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Roy Mitchell Moreland
University of Kentucky

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conflicts of law--choice of law in torts--a critique

by roy moreland*

in the changing field of conflicts of law, no topic is more confused and more difficult than that of choice of law in tort cases. historically the law in such cases was simple in statement and application—the law of the case was the law of the state where the injury occurred. but in recent years it has become increasingly clear that this historic rule is an oversimplification. in too many cases, where a series of acts occurred in several states, it was felt that to turn the choice of law wholly on the basis of where the injury occurred was unsatisfactory because this place may have had a small part in the total circumstances of the case. in line with this modern thinking, babcock v. jackson was decided in 1963. in this decision the new york court enunciated a choice of law rule based on the state having the most significant contacts with the transaction. a number of courts have followed babcock, but the majority still adhere to the old rule.

the net result is that there are now two competing rules as to choice of law in tort cases. should the law of the place where the injury occurred or the law of the state having the most significant relationship control? the place of injury rule provides certainty as to the law. whether the suit is in nevada or new york, the same decision would be made as to choice of law. this is in accord with the fundamental principle that the law should be objective. suppose several persons were plaintiffs in separate suits arising out of a single accident containing several foreign elements. under the place of injury rule, the same law would be

*professor of law, university of kentucky college of law; ll.b., university of kentucky; j.d., university of chicago; s.j.d., harvard university law school.

1 12 n.y.2d 473, 191 n.e.2d 279, 240 n.y.s.2d 743 (1963).
2 see generally 2f. harper & f. james, the law of torts § 30.4 (1956), for a discussion of the situation prior to babcock.
applied in each case, whether the suit were in Nevada, New York, or some other jurisdiction. This results in equal justice before the law, a result to be earnestly hoped for.

On the other hand, if the courts of the several states involved were able to determine subjectively which state had the most significant contacts with the chain of events leading to the injury, it is not only possible but probable that in many cases the law of different states would be applied in the various suits arising from the same accident. This encourages litigants to choose the most favorable jurisdiction in which to sue, making it difficult for lawyers to advise clients as to the law of the case. It is a clear invitation to uncertainty and confusion.

In addition, these cases involve the basic premise that a tort action is a suit for compensation by the defendant for an injury caused by his wrongful conduct. If there is no injury, there is no right to recover. For example, suppose that the defendant is reckless, but his recklessness causes no injury to the plaintiff. Although there may be a criminal action for the recklessness, there is no civil action. It is well that this principle in civil tort cases be preserved.

While there may be no recovery for negligence which causes no injury, conversely, injury without negligence is not actionable. Each is as significant as the other. Both are essential to a cause of action and a recovery. The point is that mechanical application of the law of the place of injury as the controlling factor in a multi-state tort case is an oversimplification when the conduct which caused the injury occurred in another state. Perhaps, too little thought has been given to the place or places of conduct in determining the law in tort cases. Frequently the place of the injury is merely fortuitous and only a small part of the relevant circumstances occurred there. As wrongful conduct and injury are both essential elements of liability, the choice of law is complicated when the law of the state of the conduct and that of the injury are different. What to do in such a situation is the question.

3 Note, Lex Loci Delecti or Significant Contacts—That is not the Question, 54 Ky. L.J. 728, 733 (1966).
4 H. Goodrich, CONFLICT OF LAWS 263 (3d ed. 1949).
5 W. Prosser, LAW OF TORTS 146 (3d ed. 1964) [hereinafter cited as Prosser].
6 2 F. Harper & F. James, supra note 2.
Several cases will be considered that illustrate the problem and the difficulty.

A case illustrating the place of injury rule is *Alabama Great Southern Railroad Company v. Carroll*. In that case, the plaintiff was a brakeman on the defendant's railroad. The defendant was an Alabama corporation running the railroad from Tennessee through Alabama into Mississippi. The plaintiff was a resident of Alabama, the state in which the employment relationship was entered into. The injury arose out of the negligence of the defendant's employees in failing to inspect brake couplings in Alabama. The injury occurred, however, in Mississippi. The court held that the place of injury rather than that of the negligent conduct determined the law of the case, and that the plaintiff had no cause of action under Mississippi law. If *Babcock* had been decided at that time (1892), it is possible that Alabama law would have been applied under the "most significant contacts" rule since both parties were residents of Alabama; the plaintiff was hired there, and the place of injury was fortuitous in that the negligent coupling had remained in service through several states. However, the conduct which caused the injury occurred in Alabama. While it is submitted that it is hardly satisfactory to apply the law of Mississippi, it is not altogether satisfactory to apply Alabama law. So neither the state having the most significant relationship nor the state of injury presents a satisfactory locus for choice of law. What is the solution?

Two cases will illustrate the simplicity of applying the mechanical place of injury rule, but show its potentially unsatisfactory result. In the first case, *Dallas v. Whitney*, plate glass stored in Ohio by the plaintiff was broken by the force of an explosion caused by the defendant's blasting in West Virginia. The suit was in West Virginia. The West Virginia court held that the defendant's liability was determined by Ohio law, which imposed liability without fault.

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7 97 Ala. 126, 11 So. 803 (1892).
8 Alabama law would have been employed if this had been a workman's compensation case. In workman's compensation cases, the law of the state of the employer-employee contract governs. Such cases have long been considered an exception to the place of injury rule. E.g., Val Blatz Brewing Co. v. Gerard, 201 Wis. 474, 230 N.W. 822 (1930).
If the court had been using the Babcock rule and under West Virginia law the defendant would have been liable only if he had been negligent, would West Virginia law have been applied? Ohio would have remained the place of injury, but it is highly probable that the West Virginia court might well have held that West Virginia was the state of most significant contact and applied its own law. In a case where the state of injury has a rule of liability without fault, the forum, if it has the contrary rule, is apt to apply its own law and hold its citizen not liable. Thus, Babcock may furnish a convenient peg upon which to hang the choice of law, although normally the law of the case would be that of the place of injury. Conversely, if West Virginia were the forum, and liability without fault had been its law (the place of conduct), it is altogether probable that the law of Ohio would be applied. These examples indicate that Babcock furnishes the opportunity for inconsistent results favoring or not favoring contesting parties.

Somewhat similar are the problems inherent in Hunter v. Derby Foods, which involved an action for wrongful death brought in a New York federal district court. The deceased died in Ohio from eating unfit canned food which he had purchased and eaten in Ohio. The defendant, a New York distributor, had secured the food from a concern which had canned it in South America. The defendant sold it to a wholesaler in Ohio who in turn sold it to the grocer from whom the deceased purchased it. An Ohio statute made it negligence per se to sell unwholesome food without disclosure of that fact. The court held that the plaintiff could recover under the Ohio statute. Here the place of injury was Ohio, and the result was to hold the defendant negligent as a matter of law without privity of contract.

Suppose that the place the food was canned imposed strict liability but Ohio would hold the defendant only if he failed to exercise due care. This would make it hard to determine the jurisdiction having the most significant relationship, but in such a case Babcock would almost certainly have not been mentioned in

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11 110 F.2d 970 (2d Cir. 1940).
12 See E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBURG, supra note 10, at 448-49.
the court's opinion. The "unfit food" cases occupy a separate category in conflicts law. The states in such cases generally follow either the majority rule of strict liability or the minority one which requires lack of due care for liability.\textsuperscript{13} If, in such a case, Ohio had the minority rule and decided to repudiate it, as some sixteen states have done in the last thirty years,\textsuperscript{14} the court would have adopted the rationale found in majority state decisions with no regard to the reasoning in Babcock. This illustrates that Babcock is used only where desired. In too many types of situations it is not desired. This results in numerous separate categories for different types of cases, causing a lack of uniform choice of law rules and debatable rationalizations in support of the various differences between these categorized rules. For example, the Restatement Second of Conflicts of Laws provides for different rules in at least seven categories of actionable wrongs, with a different rule for different types of wrongs.\textsuperscript{15} Over-categorization is the bane of objectivity in the law.

The lack of objectivity in the Babcock rule, its lack of certainty, and the opportunity it presents for the judge to show preference and even prejudice have caused the writer to wonder if the inadequacies of the place of injury rule might be better cured by extending and broadening old, established principles. Schmidt v. Driscoll Hotel, Incorporated\textsuperscript{16} will serve somewhat to illustrate what is in mind. In that case, liquor was sold to an intoxicated person in violation of Minnesota's dram shop law. The intoxicated purchaser drove his car into an adjoining state, Wisconsin, where he caused injury to the plaintiff. The Minnesota court allowed recovery under its own statute. Using much the same reasoning as Babcock, which was not decided until six years later, the court pointed out that both plaintiff and defendant were residents of Minnesota, the wrongful conduct of the defendant occurred in that state, and the purpose of the statute was to punish Minnesota dram shop keepers who sold liquor to intoxicated persons. Wisconsin's only connection was that the harm (injury) fortuitously occurred there.

\textsuperscript{13} See Prosser 674-75.

\textsuperscript{14} Id. at 676.

\textsuperscript{15} See Restatement (Second) of Conflict of Laws §§ 379(c)-379(1) (Tent. Draft No. 9, 1964).

\textsuperscript{16} 249 Minn. 378, 82 N.W.2d 365 (1957).
The writer is not too impressed with the court's reasoning. Would it not have been possible to have reached the same result (assuming it advisable) by the use of established tort principles? The wrongful conduct of the defendant in Minnesota was a continuing tort which continued without interruption into Wisconsin and caused the harm of which the plaintiff complained. This closely follows the reasoning in the squib case, a celebrated decision in tort law.

In that case, the defendant threw a lighted squib, i.e., fire-cracker, into a stall in a market. Acting in self-defense, the occupier of the stall it landed in instinctively threw it into another stall, and so on, until it fell into the plaintiff's stall and exploded causing the plaintiff to lose an eye. The court held that the acts of the intermediate occupiers of stalls were instinctive and reflexive, thus not intervening causes, and that the defendant was responsible for his act. Since the squib continued to burn as it passed from stall to stall, his tortious act continued until it culminated in the plaintiff's injury. Similarly, the defendant's unlawful act in the dram shop case continued, without intervention, until the injury occurred in Wisconsin. Admittedly, this reasoning holds the defendant liable in Wisconsin for his unlawful conduct in Minnesota, but if the law is to change without the aid of Babcock, there must be extensions in established law. It is submitted that it is in accord with existing legal reasoning to hold the defendant liable for his unlawful act in Minnesota, which continued until the injury occurred in Wisconsin. The courts have been applying the law of the place of injury; it is theoretically just as sound to apply the law of the place of conduct. The Restatement Second uses the place of conduct as a factor in determining the state of most significant relationship. The rules governing choice of law cannot be liberalized without some changes, and this is one of the suggested reforms.

There are other ways historic principles can be extended and liberalized without adopting the vague, subjective rule in Babcock. For example, the same result reached in Schmidt was reached in another dram shop case with the same facts. The federal court

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18 RESTATEMENT, supra note 15, at § 379.
19 Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959).
for the Northern District of Illinois held the dram shop owner liable for the tort, as in Schmidt, but with different reasoning. The liquor was sold in Illinois, but the resulting injury was in Michigan. The court, sitting in Illinois, held that although the Illinois Act was not intended to have extra-territorial effect and the Michigan Act was not applicable, the Illinois defendant was liable under Michigan common law. Of course, to reach that result, it was necessary to hold that the defendant's act in Illinois continued its intoxicating effect into Michigan where the injury occurred.

The use of the continuing act principle to hold a defendant liable for an injury in a second state is ordinarily used where the act was unlawful in the initiating state. However, the defendant may also be liable where the act was unlawful only in the state where the injury occurred. But this calls for a shift in reasoning. Thus, in Steele v. Bulova Watch Company, a citizen and resident of the United States purchased Swiss watch parts and took them to Mexico City where he assembled the watches, stamped "Bulova" on them, and sold them. This was lawful in Mexico, but these watches eventually "found" their way into the United States where they were in competition with the plaintiff's Bulova watch business in this country. The court issued an injunction against the American's acts in Mexico. Although the acts were lawful there, their effect continued on into the United States where they constituted unlawful competition. The continuing lawful acts became unlawful when they caused injury to the plaintiff in this country.

With such suggestions in mind, an examination of Babcock and related cases will now be made. The case was decided in 1963, after the decisions just discussed. The Jacksons took Miss

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20 344 U.S. 280 (1952). See American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). The complaint charged the defendant with monopoly of the banana import trade and, with the instigation of the Costa Rican government, conspiracy to seize plaintiff's plantation in Panama. The Court held that a violation of American laws could not be grounded on a foreign nation's sovereign acts. It is submitted that the case reached the wrong result; it was criticized by the majority of law review articles at that time.

21 Although the defendant registered the trademark "Bulova" under Mexican law, the Mexican courts nullified the registration before final disposition in the United States. However, this should have no effect on the result. A state can enjoin its own citizens from acts, though valid where committed, if they have an unlawful effect within the borders of the state. The injunction is directed against the person.
Babcock in their automobile on a weekend trip to Canada. While Mr. Jackson was driving in Ontario, the car ran off the highway and Miss Babcock was seriously injured. She brought an action in New York alleging negligence in the operation of the automobile. Since Ontario’s guest statute barred recovery, the defendant moved to dismiss on the ground that there was no cause of action at the place where the injury occurred. The New York appellate court, however, basing its precedent-shattering opinion on the reasoning that New York had “the most significant contacts with the matter in dispute,” applied New York law and allowed recovery. The decision has been acclaimed by some judges, primarily in New York and Pennsylvania, and by a majority, perhaps, of law school professors and commentators. However, it has been followed in only a few states and remains distinctly the minority rule. The main reasoning of the court in Babcock is stated as follows:

Comparison of the relative “contacts” and “interests” of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at least minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.\(^\text{22}\)

Perhaps the most objectionable feature of the rule in Babcock is the uncertainty of its application. Judges hearing a case in New York may well decide that the “center of gravity” is in New York; judges adjudicating the same case in Kentucky might just as well decide it is in Kentucky. The rule is almost certain to result in too much slanting of decisions towards the plaintiff's side. Such subjective determination of the rights of the parties causes not only uncertainty but injustice before the law. It will cause clients to choose the forum that will be most favorable towards them. Sparks, a practicing attorney, who has written a vigorous criticism of the case, says that the decision is “wholly indefensible.” He believes that the decision

will throw the law governing torts into a state of utter confusion, will bring forth a hodge podge of decisions based neither upon rhyme nor reason, will breed uncertainty, will enlarge forum shopping by the parties, will increase provincialism throughout the federalized country and will allow recovery solely that one might recover.23

Those who were dissatisfied with the historic rule might well have found a stronger case upon which to ground a change. In Babcock, both the unlawful conduct (negligence) and the injury occurred outside of New York; in fact, they both occurred in Ontario. If the conduct and injury both occurred in Ontario, it is hard to argue that the most substantial factors occurred in New York in light of the fact that conduct and injury are ordinarily considered the two most important factors in a multi-state tort case. The inconsistency inherent in the New York decision is indicated by the fact that if this suit had been brought in Ontario instead of New York, and the Babcock rule had been applied there, it is quite possible that the court would have held that Ontario was the place of most significant relationship and applied its own law.24

It is occasionally suggested that Babcock is an insurance rather than a tort case. However, the result, in the light of fundamental insurance principles, is clearly erroneous. The purpose of an insurance contract is to stand between the insured and liability.25 If there is no liability, there should be no payment of insurance. In Babcock, there was no liability under accepted conflicts tort principles. So the court created new law to make the insurance company liable. This may be advantageous to the injured plaintiff, but its net result is to raise insurance premiums for other persons who have insurance with the company.26 It may be safely inferred that this result was by no means contemplated by any of the parties to the insurance contract.

26 Professor Currie states that Babcock will not raise insurance rates in Ontario. That is true, but it will raise insurance rates in New York! It changes New York law, thus adding to an insurance company’s liability there. Comments on Babcock v. Jackson, supra note 24, at 1238.
Running through the cases which are similar in result to Babcock is constant talk of the interest of the various states involved in the cases. Thus, in Schmidt; the court held the Minnesota statute applicable partly on the reasoning that it was the purpose of the statute to punish Minnesota dram shop keepers who sold liquor to intoxicated persons. What has that to do with the defendant's liability for the tort injury in Wisconsin? "Punish" is a word properly found on the criminal side of the docket and has nothing to do with a tort injury, unless it is a case involving punitive damages.

Professor Currie has also stressed the idea of considering the interests of the several states in the determination of liability in these multi-state tort cases. Thus, Babcock is rationalized in terms of New York's interest in enforcing liability since the parties are New York residents. This, it is submitted, is wrong. What we have in Babcock is a suit between private parties, to which the state is not a party. Objective conflicts torts principles should be applied. More and more, society in the United States moves toward the enforcement of state interests as such, rather than the individual rights of private parties although, admittedly there is public policy behind all law. The law in this country (supposedly) serves the citizen, not the state. What is good for General Motors may or may not be good for the country, but certainly what is good for the state is not necessarily good for its citizens. It is the function of the state to furnish courts and procedures for the enforcement of private rights in civil cases. The point attempted to be made is not easy, but the fact undoubtedly is that more and more the law and policy serve the interests of the state rather than the individual. A re-assertion of private rights and obligations is needed in this country. The state and federal trends are only too apparent.

While Babcock has not been generally followed, except by professorial commentators, there are several cases subscribing to its rule. A leading one is Griffith v. United Air Lines, a Pennsylvania case decided in 1964. It repudiated the place of injury rule in favor of the "more flexible" principle in Babcock which

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27 Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957).
permits a weighing of the interests of the various states involved. The judge in the *Griffith* case wrote an exhaustive opinion in which he relied heavily on a North Carolina case.\(^\text{30}\) That case involved an action brought against a Pennsylvania insurance company for negligent delay in acting upon an application for life insurance. Pennsylvania law, which denied such an action, was applied. The court so held because Pennsylvania had "the most significant relationships with events constituting the alleged tort and with the parties."\(^\text{31}\) One might challenge the conclusion that Pennsylvania was the state of most significant relationships in this case. Another judge might well decide that under all the facts and circumstances, North Carolina was the center of gravity.\(^\text{32}\) The decision is a good illustration of the subjectiveness of the *Babcock* rule.

The Kentucky Court of Appeals, in a five to two decision, adopted the *Babcock* rule in 1967.\(^\text{33}\) The parties to the suit were Kentucky residents involved in an accident in Indiana. The plaintiff was riding in the defendant's car when the negligence of her host caused an accident. Kentucky law permits a guest to sue a negligent host, but Indiana law does not. The Court found Kentucky to be the state of the most significant contact with the suit and applied Kentucky law. It is submitted that the case reached the wrong result since, as in *Babcock*, the unlawful conduct and injury both occurred in Indiana. This should make Indiana the state of the most significant contact with the accident. The fact that the parties were residents of and domiciled in Kentucky seems of relatively less importance.

A recent case following stare decisis and applying the historic rule is *Shaw v. Lee*,\(^\text{34}\) a North Carolina decision. In that case, a wife was allegedly injured while riding as a guest with her husband in Virginia. They were residents of North Carolina. North Carolina law would allow her an action; Virginia law would not. The court applied Virginia law, stating that some


\(^{32}\) Compare the factors pro and con. *Id.* at 474.

\(^{33}\) Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967).

\(^{34}\) N.C. 609, 129 S.E.2d 288 (1963).
jurisdictions would allow the plaintiff an action but that North
Carolina preferred to follow stare decisis and did not "deem it wise
to voyage into such an unchartered sea, leaving behind well
established conflict of laws rules." In a similar Kansas case, the
decedent was fatally injured in an automobile collision in Mis-
souri. A wrongful death action was brought in Kansas by his ad-
ministratrix. The decedent and all parties to the action were
residents of Kansas, but the Supreme Court of Kansas held that
the rights of the parties were governed by Missouri law.

In a 1966 New York case, Kell v. Henderson, the parties and
their guest were all domiciled in and residents of Ontario. The
alleged negligent operation of the automobile and the injury
occurred in New York. Kell reached a result that would seem con-
trary to the Babcock decision. It held that the law of the state of
injury was the law of the case, and that the guest had a cause of
action in New York for injuries occurring in that state whether
those involved were residents or domiciliaries of that state or not.
It is believed that Kell was correctly decided and cases like Bab-
cock and Wessling were not. All three cases involved unlawful
conduct and injury occurring in the same state. Where the conduct
and injury occur in the same state, the Restatement Second takes
the position that "the local law of that state usually determines
the rights and liabilities of the parties." Kell holds that domicile
and residence do not cause as much "significant relationship" as
"conduct and injury."

An indirect effect of Kell is that it repudiates the argument of
those who would say that such decisions are insurance cases and
should be decided according to the insurance interests of the states
involved. In Kell, the parties were residents of, and domiciled in,
Ontario. Consequently, the automobile that was involved in the
accident was presumably licensed, garaged, and insured there. So
it might have been argued that Ontario’s insurance interests
should have determined the choice of law. But the court decided
otherwise, and correctly, holding with the view of the Restatement
Second that the law of the state of both unlawful conduct and

35 Id. at —, 129 S.E.2d at 293.
38 Restatement, supra note 15, at § 379(2) (b).
injury was the law of the case, without any mention of Ontario's insurance interests. If, then, *Kell* is correctly decided, it is apparent that *Babcock* is not since in *Babcock*, the conduct and injury were both in Ontario. So, although *Babcock* gave rise to the important "significant relationship" doctrine, the decision itself does not satisfy the court's own test and reaches a holding manifestly erroneous on the facts.

Courts which have not accepted the *Babcock* rule have not, generally speaking, made any attempt to rebut the reasoning behind it. They have been largely content to point out the uncertainties in the new rule and rely on stare decisis. One who wishes to differ with the *Babcock* rationale must for the most part glean his reasoning from decisions prior to the case, sometimes many years prior. However, one *limitation* is developing in decisions that might otherwise apply the new rule. This limitation amounts to an interpretation of the word "fortuitous." One objection to the place of injury rule is that the parties were often only "fortuitously" in the state of injury, *i.e.*, that they were only passing through, and that most of the factors of the case were associated with another state or states. Several recent cases have stated that "fortuitous," in the legal sense, means that the parties involved in the multi-state tort had not "come to rest" in the state where the injury occurred.

The leading case applying the "come to rest" limitation is *Dym v. Gordon*, a New York decision. In that case a New York passenger brought suit against a New York host for injuries sustained during a trip that began and ended in Colorado. Both parties were temporarily residing in Colorado. A divided New York Court of Appeals concluded that the Colorado guest statute controlled. The majority applied what they conceived to be the *Babcock* rule, but they concluded that the accident "arose out of Colorado based activity" since the parties were at the time *temporarily residing* in Colorado. Judge Fuld, who had written the majority opinion in *Babcock*, joined in a dissent on the ground that the "center of gravity," as in *Babcock*, was in New York.

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41 16 N.Y.2d 120, 128-29, 209 N.E.2d 792, 797, 262 N.Y.S.2d 463, 470 (1965).
The majority opinion, however, pointed out that in Babcock "the parties were in transitu."\(^{42}\)

The "come to rest" limitation on Babcock is discussed at some length in an excellent Note\(^{43}\) in the Kentucky Law Journal. The commentator, in the course of his discussion, uses a number of illustrative situations to point up the limitation. He suggests that the traveling party has come to rest, for example, if the injury occurs during the course of a several weeks vacation at a particular place, or during the course of a week-end fishing or hunting trip. He suggests that if a party should go from Kentucky across the river to Cincinnati, Ohio, for a one day shopping trip, that an injury in Ohio during the day would be "fortuitous." From that illustration he moves on to suggest that in any stop for more than twenty-four hours the party would have "come to rest." This might be questionable under some circumstances. The point is that "coming to rest" is a matter of time and degree and while lawyers may differ as to applying the limitation in a particular case, it is submitted that this limitation is reasonable and valid and a marked step toward a refinement of the Babcock rule. It is a move toward objectivity.

**Conclusion**

No problem in the law is currently more difficult than choice of law in multi-state tort cases. The many courts that have faced the problem have applied numerous conflicting theories in their opinions. Commentators are in equal conflict and confusion. In such a situation it is difficult to make specific suggestions. However, this article has been critical of the new "center of gravity" rule, and it is felt that something specific should be offered. The Restatement Second has offered a formula for the determination of the law to be applied in such cases. That formula is a compromise; it embodies the historic place of injury rule, the place of conduct, domicile and related factors, and the "center of gravity" (Babcock) rule. This formula provides:

\[ § 379. \text{The General Principle.} \]

\[ (2) \text{Important contacts that the forum will consider in} \]

\(^{42}\) Id. at 125-26, 209 N.E.2d at 795, 262 N.Y.S.2d at 467-68.

\(^{43}\) Note, supra note 3.
determining the state of most significant relationship include:

(a) the place where the injury occurred,
(b) the place where the conduct occurred,
(c) the domicile, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

The Restatement Second has also categorized various specific tort situations which do not come within the personal injury rule and for which separate formulas are provided. Case law is doing this also. Whether it is advisable to have separate rules and categories may well be questioned, but that matter is grist for a long discussion, much longer than the limits of this article.

The Restatement Second, in section 379 (1), provides that the local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort. This is practically a restatement of Babcock, and if the formula ended there, the writer would be much opposed to it. However, section 379 (2) also attempts a break-down of the important contacts that the forum will consider in determining the state of most significant relationship. These factors will be discussed in turn:

1. The place where the injury occurred—This factor standing alone is, of course, the sole factor employed under the historic rule in determining choice of law in conflicts tort cases. What is its weight under the Restatement Second? One can obtain a definite and specific answer to that question in section 379a (2), which provides:

§ 379a. Personal Injuries.

(2) When the actor's conduct and the personal injury occur in different states, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless it appears that some other state has a more significant

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44 The Restatement Second has at least seven sub-sections of different rules in separate categories of actionable wrongs depending upon the type of wrong. Restatement, supra note 15.
relationship with the occurrence and the parties, in which event the local law of the latter state will govern.\textsuperscript{45}

Thus, the law of the place of injury is the law of the case \textit{unless} it appears that some other state has a more significant relationship. In other words, the law of the place of injury is the law of the case, subject only to certain \textit{exceptions}. So the historic rule remains the fundamental factor in determining choice of law. Consequently, the \textit{Restatement Second} would not advocate a complete following of \textit{Babcock} but an acceptance of the growing feeling that the historic rule is an oversimplification which does not adequately provide for "exceptional" circumstances. It is on that basis the writer accepts the \textit{Restatement} formula, with some reservations.

The inadequacies of the place of injury rule can be partly cured by extending and broadening recognized legal principles. For example, desirable results can be obtained by the application of the continuing act principle in cases like \textit{Schmidt} and \textit{Steele}.\textsuperscript{46} One reason for the birth of \textit{Babcock} was the ineptness of the courts in failing to broaden the place of injury rule in multi-state situations even though ours is a society with more and more inter-state communication. Too often the courts applied the place of injury rule narrowly and without imagination. Flexibility is needed in the law.

The new "come to rest" limitation on \textit{Babcock} will throw a number of cases that would otherwise be decided under the "center of gravity" approach back into the "place of injury" category. This limitation on \textit{Babcock} indicates the possibilities of refinement, not only as to the "most significant contacts" part of the \textit{Restatement Second}'s formula, but as to other portions of the formula as well. The thoughtless use of stare decisis is on the way out in conflict of laws. Judges are turning their attention to actual solutions of conflicts problems. The utilization of the "come to rest" rule is illustrative of creative energy thoughtfully applied. The New York courts are primarily responsible for the judicial creation of \textit{Babcock}; they are also largely responsible for the rea-

\textsuperscript{45} \textit{Restatement (Second) of Conflict of Laws} § 379a(2) (Tent. Draft No. 8, 1963).
sonable "come to rest" limitation on the rule. Further refinements of the choice of law formula may be expected.

2. The place where the conduct occurred—The place where the conduct occurred has not, in the past, been controlling in determining the choice of law. Instead, the place of injury has governed. Fundamentally, this is because a tort is an injury for which compensation should be paid. If there is no injury, no compensation should be paid; the conduct, even though it may be blameworthy, is non-tortious. This is not true on the criminal side. Recklessness may be a crime without injury. This is because crime is a public offense and the state desires that dangerous conduct be deterred. But on the civil side the plaintiff is not the state but a private citizen, and he has no business in a civil court asking for compensation unless he has been injured.

All this does not change the fact that the courts, particularly in recent years, have begun to struggle with the problem of the relation of conduct to choice of law. Almost invariably they have approached the problem indirectly. Schmidt and similar cases are confusing in their reasoning. Many of these cases, where the conduct occurred in one state and the resulting injury in another, can be solved most logically by an application of the "continuing act" principle. If A lights a squib in state X and throws it across the line into state Y where it explodes and injures B, A should be held liable under the law of state X if state Y does not have a law making him liable.

The Restatement Second has suggested what amounts to new law in exceptional cases where conduct, as such, may be the decisive factor in choice of law. There may be those who would argue that this provision is not new law. But fundamentally it is new law; the provision is a distinct addition to, and change in, the law which is to be applied in certain exceptional cases. The writer is in accord with the insertion of conduct as a determinative factor in such cases where it is logical and reasonable to do so. The same result may be reached in some of these cases by the use of the continuing act principle and perhaps some other devices; but it is believed that the inclusion of conduct, as such, in the deter-

47 Prosser § 30.
48 See 2 F. Harper & F. James, supra note 2.
49 Restatement, supra note 15, at § 379, Comment b.
mination of the law in certain cases is a forward step and strengthens the Restatement Second formula.

However, new departures should be used cautiously and thoughtfully. This is new; what are the kinds of situations where the provision should or should not be applied? The restaters' Comment\(^\text{50}\) on the provision attempts to meet this question by suggesting several specific illustrative situations. It points out that where the conduct and injury occur in the same state, the local law of that state almost invariably determines the law of the case. The Comment then moves on to state that "situations may, however, arise, where although conduct and injury occur in the same state, some other state has the most significant relationship with the occurrence and the parties and is therefore the state of governing law."\(^\text{51}\) The situation given is where the plaintiff, who is domiciled in state X, purchases a ticket there from the defendant airline, which is incorporated and has its principal place of business in X, for a flight from one point in X to another point in X. A straight line between these points runs for a short distance over the territory of Y. While over Y the pilot is negligent and the plane loses an engine, causing the plaintiff to be badly frightened. Here the conduct and injury both occurred over Y but, according to the Comment, X is the state of most significant relationship.\(^\text{52}\) Hard cases make difficult decisions. The writer is no friend of domicile as a decisive element, particularly if the plaintiff was not also a resident of X. If this suit were in Y, the court might apply the law of Y. At any rate, the formula provides a framework within which to examine the facts.

The Restatement struggles through several pages of Comment and illustrations to draw the lines for the incorporation of "conduct" into the formula for the determination of choice of law. One may not agree with the entire Comment or with all of the conclusions in the illustrations, but they are most helpful in arriving at a semblance of exactness and certainty of decision. It is this kind of precise thinking that will gradually but definitely result in applying the new element "conduct" in a satisfactory

\(^{50}\text{Id. at § 379(a), Comment e.}\)
\(^{51}\text{Id.}\)
\(^{52}\text{See also id. at Comment f.}\)
manner to help determine the law of the case in a conflicts torts situation.

3. The domicile, nationality, place of incorporation and place of business—This subdivision of the formula troubles the writer. It embodies a goodly portion of the Babcock principle. A number of cases have relied upon one or another of these enumerated elements. Particularly, the writer is no friend of "domicile" as a determinative choice of law factor. Its use in the migratory divorce is a thing of reproach to the law. One remembers the prominent eastern wife who went to Nevada for a quick divorce and who was specifically asked by the judge if she intended to make Nevada her home. She answered, "Yes." Then the judge asked, "Do you intend to stay in Nevada permanently?" Again she answered, "Yes." The judge gave her a divorce and within an hour she was on a plane and on her way back to New York. The writer does not know the answer to the migratory divorce but certainly the application of "bona fide domicile" in such cases is an abomination in the law and a discredit to the legal profession.

Nor has the writer found "domicile" a very helpful factor in other conflicts problems, e.g., as a basis of jurisdiction. If a defendant is domiciled in X but working for six months in Y, five hundred miles away, it is not satisfactory to force him to return to X to defend a suit. Of course, there are arguments on the other side. Domicile is a very vague word anyway, hard to define and hard to apply. "Residence" is a more satisfactory word, but "residence" is a venue term.

Yet there is an increasing tendency to use "domicile" as a factor in the determination of choice of law. The Restatement Second uses the factor of domicile in illustrations and discussions in several of the sub-sections to Section 379, e.g., those pertaining to fraud and misrepresentation, defamation, and right of privacy. Each of these could be considered at length, but the choice of law in intra-family immunity cases will be the only situation discussed, for it embraces situations that have caused confusion and difference of opinion in conflicts for a long time.

The writer found considerable pleasure in applying the

technicalities of the vested rights theory to some of these earlier marital torts cases. For example, take the debatable question raised in *Buckeye v. Buckeye*.

The plaintiff was allegedly injured by the defendant's negligent driving in Illinois. Subsequently the parties married. By the law of Illinois, marriage extinguished the right of action. But marriage did not extinguish the right of action in Wisconsin, the state to which the parties had moved. The Wisconsin court applied Illinois law. If the vested rights theory is applied to the case, it is easy to justify the decision. The plaintiff had a cause of action in Illinois, but marriage extinguished it.

This is the type of situation that jolts those who would follow the place of injury rule in all cases. To apply the rule makes the decision simple and certain. To those who do not like the result one can say, "But that is the law." But to say it is the law is not enough. Is it good law? Some subsequent cases have not thought so. In fact, *Buckeye* itself has been overruled in Wisconsin by *Haumschild v. Continental Casualty Company*.

That case held that in torts cases where one spouse sues the other, the law to be applied is that of the state of domicile. A number of other states are now coming to the same conclusion. Stumberg looks with considerable favor on the emerging rule, but the discussions and cases are by no means in accord on the matter. The *Restatement Second* cites cases supporting domicile as the basis of choice of law in such situations.

Somewhat conversely, the *Restatement Second* repudiates domicile as the basis for choice of law in the somewhat similar situations of alienation of affections and loss of consortium, and chooses the place of injury as the criterion in line with recent cases in this category. The leading case is *Gordon v. Parker*.

In that celebrated case the husband sued the defendant for alienation of his wife's affections. The spouses had lived in Pennsylvania. The wife was induced to cohabit with the defendant in Mas-

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54 208 Wis. 248, 234 N.W. 342 (1931). See also Gray v. Gray, 87 N.H. 82, 174 A. 508 (1934).
55 7 Wis. 2d 130, 95 N.W.2d 814 (1959).
59 Id. at 17.
60 83 F. Supp. 40 (D. Mass. 1949), aff'd 178 F.2d 888 (1st Cir. 1949.)
sachusetts. There was a cause of action under Massachusetts law but not Pennsylvania, the matrimonial domicile. The court chose to apply the law of Massachusetts after weighing the relative interests of the two states. This is somewhat specious, since the husband had not been in Massachusetts and the place of matrimonial domicile was Pennsylvania. However, it is believed that the decision is correct even though it is somewhat difficult to define the technical reasons. Undoubtedly the place of injury was Massachusetts, but injury to what? To the husband's consortium? The writer is not too impressed by the interest of the state of Massachusetts in the husband's action. The question is the husband's injury, not Massachusetts' interest in punishing the defendant in a civil action.

The inclusion of domicile, nationality, place of incorporation and place of business as possible factors in the choice of law in torts cases is in line with discussions and holdings in current cases. It will broaden and extend the existing law. It will not bring immediate uniformity, but it will, as in other portions of the Restatement, give a formula of specific statement if not of uniform application. As time passes, it will result in more predictable prophecy as to choice of law in such cases after the courts and the commentators have had an opportunity to further refine and reform it.

4. The place where the relationship, if any, between the parties is centered—Where there is a relationship between the parties and when the injury is caused by an act done in the course of the relationship, the place where the relationship is centered is another factor to be considered in determining the choice of law. Thus, if a passenger is injured on a train, the place where the relationship is centered may be the state of governing law. In rare cases the place of the seat of the relationship may outweigh all other factors in choice of law. Thus, if the plaintiff purchases a train ticket to ride from X to Y in state A, but is injured while the train is passing for a short distance through state B, the law of A rather than B will likely govern. However, this factor must be weighed with others in reaching a conclusion.61

61 Restatement, supra note 15, at § 379, Comment b.
It may be said with finality that the determination of choice of law in torts cases on the basis of the place of injury is an oversimplification and inadequate under modern conditions of interstate travel and communication. The place of injury rule can be extended and broadened by the use of the continuing act principle and other technical devices, but these are not sufficient. The cases and commentators are in confusion on the matter. In such a situation, the formula provided by the Restatement Second, Conflict of Laws, in Section 379 offers something rational on the whole and reasonably specific. Further refinement by the courts and commentators will be needed to clarify and improve the formula. The "come to rest" limitation now developing in New York is an illustration of this type of refinement. Continuing thought and discussion will bring others.