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Interspousal Immunity in the Conflict of Laws Automobile Accident Claims

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INTERSPOUSAL IMMUNITY IN THE CONFLICT OF LAWS: AUTOMOBILE ACCIDENT CLAIMS

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I

INTRODUCTION

The doctrine of interspousal immunity traditionally bars suits between husband and wife for damages based on negligence. The judicial reluctance to interfere with the marital relationship and family resources, however, is substantially unjustified in automobile accident claims, where liability insurance compensation is usually the object of the lawsuit. Most of the burden of automobile accident losses is today distributed among insurance policyholders. This burden is considered a necessary cost of operating an automobile, to be borne generally by those who drive, rather than solely by the individual at fault in a given instance. As the fault principle disappears, so should those doctrines that arose in response to it. In particular, interspousal immunity is a remedial doctrine by which the general responsibility for one's wrongful acts has been qualified by the principle that the courts will not interfere with the marital relationship. Where the burden of a judgment against the defendant spouse will be borne by an insurance company, however, there is no significant threat to the marital relationship.

In a modern conflict-of-laws setting, changes in the treatment accorded the interspousal immunity doctrine are especially likely.[1] As the choice-of-law process changes from selection among competing jurisdictions to selection among competing laws, courts must more closely analyze the policies and interests allegedly served by those laws.[2]

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1 For earlier treatments of the subject, see Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397 (1954); Hancock, *The Rise and Fall of* Buckeye v. Buckeye, *1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962). For recent treatment, see Jayme, *Interspousal Immunity, Revolution and Counterrevolution in American Tort Conflicts*, 40 S. CAL. L. REV. 307 (1967).

2 *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933), *reprinted in* COMM. ON SELECTED ARTICLES ON CONFLICT OF LAWS, ASS'N OF AM. LAW SCHOOLS, SELECTED READINGS ON THE CONFLICT OF LAWS 101 (1956); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966).

With certain exceptions, the appropriate result of such analysis is to treat the presence of the marital status by referring to the law of a concerned jurisdiction[3] that does not allow that status to preclude litigation arising from automobile accident injuries. Thus, in cases where reference to a more liberal law can properly be made, the inhibiting function of the immunity doctrine can, and should, be limited to purely local cases.

This solution is in part an extension of other views.[4] In his effort to develop broad choice-of-law principles in the field of torts, Professor Cavers has already provided an interesting interplay between territorial and domiciliary bases of reference.[5] These principles allow the choice-of-law process to assist the trend toward the compensation of accident victims. It is significant that Professor Cavers expresses dissatisfaction with his fifth principle where, for example, the marital relationship "is used as a basis to avoid the full application of the liability-creating law of the state of injury."[6] He shuns a too particularized basis for escaping interspousal immunity.

> If a base were sought for disregarding the immunity that did not depend for its justification on the particulars of the case, it should be found in the basis for the first principle I have proposed: a preference for the law of the state which has established general standards of conduct and of financial protection against the hazards of life in that state. . . .
>
> Whether an exception to that broad principle should be admitted with respect to inter-spousal claims poses a question that is hard to answer without taking into account the intrinsic merits of the competing rules.[7]

Under this analysis, the choice-of-law method ceases to be an honest broker in the style of the first *Restatement,* which simply prescribed rules of choice based upon accepted and unquestioned priorities of legislative jurisdiction.[8] Rather, the choice-of-law method becomes a catalyst, accelerating the reaction against unduly protective or inhibitive policies.

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3 "By concerned jurisdictions are meant all the legally relevant communities that have, in view of the elements in the multistate transaction relating it to various jurisdictions, a concern with the particular issue or issues that have arisen." A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES ON CONFLICT OF LAWS 76 (1965). In the foregoing passage the authors present a definition of "concerned jurisdiction," but do not assert a choice in the context of any particular problem. *See also id.* at 102-33.

4 *E.g.*, D. CAVERS, *supra* note 2, at 139-80, especially 177-80; Weintraub, *A Method for Solving Conflict Problems—Torts,* 48 CORNELL L.Q. 215 (1963).

5 D. CAVERS, *supra* note 2, at 139-80.

6 *Id.* at 177.

7 *Id.* at 179.

8 RESTATEMENT OF CONFLICT OF LAWS (1934).

Given the trend toward the distribution of loss, a resolution of the "intrinsic merits of the competing rules" leads one away from the choice of a law that provides interspousal immunity.[9] Professor Weintraub has formulated a general choice-of-law rule that expresses no reservation in favor of the domicile's interspousal immunity policy:

> An actor is liable for his conduct if he is liable under the law of any state whose interests would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise the actor.[10]

Two recent New York cases involving suits by guest passengers against the host drivers suggest a synthesis in favor of a law which distributes loss. In *Macey v. Rozbicki*,[11] a guest passenger was injured in Ontario, whose guest statute provided absolute immunity.[12] The plaintiff, driver, and owner were all residents of New York. The plaintiff was in Ontario for a week's visit at a summer home maintained there by the other parties. The automobile involved was garaged and insured in New York. The court, following the method of *Babcock v. Jackson*,[13] rejected the application of Ontario's guest statute and held that the New York standard of ordinary negligence should apply. In a concurring opinion, Judge Keating observed that no interest of Ontario "has any relation whatever to the New York policy of affording recovery to injured residents of this State . . . ."[14]

Kell v. Henderson[15] presented the converse of *Babcock*. An Ontario passenger in an automobile driven by another Ontarian was seriously injured in an accident in New York. The trial court denied defendant's

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9 *See* Weintraub, *supra* note 4, at 238. "Thus a choice-of-law rule keyed to such a trend will be focusing on a broad common policy as a basis for reconciling a conflict of two narrow rules of law." *Id.*

10 *Id.* at 249.

11 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

12 ONTARIO REV. STAT. c. 172, § 105(2) (1960), *as amended*, Highway Traffic Amendment Act c. 64, § 20(2) (1966).

13 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The court stated that the *Babcock* rule, applied to a conflicts situation, gives controlling effect "to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in litigation." 18 N.Y.2d at 291, 221 N.E.2d at 381, 274 N.Y.S.2d at 592, *quoting* Babcock v. Jackson, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963). In *Rozbicki*, the court held that since the parties were New Yorkers, the car licensed and insured in New York, and the trip a temporary excursion into Canada, all the important "contacts" were with New York, and therefore that state's law should apply. 18 N.Y.2d at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 592.

14 18 N.Y.2d at 294, 221 N.E.2d at 383, 274 N.Y.S.2d at 595.

15 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), *aff'd mem.*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966).

motion to plead the Ontario guest statute as an affirmative defense; this ruling was affirmed on appeal to the appellate division.[16] Since the decision was reached after *Babcock*, it cannot be justified as a mechanical application of the lex loci rule. The law of New York controls not because New York is the place of injury but because its law asserts a policy of compensation for persons injured on New York roads. If the decision stands, a synthesis of *Kell* and *Macey* would produce at least a qualified principle favoring the law of whichever concerned jurisdiction does not provide immunity. In his discussion of the case, Professor Rosenberg has suggested an alternative reference rule: "My proposed rule would provide that the domicile of the automobile host determines the liability he owes to a guest, unless the place of injury provides a higher standard."[17]

A principle of alternative reference can be viewed as a masked preference for finding a law that will favor the plaintiff. A two-fold answer can be made. First, state laws have been shifting toward allowing a distribution of those losses that are an inevitable aspect of life in a modern industrial society.[18] Second, there is a tendency in the conflict of laws to select an appropriate law that protects "socially favored legal arrangements"[19] without damaging other properly protected interests. It is evident that the compensation of traffic victims is a socially favored arrangement. Charitable immunity has fallen into disfavor, and guest statutes have been narrowly construed in order to favor compensation of victims.[20] Interspousal immunity has long been under fire; supported by the unanimous voice of legal scholarship,[21] a trend away from this rela-

16 In approving the result, Professor Trautman draws upon a series of Canadian decisions limiting the Ontario guest statute and upon the recent amendment of the statute to admit recovery when gross negligence can be shown. The amendment was not applicable to the facts of the case. Trautman, *A Comment*, 67 COLUM. L. REV. 465 (1967); *see* ONTARIO REV. STAT. c. 172, § 105(2) (1960), *as amended*, Highway Traffic Amendment Act c. 64, § 20(2) (1966) (proclaimed in force Jan. 1, 1967).

17 Rosenberg, *An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967).

18 *See, e.g.*, Keeton & O'Connell, *Basic Protection—A Proposal for Improving Automobile Claims Systems*, 78 HARV. L. REV. 329, 344-45 (1964); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 475, 484-85, 493 (1962).

19 Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 284, 295-304 (1966). As regards the "revolution" in the choice-of-law process in the field of torts, Professor Ehrenzweig has observed that "the alleged revolution . . . is due primarily to the malaise which pervades our domestic law, rather than to our dissatisfaction with the conflicts law in this area." Ehrenzweig, *supra* note 2, at 378. *See also id.* at 383-84.

20 *See* W. PROSSER, TORTS § 127, at 1023-24 (3d ed. 1964) (retreat of charitable immunity doctrine).

21 *See id.* § 115, at 879-85, and authorities cited therein, especially McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959), and McCurdy, *Torts Between*

tional disability has slowly developed.[22] If scholarly opinion is at all cogent, the trend must be viewed as enlightened.[23] At least in the case of automobile accidents for which insurance coverage is available, interspousal immunity serves no useful societal function. It seems quite reasonable that the choice-of-law process should serve to harmonize the trend away from interspousal immunity.[24]

II

INTERSPOUSAL IMMUNITY

A. *The Doctrine in Traditional Form*

1. *The Fiction of Unity of Husband and Wife*

The conceptual origin of interspousal immunity is the presently unworkable fiction that husband and wife are one person in the contemplation of the law.[25] The consequence of this fiction can be looked upon as substantive: a wife was deemed to have no cause of action against her husband because he assumed title to all her choses in action. The fiction also had a procedural impact: the law required the husband to be joined in any suit involving the wife, and the anomaly of the husband being both a plaintiff and a defendant in an interspousal suit was rejected.

Persons in Domestic Relations, 43 HARV. L. REV. 1030 (1930). *See also* Sullivan, *Intra-Family Immunities and the Law of Torts in Ohio*, 18 W. RES. L. REV. 447 (1967); Comment, *Interspousal Immunity—Time for a Reappraisal*, 27 OHIO ST. L.J. 550 (1966); Note, *Interspousal Immunity—A Policy-Oriented Approach*, 21 RUTGERS L. REV. 491 (1967); Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423 (1966).

22 Professor Prosser lists 19 jurisdictions as part of this trend. *See* W. PROSSER, *supra* note 20, at 884-85.

23 See Hancock, *supra* note 1, at 240-43, 261-62, for a brief discussion of cases starting the trend.

24 The societal function of each area of law in which a conflict arises, as well as the locally conceived functions of the specific rules between which conflict exists, ought to be tied into the choice-of-law process.

Lefiar, *supra* note 19, at 282.

25 By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . .

1 BLACKSTONE, COMMENTARIES 442 (2d ed. 1766); *see* 2 *id.* at 433.

The immunity of one spouse from suit by the other and the corresponding disability of the latter to sue the former illustrates in our law:

> [A] tendency to affix duties and liabilities independently of the will of those bound, to look to relations rather than to legal transactions as the basis of legal consequences, and to impose both liabilities and disabilities upon those standing in certain relations as members of a class rather than upon individuals.

R. POUND, THE SPIRIT OF THE COMMON LAW 14 (1921).

> [N]either spouse could maintain an action against the other for either a personal or a property tort, whether it was committed before or during marriage, and the action was not maintainable even after divorce . . . .[26]

Although the common-law fiction of unity of husband and wife has been discarded, the doctrine of interspousal immunity for personal torts remains the majority view.[27]

2. *Present Justifications—Pro and Con*

Many judicial opinions have asserted that suits between spouses are disruptive of the family harmony that law and society ought to foster. Compensation through insurance, however, probably causes less division than leaving the injury uncompensated. Further, maintaining immunity from suit for personal injury inflicted negligently is inconsistent with allowing suits for intentional torts or for injury to the wife's property. Of course, in the case of intentional torts there is little family harmony left to protect. Property disputes, however, are at least as productive of discord as nominal disputes in which compensation from insurance works to the advantage of both spouses.[28] To view otherwise the typical automobile accident claim (for insurance compensation) is to take a false view of the need to preserve the family exchequer. The law should not be blind to the husband's contractual provision for the victims of his negligent operation of an automobile. To exempt from the protection of this arrangement the person most dependent on the insured is to view the resources available for redress in a static rather than a dynamic way.[29]

The family has been looked upon as a quasi-governmental system of order within society. It is left free to administer many rules of conduct in a manner consistent with the peculiar demands of its own nature and organization. Yet, intrafamily relations are not exempt from

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26 W. PROSSER, *supra* note 20, at 880.

> Thus in many situations it is impossible to decide whether at common law the determinative factor is one of substance or of procedure. Often one incident of marriage is explained by referring to another, whereas they are both based on some common reason.

McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1034 (1930).

27 The Majority Rule is that one spouse cannot sue the other for personal injury where (1) the tort occurred during marriage (2) they are both . . . married to each other and (3) the injury was due to negligence and was not intentional.

Hume, *Intra-Familial Immunity to Suit*, 17 FEDERATION OF INS. COUNSEL J., Fall 1966, at 45. For a convenient collection of cases representing variations of the majority and minority views, see *id.* at 50-57.

28 *See* McCurdy, *supra* note 26, at 1052-53.

29 *Cf.* H. HART, JR. & A. SACKS, THE LEGAL PROCESSES: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 111-16 (tent. ed. 1958).

society's control. The legal system polices many family activities today, and modern social and economic realities and ideals are not consistent with the theory that the wife's inability to recover is justified by the need to maintain the authority of the paterfamilias.[30]

Some may claim that other existing remedies justify the preservation of interspousal immunity; but these are particularly irrelevant to automobile accident cases. Divorce and separation, for example, may be adequate remedies when tortious or criminal conduct justifies judicial involvement with the domestic unit, but inflicting injury by negligent operation of a motor vehicle is not yet a ground for either. Although most traffic accidents involve some violation of traffic rules and may thereby occasion criminal sanctions, the offended spouse's interest in financial compensation for injury is not vindicated by the husband's paying a fine or serving a term in the workhouse.

The courts preserve interspousal immunity also because they do not wish to be converted into supra-family councils. They feel that they should be protected from disputes that offend their decorum and allow spouses to shed the responsibility of good faith conciliation that is an incident of their status. But automobile accident claims, especially when compensation is sought from insurance coverage, should not be treated as legally irrelevant family squabbles. The recognition of such claims would serve to stabilize family finances and perhaps even to restore family harmony. In states that permit such claims, there is apparently no greater disruption of family harmony, and no greater flood of litigation, than in other states.[31]

The courts are also reluctant to make any change that may seem to require a competence residing more appropriately in the legislature.[32]

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30 Historically it is most likely that the explanation of no cause of action for personal injuries is to be found [in the doctrine that the head of the family is clothed with broad authority and enjoys a sort of "sovereign immunity"] . . . , both in the husband and wife and in the parent and child cases. It is, however, an obsolete conception.

McCurdy, *supra* note 26, at 1076.

31 *Id.* at 1053.

32 "[T]his long-established immunity is based upon significant considerations of public policy, questions concerning which are peculiarly suited to legislative resolution." Hovanetz v. Anderson, 148 N.W.2d 564, 565 (Minn. 1967). *Hovanetz* involved a plaintiff who was injured when an automobile operated by defendant in which she was a passenger struck a parked vehicle. Plaintiff and defendant were married after the action was commenced. The court likened its task, quite erroneously, to a judicial abrogation of governmental immunity. In deferring to legislative inactivity the court, however, conceded:

> We recognize that for the past 50 years this common-law doctrine of marital immunity has been under attack and that many of the reasons advanced for continued judicial adherence are out of tune with the realities of life about us, especially as to torts arising out of the operation of motor vehicles. . . . The growing number

But most states have passed married women's acts which do not make clear whether one spouse may assert a claim against the other for negligently inflicted personal injuries.[33] Since these statutes apparently leave the matter for judicial interpretation, the claimed deference to legislative judgment becomes a refusal to perform the delegated task of interpretation.[34] The inconsistent interpretations given the same or similar statutory language by the various state courts show that the judiciary often is the branch unconvinced of the propriety of interspousal litigation.[35] Yet, a moribund doctrine of judicial origin should not be allowed to stand merely because a legislature has imperfectly or inarticulately abrogated it.[36] Apart from the few jurisdictions that have expressly authorized such suits[37] or those that have expressly proscribed them,[38] most have statutes that allow more flexibility of interpretation than the courts have exercised.

Yet, interspousal immunity does protect the adversary process from the possibility of having merely nominal opponents. The closeness of the parties and their freedom from outside observation enhances the opportunity for collusive misrepresentation of the facts. If fear of collusion is the primary reason for continuing interspousal immunity, however, the courts have raised a presumption of collusion that is manifestly unfair. If collusion exists in a particular case, it should be demonstrated to the forum. Even where the potential for collusion is greater because of

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of decisions in jurisdictions permitting direct suits by the spouse are based either upon express statutory authority or, in large part, upon a liberal construction of their married women's acts.

148 N.W.2d at 565-66.

33 McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 310-22 (1959). *See, e.g.*, MINN. STAT. ANN. § 519.01 (1945):

> Women shall retain the same legal existence and legal personality after marriage as before and every married woman shall receive the same protection of all her rights as a woman which her husband does as a man, including the right to appeal to the courts in her own name alone for protection or redress . . . .

34 *E.g.*, Hovanetz v. Anderson, 148 N.W.2d 564 (Minn. 1967).

35 *See* McCurdy, *supra* note 26, at 1050-54.

36 Courts have been slow to reverse prior constructions in order to abrogate the doctrine. *See, e.g.*, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965).

37 *E.g.*, N.Y. GEN. OBLIGATIONS LAW § 3-313 (McKinney 1964). WIS. STAT. ANN. §§ 246.07, 246.075 (1957) has similar provisions. *But see* N.Y. INS. LAW § 167(3) (McKinney 1963), which changes the liability insurance laws to provide that no policy "shall be deemed to insure against any liability of an insured because of death or injuries to his or her spouse . . . unless express provision . . . is included in the policy."

38 *E.g.*, ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd 1959), establishing interspousal immunity shortly after it was judicially abrogated in Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952).

the nature of a suit, the cure should not be to bar the suit, but to develop procedural safeguards that will enable the forum to view the matter properly on its merits.[39]

This article will not discuss in any detail the developing enterprise-risk theory, which is replacing fault as a basis for allocating losses.[40] As enterprise risk becomes the dominant factor, however, judicial fear of collusion between spouses should diminish; for without the issue of fault, there will be less temptation for collusion on the primary issue of liability.

B. *An Analysis of Interspousal Immunity*

The law of torts is concerned with related but distinguishable aspects of the automobile accident: the conduct of the one sought to be held liable, and the compensation which is sought for the resulting injury. Interspousal immunity is concerned with whether the injury is compensable. The marriage relation has nothing to do with whether the defendant spouse has been negligent or whether his negligence has caused an injury. In other words, interspousal immunity is not relevant to an inquiry concerning primary rights and duties. The issue is not whether a standard of conduct has been violated, but whether a remedy may be pursued in the courts.[41] By the application of interspousal immunity, the injured wife is excluded from the class of persons who have recourse against the husband for injuries caused by his tortious operation of an automobile.[42]

Insurance companies, of course, have an immediate interest in

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39 *See* Lassiter, *Direct Actions Against the Insurer*, 1949 INS. L.J. 411; Leigh, *Direct Actions Against Liability Insurers*, 1949 INS. L.J. 633. *See also* Ford, *supra* note 1, at 400; Streit, *The Carrying of Liability Insurance as Creating Tort Liability*, 1952 INS. L.J. 602. It has been suggested, for example, that the insurance company, in cases where it is represented, should be permitted to treat the defendant husband as a hostile witness. "The few states that have permitted this procedure have apparently found the law of evidence adequate to deal with the problem of collusion in a manner that gives maximum protection to all concerned." Ford, *supra* note 1, at 423.

40 *See* Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965). For a suggested reordering of the treatment of automobile accident injury claims, see R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

41 It is otherwise where one person is required to exercise, by reason of his office or profession, a greater degree of skill than that to which ordinary persons are held. Even so, it may be argued that most of tort law is concerned with a preliminary inquiry whether a standard of conduct has been violated, and then with whether it is in the public interest to compensate particular groups of individuals within the general class of injured persons. To this extent, the criminal law is primarily admonitory and tort law is only indirectly so. *See* H. HART & A. SACKS, *supra* note 29, at 136-38, 141-47, 153-55.

42 Although the converse is also generally true, most cases involve suits by the wife.

knowing the class of claimants who may be compensated in accordance with general or specific liability insurance provisions. As tort law moves away from fault liability and towards loss distribution, insurance companies are sure to be affected. But to the extent that they are engaged in a private enterprise based on consensual arrangements, they are able in large measure to plan accordingly. To be sure, the legal consequences of primary activity may shift from time to time in keeping with the observed trend; but with the exception of an unreasonable surprise or an especially radical innovation, insurance companies can claim no legally protected interest to be insulated from shifts in the treatment of accident losses. Since the terms of insurance policies are largely dictated by the insurer,[43] existing liabilities can be expressed as within or without the terms of insurance contracts. A shift away from interspousal immunity would not raise the issue of what conduct creates liability.[44] Even so, legislation in some states has protected the insurer by providing that it can be liable on interspousal claims only if the contract expressly covers such claims.[45] Accordingly, the insurer can protect itself from the peculiar disadvantages occasioned by interspousal litigation. The insurance company may be despoiled by baseless claims, but it usually has the right to defend on behalf of the insured against the action by the spouse. In the long run, interspousal automobile accidents probably will not have any significant impact upon the actuarial practices of insurance companies.[46]

Cases involving suits by the wife against persons connected with the husband generally support the foregoing analysis.[47] In *Schubert v. Schubert Wagon Co.*,[48] the court sustained a suit by a wife against her

43 Sometimes, however, the insurance company cannot dictate the manner in which the funds may be sought. Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954). In *Watson* a Louisiana statute which allowed persons injured in Louisiana to proceed directly against the insurance company of the tortfeasor was held constitutional, even when applied to a policy made in another state which recognized the binding effect of provisions in insurance contracts denying such direct actions. The Court held that Louisiana could thus protect the interests of persons injured there.

44 *Cf.* Weintraub, *supra* note 4, at 234-40. *See also* H. HART & A. SACKS, *supra* note 29, at 485.

45 *See* Maryland Cas. Co. v. Jacek, 156 F. Supp. 43 (D.N.J. 1957); statutes cited note 37 *supra; cf.* Bradford v. Utica Mut. Ins. Co., 39 N.Y.S.2d 810 (Sup. Ct. 1943).

46 *Cf.* Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960) (no change in insurance premiums after a change from contributory to comparative negligence rule). *See also* Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Ehrenzweig, *Guest Statutes in the Confilict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595, 794, 978 (1960).

47 *Cf.* F. HARPER & F. JAMES, TORTS § 8.10, at 646-47 (1956).

48 249 N.Y. 253, 164 N.E. 42 (1928).

husband's employer after she had been injured by her husband's negligence. The court rejected the argument that, since a suit by the wife against the husband would have failed, the employer should not be held liable. Chief Judge Cardozo observed:

> We find no collision between the principle of liability established in this case and the principle of exemption established in actions against a husband. If such a collision, however, could be found with the result that one or other principle must yield . . . the exemption would have to give way as an exception, more or less anomalous, to a responsibility which today must be accepted as the general rule . . . . By authority and tradition, an exception has been engrafted upon this rule where the husband is defendant. We are not at liberty to extend it by dubious construction.[49]

Whether based upon a social policy of enterprise risk or an analysis of derivative liability, the result is sound. The employer is a stranger to the husband-wife relationship; suit against him should not be barred by an immunity that protects other interests.

Baker v. Gaffney[50] illustrates the confusion that results from failure to treat interspousal immunity as a doctrine of remedial rights and duties. The wife sued her husband and the owner of the auto he negligently operated. The spouses were domiciled in the District of Columbia, which bars suits between spouses for negligently inflicted personal injuries. The accident occurred in New York, which allows such suits.[51] Both jurisdictions have financial responsibility acts, which make the owner of an automobile responsible for injury caused by a borrower's negligent driving.[52] The suit against the husband was dismissed by the District of Columbia court because the parties had been married after the accident.[53] The court determined that the owner, "who as a Good Samaritan" had loaned his car to the husband, should not be held liable to the latter's wife. It asserted that, since there was no *judicial ma-*

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49 *Id.* at 258, 164 N.E. at 43. The argument may be made that, since the employer has, at any rate, a right over against the husband, the wife in reality recovers from the husband. F. HARPER & F. JAMES, *supra* note 47, § 8.10, at 646-47. This argument, however, ignores the economic reality that the employer would probably gain little from such a suit and that the real stake-holder is the insurance company. The French method is to allow recovery against the employer under C. CIV. art. 1384 without proof of fault while restricting recovery against the employer to art. 1382, where fault must be established. *See* cases collected in A. VON MEHREN, THE CIVIL LAW SYSTEM 404-10 (1957).

50 141 F. Supp. 602 (D.D.C. 1956).

51 *See* note 37 *supra.*

52 D.C. CODE ANN. §§ 40-417 to 40-498 (1961); N.Y. VEH. & TRAF. LAW §§ 330-68 (McKinney 1960).

53 In the District of Columbia interspousal immunity was a bar even to suits based on antenuptial torts. Spector v. Weisman, 40 F.2d 792 (D.C. Cir. 1930).

chinery to entertain a suit by the wife against the husband, the financial responsibility act should not be enlarged by questionable interpretation to allow the wife to sue the owner.[54] Further, the lex loci could not be used, because of this "mechanical" lack.[55] The result may be accepted as an expression of remedial policy, but basing the decision on procedural inadequacy is functionally inappropriate. The difficulty of handling potentially collusive litigation raises procedural problems, but the rationale of this case in terms of procedure really derives from implementation of the remedial policies of the law.[56]

III

INTERSPOUSAL IMMUNITY IN THE CONFLICT OF LAWS

A. *Concerns, Policies, and Interests*

To secure the safety of persons and property, all states have established a general responsibility to compensate those injured by another's negligent conduct. This remedial obligation operates directly to allow compensation to an injured person, and indirectly to deter negligent conduct. As in many other particulars, however, the states do not agree whether this general responsibility may be enforced against one's spouse. In a conflicts setting the issue of remedy may involve the interests of three states; an accommodation must be sought among the poli-

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[54] 141 F. Supp. at 604. The point was novel in the District of Columbia but since the District inherited Maryland common law, the court followed the case of Riegger v. Bruton Brewing Co., 178 Md. 518, 16 A.2d 99 (1940). There a wife sought recovery against her husband's employer. The suit was barred on the grounds that the doctrine of respondeat superior was inapplicable where the one primarily negligent was free of liability.

[55] Had there been a sufficient "judicial machinery," lex loci would have been applicable. *See* Woollen v. Lorenz, 98 F.2d 261 (D.C. Cir. 1938).

[56] In Roscoe v. Roscoe, 379 F.2d 94 (D.C. Cir. 1967), the United States Court of Appeals for the District of Columbia refused to apply the District's interspousal immunity rule, applying instead the law of North Carolina, the place of the accident. The husband died after suit was instituted and the court determined that, therefore, the basis of the doctrine disappeared and the wife should be permitted to maintain the suit against the husband's estate.

> No longer was there in existence a predicate for the assertion of a policy which would bar the continued maintenance of an action designed to vindicate the right which had . . . accrued to the wife. Balancing the respective interests in such circumstances with the permissible flexibility open to us . . . we may apply the law of North Carolina.

Id. at 99. Thus, the court assimilated the position of the wife to that of persons generally benefited by the policy of its own survival statute, D.C. CODE ANN. § 12-101 (Supp. V, 1966), shared by that of North Carolina, N.C. GEN. STAT. § 28-175 (1966). The court relied on the flexible approach of Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965). For recent approval of this approach, see Myers v. Gaither, 232 A.2d 577 (D.C. Ct. App. 1967).

cies and interests of the place where the accident happened, the place of domicile of the spouses, and the place where the remedial claim is put forth, *i.e.*, the forum.

The state where the accident occurred has an interest in regulating the conduct of persons within its borders. Further, the expenses of treatment given the injured person often are incurred where the accident took place; the credit arrangements made to cover these expenses give rise to a state's interest in protecting creditors by assuring that the victim is compensated.

The state of domicile is the one most concerned with the well-being of the spouses and protection of the marital relationships, and it is upon this that it bases its claim to primary interest in the outcome of the conflicts situation.[57] Often the credit arrangements arising from treatment are made in the domicile;[58] and, in any event, many economic consequences, such as inability to work, are most evident there.

The forum state has an interest in maintaining the dignity of its courts by not allowing collusive claims. As discussed above, however, it is unfair to presume an undemonstrated collusion between spouses. Thus, the propriety of a forum state asserting its own remedial policies raises delicate considerations.[59]

Moreover, there may be a multistate interest in having the accommodation among interested states made in a manner consistent with the concerns of a federal system. As the trend toward the distribution of losses continues, doctrines that concentrate losses are being limited. It seems an appropriate function of the choice-of-law process to accelerate the trend by localization of the interspousal immunity doctrine.

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57 Although "domicile," in its technical sense, will probably continue to be used as a choice-of-law reference for interspousal immunity matters, "home" or "settled residence" has been suggested as a more rational index. *See* D. CAVERS, *supra* note 2, at 140, 155, 182.

58 Our territorial allocation of jurisdiction necessarily requires that the interests and policies invoked be those of the states concerned. An accounting of the economic interests of the creditors involved might be made without reference to state lines. For example, a person injured near a state line might be taken from the place of injury to a hospital in a bordering state that is not the domicile. Creditors affected by this transaction may reside or do business in both, or all three, states. However, the administrative difficulty of reckoning the apportionment of creditor interests in such a case and the facility of doing substantial justice to creditors by the sharing among the states of a general policy of protecting creditor interests make such complications undesirable and unnecessary in the long run. In any event, concern for creditor interests is ancillary to the disposition of the controversy between the parties to the transaction, and the well-being of creditors is necessarily incidental to the immediate problem. It is obvious, however, that, whereas nonimmunity works to the benefit of inevitable creditor claims, an immunity policy may work to their detriment.

59 *See* Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

1. *False Conflicts Exposed*

If the domicile state is the forum and it allows suit between spouses, its policy should control over an immunity policy of the place of the wrong. The latter's interest in immunity is at best slight, since the parties are foreign spouses. This situation represents a false conflict,[60] and only the domicile's policy allowing suit is appropriately invoked. Also, allowing the suit gives incidental benefit to creditors at the place of injury.

When the forum is also the place of injury the disposition of interests is much the same: this situation presents a false conflict. Although it may be argued that the combination of the interests of the locus and the forum *qua* forum does not make it unreasonable to apply the immunity doctrine, the interests supporting such policies are outweighed by those of the state of domicile. The judicial facilities may be claimed incapable of handling the peculiar problems of interspousal litigation, but most likely this would merely be a mask for assertion of the immunity policy.[61]

A disinterested state before whose courts the parties appear has no connection with the parties or the transaction to support the application of its own dispositive rules. It can, however, select appropriate rules from the laws of the concerned jurisdictions, according to its choice-of-law method. The disinterested forum has the advantage of selecting an appropriate dispositive rule without being constricted by the doctrines of its local decisional law. On the other hand, it has the disadvantage of not being able to modify the rule of the jurisdiction to which its choice-of-law method may refer. It may also be disinclined to modify its choice-of-law method in a matter not involving its own dispositive rules. Nevertheless, the interests of the domicile still outweigh those of the locus, and the defense of immunity should be rejected. If the forum also has a policy of nonimmunity there is no difficulty presented by its advancing the policy of the domicile; certainly it should have no institutional inhibitions. If the forum has a policy of immunity there may be some difficulty, though the conflict is still false. The difficulty is dispelled if the forum's choice-of-law solution points to the law of the domicile. But when its conflicts rule points to the law of the place of injury, its lack of concern with the case may militate against abandoning its choice-of-law rule, even for the sake of enlightenment. A change, however, is preferable to assertion of the irrelevant policy of the place of

60 Hancock, *supra* note 1. *See generally* Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

61 *See, e.g.*, Baker v. Gaffney, 141 F. Supp. 602 (D.D.C. 1956), discussed at p. 416 *supra*.

injury. Where consistent with justice, the case ought otherwise to be dismissed on the ground of *forum non conveniens*.[62]

2. *The True Conflict Resolved*

Where a state prohibits suits between its domiciled spouses, and the state in which injury occurs has a policy of nonimmunity, a true conflict emerges. The general applicability of the remedial policy of the locus is challenged by the special exemption policy of the domicile. Where the forum is also the domicile and the matter is viewed as a problem of accommodating the competing interests of the domicile and the place of injury, a resolution in favor of the law of the domicile seems sensible, especially where the choice-of-law rule of the place of injury would point to the law of the domicile.[63] If, however, the choice-of-law rule of the place of injury would point to the lex loci, the forum faces an assertion of that other state's policy in cases involving spouses of the forum state. This total law reference should not be adopted as a mere mechanism to escape the domicile's immunity. Attention to the manner in which the place of injury treats out-of-state spouses, however, may lead the forum to consider whether its interest requires the assertion of the immunity policy in the case of a claim based on an out-of-state injury. If a "restrained and moderate" interpretation of the forum's law is appropriate for the purpose of mitigating or avoiding potential conflicts,[64] a similar interpretation is appropriate here to favor an accommodation that reflects the trend toward the distribution of risk and loss.[65] While the forum's interest in its

62 For a consideration of whether a state is obligated constitutionally to provide a forum for cases of this type, see Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1958), *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 283 (1963) [hereinafter cited as SELECTED ESSAYS]. *See also* Currie, *supra* note 59, at 767.

63 *See, e.g.*, Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). In *Haumschild*, the situation was reversed; the formal domicile state (Wisconsin) had a nonimmunity doctrine and the state where the accident occurred (California) recognized interspousal immunity. The reach of California law was tangentially considered, because if California had been the forum state its choice-of-law rule would have pointed to the law of the domicile. Although it was rejected as the basis of decision, attention to the possibilities of *renvoi* may be conducive to a functional analysis. *See* von Mehren, *The Renvoi and its Relation to Various Approaches to the Choice-of-Law Problem*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 380 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961).

64 *See* Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). *See* Currie, in *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242 (1963); Currie, *supra* note 59, at 768; *cf.* Cavers, *Oral Contracts to Provide by Will and the Choice-of-Law Process*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 38, 48-53 (R. Pound, E. Griswold, & A. Sutherland eds. 1964).

65 *See* Weintraub, *supra* note 4, at 215, 238-39.

own domiciliaries is dominant, it is not necessarily exclusive. To avoid asserting an archaic common law immunity, the domicile forum might retain the doctrine only in wholly domestic cases. In conflicts cases that involve the interests of a nonimmunity policy of the place of injury, the domicile forum could adopt a choice-of-law principle that points to the law of whichever concerned state's policy of compensation can reasonably be furthered. Thus, in Professor Cavers's terms it could adopt a principle that expresses "a preference for the law of the state which has established general standards of conduct and of financial protection against the hazards of life in that state."[66] As the choice-of-law process increasingly focuses on the bases of conflicting policies, the resolutions of conflicts problems will more likely reflect a reasoned preference for the sounder policy.[67]

A possible exception to the principle of alternative reference occurs where the immunity policy of the domicile is expressly provided by statute. As the primary instrument of that policy, the domiciliary forum may find its application unavoidable. Even so, there are mitigating factors. Typically, such statutes make no provisions for choice of law. Although they are clearly intended to apply to domiciliaries of the state, they express no more policy grounds than have been urged to support immunity as a common law doctrine. As such they are merely declaratory of the common law. Nevertheless, when the legislature has clearly spoken, judicial deference probably requires a court to apply the immunity to its domiciliaries, even when the injury occurred in another state.[68]

When the forum is at the place of injury, the principle of alternative reference is more easily asserted. The forum presumably can handle the peculiar problems of interspousal suits, and it may act as the judicial agent of its own policy. Courts that have reached this result, however, have done so on the basis of the lex loci rule as a mechanical formula, or

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66 D. CAVERS, *supra* note 2, at 179. Professor Cavers warns, however, that "the financial hazard of the state of injury may seem too erratic or too narrow a basis for applying its law." *Id.* at 178-79. Nevertheless, "the difference in the loss experience in the domiciliary state owing to the adoption of one rule as against the other would almost certainly never show up in that state's liability insurance rates." *Id.* at 179-80. *See also* Peck, *supra* note 46, at 727-28.

67 *See* Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847 (1967). *See also* Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).

68 For the suggestion that courts in cases of this type may not avoid the application of local statutes, see Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963). "The court must follow the dictates of its own legislature, provided these dictates are constitutional." *Id.* at 682 (emphasis omitted).

have emphasized the merely procedural aspect of capacity to sue or be sued, which is a result of, rather than a basis for, a policy of interspousal immunity. Some have even ignored the conflicts issue involved.

In *Alberts v. Alberts*,[69] a Massachusetts couple were involved in an automobile accident in North Carolina. Massachusetts has an immunity policy, whereas North Carolina, where suit was brought, does not. Observing that its Married Women's Act contains no express provision of limitation to resident spouses, the court concluded that "although plaintiff is a nonresident and the action transitory, the doors of the courts of this state are open to her to determine her rights."[70] Nevertheless, mechanical adherence to the lex loci rule compelled the result in the case, for the procedural classification alone is inadequate.[71]

When the choice-of-law rule of the domicile points to the lex loci, it is then reasonable to conclude that the domicile has adopted a restrictive application of its immunity policy. In such a case the forum should apply the nonimmunity policy; to change its own choice-of-law rule in the face of the domicile's unwillingness to extend its own immunity policy would be inappropriate. Yet, in spite of functional overtones, these are just mechanical evaluations; the application of the nonimmunity policy would more easily rest upon a preference for a policy of loss-dis-

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69 217 N.C. 443, 8 S.E.2d 523 (1940).

70 *Id.* at 444, 8 S.E.2d at 524. In Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), a case involving the same law-fact pattern, the court observed that "such a limitation might import some constitutional difficulty." *Id.* at 54, 12 S.E.2d at 651 (concurring opinion). This seems unduly solicitous of the privileges and immunities clause of the United States Constitution (art. IV, § 2). Unless the doctrine of interspousal immunity is treated merely as a rule of procedure or court administration, a classification for choice-of-law purposes based on the domicile of the parties does not seem unreasonable under the Constitution. *See* Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960), *reprinted in* SELECTED ESSAYS 445.

> When the privileges-and-immunities clause requires that a citizen of another state be permitted access to the courts of the forum, however, there is no necessary implication regarding the law to be applied; whether the state must also extend to him the benefit of its laws is a separate question.

Id. at 1351, SELECTED ESSAYS at 477. Perhaps the North Carolina court was asserting that the lex fori controlled both procedure and substance—procedure expressly and substance implicitly by reason of the lex loci rule.

71 In Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963), the law-fact pattern was the converse of that in Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940), and the court applied the immunity policy of the place of injury (Virginia) in a case involving its own domiciliaries. On the other hand, application of the immunity policy of the domicile in a case like Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), discussed in note 70 *supra*, may be undesirable in Professor Currie's view, for "to deny recovery would mean that the North Carolina people who furnish . . . services would be denied an important source of compensation, perhaps the only adequate source." Currie, in *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1237 (1963).

tribution in accordance with the more liberal policy of the place of injury.

The disinterested forum is a stranger to a case involving a true conflict. The court is faced with a dilemma: whether to be an unnecessary instrument of the inhibitive policy of the domicile or an instrument of the compensatory policy of the locus. In the latter case, the court, in the guise of enlightenment, would be making a "disinterested" choice of a policy that arguably is supported by the lesser of the two competing interests. Yet, no interest of the forum is disadvantaged by the selection of the nonimmunity policy of the place of injury. In situations like this, Professor Currie would abandon rules for choice-of-law and allow the disinterested forum to ask itself what interest Congress would subordinate if it were to consider the conflict from the viewpoint of the national interest.[72] Although Congress is unlikely to venture into the resolution of this problem, federal legislation in the field of torts has not been hospitable to common law doctrines that provide immunity or tend to concentrate risk and loss.[73] The interstate policies in favor of the free movement of persons, property, and credit across state lines suggest a choice of law in favor of compensation, especially in view of the trend away from immunity in a number of states.

3. Nonconflict Cases

When the domicile and the locus both have nonimmunity policies, there is no conflict. Unless there is some procedural inability to handle interspousal litigation, the disinterested forum's policy is not invoked and the nonimmunity policy should be applied. Nor is there any conflict when both the domicile and the locus have immunity policies; but in such cases the disinterested forum has no opportunity to invoke the principle of alternative reference. The court is not in a position to make use of its own policy of nonimmunity.[74] Of course, a dismissal on the ground of *forum non conveniens*, if possible, is preferable to a dismissal with prejudice by a forum necessarily reluc-

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72 Currie, *supra* note 59, at 778, 785. This would involve "candid free choice between the competing policies and interests, amounting to the exercise of legislative discretion . . . ." *Id.* at 785.

73 *E.g.*, Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1964), abolishes the defenses embodied in the fellow-servant rule and defenses of contributory negligence and the assumption of risk. A standard of comparative negligence is established for the purpose of mitigating damages in proportion to the employee's negligence.

74 The disinterested forum's application of its own nonimmunity policy when contrary to the law of both concerned jurisdictions would likely be "unwarranted and unconstitutional." Currie, *supra* note 59, at 780. *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

tant to anticipate a modification or abandonment of interspousal immunity by the domicile or the locus.

B. *The First Restatement and the Lex Loci Rule*

One of the advertised aims of conflict-of-laws rules is that the choice of forum should not determine the disposition of the claim.[75] At first impression, there are two ways to accomplish such uniformity. If each state had the same internal law, then conflicts law would be superfluous.[76] But such an identity is unlikely to develop in our federal system.[77] Alternatively, if all jurisdictions employed the same conflicts rules, only one jurisdiction's law would be selected for the disposition of a particular issue.[78] This solution was the doctrinaire aim of the first *Restatement*[79] and the vested rights theory it promulgated.[80] This proffered certainty was and is illusory.[81]

To determine what law should apply in a torts case, the *Restatement* prescribed that "the law of the place of the wrong determines whether a person has sustained a legal injury."[82] With respect to interspousal immunity, prevailing case authority was equally doctrinaire: "that no cause of action arises in favor of either husband or wife for a

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75 Of course, there are other aims that occasionally overshadow the desire to secure unqualified uniformity. *See* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Leflar, *supra* note 19; Reese, *supra* note 68; Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721 (1957); *cf.* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, *reprinted in* SELECTED ESSAYS 177.

76 The identity among state laws would necessarily have to be very fine. For example, even with the same substantive laws, the disposition of cases might depend upon whether a suit is treated as sounding in contract or tort. *See, e.g.*, Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928).

77 Uniformity of formal doctrine throughout the forty-eight states is occasionally desirable, and where that is so a uniform federal substantive law provides the best means of securing it. But uniformity of obligation as between particular individuals, regardless of the locus of litigation, is almost invariably desirable; and the essence of this can be achieved without enacting uniform substantive laws. The promotion of this kind of uniformity, so far as this can be done without sacrifice of greater values, is one of the functions of the principles of the conflict of laws.

Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-14 (1954).

78 Again, it is assumed that the several jurisdictions concur as to the nature of the given case. *See* Hancock, *Three Approaches to the Choice-of-Law Problem: The Classificatory, the Functional, and the Result-Selective*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 365 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961). *See also* A. VON MEHREN & D. TRAUTMAN, *supra* note 3, at 493-95.

79 RESTATEMENT OF CONFLICT OF LAWS (1934).

80 *See* Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-85 (1945).

81 *See, e.g.*, A. VON MEHREN & D. TRAUTMAN, *supra* note 3, at 63.

82 RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

tort committed by the other during coverture is too well settled to require citation of authority."[83] The combination of the lex loci rule for choice of law and the prevailing attitude toward interspousal immunity dictated that no court would allow an interspousal suit in tort if such suits were against the policy of the lex loci.

The first *Restatement* was subjected to vigorous criticism because of the jurisdiction-selecting nature of the lex loci rule.[84] The attempt of courts to rationalize its application to the issue of interspousal immunity by distinguishing between status as a matter of domiciliary concern and the incidents of status, among them the question of immunity, as a matter of tort law,[85] has been exposed as sleight-of-hand servility to that rule.[86] It has also been noted that:

> The "law of the place of the wrong" formula, which has been adopted in the Restatement . . . was developed primarily in reference to tort liabilities that were fundamentally admonitory in character and closely related to the early criminal law concept of moral "fault." This concept of fault, still very much a part of the law of torts in spite of the fact that modern enterprise liabilities are primarily compensatory in character, was incorporated into the conflict of laws through the adoption of the "place of the wrong rule . . . ."[87]

Hence, the exclusive application of the lex loci rule fails to distinguish between primary rights and obligations regarding conduct and remedial rights and obligations arising from such conduct.[88] This misconception accounts in part for the tenacity of the lex loci rule and the general failure to recoguize the domicile's interest in the welfare of its own spouses.

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83 Callow v. Thomas, 322 Mass. 550, 551-52, 78 N.E.2d 637, 638 (1948). *But see* Burke v. Mass. Bonding & Ins. Co., 19 So. 2d 647 (La. Ct. App. 1944), *aff'd*, 209 La. 495, 24 So. 2d 875 (1946).

84 *E.g.*, Cavers, Book Review, 44 YALE L.J. 1478 (1935). Other similar attacks are almost too numerous to mention. *See* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1949).

85 Gray v. Gray, 87 N.H. 82, 84, 174 A. 508, 509 (1934), *overruled by* Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963).

86 *See* Hancock, *supra* note 1.

87 Ford, *supra* note 1, at 404 (footnotes omitted). Ford continues:

> Since this "place of the wrong" rule was developed in reference to admonitory tort liabilities, it would be only a happy coincidence if the rule proved to be a satisfactory and desirable method of dealing with the enterprise liabilities involved in actions to recover for personal injuries suffered in automobile accidents.

Id. (footnote omitted).

88 [T]he present trend in the decisions of courts that still refuse to entertain interspousal actions for personal tort is to base their refusal on grounds of the immunity of the defendant or the disability of the plaintiff rather than on the ground that a cause of action did not arise.

Id. at 399 n.6.

A look at several early cases discloses the reasoning of another generation. In *Dawson v. Dawson*,[89] a husband and wife domiciled in Alabama were involved in an automobile accident in Mississippi. According to the law of Mississippi, and wife not only lacked a remedy but also was entirely without a right of action against her husband.[90] Citing its own landmark case of *Alabama Great Southern Railway v. Carroll*,[91] the Alabama court determined that, although the wife could sue the husband under Alabama law, the lex loci must govern. Adhering to the vested rights theory, the court held that, since Mississippi law gave no right of action to the wife, none could be enforced in her favor in the state of her domicile. In response to the objection that the Mississippi rule of immunity applied only to cases involving Mississippi residents, the court said:

> [I]t would be a most violent assumption to hold that the Mississippi court intended to discriminate against the wives of that state in favor of those of another state, and we must construe the same as applicable to all wives who seek redress for torts inflicted upon them by their husbands in said state regardless of the domicile of the parties.[92]

The court recognized the exclusive legislative jurisdiction of the place of injury.

> The only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another . . . shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired.[93]

The law-fact pattern of *Howard v. Howard*[94] is identical. There a husband and wife, residents of North Carolina, were involved in an automobile accident in New Jersey. The North Carolina court noted that the plaintiff spent one week in a New Jersey hospital, but attributed no significance to the fact. In a somewhat muddled discussion,[95] the court adhered to the place of injury rule. In discounting plaintiff's

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89 224 Ala. 13, 138 So. 414 (1931).

90 Austin v. Maryland Cas. Co., 105 So. 640 (Miss. 1925); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924).

91 97 Ala. 126, 11 So. 803 (1892).

92 224 Ala. at 15, 138 So. at 415.

93 *Id.* at 16, 138 So. at 416, *citing* Alabama Great So. Ry. v. Carroll, 97 Ala. 126, 138-39, 11 So. 803, 808-09 (1892).

94 200 N.C. 574, 158 S.E. 101 (1931).

95 The territorial vested rights theory is mingled with the comity theory. *See id.* at 577-79, 158 S.E. at 102-04.

argument that the enforcement of the New Jersey immunity rule would violate the public policy of North Carolina, the court concluded that no important policy of North Carolina was at issue.[96]

In the celebrated case of *Gray v. Gray*,[97] a New Hampshire couple was involved in an automobile accident in Maine, which retained the common law rule of interspousal immunity. Adhering to the vested rights theory, the New Hampshire court determined that under Maine law the injured wife had no cause of action and that according to the lex loci rule she could have none anywhere else.[98] Secure in the assertion that "there is no decision in Maine bearing upon the doctrine of *renvoi*,"[99] the court easily sidestepped the possible use of "the rule . . . that in a suit by a non-resident upon a cause of action arising locally his capacity to sue will be determined by looking to the law of his domicile rather than to the local law."[100] Dean Griswold's suggestion that *renvoi* would be serviceable here was foredoomed by the absence of authority indicating what Maine would have done in a similar case.[101]

Growing awareness that the immunity doctrine expresses a policy regarding remedies helped to undermine the conceptual foundation of the lex loci rule. Interestingly, the change was foretold by cases in which immunity was enforced. In cases involving their own domiciliaries who were injured in nonimmunity states, those states that wished to maintain immunity had to qualify the lex loci rule. Although clothed as a public policy exception to that rule, the assertion of the immunity doc-

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96 *Id.* at 579-80, 158 S.E. at 103-04; *see* RESTATEMENT OF CONFLICT OF LAWS § 612 (1934): "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." *Cf. id.*, Comment *b*: "A mere difference between the laws of the two states will not render the enforcement of a cause of action created in one state contrary to the public policy of the other." That the prevalence of the immunity doctrine at that time colored a court's reaction to this reservation, may be inferred from the assertion of the public policy exception in Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936), where the law-fact pattern is reversed.

97 87 N.H. 82, 174 A. 508 (1934), *overruled by* Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); *see* Gueuther, *Changing Choice of Law Rules in Intrafamily and Other Tort Actions: Comments on* Thompson v. Thompson, 7 N.H.B.J. 19 (1964).

98 In addition to its own precedents, the court cited the *Restatement*, several text authorities, and three then recent cases: Dawson v. Dawson, 224 Ala. 13, 138 So. 414 (1931), Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931), and Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931), *overruled by* Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

99 87 N.H. at 88, 174 A. at 511.

100 *Id.*

101 *See*, Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1205-07 (1938), *reprinted in* COMM. ON SELECTED ARTICLES ON CONFLICT OF LAWS, ASS'N OF AM. LAW SCHOOLS, SELECTED READINGS ON CONFLICT OF LAWS 186-87 (1956); *cf.* A. VON MEHREN & D. TRAUTMAN, *supra* note 3, at 509-16; von Mehren, *supra* note 63, at 385-89.

trine in such cases was actually a shift to a lex domicilii choice-of-law rule.

Mertz v. Mertz[102] illustrates the struggle of the forum in such a case to maintain the lex loci rule but simultaneously to escape its consequences. Spouses domiciled in New York, which at the time maintained the immunity doctrine, were injured in Connecticut, which had abandoned the doctrine.[103] Although the lex loci rule prevailed in New York as well as in Connecticut,[104] the court asserted the local policy of immunity.[105] A tenuous public policy argument was used as a basis for classifying the question of immunity as one of remedy. Hence, "[t]he law of the forum determines . . . the capacity of parties to sue or to be sued, the remedies which are available to suitors and the procedure of the courts."[106] The court reacted to the inappropriateness of abandoning the policy of the domicile simply because the parties were injured outside New York. "A disability to sue . . . arises solely from the marital status and . . . has no relation to a definition of wrong . . . ."[107] This view suggests that the real basis for the decision was the domicile's substantive interest in the marital relationship, and not a mere expansive notion of public policy or a procedural classification.[108]

C. *The Second Restatement and the Lex Domicilii Rule*

Discussion might have begun with *Mertz v. Mertz;* its expressed preference for resolution of the immunity issue by reference to the law of the domicile has been favored by modern commentators.[109] But the modern revolt against the lex loci rule is better seen in the more frequently litigated situation where the law of the domicile provides nonimmunity. Cases like *Mertz* therefore serve as a springboard for investigating whether reference to the law of the domicile is always the best choice-of-law solution.

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102 271 N.Y. 466, 3 N.E.2d 597 (1936).

103 Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925).

104 For a criticism of Connecticut's refusal to abandon the lex loci rule in interspousal suits arising from automobile accidents, see Shea, *Conflict of Laws: Interspousal Tort Litigation*, 37 CONN. B.J. 520 (1963).

105 271 N.Y. at 473, 3 N.E.2d at 599-600.

106 *Id.* at 473, 3 N.E.2d at 599.

107 *Id.* at 473-74, 3 N.E.2d at 600.

108 *See* G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 206 (3d ed. 1963). For a recent rehabilitation of the *Mertz* case along similar lines, see Kjeldsen v. Ballard, 52 Misc. 2d 952, 277 N.Y.S.2d 324 (Sup. Ct. 1967). "We know that a New York marital relationship and the ramifications thereof will prevail in the face of an occurrence in a foreign state whose laws permit an action within the relationship contrary to our own." *Id.* at 955, 277 N.Y.S.2d at 327, *citing Mertz.*

109 *See* Hancock, *supra* note 1; Shea, *supra* note 104.

In the California case of *Emery v. Emery*,[110] an automobile accident occurred in Idaho involving a father and his minor children. The law of Idaho appeared to be silent on the question of immunity in such a case. The law of California, where the parties were domiciled and where suit was brought, provided no cases involving an action by a minor child for a willful or malicious tort.[111] The opinion of Justice Traynor resolved the choice of law in favor of the domicile.

> We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative process, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home.[112]

Hence the California court was free to adopt the modern trend of decisions and allow the suit for the reason that "the lack of such immunity does not conflict with or inhibit reasonable parental discipline."[113]

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110 45 Cal. 2d 421, 289 P.2d 218 (1955).

111 Ordinary negligence would not have been enough under California law. *Id.* at 429-30, 289 P.2d at 223-24.

112 *Id.* at 428, 289 P.2d at 223.

113 *Id.* at 429, 289 P.2d at 223. Similarly, the case of Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966), is interesting. A Minnesota parent brought suit against her child, who was a minor when the accident occurred in Wisconsin, but was emancipated at the time of suit. Under Wisconsin law at the time of the accident, a parent could not assert a tort claim against an unemancipated child. Minnesota had never squarely passed on the question, but had assumed that the matter was to be governed by the law of the jurisdiction in which the tort occurred, unless some overriding local policy made the application of foreign law unacceptable. *See* Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941). Rather than base its decision on an outmoded public policy concept, the court considered Minnesota's relation to the facts of the case. 273 Minn. at 424, 142 N.W.2d at 69. In addition to the fact that Minnesota was the domicile of the parties, the court noted that the vehicle involved was garaged and insured in Minnesota. The court also weighed the economic impact on the Minnesota family and insurer and determined that this was "a matter of family law rather than tort law and that Minnesota is free to establish its own policy of immunity without being bound by that of Wisconsin." *Id.* at 425, 142 N.W.2d at 70. The court thereupon ruled prospectively that the parent-child immunity should no longer be a defense. The court would probably have reached a similar result in a purely domestic case, but here it not only established a choice-of-law rule in favor of the domicile but also brought its domestic rule within the fold of more modern thought; otherwise a change in choice-of-law rule would have been unnecessary. It must be noted, however, that the Minnesota court in a subsequent decision involving purely domestic facts adhered to the interspousal immunity doctrine. Hovanetz v. Anderson, 148 N.W.2d 564 (Minn. 1967).

In a celebrated "package deal reversal"[114] of previous Wisconsin authority, the court in *Haumschild v. Continental Casualty Co.*[115] quoted the foregoing language with approval and determined that, since the issue of interspousal immunity was one of domestic relations, the law of the domicile should control. This view has been adopted by the second *Restatement*.[116] Section 379(1) provides that "the local law of the state which has the most siguificant relationship with the occurrence and with the parties determines their rights and liabilities in tort." Section 390g provides specifically that "[i]n accordance with the rule of § 379, whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicil." No distinction is made between cases in which the domicile has a policy of immunity and those in which it has a policy of nonimmunity.[117]

D. *The Merits of the Lex Domicilii Rule*

A lex domicilii rule is sounder than a lex loci rule because the domicile state has the stronger interests concerning whether family members should sue each other. Nevertheless, in form, lex domicilii is merely a jurisdiction-selecting rule. If reference to the law of the domicile is invariably the best solution then the rule may represent a proper synthesis of the competing concerns.[118] But if use of the lex domicilii is not

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114 *See* Hancock, *supra* note 1; Note, 73 HARV. L. REV. 785 (1960).

115 7 Wis. 2d 130, 95 N.W.2d 814 (1959). For an interesting analysis of the case that considers the fact that the marriage was annulled after the accident, see Jayme, *supra* note 1, at 325-29. This fact was not treated as material by the court.

116 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Tent. Draft No. 9, 1964).

117 In his concurring opinion in *Haumschild*, Justice Fairchild suggests:

> Another possible alternative would be that the forum state when faced with the question of immunity choose the law of whichever state (locus or domicil) conforms more closely to its own. The party adversely affected by such a rule can be said to have subjected himself to the law of the domicil state by choosing to live in it or to the law of the locus state by choosing to travel in it. Our legislature has set up a similar rule for a choice of law with respect to the mode of execution of a will outside of Wisconsin.

7 Wis. 2d at 145, 95 N.W.2d at 822. Such a rule is pure jurisdiction-selection. (The reference to the wills problem is inapt here because that rule is adopted for the purpose of increasing the chances of validation.) It bears some formal similarity to a solution suggested by Professor Currie for the problems of choice of law in a disinterested forum. *See* Currie, *supra* note 59.

118 The jurisdiction-selecting rule makes a state the object of choice; in theory it is only after the rule has selected the governing state by reference to the "contact" prescribed in the rule that the court ascertains the content of the state's law. . . . [H]owever . . . a jurisdiction-selecting rule may be the product of two decisions choosing on policy grounds between competing rules in cases in which the law-fact patterns are reversed. If the court concludes that the same contact should be controlling in each case, economy in stating the results would yield a choice-

always the best resolution, then the rule is merely a better jurisdiction-selecting rule.

By modern reckoning, *Buckeye v. Buckeye*[119] represents the most extreme application of the lex loci rule.[120] A Wisconsin couple was involved in an automobile accident in Illinois. After the start of litigation in Wisconsin, the parties married. Wisconsin permits suits between spouses for tort, including antenuptial torts. By the law of Illinois, however, the marriage of the parties extinguished the "cause of action." Ignoring the interest of Wisconsin in its own residents, the court determined that "the law governing the creation and extent of tort liability is that of the place where the tort was committed."[121] The converse situation was presented in *Forbes v. Forbes*,[122] where Illinois spouses were involved in an automobile accident in Wisconsin. Although the wife could not have sued her husband in their home state, the Wisconsin court distinguished status from its incidents and allowed the suit in Wisconsin. "[W]hile they were here their personal duties, obligations, and liabilities incidental to that status were such as existed or arose under our laws in relation to the legality, effect, and consequences of their transactions within this state."[123]

If Judge Traynor correctly asserted in *Emery v. Emery*[124] that the domicile state has an interest in the "incidents" of the marital status of its domiciliaries, then the Wisconsin court made the wrong choice of law in both cases. Even if the place where the accident occurred in *Forbes* had a reasonable interest in applying its own nonrestrictive law, a paradox still remains. Wisconsin allowed foreign spouses to escape the immunity afforded by the law of their home state, while it imposed immunity upon its local spouses when they were involved in an accident in an immunity state. Wisconsin thus became the agent of a restrictive pol-

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of-law rule stated in terms of the jurisdiction where that contact is located. However, in the use of a rule thus synthesized, its origin should always be kept in mind.

D. CAVERS, *supra* note 2, at 9 n.24. *See also id.* at 178.

119 203 Wis. 248, 234 N.W. 342 (1931), *overruled by* Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

120 The case has been the object of repeated attack. *E.g.*, Ford, *supra* note 1; Hancock, *supra* note 1.

121 203 Wis. at 250, 234 N.W. at 342; *cf.* Comment, *Functional Application of Conflict of Laws Rules in Torts Cases*, 44 YALE L.J. 1233 (1935). The law-fact pattern of *Buckeye* is repeated with the same result in Garlin v. Garlin, 260 Wis. 187, 50 N.W.2d 373 (1951).

122 226 Wis. 477, 277 N.W. 112 (1938), *overruled by* Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

123 *Id.* at 484, 277 N.W. at 115.

124 45 Cal. 2d 421, 289 P.2d 218 (1955).

icy, which it applied to the obvious, and perhaps invidious, disadvantage of its own citizens. Clearly, the lex loci rule as such does not represent a functional synthesis of the policies involved in either of these two cases.[125]

The uneasiness of the Wisconsin court in handling these cases is shown in *Bodenhagen v. Farmers Mutual Insurance Co.*[126] There again a Wisconsin couple was involved in an automobile accident in Illinois. Working in the shadow of *Buckeye*, the court reviewed Illinois authorities and found that the Illinois Married Women's Act[127] was remedial and therefore would not bar suit between Wisconsin residents after an accident in Illinois.[128] Thus, the court applied the lex loci to determine whether a cause of action existed, and still furthered the interests of the domiciliary state by applying its own law regarding the incidents of the marital status. The accommodation reached suggests a functional approach to the problem, in spite of the result-oriented spirit of the opinion. Upon rehearing, the Wisconsin court decided that its interpretation of Illinois law had been erroneous.[129] The result was saved, however, by the *Haumschild* case, decided the same day, and the law of the domicile was applied regardless of the interpretation of the immunity doctrine in Illinois. While considering a number of different conceptual solutions to the problem[130] and overturning previous authority,[131] the court settled upon the law of the domicile as the proper reference for determining whether to apply interspousal immunity. In the *Haumschild* case, a "false conflict" was presented: the law of the domicile allowed interspousal suits and the law of the place of the accident prohib-

125 *See generally* D. CAVERS, *supra* note 2, at 139-80.

126 5 Wis. 2d 306, 92 N.W.2d 759 (1959).

127 "[N]either husband nor wife may sue the other for a tort to the person committed during coverture." ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd 1959). This provision was originally passed in response to Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952), which had departed from the immunity doctrine. The remedial characterization in *Bodenhagen* seems to reflect a preference for the use of forum law on a matter of procedure.

128 Particularly where, as here, the married people involved are domiciled in a state where public policy recognizes both the cause of action and the right to sue, there is no reason to suppose that the Illinois legislature was concerned with barring liability completely.

5 Wis. 2d at 310a, 92 N.W.2d at 762.

129 "There is no question that such immunity at common law was substantive in nature." 5 Wis. 2d at 310b, 95 N.W.2d at 823 (per curiam opinion on rehearing).

130 *See* Hancock, *supra* note 1; Note, 73 HARV. L. REV. 785 (1960).

131 The court did not distinguish between immunity and nonimmunity in the cases overruled. For a criticism of this indiscriminate style of reversal, see Cavers, in *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1219, 1222 (1963).

ited them. In rejecting the use of the *renvoi* doctrine to dispel the conflict, the court may have neglected a more rational basis for disposing of the converse situation.[132]

To determine whether the rule expressed is a jurisdiction-selecting rule, its application in the converse fact situation must be considered.[133] In *Pirc v. Kortebein*,[134] a post-*Haumschild* case, Illinois spouses sued in a federal district court in Wisconsin after an automobile accident in Wisconsin. The defendant claimed contribution from the husband's insurer by reason of the husband's negligence. In applying the law of the spouses' domicile the court held that because the wife could not sue the husband there was no common liability between the negligent parties, and the defendant was denied contribution. But the court applied the law of the domicile without regard to the interests of Wisconsin as place of injury, thereby indicating that the *Haumschild* rule is apparently a jurisdiction-selecting rule.

A strict lex domicilii rule does not distinguish between the domicile's inherent concern with the marital status and its shared concern with the incidents of that status. Of course, in interspousal immunity cases exclusive reference to the law of the domicile is more satisfactory than exclusive reference to the lex loci. False-conflict cases are then decided appropriately. Further, the domicile has a more particular interest in asserting its immunity policy in the face of a more liberal policy of the lex loci than the locus has in the converse situation in expanding its own immunity in the face of a more liberal policy of the domicile.

Now that Wisconsin had adopted the choice-of-law method of *Babcock v. Jackson*,[135] it remains to be seen whether its adherence to the lex domicilii rule will be constant. In expressing a presumption in favor of the lex fori when the lex loci is repugnant to the public policy of Wisconsin,[136] Wisconsin might apply its nonimmunity rule when spouses

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132 Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 141-42, 95 N.W.2d 814, 820 (1959). In discussing *Haumschild*, Professor von Mehren observes that courts "often fail to see that the *renvoi* can be a step in the direction of . . . functional analysis and reject its use." von Mehren, *supra* note 63, at 385 n.1.

133 The answer was foreshadowed in *Haumschild*:

> The adoption of the new rule would not in theory close the doors of our courts to a nonresident spouse in such a situation instituting suit in Wisconsin. However, the defendant spouse might have a good defense in bar if he pleaded, and proved, the true state of domicile, and took the proper steps to bring before the trial court the law of such state granting the immunity.

7 Wis. 2d at 139-40, 95 N.W.2d at 819.

134 186 F. Supp. 621 (E.D. Wis. 1960).

135 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *See* Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); *cf.* Peterson v. Warren, 31 Wis. 2d 547, 143 N.W.2d 560 (1966).

136 Wilcox v. Wilcox, 26 Wis. 2d 617, 634-35, 133 N.W.2d 408, 416 (1965).

from an immunity state are involved in an automobile accident in Wisconsin. At least one court has held, however, that this presumption is overcome by the "inherent claim of the domiciliary state to vindication of its policy," and has applied the immunity policy of the domicile.[137] It is noteworthy, however, that domiciliary immunity is selected because of a "mild presumption" in favor of the lex domicilii rather than because of an invariable jurisdiction-selecting rule.[138] Discarding the "mild presumption," of course, could lead to a rule of alternative reference.

E. *Interspousal Immunity in Suits Involving Third Parties*

1. *Spouse v. Husband's Employer*

In actions by the injured spouse against a third party, the presence of immunity has been held not to benefit the third party.[139] A consideration of this kind of case in a conflicts setting reveals not only that interspousal immunity is treated as a matter of remedy but also that interspousal immunity can and should be relegated wherever possible to purely domestic fact situations.

As the remedial analysis indicates, the husband is not privileged to cause negligent injury to his wife. The immunity defense is personal to him, and the policy considerations that support it are not necessarily relevant in a suit against the negligent spouse's employer.[140] Further, the doctrine of respondeat superior is increasingly viewed as a doctrine of strict liability imposed as a cost of enterprise risk. The older view of the doctrine as one of substitutional responsibility limited by the personal liability of the agent has become outmoded.[141] The modern view is that

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137 Magid v. Decker, 251 F. Supp. 955, 959 (W.D. Wis. 1966).

138 Indeed, although the Supreme Court of Wisconsin may ultimately define more clearly the effect of *Haumschild* and *Haynie* in the post-*Wilcox* era, here and now, in this federal diversity action, we consider this court obliged to afford a mild presumption in favor of the application of the law of the domicile of the spouses.

Id.

139 *E.g.*, Kowaleski v. Kowaleski, 227 Ore. 45, 361 P.2d 64 (1961) (wife v. husband's employer).

140 In an action against a principal based on the conduct of a servant in the course of his employment: . . . (b) The principal has no defense because of the fact that: . . . (ii) the agent had an immunity from civil liability as to the act.

RESTATEMENT (SECOND) OF AGENCY § 217 (1957).

Thus, where a servant in the scope of employment negligently runs over his wife, an action against the master by the injured wife is not barred. This result is in accordance with the rule stated in this Section and is the rule adopted in most of the States.

Id. comment *b*.

141 Morris, *supra* note 46, at 555.

the mere negligence of the agent creates liability, and that the agent need not be personally responsible to the person he injures.[142] Since the unanimous decision of the New York Court of Appeals in *Schubert v. Schubert Wagon Co.*,[143] most cases have reached this result, recognizing that the employer, and not the husband, is the real party defendant even where both are joined.[144] Hence, the goal of preserving family harmony is subordinated to the policy of responsibility embodied in respondeat superior. Whether the employer will sue his negligent servant is conjectural. Even so, his right to recover is based upon the employee's duty to render faithful service to the employer, and not upon a right of indemnity.[145] Thus, the family exchequer is not threatened by the immediate suit. If, as is likely today, the employer is insured, the loss is absorbed by an increase in insurance premiums, which is a cost of doing business.[146] The cost of insurance is ultimately recovered in the course of commercial enterprise. Although interspousal immunity prevails in most jurisdictions, the majority view is that this immunity will not bar recovery from the negligent spouse's employer.

In *Jones v. Kinney*,[147] suit was brought in a United States District

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142 Moreover, it would be a sad reflection upon the courts if a group of people were injured in one accident by an employee and everyone injured could recover from the employer but the wife of the negligent employee.

Kowaleski v. Kowaleski, 227 Ore. 45, 61, 361 P.2d 64, 71 (1961).

143 249 N.Y. 253, 164 N.E. 42 (1928).

144 For a recent collection of these cases, see Annot., 1 A.L.R.3d 677 (1965).

145 Kowaleski v. Kowaleski, 227 Ore. 45, 361 P.2d 64 (1961).

146 And finally, if the prospect of a suit for indemnity were a lively one, there is the possibility that upon a balancing of considerations the right to indemnity would yield to the right of the injured spouse, that is to say, that indemnity from the negligent spouse would be denied.

Eule v. Eule Motor Sales, 34 N.J. 537, 541, 170 A.2d 241, 243 (1961). To the effect that a more recent legislative policy requiring insurance compensation would prevail over the somewhat outmoded notion of preserving family harmony, see Sullivan v. Christiensen, 191 N.Y.S.2d 625 (Sup. Ct. 1959) (dictum) (child v. parent's employer after injury sustained in automobile accident). For a suggestion that Illinois, which proscribes interspousal suits by express statutory provision, ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd 1959), may continue to allow the injured wife to sue the negligent husband's administrator, see Keegan, *The Family and Tort Actions: Liability and Immunity*, 1962 U. ILL. L.F. 557, 560-62; Survey, 32 CHI.-KENT L. REV. 1, 63 (1953). For an English case allowing suit in the face of similar statutory expression of interspousal immunity, see Broom v. Morgan, [1953] 1 Q.B. 597, [1953] 1 All E.R. 849 (C.A.). The Law Reform (Husband and Wife) Act of 1962, 10 & 11 Eliz. 2, c. 48, now allows the spouses to sue each other in tort.

147 113 F. Supp. 923 (W.D. Mo. 1953) (denying summary judgment to both parties). Jones v. Avco Mfg. Co., 218 F.2d 406 (8th Cir.), *cert. denied*, 350 U.S. 826 (1955), affirmed a judgment n.o.v. for the employer. The Eighth Circuit held that under the general rules of agency the employer was not liable to the wife because the agent, for reasons of his own, took her as a passenger on a business trip without the knowledge

Court by an injured wife against her husband's employer and the driver of the other car involved. The employer, by third party complaint, brought in the husband to recover from him whatever damages might be assessed against it. The spouses were residents of Michigan, which recognized interspousal immunity[148] and did not recognize the liability of the employer in such a case.[149] Missouri, the domicile of the other party, recognized interspousal immunity,[150] but allowed recovery against the employer.[151] Delaware, the corporate domicile of the employer, also recognized interspousal immunity,[152] but whether it allowed recovery against the employer was uncertain.[153] Without discussion of choice-of-law, the court sought to apply the law of Kansas, the place of injury. Kansas had interspousal immunity,[154] but there was no Kansas authority concerning whether the employer could be held responsible. The court decided that the employer should be accountable because that was the better view and was in accord with the weight of authority.

Neither the jurisdiction-selecting rule pointing to the place of injury nor the characterization of the issue as simply one of agency is very helpful. Admittedly, the court's choice-of-law rule was imposed by the *Klaxon* doctrine.[155] The lex loci rule forced the court to reach an enlightened result, but purely as a matter of what a Kansas court might be expected to do in the given case.

An interest analysis would reach the same result. Yet, something more than a balance in favor of the majority rule and a citation to the *Restatement of Agency*[156] is needed to provide enlightenment. The problem is one of competition between the policies of interspousal immunity and respondeat superior. Michigan, the domicile of the spouses gave priority to the doctrine of interspousal immunity; it would not allow the wife to sue the employer when she could not sue the employee. In this conflicts setting, however, Michigan's policy was subordi-

or authority of the employer. It became unnecessary, therefore, to consider whether Kansas law would permit her to sue her husband's employer in tort. *Id.* at 408-09.

148 Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939). The doctrine was partially abrogated in Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965).

149 Watkinson v. Reichle, 292 Mich. 484, 290 N.W. 877 (1940).

150 *See* Brawner v. Brawner, 327 S.W.2d 808 (Mo. 1959).

151 Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S.W.2d 645 (1936) (dictum).

152 *See* Saunders v. Hill, 202 A.2d 807 (Del. 1964).

153 For recent authority, see Fields v. Synthetic Ropes, Inc., 215 A.2d 427 (Del. 1965) (suit by wife against husband's employer upheld).

154 Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952).

155 Klaxon v. Stentor Elec. Co., 313 U.S. 487 (1941) (federal court in diversity jurisdiction must follow conflict of laws rules of the state in which it sits).

156 RESTATEMENT OF AGENCY § 217 (1933). See note 140 *supra* for the present version.

nated to a policy that was in keeping with the trend to distribute loss as a cost of enterprise. The effect of the choice-of-law rule was to accelerate the view of the growing majority and to localize the impact of the diminishing immunity doctrine. Although the problem may be viewed as one primarily involving employer liability, it arises because of the presence of interspousal immunity. The solution depends upon whether or not the immunity should be localized.

Arguably, the admonitory function of legal standards for conduct on the highway is stronger in this kind of case, because a corporate employer is more responsive to the need to have its drivers conform to such standards. The place of a particular accident may be fortuitous, but the incidence of accidents as a feature of doing interstate business is in a general sense predictable. Further, even without considerations of insurance, the choice is not that of shifting loss from the injured party to the negligent party, but that of shifting loss from concentration upon the injured party to distribution through the employment enterprise. In *Jones v. Kinney*, Kansas law was paramount not because it was the law of the place of injury but because its terms served to distribute loss.[157] The usefulness of a choice-of-law rule of alternative reference is evident, for even if the Kansas law had been otherwise, the place of injury could have little interest in concentrating loss in a case not involving its own domiciliaries. Moreover, if the domiciliary state allows recovery against the employer, it has disavowed any priority for interspousal immunity between its own domiciliaries and can have no objection to the distribution of loss in an out-of-state accident involving them. Thus, it is reasonable to select the law of either the domicile of the spouses or the place of the accident, depending upon which exposes the employer to suit by the injured spouse. Finally, the law of the employer's domicile or principal place of business might serve as an additional basis of reference when its policy is to distribute loss.

2. *Wife v. Owner of Automobile Negligently Operated by Her Husband*

A principle of alternative reference can be used to give wider scope to a policy of owner liability, as well as to cut down the scope of the immunity doctrine. Here we posit a conflict between the doctrine of interspousal immunity and an owner liability act that ren-

157 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 390g, comment *b* at 142 (Tent. Draft No. 9, 1964), restricting the application of lex domicilii to cases involving the spouses themselves. Hence, the choice of law to govern whether the injured spouse can sue the employer would turn upon which state has the most significant concern with that issue. *See also id.* § 379.

ders the owner liable for the negligent operation of his vehicle.[158] Even within a single jurisdiction the conflict of policies seems to be between extremes; the immunity policy concentrates loss, while the policy of owner liability merely shifts loss to a basis without fault or enterprise involvement. But this shift of loss rests upon the availability of loss distribution through insurance coverage. Thus, the conflict in policies can be reformulated: the immunity policy is still an extreme, but the owner liability policy is a risk-distributing mechanism, radical perhaps, but in keeping with the modern trend. The inevitability of loss through automobile accidents and the owner's "involvement" through his ownership are demonstrable. The owner's responsibility, moreover, continues to be based on the negligence of the driver, and thus his responsibility still has a traditional basis.

The extension of the immunity of the spouse to shield the owner serves only to inhibit the policy of invoking the owner's liability. In order to give full scope to that policy, a choice-of-law principle of alternative reference is necessary. Where the domicile of the spouses and the place of injury each have a policy of owner liability, the choice-of-law problem is similar to that in suits by the wife against the husband's employer. If the domicile allows suit against the owner, a choice of that law in the case of an out-of-state accident offends no interest of the place of injury. If the place of injury allows such suits, a choice of its law asserts its interest in assuring compensation for the victims of accidents on its highways. The domiciliary state is still free to assert its inhibitive policy in purely local cases. Thus, if the owner liability policy of either the domicile or the place of injury extends to the benefit of an injured spouse, that state's law should apply.[159]

3. *Wife v. Concurrent Tort Feasor: The Latter's Right of Contribution Against the Negligent Spouse*

In *LaChance v. Service Trucking Co.*,[160] a husband and wife, residents of Maine, were involved in a two-car collision in North Carolina

158 It is assumed that the owner is not in the business of renting automobiles. The discussion focuses attention upon the more difficult case, where the owner's affairs are not being furthered by the operation of the automobile and responsibility to the injured party is made to rest upon the unadorned fact of ownership. Where the commercial enterprise of renting automobiles is involved, a resolution somewhat along the lines of the treatment of respondeat superior in this context may be expected. For a result-oriented decision in favor of distribution of loss, see Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928). For a result-oriented discussion of variations on the *Levy* case, see A. EHRENZWEIG, CONFLICT OF LAWS 574-75 (1962).

159 Arguably, the scheme of alternative reference could also include the domicile of the owner.

160 215 F. Supp. 162 (D. Md. 1963).

with a vehicle operated by an employee of a Maryland corporation. The wife sued the driver of the other vehicle, who, in turn, brought a third party complaint against the husband for contribution. Maine[161] and Maryland[162] retain the doctrine of interspousal immunity; North Carolina [163] has abandoned it. Maine and Maryland would not have allowed contribution; North Carolina, lacking the immunity policy, would have permitted it.[164] The court chose North Carolina law and allowed contribution.

Professor Currie's approval of this result in the case is based upon his interpretation that the case involved an avoidable conflict between the interests of Maine and North Carolina.[165] Currie emphasizes North Carolina's interest in deterrence and in affording security for local creditors. Since the suit was not between husband and wife, fears of collusion, family discord, and depletion of the family exchequer were mitigated. Further, Maine might have localized its noncontribution policy to avoid conflict with the policy of North Carolina.[166] At first impression, Professor Currie's argument seems attenuated. The assertion that Maine might adopt a "moderate and restrained" construction of its noncontribution policy is not based upon any position taken by that state. Further, the interest of North Carolina in protecting local creditors is not based upon any demonstrated need in this case. Such an interest may, however, be assumed on the basis of reasonable policy considerations; otherwise, choice-of-law in these cases would depend upon particularized reference to secondary interests.[167] The proper merit of Currie's argument, however, may be

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161 *See* Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669 (1932).

162 Ennis v. Donovan, 222 Md. 536, 161 A.2d 698 (1960). It is unlikely that Maryland had any interest in having its own law applied here; but since the defendant third party was a Maryland corporation, the federal district court sitting in a diversity case had little justification for a dismissal on the ground of *forum non conveniens*. *See* D. CAVERS, *supra* note 2, at 110 n.51.

163 *See* Cox v. Shaw, 263 N.C. 361, 139 S.E.2d 646 (1965).

164 *See generally* W. PROSSER, TORTS § 47, at 273-78 (3d ed. 1964).

165 Maryland was in the position of the disinterested third state. Having no interest in the application of its own law and policy, it was confronted with an apparent conflict between the interests of Maine and North Carolina. But after careful analysis the interest of Maine could be moderately defined, with the result that conflict was avoided and the law of the only interested state was applied.

Currie, *supra* note 59, at 771.

166 *Id.* at 771-72. Subsequent to *LaChance*, Maine allowed contribution in an automobile accident case involving interspousal immunity. Bedell v. Reagan, 159 Me. 292, 194 A.2d 24 (1963).

167 "[T]he financial hazard of the state of injury may seem too erratic or too narrow a basis for applying its law." D. CAVERS, *supra* note 2, at 178-89.

phrased thus: contribution was necessary to the maintenance of North Carolina's policy of deterring negligent conduct on its highways; the assertion of a noncontribution policy would have frustrated this interest and done little to serve Maine's interests in preserving interspousal immunity and noncontribution. Again the competing policies are resolved in favor of distributing loss, and the noncontribution policy (derived from the immunity doctrine) of a concerned jurisdiction is localized.[168] Interspousal immunity in a conflicts setting is thus partially abrogated. The husband is made to bear part of the loss to his wife by reason of the imposition of an obligation to contribute to the other party, and as such is rendered only partly immune.

In *Goulding v. Sands*,[169] New York spouses were involved in a collision in Pennsylvania with an automobile driven by a resident of that state. After a judgment of contribution for the driver of the other car against the spouse of the injured party,[170] the latter's insurance carrier alleged that no coverage existed. The policy did not expressly cover injuries to the spouse, and under New York law this would have precluded insurer liability.[171] In rejecting the insurer's denial of

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168 In Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962), the court refused to permit the defendant to implead the husband's insurance carrier because the noncontribution policy of the spouses' domicile, Illinois, would be subverted.

> It is thus apparent that this court was fully mindful of the prospective application of the *Haumschild* rule to litigation arising from torts committed in this state. Whether the accident was a one-car accident or a two-car accident would seem to have no bearing on the proper rule to be applied.
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> . . . . If the appellants' position were adopted it would mean that Mrs. Haynie could not sue her husband in her own state of Illinois, but she could do so in Wisconsin.

Id. at 302, 114 N.W.2d at 445. The court does not seem to have perceived the propriety of a solution like that reached in *LaChance*. With some justification, Professor Weintraub treats this case as one involving a "spurious" conflict. Weintraub, *supra* note 4, at 219. Whether the *Babcock* approach displayed in Wilcox v. Wilcox, 26 Wis. 2d 617, 630-31, 133 N.W.2d 408, 414-15 (1965) (preference for fixed reference), would alter the result is not yet decided. *See* note 138 *supra*.

169 237 F. Supp. 577 (W.D. Pa. 1965), *aff'd*, 355 F.2d 230 (3d Cir. 1966).

170 The contribution judgment against the insured was rendered because under Pennsylvania law contribution is permitted between joint tortfeasors even when the injured party has no cause of action against one of them. "The theory is that as between the two tort-feasors contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done." Puller v. Puller, 380 Pa. 219, 221, 110 A.2d 175, 177 (1955) (contribution upheld against husband of injured spouse, although husband himself could not be held responsible). This is a minority view, but quite consistent with the views expressed in this article. *See* W. PROSSER, *supra* note 164, § 47, at 277; Note, *Contribution Among Joint Tortfeasors when One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L.Q. 407 (1967).

171 The company relied on N.Y. INS. LAW § 167(3) (McKinney 1966). 237 F. Supp. at 578.

liability, the court held that New York law did not govern the New York insurer's liability, although the insurance contract was executed in New York. There was no clear precedent in Pennsylvania, and the court, exercising diversity jurisdiction, applied the choice-of-law method established by the Pennsylvania court in *Griffith v. United Airlines.*[172] By a "grouping of contacts" the court found that the "center of gravity" resided in Pennsylvania's greater concern with the issue of insurer liability. Both the insurer, which does business in New York and Pennsylvania, and the insured "were on notice that the insured would drive across state lines and subject residents of other states to potential injury and, in turn, subject both to the laws of other states."[173] The court went on to express an interest analysis that might have pleased Professor Currie:

> The Courts of Pennsylvania should be interested in Goulding, a resident of said State, who unquestionably would be injured and prejudiced by the application of the New York statute. Pennsylvania's interest is apparent in protecting its residents from injury either bodily or pecuniary from out-of-state residents while traveling on its highways.[174]

Thus, the court reached a solution that served to distribute loss and to localize the effect of the stricter provision of the New York law of insurance. Of course, that solution could not have been reached without dwelling upon the foreseeability of the insured's incurring a greater liability than that permitted under his insurance policy according to the law of the place of contracting. Nevertheless, enlarging insurer liability on the basis of the laws of other states concerned with its activities seems reasonable. A decision articulated in terms of alternative reference would have served the same end. It would also have expressed more clearly the interstate nature of insurance operations and the desirability of resolving the choice-of-law problem in favor of allowing compensation.

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172 Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

173 237 F. Supp. at 579.

174 *Id.* The Third Circuit affirmed on different grounds, finding that:

> Both the Courts of Pennsylvania and New York are in accord that, in a given situation, where the insurance policy has a provision which renders it inapplicable to a particular loss, or if the policy does not provide a given coverage for a particular loss, the carrier is not permitted to manage and defend the assured throughout pretrial and trial proceedings, have judgment rendered against the policyholder, and then, when execution on the judgment threatens, belatedly disclaim coverage and liability.

Goulding v. Sands, 335 F.2d 230, 232-33 (3d Cir. 1966). It must be admitted that the doctrine of estoppel, commonly held by New York and Pennsylvania, avoids the conflict and therefore supports an easier solution.

F. *Interspousal Immunity and the Community Property States*

Automobile tort litigation involving spouses from a community property state[175] may be an exception to the principle of alternative reference.[176] For example, where the tort claim of the wife is treated as community property, recovery against her husband would produce a redundancy similar to that which obtained at common law. Further, one spouse's negligence may be imputed to the other in a suit by the injured spouse against a third party, in order to prevent the community from profiting from the misconduct of the negligent partner.[177] The husband, as manager of the community, may be the only one entitled to bring suit, or he may be an indispensable party, as at common law.

In *Traglio v. Harris*,[178] a California family, in a car driven by the son, was involved in a collision with a truck in Oregon. Suits by the husband and wife against the other driver were brought in Oregon, a common law jurisdiction. Under California law the negligence of the son was imputable to the father and, since any recovery by the wife

175 When the spouses are from a common law state and the injury occurs in a community property state, the courts have had little difficulty referring to the law of the domicile, since the matter involves marital status and property. In Bruton v. Villoria, 138 Cal. App. 2d 642, 292 P.2d 638 (1956), the court refused to impute the contributory negligence of the husband to the wife according to the law of California, a community property state. According to the law of their domicile, Ontario, the husband had no interest in damages recovered by his wife. In Reeves v. Schulmeier, 303 F.2d 802 (5th Cir. 1962), although the lex loci rule prevailed, the court, with no Texas authority in point, applied the law of the spouses' domicile, Oklahoma, rather than the law of Texas, where the accident occurred and under whose law the wife's cause of action for damages would have been community property. In Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952), when Wisconsin still followed the lex loci rule, the court had no hesitancy in using its own law to determine that a Wisconsin spouse retained the right to sue her husband although the cause of action arose in Arizona, a community property state. The court's treatment of Arizona law is questionable. *See* cases collected in Annot., 97 A.L.R.2d 725 (1964).

176 Where the spouses are domiciliaries of a common law state, the only drawback to a principle of alternative reference in favor of the nonimmunity policy appears when the common law domicile itself has an immunity policy. Then, unless the law of the community property state, the place of injury, nevertheless allows the wife to sue her husband to recover, there would be no alternative, since both states inhibit suit—the domicile by the common law immunity, the place of injury by the regime of community property.

Cf. Matney v. Blue Ribbon, Inc., 202 La. 505, 12 So. 2d 253 (1942). Under the law of the domicile, Texas, an action in damages for personal injury by a married woman was community property and could be maintained only by the husband. Under the law of the place of injury, Louisiana, the right to recover for personal injury was her separate property, and she was allowed to bring suit.

177 *See* W. PROSSER, *supra* note 164, § 73, at 503.

178 104 F.2d 439 (9th Cir.), *cert. dismissed*, 308 U.S. 629 (1939).

would have been for the benefit of the family, recovery had to be denied in order to prevent the husband from benefiting from his own negligence. The court held that the law of the place of injury governed both the existence of a cause of action and any defenses to it. Since under Oregon law the negligence of the child was not imputable to the mother unless she exercised control over the child, her claim was established.[179] The dissent reasoned that the proper issue before the court was: "[w]hat law is applicable to determine the ownership of the cause of action and of the proceeds thereof for the injury to the wife?"[180] Thus, the preliminary question was one of property, and the law of the domicile, California, ought to control.[181] This threshold inquiry would have defeated the wife's claim for relief.

The problem is to avoid application of the law of the community property domicile when it inhibits a spouse's claim for relief against a third party. Where the forum is also the place of injury this result has been reached by treating the matter as one of tort and following the lex loci rule.[182] While the result may be satisfactory, a mechanical characterization of this sort seems to require that the wife from a common law state be deprived of a remedy when her injury occurs in a community property state.[183] Upon a closer analysis, however, the real issue, as with interspousal immunity, is what remedy the wife can claim when she has been injured by tortious operation of an automobile. Before the forum at the place of injury the question becomes that of the effect to be given to the incidents of the domicile's community property regime in the face of the policy of general responsibility of the law of the place of injury. Both the imputation of the husband's negligence to the wife and the requirement that he be joined as a party to the suit are based solely on community property considerations. Since there are no considerations of court order or management in

179 Oregon preserves the interspousal immunity doctrine. Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964).

180 104 F.2d at 444.

181 RESTATEMENT OF CONFLICT OF LAWS, §§ 208, 290 (1934); *cf.* A. VON MEHREN & D. TRAUTMAN, *supra* note 3, at 506. For a discussion of the *Traglio* case that is sympathetic to the dissent, see Hancock, *supra* note 78, at 375-79.

182 Traglio v. Harris, 104 F.2d 439 (9th Cir.), *cert. dismissed*, 308 U.S. 629 (1939) (suit by wife against third party); Texas & Pac. Ry. v. Humble, 97 F. 837 (8th Cir. 1899), *aff'd*, 181 U.S. 57 (1901) (rejection of domiciliary law requiring joinder of husband because damages claimed would be community property). As to the specter of double recovery, see Texas & Pac. Ry. v. Humble, 181 U.S. 57, 61 (1901); Hancock, *supra* note 78, at 373 n.2.

183 *See* the dissent in Traglio v. Harris, 104 F.2d 439, 445 (9th Cir.), *cert. dismissed*, 308 U.S. 629 (1939). That this involves a "conceptual quandary," see Hancock, *supra* note 78, at 377. For an analysis of the case, see *id.* at 375-79.

the common law forum, the joinder requirement can be disregarded as a mere procedural adjunct to a property regime that is not directly involved.[184] Since the imputation of the husband's negligence is not a function of the law of the place of injury, its role in the litigation is irrelevant. When the policy of the place of injury is to extend a remedy to the wife, the forum can assert the interest that sustains that policy. Even if a resulting judgment is considered property, it is property as bestowed by the law of the place of injury. Community property incidents will be relevant to the judgment only if the community property regime may be imposed immediately upon property acquired in other states.[185] To say that the incidents attach because of the law of the domicile is to beg the question. The forum has a reasonable basis for asserting the remedial policy of the place of injury, and whether the law of the domicile is later invoked in a related matter is not the forum's concern.

The more difficult problem arises when the suit is brought at the domicile. Here the forum is the agent of the community property policy, and its own domiciliaries are before it. The difficulty is in subordinating the domicile's policy to that of the place of injury.[186] Of course, interspousal immunity does not prevail in all community property states,[187] and in some the injured spouse's cause of action is treated as separate property.[188] It would be perverse to suggest that the injury resulted from the joint effort of the spouses or that the community regime restores the ancient fiction of *unitas personarum*. Yet, unless the community property statute can be interpreted to allow the right of action as separate property, the domicile probably cannot give preference to the law of the place of injury. While the policy of such a statute restricts policies of compensation, its basis is more comprehensive than the suspect justifications of the doctrine of interspousal

184 *Cf.* Texas & Pac. Ry. v. Humble, 97 F. 837 (8th Cir. 1899), *aff'd*, 181 U.S. 57 (1901).

185 The reduction of the wife's award to community property may present constitutional difficulties. *See* H. MARSH, MARITAL PROPERTY IN THE CONFLICT OF LAWS 171-79 (1952).

186 Under the doctrine of comparative negligence a hybrid solution might be reached in a suit by the wife against a third party. The damages recoverable might be reduced by the percentage of loss occasioned by the husband's negligence. This would prevent the community from being "enriched" by the husband's misconduct and at the same time prevent the property regime from depriving the injured spouse of any recovery and so giving a windfall to the defendant and his insurer.

187 Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); *see* Addison v. Employers Mut. Liab. Ins. Co., 64 So. 2d 484 (La. App. 1953).

188 *See* Hancock, *supra* note 78, at 376 n.1 and cases cited therein.

immunity. The fact of community, rather than the demonstrably uncertain basis for interspousal immunity, inhibits recovery in such cases.

Hence an exception must be made to the principle of alternative reference: when the domiciliary forum cannot judicially establish an exception to its community property regime, the principle is inapplicable, even in the case of an out-of-state injury. This exception parallels the situation in which the forum of the domicile in a common law state cannot judicially make an exception to an express statutory policy of interspousal immunity.

Conclusion

An effort has been made to formulate a choice-of-law rule that reflects the social and economic realities of the times. The rule synthesizes two quite compatible modern policies: the nonimmunity policy of a concerned domicile and the compensation policy of a concerned place of injury. Where one or the other can be selected, the result will be either (*1*) to dismiss a supposed conflict as false, as when the place of injury has an immunity policy that is rendered irrelevant because of its lack of interest in the given spouses, or (*2*) to resolve a true conflict in favor of the policy with greater intrinsic merit, as when a concerned domicile has an immunity policy.