382-83. Professor Cavers' fifth "principle of preference" provides:

> Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which was lower than the standards imposed by the state of injury, the law of the former state should determine the standard of conduct or financial protection applicable to the case for the benefit of the party whose liability that state's law would deny or limit.

CAVERS 177. Cavers disapproves of this principle, *id.*, which would provide for a result opposite that of *Griggs*.

The Wisconsin Supreme Court has noted this general criticism; in Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973), the court said in defense of *Conklin*:

> That [the imposition of tort liability] is a deterrent is one of the accepted propositions of our law. . . . With the growth of the concept of no-fault and strict liability, we are, on the other hand, seeing that the deterrent effect of tort liability may be less valuable as a social tool than its use as a device for compensating the injured and spreading the risk of loss. While its value as a guide to a public-policy interest can be overemphasized, it represents an area of real concern to an affected jurisdiction.
>
> Under modern practice the availability of insurance and the premiums paid are geared to whether or not the assured has a reasonably good driving record. In Wisconsin the failure to satisfy tort judgments triggers procedures that may cancel driving privileges. . . . Tort liability imposed on parents for the accidents of their children surely results in some parental admonitions conducive to safe driving. It is the "accident prone" . . . drivers who are the exact targets of procedures both by insurance companies and by the state that seek to deter bad-driving conduct by refusing to insure them and eventually of depriving them of driving privileges. These procedures are set in motion by tort judgments. Under reciprocal arrangements, safety-responsibility acts may be triggered by a tort judgment in another state.
>
> . . . .
>
> Moreover, we would be blind indeed to the world about us if we are to ignore the barrage of safety-education messages put out by insurance companies. Seat belt use is stressed . . . , sobriety while driving and courtesy and observance of the rules of the road are emphasized. Who but the most unsophisticated can believe that insurance company-sponsored educational programs are not directly related to the impact of tort judgments. It is clear that insurance company safety programs have had a salutary effect on industrial safety. Who without a definitive study could assert that the same salutary effect is not operating to improve our highway safety record.

Id. at 604-05 n.2, 204 N.W.2d at 905-06 n.2.

125. *See* note 124 *supra*.

126. *See, e.g.*, W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1949); CURRIE; Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

many courts have turned to other methods of analysis, with the result that many *Griggs*-type cases are decided in favor of forum law that benefits the plaintiff,[127] the commentators are beginning to argue that the new methods of analysis are producing chauvinistic results.[128] There are, however, some encouraging signs that neither lex loci delicti nor forum law will be automatically applied. In *Neumeier v. Kuehner*[129] the New York Court of Appeals approved the following rule, which should apply to all *Griggs*-type cases:

> When the guest-passenger and the host-driver are domiciled in the same state and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.[130]

This rule would not only eliminate decisions that find a "true" conflict in the mirror image situation and resolve that conflict in favor of liability, but would also prevent *Griggs*-type reasoning, by which a "false" conflict favoring Illinois law is converted into a "true" one and then back to "false" by manipulation of the analysis.

The *Griggs* court asserted an additional interest that makes the case different from the straightforward applications of forum law presented above. This additional interest was the protection of the Missouri defendant's right to contribution from Riley if both were found negligent, since application of Illinois law would "obviate that right."[131] Under Missouri law, if Riley were found liable to Griggs, Martin might, if he were also found negligent, receive contribution. Thus the Missouri co-defendant's fiscal security would be protected and Missouri's interest in seeing that joint tortfeasors bear the burden of damages equally would be furthered. This interest has been uncritically accepted in other cases.[132] In analyzing the interest, an analogy can

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127. Summers v. Interstate Tractor & Equip. Co., 466 F.2d 42 (9th Cir. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Gagne v. Berry, 112 N.H. 125, 290 A.2d 624 (1972); Bray v. Cox, 39 App. Div. 2d 299, 333 N.Y.S.2d 783 (1972); Kell v. Henderson, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). *Contra*, Fuerste v. Bemis, — Iowa —, 156 N.W. 2d 831 (1968); Arbuthnot v. Allbright, 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (1970); Mager v. Mager, 197 N.W.2d 626 (N.D. 1972).

128. *See* note 124 *supra* and accompanying text. *See also* Weintraub, *Comments on* Reich v. Purcell, 15 U.C.L.A.L. REV. 556, 559-60 (1968) (decide *Griggs*-type case in favor of liability only if medical creditors at place of injury).

129. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

130. *Id.* at 128, 286 N.E.2d at 457, 335 N.Y.S.2d at 70.

131. 489 S.W.2d at 473.

132. Purcell v. Kapelski, 444 F.2d 380, 383 (3d Cir.), *cert. denied*, 404 U.S.

be made to cases in which the presence of insurance is used to bolster the interests of a jurisdiction or to weaken the insured's arguments of surprise and unfairness.[133] In these cases, the ubiquitous nature of insurance becomes a handle courts grasp to find liability and to avoid analyzing the states' interests in the underlying dispute. A contribution statute should not be used as a pretrial method of assuring that the statute will come into effect by using it to increase the interests of the contribution-statute state. Otherwise, the very presence of the statute will virtually assure the co-defendant who is a resident of the contribution state of the statute's applicability. The contribution statute should be used to spread liability among tortfeasors, not to create it.[134]

An additional problem with the *Griggs* approach to the contribution interest has been pointed out by Professor Weintraub in his discussion of the Kentucky conflicts experience. In *Arnett v. Thompson*[135] an Ohio driver's wife had, in addition to suing her husband, sued a Mr. Mullins, a Kentuckian and the driver of the other automobile involved in the crash. Weintraub initially submits that the Kentucky contribution statute[136] would give Kentucky an additional interest in deciding whether to apply Ohio immunity law or Kentucky no-immunity law,

940 (1971); Korth v. Mueller, 310 F. Supp. 878 (W.D. Wis. 1970); Clough v. Liberty Mut. Ins. Co., 282 F. Supp. 553 (E.D. Wis. 1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); *cf.* Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968) (interspousal immunity).

133. *See, e.g.*, Tooker v. Lopez, 24 N.Y.2d 569, 575, 249 N.E.2d 394, 397, 301 N.Y.S.2d 519, 524 (1969); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). *But cf.* Cavers, *The Value of Principled Preferences*, 49 TEXAS L. REV. 211, 220 (1971): "I cling to the notion that a liability insurer is liable only if and to the extent the insured is liable. A preference disregarding that contractual relationship does not seem to me to be choosing between competing laws: It is sticking the insurance company."

134. *Contra,* cases cited note 132 *supra*; CAVERS 214 n.11; Weintraub, *supra* note 76, at 426; Comment, *supra* note 110, at 590. A distinction may perhaps be made in this regard between guest-host cases and interspousal immunity cases, at least where the purpose of the guest statute, as in Illinois, is construed to reflect a policy of preventing the guest from showing ingratitude by suing his host, *see* note 39 *supra* and accompanying text, and the situation presented when the spouse has sued a third person who impleads the other spouse seeking contribution. If the reason for the immunity is to promote familial harmony or prevent collusive suits, that policy is probably not infringed by disregarding the immunity. *See* Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); *cf.* WEINTRAUB, COMMENTARY 229. In the *Griggs* situation the host is not protected at all and the guest statute policy is frustrated.

135. 433 S.W.2d 109 (Ky. 1968).

136. KY. REV. STAT. § 412.030 (1971).

but only if Mullins were found liable.[137] In fact, Mullins was exonerated by the jury, just as Martin was exonerated by the *Griggs* jury.[138] Weintraub then disputes the conclusion later reached by the Missouri court that the applicable law "must be determined prior to verdict"[139] by suggesting that Kentucky's (and Missouri's) interests depended on "whether the driver of the other car is liable to the guest-wife. Therefore, in such a case, the jury should either be given alternative instructions concerning the circumstances under which the host-husband can be found liable, or be instructed to render special verdicts on the various fact findings that will determine choice of law."[140] This approach seems eminently sensible. No overwhelming reason appears why the choice of law must invariably be made before the case is submitted to the jury. To be sure, the defendant-host may have to await the result of a full trial, since summary judgment would usually be inappropriate. As far as the host is concerned, however, if the jury finds his co-defendant not liable and the judge then rules that the immunity law applies, full trial is certainly preferable to the *Griggs* result that gives the forum state an interest not supportable by the facts eventually found by the jury. The present unavailability in Missouri state courts of special verdicts (except in limited situations) creates procedural problems in determining the exact findings of the jury.[141] Thus alternative instructions must be given. This general approach would eliminate the inconsistency of reasoning typified by *Purcell v. Kapelski*,[142] in which the Third Circuit noted that if the driver of the other car had "not already been adjudicated free from negligence,"[143] the state of his residence would have had an interest in protecting his right to contribution. As a matter of fact, the interest either exists or it does not, regardless of the sequence of the determinations.

C. *Other Possible Interests*

This discussion of *Griggs* has considered the facts only as of the

137. Weintraub, *supra* note 76, at 426.

138. 489 S.W.2d at 473-74.

139. *Id.* at 474.

140. Weintraub, *supra* note 76, at 426.

141. *See* Mo. Civ. R. 71.05. This procedure is available in federal court. F.R. Civ. P. 49(a). *See* Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968). This approach is not, however, an approval of submitting the place of principal conduct to the jury. *See* Marra v. Bushee, 447 F.2d 1282 (2d Cir. 1971).

142. 444 F.2d 380 (3d Cir.), *cert. denied*, 404 U.S. 940 (1971).

143. *Id.* at 383.

time of the accident. The opinion reveals two changes that occurred after the accident that could have some bearing on the analysis and outcome. First, the plaintiff subsequently moved to Missouri.[144] Secondly, Illinois subsequently amended its guest statute to limit its application only to hitchhikers.[145] By not considering these changes, the court impliedly rejected their relevance. Whether that approach was correct is not an easy question.

1. *Plaintiff's Change of Domicile*

Since the residence and domicile of the parties is often of great importance in analyzing the interests of the concerned jurisdictions in a conflicts case, a change in residence or domicile arguably changes those interests.[146] Courts, however, have split rather evenly on whether the change may be taken into account. For example, in *Reich v. Purcell*[147] the California Supreme Court held that California acquired no interest in applying its law, which did not limit liability for wrongful death,[148] on behalf of a plaintiff-beneficiary who moved to California after the fatal occurrence in Missouri that gave rise to the claim, even though the defendant was also a Californian. At the other extreme, the New York Court of Appeals in *Miller v. Miller*[149] held that a defendant who moved from Maine to New York after an accident in Maine in which his New York brother was killed thereby removed the reason for Maine's protection of him through its wrongful death limitation,[150] and that the protective interest was therefore not assertable by the defendant in urging the application of Maine law.[151]

Both cases have been subjected to vigorous criticism, *Reich* for not going far enough[152] and *Miller* for going too far.[153] Of course, the

144. 489 S.W.2d at 471 n.1.

145. *Id.* at 472 n.3.

146. In the Introductory Note to chapter 7, "Torts," of the *Restatement (Second)*, the position is apparently taken that a change in domicile after an accident "should have no effect upon the law governing most of the issues involving the accident," but no firm conclusion is stated.

147. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

148. CAL. CIV. PRO. CODE § 377 (Deering 1972).

149. 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

150. ME. REV. STAT. ANN. tit. 18, § 2552 (1964), *as amended*, (Supp. 1973).

151. 22 N.Y.2d at 18-19, 237 N.E.2d at 882, 290 N.Y.S.2d at 739.

152. WEINTRAUB, COMMENTARY 249; Gorman, *Comments on* Reich v. Purcell, 15 U.C.L.A.L. REV. 605, 611 (1968); 81 HARV. L. REV. 1342 (1968).

153. Comment, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843, 860-65 (1969).

result in *Reich* (full liability) does not support criticism of the California court's refusal to consider the plaintiff's move, since the law of both Ohio,[154] the plaintiff's former residence, and California, the defendant's residence, provided unlimited recovery for wrongful death. The criticism has been directed instead toward the court's position that changes of residence are never material in conflicts cases. *Miller,* on the other hand, has been criticized for taking too lightly the possibility that the defendant forum-shopped to subject himself to an insured liability to the plaintiff-sister-in-law. Of course, *Miller* may also be criticized for subjecting the defendant to a completely unanticipated liability.

Although commentators have suggested that no flat rule can be laid down on whether a post-event move may be taken into account,[155] it seems clear that only a rare case will present facts supporting a consideration of the move. The factual settings involving a post-event move may take a variety of patterns. One situation is a move by the plaintiff from a state with sufficient contacts to apply its own law to increase plaintiff's recovery over that of the place of wrong to a state that either has insufficient contacts to apply its own law or would apply the rule of lex loci delicti. In such a situation, the Second Circuit in *Gore v. Northeast Airlines, Inc.*[156] refused to consider the move and awarded the plaintiff recovery for the wrongful death of her husband under the law of New York, the place of her former residence. This result seems proper, since it could be unfair to reduce the widow's recovery by her quick move to more congenial surroundings.[157] In other situations involving moves between states each with sufficient nexus to the case to apply its own law prior to the move,[158] only four basic fact patterns will present any analytical problem: (1) plaintiff moves from plaintiff-protective to defendant-protective jurisdiction;[159] (2) plaintiff

154. OHIO CONST. art. I, § 19a.

155. *See generally* Leflar, *Torts Provisions* 275-76.

156. 373 F.2d 717 (2d Cir. 1967).

157. WEINTRAUB, COMMENTARY 250.

158. A move to a state that lacks sufficient nexus with the case prior to the move probably would not enable that state to apply its own local law as a matter of constitutional law, if that application would substantially affect the outcome of the litigation. *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936). *But cf.* Confederation Life Ins. Co. v. deLara, 409 U.S. 953 (1972), *denying cert. to* 257 So. 2d 42 (Fla. 1971) (Brennan, J., dissenting). *See generally* Comment, *Due Process in Choice-of-Law: The Role of Fundamental Fairness,* 9 CALIF. W.L. REV. 136 (1972).

159. Doiron v. Doiron, 109 N.H. 1, 241 A.2d 372 (1968); Kjeldsen v. Ballard, 52 Misc. 2d 952, 277 N.Y.S.2d 324 (Sup. Ct. Suffolk County 1967); Manning v. Hyland, 42 Misc. 2d 915, 249 N.Y.S.2d 381 (Sup. Ct. Queens County 1964).

moves from defendant-protective to plaintiff-protective jurisdiction;[160] (3) defendant moves from plaintiff-protective to defendant-protective jurisdiction;[161] and (4) defendant moves from defendant-protective to plaintiff-protective jurisdiction.[162] It seems unfair in the second and third situations to consider a move possibly motivated by desire for protection, and unfair in the first and fourth to increase or decrease damages as a result of a move that might otherwise be in the best interests of the moving party but that could result in surprise by the change the move makes in liability or in the amount of recoverable damages. By slight changes in the *Reich* facts, however, an appealing case for consideration of the post-event move can be made.[163] Suppose that the plaintiff is the beneficiary widow of a man who was killed in a Missouri crash with a car driven by a Californian while the plaintiff's family was moving from Ohio to California. California retains its unlimited recovery but Ohio and Missouri have limitations. These changes would eliminate any suggestion of forum shopping by the plaintiff and any surprise to the defendant (who is presumably fully insured in accordance with his possible full liability in California), and would increase the interest of California in seeing that proper recompense is made to the plaintiff so that the "undesirable social consequences" that may result after the accident will not fall on California.

The *Griggs* facts, unlike those of the hypothetical, do not support an analysis that meets the objections to consideration of post-event moves. First, as far as the opinion reveals, the move could have been made with the express motive of trying to increase the chances of recovery under Missouri law.[164] The suggestion by the Wisconsin Supreme Court in *Haines v. Mid-Century Insurance Co.*[165] that "it is doubtful that anyone would move from one state to another merely

160. Summers v. Interstate Tractor & Equip. Co., 466 F.2d 42 (9th Cir. 1972); Griggs v. Riley, 489 S.W.2d 469 (Mo. App. 1972); Haines v. Mid-Century Ins. Co., 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

161. Doiron v. Doiron, 109 N.H. 1, 241 A.2d 372 (1968).

162. Purcell v. Kapelski, 444 F.2d 380 (3d Cir.), *cert. denied*, 404 U.S. 940 (1971); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

163. The hypothetical is taken from WEINTRAUB, COMMENTARY 251-52.

164. Plaintiff's attorney assured me, however, that the move was motivated solely by the plaintiff's desire to be closer to his place of business. Interview with Mr. Ray Marglous, St. Louis, Mo., Mar. 6, 1974.

165. 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

to take advantage of the latter's allegedly more favorable policies,"[166] seriously overestimates the scruples of parties involved in substantial litigation. In the St. Louis area, for example, a move from East St. Louis, Illinois, to St. Louis, Missouri (just across the Mississippi River) could be accomplished at little expense and slight inconvenience. To suggest that once attorneys and litigants become fully versed in the intricacies of interest analysis, domicile shopping would not become a serious and constant problem is simply to ignore realities in a mobile, multi-state trade-center area.[167]

Secondly, the hypothetical assures that the defendant would not suffer the application of a law imposing a higher financial standard of liability than that of his domicile, thus reducing his argument of surprise or unfair treatment. Although the surprise argument is difficult to support if the insurer ultimately bears the loss, it will prove difficult to convince more than a minority of courts that it is not fundamentally unfair to allow the plaintiff to influence the result in his favor by a move to a sister state or to subject the defendant (or his insurer) to increased liability because of a move from a defendant-protective to a plaintiff-protective jurisdiction. The move by the plaintiff in *Griggs* seems to fall squarely within the objectionable nature of a consideration of the move. In fact, the New York Court of Appeals may indirectly have backed away from the zealous interest analysis of *Miller*, in which the court discounted this objection to consideration of the change, when, in *Neumeier*, the court wrote:

> The fact that insurance policies issued in this State on New York-based vehicles cover liability, regardless of the place of the accident . . . certainly does not call for the application of internal New York law in this case. The compulsory insurance requirement is designed to *cover* a car owner's liability, not *create* it; in other words, the applicable statute was not intended to impose liability where none would otherwise exist. This being so, we may not properly look to the New York insurance requirement to dictate a choice-of-law rule which would invariably impose liability.[168]

This analysis would apparently lead to a conclusion, contrary to that of *Miller*, that the defendant's liability will not be gauged by considera-

166. *Id.* at 450, 177 N.W.2d at 332.

167. *But see* CAVERS 66: "I see little evidence that forum-shoppers are exploiting the existing lack of uniformity and certainty."

168. 31 N.Y.2d at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68 (emphasis original).

tions of surprise to the insurance company. If so, it is difficult to argue that a change of domicile by the defendant should have the effect of increasing his liability by perhaps hundreds of thousands of dollars.

Thirdly, as a matter of logical application of interest analysis, Missouri's interests are undoubtedly increased by the plaintiff's move to Missouri. Plaintiff Griggs may, for example, become a public charge as a result of the injuries he suffered. It will be interesting to note whether the New York court with *Neumeier* has resurrected its statement in *Dym v. Gordon*[169] that it might be well to consider whether a defendant mulcted in damages could possibly suffer the same fate.

2. *The Change in Illinois Law*

After the accident that gave rise to the *Griggs* litigation, the Illinois guest statute was amended to prohibit recovery only by hitchhikers.[170] This post-event occurrence is equally as troublesome as the change in residence. Again, judicial consideration of this change would have increased the plaintiff's chances of success, since nothing in the facts suggests that Griggs was a hitchhiker. It could thus be argued that Illinois' interest in protecting the defendant-host is not strong since the legislature has made a recent change in the law. Courts that have been presented recently with post-event changes in law have all taken the changes into consideration. In *Miller* the New York court said:

> Any claim that Maine has a paternalistic interest in protecting its residents against liability for acts committed while they were in Maine, should they move to another jurisdiction, is highly speculative and ignores the fact that for the very same acts committed today Maine would now impose the same liability as New York.[171]

Likewise, the Ninth Circuit in *Summers v. Interstate Tractor & Equipment Co.*,[172] although it declined to consider the plaintiff's move from Oregon, which had a limitation on wrongful death at the time of the accident, concluded:

> [I]t is clear that at the date of the accident Oregon had no interest

169. 16 N.Y.2d 120, 124, 209 N.E.2d 792, 794, 262 N.Y.S.2d 463, 465 (1965).

170. Law of Sept. 8, 1971, § 1, [1971] Ill. Laws 2716, *amending* ILL. ANN. STAT. ch. 95½, § 10-201 (Smith-Hurd 1971).

171. 22 N.Y.2d at 21-22, 237 N.E.2d at 882, 290 N.Y.S.2d at 742.

172. 466 F.2d 42 (9th Cir. 1972).

> in the application of its law limiting damages. The amendment repealing that law had passed the legislature and had been signed by the governor prior to the accident. Thus, although the limitation was still technically in effect, the policies and interests supporting the limitation had been officially rejected and abandoned in favor of the amended legislation which permits full compensation to the accident victim.[173]

In a similar manner, the Wisconsin court in *Haines* used a change in law to support its conclusion that Wisconsin had the "better law" all along.[174]

It may be argued that consideration of a post-event change in law gives retroactive application to the new law in violation of the due process clause,[175] but the authorities support retroactive application of law in conflicts cases when the change does not concern "the parties' conduct at the time of the liability-creating occurrence."[176] Thus, the Iowa Supreme Court in *Berghammer v. Smith*[177] applied a post-event Minnesota rule on recovery for loss of consortium, in part because the defendant was an Illinoian and Illinois had imposed liability for such losses for several years. The defendant could not have been surprised or prejudiced by application of the liability-producing rule.

Again, it is difficult to devise a hard and fast rule on application of a new law to an occurrence that happened prior to the change.[178] Certainly, consideration of the change would encourage parties to delay the day of trial if a change were being considered by the legislature. But it is strange for any court to speak of a state's "strong inter-

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173. *Id.* at 49. In State *ex rel.* Broglin v. Nangle, No. 58452 (Mo., June 24, 1974), the court said that the removal of Missouri's wrongful death limitation "makes nonpersuasive the railroad's argument that Missouri has some compelling interest to restrict recovery in the instant matter."

174. Haines v. Mid-Century Ins. Co., 47 Wis. 2d 442, 451, 177 N.W.2d 328, 333 (1970).

175. U.S. CONST. amend. XIV, § 1.

176. Comment, *supra* note 153, at 856. *See also* McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12, 23 (1967):

> In determining such an application of the new law, the forum should inquire into the purpose of the new rules, whether that purpose will be undercut by exceptions for cases, such as that at hand, and the extent of the forum's interest at the later time in protecting the expectations and investments induced or reasonably developed earlier.

177. — Iowa —, 185 N.W.2d 226 (1971), *noted in* 21 DRAKE L. REV. 633 (1972).

178. Many of the cases that have considered the general problem prior to the advent of modern conflicts analysis are collected at Annot., 98 A.L.R.2d 1105 (1964); Annot., 120 A.L.R. 943 (1939).

est" when that interest is embodied in a law that has been repealed by the legislature or overturned by judicial decision. Be that as it may, a case like *Griggs* presents a situation in which the change probably should not be considered. If it is still proper to speak of surprise to the defendant, Riley may not have been prepared for the liability that would be placed upon him retroactively. Perhaps American lawyers are too ingrained with vested rights theories to react otherwise, but a majority will undoubtedly recoil from any doctrine that rests the post-event predictability of recovery or defense on the changing tides of political fortunes in a state legislature or on a small body of men sitting as a court.

V. CONCLUSION

The Missouri Court of Appeals reached the wrong result in *Griggs* basically because it over-emphasized the hypothetical interest that Missouri has in providing compensation to out-of-state residents and because it erroneously found an interest in providing contribution to a Missouri resident who was not found liable for any damages. In so doing, the court did, however, align itself with a disturbingly large number of courts that have reached the same result on similar facts.[179] The *Griggs* result displays simultaneously the strength and weakness of the *Restatement (Second)* approach to tort choice-of-law cases. The strength is displayed by the court's conscientious use of the appropriate general rules and contacts, which it then evaluated in light of generally agreed-upon principles of choice of law, rather than merely counting contacts, as was feared by some[180] and as has occasionally occurred.[181] The weakness revealed is the inherent overflexibility of the lex loci delicti general approach with its ever-present escape hatch: "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 . . . ."[182] Thus, even a case like *Babcock* must be decided under the exception rather than under a specifically applicable rule. No wonder then that the results in *Griggs*-type cases are irreconcilable. The results in many mirror image cases basically reflect nothing more

179. *See* cases cited note 127 *supra.*

180. *See, e.g.*, WEINTRAUB, COMMENTARY 210.

181. *See, e.g.*, Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970).

182. RESTATEMENT (SECOND) § 146. *See id.* §§ 147, 148(2), 149, 188; Leflar, *Torts Provisions* 273-74.

than a lex fori or "plaintiff wins" approach to choice of law that will have few defenders, with the result that other courts will be discouraged from venturing into modern analysis even in clearly appropriate cases.[183] The time has come for courts caught up in the intractable problem of the true conflict to recall Currie's early warning that a court's initial evaluation of its interests sometimes must be reconsidered in a more restrained manner to avoid the true conflict and the application of forum law.[184]

183. *See, e.g.*, Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969).

184. CURRIE 186: "[T]here is room for restraint and enlightenment in the determination of what state policy is and where state interests lie."