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## AUTOMOBILE ACCIDENTS AND INDIANA CONFLICT OF LAWS: CURRENT DILEMMAS

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At one time if suit was brought in Indiana for personal injuries suffered in an automobile accident our courts unquestionably would have looked to the law of the state in which the tort was committed, not only to determine the elements of plaintiff's prima facie case[1] and the usual

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1. *Negligence cases*: Slinkard v. Babb, 125 Ind. App. 76, 112 N.E.2d 876 (1953) (proximate cause); Holtz v. Elgin, J. & E. Ry., 121 Ind. App. 175, 98 N.E.2d 245 (1951) (negligence and proximate cause discussed); Morley v. Cleveland, C., C. & St. L. Ry., 100 Ind. App. 515, 194 N.E. 806 (1935) (duty); Lewin v. Moll, 98 Ind. App. 1, 186 N.E. 905 (1933) (sufficiency of evidence to support jury verdict for plaintiff), noted 9 IND. L. J. 260 (1933); and Buckles v. Ellers, 72 Ind. 220 (1880) (dictum re damages).

*Wrongful death*: The Indiana cases contain no specific discussion of the plaintiff's prima facie case, but do state that the rights and duties of the parties are to be determined by the law of the place where the tort was committed. Cleveland, C., C. & St. L. Ry. v. Wolf, 189 Ind. 585, 128 N.E. 695 (1920); Wabash R.R. v. Hassett, 170 Ind. 370, 83 N.E. 705 (1908); Cincinnati, H. & D. R.R. v. McMullen, 117 Ind. 439, 20 N.E. 287 (1889); and Burns v. Grand Rapids & Ind. R.R., 113 Ind. 169 (1887).

*Guest statute*: Indiana has no case on point. Other jurisdictions with substantial unanimity have used the place of tort rule to determine the standard of care and the host-guest relationship. Page, *Conflict of Laws Problems in Automobile Accidents*, 1943 WIS. L. REV. 145, 157 (citing decisions from over 20 states).

*Place of injury v. place of acting*: Indiana has never been called on to decide which law to choose if a conflict arises when defendant has acted in one state and plaintiff was injured in another, although dictum indicates that the law of the place of injury should be applied. Baltimore & O. S.W. Ry. v. Reed, 158 Ind. 25, 28, 62 N.E. 488, 489 (1902); Cincinnati, H. & D. R.R. v. McMullen, *supra* at 445, 20 N.E. at 290, and Burns v. Grand Rapids & Ind. R.R., *supra* at 176. Most courts are in accord with this dictum although both argument and authority can be found for use of the law of the place of acting. HANCOCK, TORTS IN THE CONFLICTS OF LAWS 61 (1942); Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1 (1951); Rheinstein, *The Place of Injury, A Study in the Method of Case Law*, 19 TUL. L. REV. 4 (1944).

*The notice requirement*: Under the Uniform Judicial Notice Act, IND. ANN. STAT. §§ 2-4801-07 (1946), a party desiring the court to apply the law of another state should give reasonable notice of that intent. If reasonable notice has not been given, the court will apply the appropriate choice of law rule but presume that the common law as recognized in Indiana prevails in the state of reference, at least where that state has a common law background. Igleheart Brothers v. John Deere Plow Co., 114 Ind. App. 182, 51 N.E.2d 498 (1943). See Note, 6 IND. L. J. 568 (1931).

defenses,[2] but also for such related matters as intrafamily immunity, survival, and limitations on damages.[3]

Today, however, uncertainties regarding the scope of the place of tort rule have been created by the combined influence of changes in the underlying theory of conflict of laws, the increasing recognition given domicil as an appropriate factor by which to connect the forum with governing law, gaps between law and public opinion, and two recent automobile cases decided by the Supreme Court of California.[4] These developments will be explored and evaluated in the hope of shedding light on their relevance to the future of Indiana conflict of laws.

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2. *Negligence cases*: (1) Contributory negligence. Slinkard v. Babb, 125 Ind. App. 76, 112 N.E.2d 876 (1953); Holtz v. Elgin, J. & E. Ry., 121 Ind. App. 175, 98 N.E.2d 245 (1951); Louisville & N. R.R. v. Revlett, 224 Ind. 313, 65 N.E.2d 731 (1946); Lewin v. Moll, 98 Ind. App. 1, 186 N.E. 905 (1933). In Lake Shore & M. So. Ry. v. Boyts, 16 Ind. App. 640, 45 N.E. 812 (1897), the court found plaintiff contributorily negligent as a matter of Indiana law even though the injury occurred in Michigan, but there had apparently been no attempt by plaintiff to plead or prove the Michigan law. (2) Imputed negligence. Louisville & N. R.R. v. Revlett, *supra*. (3) Fellow servant rule. Baltimore & O. S.W. Ry. v. Reed, 158 Ind. 25, 62 N.E. 488 (1902).

*Wrongful death*: Cleveland, C., C. & St. L. Ry. v. Wolf, 189 Ind. 585, 128 N.E. 695 (1920) (fellow servant rule). Broad statements in the cases cited *infra* note 3 would include the typical defenses within the place of tort rule.

3. Hellrung v. Lafayette Loan & Trust Co., 102 F.Supp. 822 (N.D. Ind. 1951) applied the tort rule to a question of survival and damage limits. There are no Indiana cases on point, but use of the tort rule could have been inferred not only from the probable weight to be given authority from other jurisdictions, as to which see Page, *Conflict of Law Problems in Automobile Accidents*, 1943 WIS. L. REV. 145, 158, but also from broad generalizations made in Indiana cases, *e.g.*,

> "Inasmuch as this accident happened in Illinois, we must be guided by the substantive law of that state at the date of the accident in determining the respective rights and duties between the parties hereto, including the law as to proximate cause, negligence and contributory negligence." Holtz v. Elgin, J. & E. Ry., 121 Ind. App. 175, 181, 98 N.E.2d 245, 248 (1951).
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> "We must look to the laws of that state [where the accident occurred] for a declaration of the respective rights and duties existing between the parties to this action." Morley v. Cleveland, C., C. & St. L. R.R., 100 Ind. App. 515, 522, 194 N.E. 806, 809 (1935).
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> "The law of the place where the tort was committed controls as to liability for the tort." Slinkard v. Babb, 125 Ind. App. 76, 82, 112 N.E.2d 876, 879 (1953).

A multitude of conflicts problems have been solved in other jurisdictions by use of the place of tort rule, including the duty of the motorist, boundaries of roads and intersections, regulations of automobile equipment, excuse for driving on the left side of the road, railroad crossing regulations, liability for operation of the car by members of the owner's family and persons to whom he has lent the car or permitted to drive it, liability for acts of an independent contractor, the measure of damages, and the amount of recovery. See Page, *supra* note 1.

4. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955), noted in 31 N.Y.U.L. REV. 1123 (1956), 1 VILL. L. REV. 365 (1956), and Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953). See Shavelson, *Survival of Tort Actions in the Conflict of Laws: A New Direction?*, 42 CALIF. L. REV. 803 (1954); Notes, 27 So. CALIF. L. REV. 468 (1954), 1 U.C.L.A. L. REV. 380 (1954).

The thesis will be presented that despite the fact that modern conflict of laws theory calls for wider use of domicil as a connecting factor, Indiana courts would be entirely justified in retaining the place of tort rule for all substantive problems related to automobile accidents as long as Indiana substantive law retains the outmoded defenses of intrafamily immunity and abatement because of death. However, when these defenses are abolished by the legislature, the remedial acts should contain conflict of laws sections employing domicil as the connecting factor (or perhaps domicil plus the place of tort) in order to insure Indiana citizens the maximum opportunity to obtain the benefits of their modernized substantive law.

### *I. The Vested Rights V. Local Law Dilemma*

When remedial legislation or creative judicial decision alters anachronistic rules of substantive law to conform to present day conditions or with policies more basic than those which produced the outworn rules, pressure is generated for a reexamination of related choice of law rules to insure that the reform has the widest possible application (or at least that local citizens may always obtain its benefits). Developments in automobile accident law supply a current example. A growing belief that personal injuries should promptly and adequately be compensated has led many states to abolish or limit intrafamily immunities[5] and to create

5. *Actions between spouses*: Sixteen states now permit actions between spouses as though they were not married. Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Ginsburg v. Ginsburg, 126 Conn. 146, 9 A.2d 812 (1939); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Lumbermen's Mut. Cas. Co. v. Blake, 94 N.H. 141, 47 A.2d 874 (1946); Bradford v. Utica Mut. Ins. Co., 179 Misc. 919, 39 N.Y.S.2d 810 (1943); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Taylor v. Patten, 2 Utah 2d 404, 275 P.2d 696 (1954). In addition, although a husband can't sue his wife in Wisconsin and North Carolina, a wife may sue her husband. Jernigan v. Jernigan, 236 N.C. 430, 72 S.E.2d 912 (1952) and Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926). Spousal disability is inapplicable to premarital torts in California and Missouri. Carver v. Ferguson, 254 P.2d 44 (Cal. App. 1953) and Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. 1955). The disability has been held inapplicable after a decree of divorce but before it becomes final, Steele v. Steele, 65 F.Supp. 329 (D.C. 1946), and in actions for wilful or wanton torts, Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955).

The disabilities do not extend to suits by a spouse against third persons such as an employer or the owner of the car. Miller v. J. A. Tryholm & Co., 196 Minn. 438, 265 N.W. 324 (1936); Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Garnto v. Henson, 88 Ga. App. 320, 76 S.E.2d 636 (1953); Matney v. Blue Ribbon, Inc., 202 La. 505, 12 So. 2d 253 (1942). However they have been held to prevent a wife from suing a partnership for injuries caused by her husband who was a partner. David v. David, 161 Md. 532, 157 Atl. 755, 81 A.L.R. 1100 (1932); Caplan v. Caplan, 268 N.Y. 445, 198 N.E. 23, 101 A.L.R. 1223 (1935). In Indiana the disability

other substantive rules which stress the policy of risk shifting at the expense of considerations which formerly held sway, *e.g.*, family harmony and the specter of fraud on insurance companies. These changes pose the conflict of laws questions, (1) whether characterizations of legal problems preliminary to determination of the appropriate connecting factor should be revised in light of the revaluations which pervade substantive law, *e.g.*, should family immunity now be characterized as a problem of domestic relations or capacity to sue rather than one of tort and, (2) whether new connecting factors should be employed, *e.g.*, should the law of the place of tort be supplanted by that of the domicil or forum?

The vested rights approach to the conflict of laws, clearly reflected in Indiana decisions near the turn of the century, appears not to permit the policies which underlie substantive law to be given much, if any, weight in selecting the governing rule. The theoretic premise of vested rights is that when a forum decides a case with multi-state contacts, it is

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does not extend to suits against associations of which a spouse is a member. Harg v. Arney, 145 N.E.2d 575 (Ind. App. 1958). It should be noted, of course, that as of today a majority of the states retain the immunities. See Annot. 43 A.L.R. 2d 632 (1955), citing decisions from 30 states.

*Child v. Parent*: Children have been permitted, in four states, to sue their parents under a guest statute for wilful misconduct. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955); Nudd v. Matsoukas, 7 Ill.2d 608, 131 N.E.2d 525 (1956); Siembab v. Siembab, 202 Misc. 1053, 112 N.Y.S.2d 82 (1952), *rev'd on other grounds*, 284 App. Div. 652, 134 N.Y.S.2d 437 (1956); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445, 19, A.L.R.2d 405 (1950).

If the parent is engaged in his business capacity the immunity does not apply. Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Cowgill v. Boock, *supra;* Borst v. Borst, 41 Wash.2d 642, 251 P.2d 149 (1952). It is clear that the immunity does not apply to emancipated children, Perkins v. Robertson, 140 Cal. App.2d 536, 295 P.2d 972 (1956); Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953); and it has been held that wrongful conduct by the parent may be an emancipating act, Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952). Furthermore, in Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930) and Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932), the existence of liability insurance permitted a suit otherwise barred.

To date no case has permitted recovery for negligence in the absence of proof of the existence of liability insurance, although several judges have indicatd it would be desirable. Dunlap v. Dunlap, *supra;* Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928) (dissenting opinion); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923) (dissenting opinion); Worrel v. Worrel, 174 Va. 11, 4 S.E.2d 343 (1939); and Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927) (dissenting opinion).

Actions between children have been permitted. Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939). A parent has been permitted to sue his child. Wells v. Wells, 48 S.W.2d 109 (Mo. App. 1932).

It should be noted, of course, that most jurisdictions retain the immunities. See Annot., 19 A.L.R.2d 423 (1951) (citing decisions from 23 states).

*Direct actions against Insurance Companies* are now permitted by statutes in several states, *e.g.*, LA. STAT. § 655.983 E. (1951); WIS. STAT. § 261, § 85.93 (1953). Under such a statute suits are permitted against the insurance company even though the spouses could not sue each other. Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935); Burke v. Massachusetts Bonding & Ins. Co., 19 So.2d 647 (La. App.1944), however, recovery is not possible if the plaintiff dies before judgment. Addison v. Employers Mut. Liab. Ins. Co. of Wis., 64 So.2d 484 (La. App. 1953).

enforcing a right which vested under the law of the appropriate territory. Courts are expected to trace the chronology of events for the last act or event which, under the law of the state where it occurred, created a liability or defense.[6] That law is to be applied, except where the cause of action is penal in nature,[7] or against the public policy of the forum,[8] or where a rule of law is classified as procedural rather than as part of the right which vested.[9] The policy premise for this approach is uniformity,

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6. See Cheatham, *American Theories of Confliet of Laws: Their Role and Utility,* 58 HARV. L. REV. 361 (1945).

7. RESTATEMENT, CONFLICT OF LAWS § 611 (1934). Indiana is in accord with this rule. Burns v. Grand Rapids & Ind. R.R., 113 Ind. 169 (1887) (wrongful death statute held not to impose a penalty); Carnahan v. Western Union Tel. Co., 89 Ind. 526 (1883) (Indiana statute granting right of action against telegraph company for failing to send a message classified as a penalty).

Indiana has never refused to enforce a foreign cause of action on the ground that it was penal and so has never taken a stand on the issue which has split the courts in other jurisdictions: whether a statute is penal if it imposes any burden on the wrongdoer in addition to making reimbursement for damages or whether the statute should be tested by whether its purpose and effect are to punish an offense against the public justice of the state or to afford a private remedy to a person injured by the wrongful act.

8. RESTATEMENT, CONFLICT OF LAWS § 612 (1934). In Wabash R.R. v. Hassett, 170 Ind. 370, 381, 83 N.E. 705, 709 (1908), the court stated,

> ". . . [T]o justify our courts in refusing to enforce a right of action accruing under the laws of another state as against the policy of this State, the prosecution of such action must appear to be against good morals or natural justice or prejudicial to the general interests of the citizens of this State."

The *Wabash* case rejected the earlier notions of Buckles v. Ellers, 72 Ind. 220 (1880) that Indiana would enforce the statutes of sister states only if Indiana had a statute of similar import, as to which see Burns v. Grand Rapids and Indiana R.R., 113 Ind. 169, 175 (1887); and Cincinnati, H. & D. R.R. v. McMullen, 117 Ind. 439, 442, 20 N.E. 287, 288 (1887).

No Indiana case has been found refusing to enforce a cause of action on the ground of a public policy embodied in Indiana common law. It is an open question in Indiana whether a defense may be refused enforcement on the ground of public policy. However, in Baltimore & O. S.W. Ry. v. Reed, 158 Ind. 25, 31, 62 N.E. 488, 490 (1902) the Supreme Court stated in a negligence case where injury had occurred in Illinois that,

> "If appellant [defendant] had a valid, existing cause of defense under the law of the state of Illinois to the action in question, which it could have asserted and proved in that state had the action been prosecuted therein, certainly then it is beyond the power of the legislature by the section in controversy [Indiana statute abolishing fellow servant defense in certain instances] to destroy the vested right by depriving appellant of asserting the same when sued in the State of Indiana."

It could certainly be contended that if the legislature could not by statute deprive the defendant of a defense, the court could not do it by finding an adverse public policy.

9. *Held procedure and law of forum applied*: (1) Burden of pleading and proving contributory negligence. Cincinnati, L. & A. Elec. St. R.R. v. Klump, 37 Ind. App. 660 (1906) (held that the course of procedure will be governed by the law of the forum); Chicago Terminal Transfer R.R. v. Vandenberg, 164 Ind. 470, 73 N.E. 990 (1905). (2) Burden of pleading and proving assumption of risk. Cleveland, C., C. & St. L. Ry. v. Wolf, 189 Ind. 585, 128 N.E. 695 (1950) (held that all matters of upon whom the burden of proof shall rest in establishing certain issues were procedure). (3) An Illinois statute which created a presumption that a railroad had been negligent if it caused injury in a city while travelling at more than the speed permitted by local ordinances

*i.e.*, if every court would trace the chronology in a similar manner, the results of cases would be the same no matter where litigated.[10] However, many other policies press for recognition. Indeed, it has been contended that there are seven additional policies involved, some of which are more important than uniformity.[11]

In many situations the vested rights approach may reach desirable results because application of the law of the last-event state may best accommodate all the various policies. However, where this is not true the courts must choose between doctrinaire adherence to established rules or furtively giving weight to policies other than uniformity by manipulating "procedure" or "public policy."[12] Unfortunately, these concepts are so broad and vagne that they do not promote the necessary careful, continuous discrimination of fact situations in light of policy considerations.

In recent years a legitimate channel for consideration and expression of a wide range of policy factors in conflict of law cases has been opened up, primarily through the writings of Professor Walter Wheeler

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was held to pertain to the "remedy" and thus could have no effect in Indiana. Smith v. Wabash R.R., 141 Ind. 92 (1894).

*Dictum that forum's law should apply because the issue was one of procedure*: (1) Commencement of action and service of process. Chicago Terminal Transfer R.R. v. Vandenberg, *supra;* Clark v. Southern Ry., 69 Ind. App. 697, 119 N.E. 539 (1918). (2) All rules of pleading. Baltimore & O. Ry. v. Ryan, 31 Ind. App. 597, 68 N.E. 923 (1903). (3) The quantity or degree of evidence requisite to sustain an action. Baltimore & O. Ry. v. Ryan, *supra.* The force of this dicta is weakened by the fact that in Lewin v. Moll, 98 Ind. App. 515, 194 N.E. 806 (1935), the court apparently applied Michigan law to the issue of the sufficiency of evidence. (4) Presumptions. Baltimore & O. Ry. v. Ryan, *supra.* (5) Admissibility of evidence. Baltimore & O. Ry. v. Ryan, *supra;* Chicago Terminal Transfer R.R. v. Vandenberg, *supra;* Cleveland, C., C. & St. L. Ry. v. Wolf, *supra.* (6) Statute of limitations. Hobbs v. Ludlow, 199 Ind. 733, 160 N.E. 450 (1928); Riser v. Snoddy, 7 Ind. 442 (1856); Harris v. Harris, 38 Ind. 423 (1871); Wright v. Johnson, 42 Ind. 29 (1873); Fisher v. Reaser, 113 Ind. App. 292, 46 N.E.2d 280 (1943); Morrison v. Kendall, 6 Ind. App. 212 (1893). (7) All matters relating to the remedy. Garrigue v. Kellar, 164 Ind. 676, 74 N.E. 523 (1905); Hobbs v. Ludlow, *supra.*

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

In order of their importance, as listed by Cheatham and Reese, they are that the forum should:

1. Fulfill the needs of the interstate and international system.
2. Apply its own local law unless there is a good reason for not doing so.
3. Seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law.
4. Strive for certainty, predictability and uniformity of result.
5. Strive to protect justified expectations.
6. Strive to apply the law of the state of dominant interest.
7. Devise rules by which it is easy to determine applicable law and which are convenient to administer.
8. Seek to apply the fundamental policy underlying the broad local field involved.
9. Do justice in individual cases.

12. See Paulsen and Sovern, *"Public Policy" in the Conflict of Laws,* 56 COLUM. L. REV. 969 (1956).

Cook.[13] He insisted that a forum can enforce only its own law. Occasionally, and for reasons of policy which ultimately become expressed in a form which makes prediction possible, the forum will look to the laws of other states for rules of decision which may justly guide its deliberations. In so doing the forum does not enforce the laws of other states. It uses foreign rules of decision merely as an aid in developing its own local law which will be embodied in its decree. Once these local law premises have been accepted, as they have been, in substance at least, by many courts,[14] judicial thinking is freed from preoccupation with territoriality and the "last-event." The courts are thus encouraged to analyze fact situations and conduct investigations into underlying policies in order to determine when it is appropriate to take cognizance of foreign rules.[15] For example, a "vested rights" court would look to the place of injury for both intentional and negligent wrongs because in both instances it was the place of the last event. A court which accepted local law premises might separately characterize intentional torts because the basic policy involved is punishment of anti-social conduct and it might look to the law of the place of acting since that place had the dominant interest in preventing the conduct involved.[16]

Since the last event is not the single critical fact for the policy-oriented local law theory, it not only permits more refined characterizations and new connecting factors, but it also opens the door for different phases of a single case to be characterized as separate problems and thus for more than one connecting factor to be employed in a single case. Furthermore, there is reason to believe that the United States may, un-

13. Cook, *Logical and Legal Bases of the Conflict of Laws,* 33 YALE L. J. 457, 469 (1924). For elaborations see COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1949); Cheatham, *supra* note 6; Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement,* 36 MINN. L. REV. 1 (1951).

14. The statements most often quoted originated with Judge Learned Hand, who stated that the forum creates an obligation of its own, homologous to one which arose in the state of reference. Guinness v. Miller, 291 Fed. 769 (S.D. N.Y. 1923).

In Siegmann v. Meyer, 100 F.2d 367, 368 (2d Cir. 1938) he added, "It is impossible for a court to enforce any liability except one created by the law of the state in which it sits. That state may take for its model a liability created in another state. . . . Its law of the conflict of laws alone determines when it will fashion a liability after a foreign liability."

Regarding a possible distinction between the Cook and Hand approaches see Cavers, *The Two "Local Law" Theories,* 63 HARV. L. REV. 822 (1950).

15. Commentators have experienced a similar liberation. For a list of studies which qualify, see Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement,* 23 U. OF CHI. L. REV. 474 (1956); Morris, *The Proper Law of Tort,* 64 HARV. L. REV. 881 (1951).

16. See Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement,* 36 MINN. L. REV. 1 (1951). Applying a similar analysis, Rheinstein would use the place of acting for all torts. Rheinstein, *The Place of Injury, A Study in the Method of Care Law,* 19 TUL. L. REV. 4 (1944).

der the local law theory, become more closely aligned with the rest of the world in accepting the concept of a personal law; that is, the notion that an individual's legal position should normally be determined by the law of the state with which he is deemed connected in a permanent way, in the United States, his domicil.[17]

It is difficult to reconcile a broad concept of a personal law with the territorial system of vested rights, but if an automobile accident is analyzed in terms of the personal and state interests involved, as it may be under local law theory, the use of the personal law to resolve all conflicts has immediately apparent virtues—at least where both plaintiff and defendant have the same domicil. For example, it appears that although the state where the tort occurred would have an interest in insuring that certain standards of conduct are maintained, the domicil would ordinarily have to care for the needs of persons rendered indigent because of uncompensated injuries. In addition, most people form what expectations they have regarding their potential liabilities and rights to recover for injuries in terms of the only law with which they are familiar—the law of their domicil. And it is there that most insurance contracts are written and most estates settled.

Thus for the Indiana lawyer a dilemma is created: To what extent will our courts today accept local law theory as a premise for reasoning?

It is certainly true that many Indiana conflict of laws decisions have

17. To speak of recent and possibly increased use of domicil is not to deny its substantial place in the past history of conflicts. Indiana, in accord with most other states, has used domicil as a connecting factor for problems characterized as acquisition of marital property rights, Parrett v. Palmer, 8 Ind. App. 356, 35 N.E. 713 (1893); succession to moveables, Warren v. Hofer, 13 Ind. 167 (1859); McClerry v. Matson, 2 Ind. 79 (1850); Irving v. M'Lean, 4 Blackf. 52 (1835); Miller v. Bode, 80 Ind. App. 338, 139 N.E. 456 (1923). As to capacity to make a will, and its validity as respects personal property see Duckwall v. Lease, 106 Ind. App. 664, 20 N.E.2d 204 (1939). Domicil is also established as a sufficient contact to give the courts power to annul a marriage, grant a divorce, grant a judicial separation, award custody of a child, legitimize a child, and adopt a child. STUMBERG, CONFLICT OF LAWS 319-46 (2d ed. 1951). And it exerts strong influence in determining whether a marriage is valid. STUMBERG, *supra* at 282. Indeed, domicil has been called "the most widely advocated rule of conflict of laws." HARPER AND TAINTOR, CASES AND OTHER MATERIALS ON JUDICIAL TECHNIQUE IN CONFLICT OF LAWS 271, n. 17 (1937). Recent developments go a long way toward establishing a personal law. Since 1940 it has been definitely established that domicil is a sufficient contact for jurisdiction in personam. Milliken v. Meyer, 311 U.S. 457 (1940). It now appears that domicil is a sufficient contact on which to apply a Workmen's Compensation statute. Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947). It may be a sufficient contact to permit a state to allow a workman to sue a third party who was immunized from such suit under the compensation law of the place of injury. See Carroll v. Lanza, 349 U.S. 408 (1955). Stumberg has advocated that it be applied to determine interspousal immunity, *supra* at 207; the liability of a husband for torts of his wife, *id.* at 208; and survivorship of actions, *id.* at 206. It has been suggested as appropriate for multiple-state torts, Note, 60 HARV. L. REV. 941 (1947). Other examples appear in part V of this article.

been rationalized in terms of rights which had vested under the law of the appropriate territory.[18] However, this view was not adopted after explicit consideration of all the consequences or of local law theory as a possible alternative. Nor has it been consistently maintained. For example, even in *Baltimore v. Reed,*[19] probably the highwater mark of vested rights terminology, the court quoted approvingly from *Burns v. Grand Rapids*[20] to the effect that rights are enforced out of regard for comity. Earlier Indiana cases, citing Story, spoke of comity as the true theory of the conflict of laws.[21] Yet the recent case of *Barber v. Hughes,*[22] in which the court created the "most intimate contact" test for at least some problems of contracts, appears based on local law theory since under this test the court is not concerned with a geographical search for some one event on the happening of which rights are vested.

Therefore it is probable that an argument inconsistent with the vested rights approach will not automatically be rejected by Indiana courts. Out of professional caution Indiana lawyers will no doubt avoid forcing a choice on the courts. But when the need arises it may well be that an appeal based on local law theory will generate a sympathetic response from our appellate courts which have approached other areas of the common law by weighing and balancing interests and policies.[23]

However, even if our courts are willing to accept the local law theory, the extent to which its premises will induce them to depart from previous broad utterances concerning the scope of the place of tort rule is far from clear. Thus is framed the family immunity and survival dilemmas, illustrated and intensified by *Emery v. Emery* and *Grant v. McAuliffe.*[24]

### *II. The Family Immunity Dilemma*

In *Emery,* unemancipated minor children sued their father and brother in California for injuries sustained while the family was driving in Idaho. A unanimous court seized the opportunity to find no immunity for wilful torts under California law, to characterize the problem of

18. See *e.g.,* Wabash R.R. v. Hassett, 170 Ind. 370, 83 N.E. 705 (1908); Cincinnati, H. & D. R.R. v. McMullen, 117 Ind. 439, 20 N.E. 287 (1889); and Baltimore & O S.W. Ry. v. Reed, 158 Ind. 25, 62 N.E. 488 (1902).

19. 158 Ind. 25, 62 N.E. 488 (1902).

20. 113 Ind. 169 (1887).

21. *E.g.,* Buckles v. Ellers, 72 Ind. 220, 225 (1880).

22. 223 Ind. 570, 63 N.E.2d 417 (1945).

23. Judge Emmert acknowledged that balancing of interests is properly used to extend the growth of the common law in State *ex rel.* Black v. Burch, 226 Ind. 445, 467, 80 N.E.2d 294, 560 (1948) (dissenting opinion) but chided the majority for extending that approach to the interpretation of the constitution.

24. *Supra* note 4.

family immunity as one of capacity to sue rather than tort, and to select the family domicil as the appropriate connecting factor for problems of disabilities to sue and immunities from suit arising from a family relationship.

Thus did the court place itself at odds not only with the vast majority of American courts which characterize the problem as one of tort,[25] but also with the two courts which have characterized the problem as one of capacity to sue but have applied the law of the forum.[26]

Nevertheless, *Emery* cannot be dismissed as an unreasoned maverick. The method of characterization employed by Judge Traynor represents a distinct advance over the undiscriminating approach to characterization embodied in the Restatement rules that the forum should simply use its substantive law concepts and that "if no cause of action in tort arises at the place of wrong, no recovery in tort can be had in any state."[27] In contrast, Judge Traynor engaged in analytical jurisprudence to find a correlation between substantive theory and characterization concepts. He examined the logical structure of the concepts of substantive law and found that parental immunity from tort is based on the child's disability to sue rather than the absence of a violated duty.[28] In comparison with the Restatement's approach to characterization, Judge Traynor's analytic approach stands a better chance of focusing the attention of the court on at least some of the underlying policies whose accommodation is the real issue in troublesome choice of law cases. The theory underlying local law is apt to reflect the purposes of the local substantive rules of law and the fundamental policies behind the broad substantive fields of law involved, and to point up the state of dominant interest, all of which are significant considerations in the selection of a connecting factor.[29]

However, substantive law concepts may not adequately reflect underlying policies and undesirable correlations may result. For example, in Indiana the theoretic explanation of the inability of a wife to sue her husband is that they are considered one person.[30] Thus there may be an

25. See Annot., 22 A.L.R.2d 1248 (1952).

26. Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936) (suit not allowed at forum which was domicil) and Bradford v. Utica Mut. Ins. Co., 39 N.Y.S.2d 810 (1943). The capacity to sue characterization was later rejected in New York in Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509, *rehearing denied*, 290 N.Y. 662, 49 N.E.2d 621 (1943).

27. RESTATEMENT, CONFLICT OF LAWS § 7, comment (b) and § 384 (2) (1934).

28. See footnote 3 of his opinion. It should be noted that this disability is more than procedural because a child who has become an adult or who has been emancipated since the tort cannot maintain an action if he could not have done so at the time the tort was committed. Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938); and Reingold v. Reingold, 115 N.J.L. 532, 181 Atl. 153 (1935).

29. See note 11 *supra*.

30. Henneger v. Lomas, 145 Ind. 287, 293, 44 N.E. 462 (1896).

absence of duty[31] and under analytic characterization this branch of family immunity might be a tort question in Indiana, even though parental immunity would be one of capacity to sue—a startling inconsistency.

If characterization of legal problems preparatory to selection of the factor which will connect them with governing law is consistently to be anything more than uncritical acceptance of substantive concepts, the chance result of word associations, or a rationalization of results reached by unexplained or unguided analysis, it must explicitly be designed to further some one or more of the basic policies of the conflict of laws. Since the application of most of these policies, particularly the determination of what expectations may be considered justified, and what state has the dominant interest, are in large part dependent upon the basic policy or policies of the broad substantive field or fields involved, (and attaining those policies is itself an important conflicts policy), it seems that primary characterization, logically the first step in the choice of law process, should be designed to require consideration of those basic substantive policies. Thus in the characterization of legal problems the court should seek to find what field of substantive law is most closely associated with the conflicting policies which produced the possibly relevant rules of the forum and of the foreign state which are found to conflict. The court should then employ characterization concepts suggestive of that field.[32] The remaining policies of the choice of laws are more

31. An argument to the contrary could be built around Wallace v. State, 232 Ind. 700, 116 N.E.2d 100 (1953), which held that suicide is a legal wrong. If so, a person may owe legal duties to himself.

32. Perhaps a short statement of the possible alternative approaches to primary characterization would make this point clearer.

1. Primary characterization could be performed according to the domestic law of the forum. This is essentially the Restatement approach. It is rather mechanical and breaks down completely when there is no local institution analogous to those of possibly relevant foreign jurisdictions.

2. The process of characterization could be performed in accordance with the appropriate foreign law. But which law is appropriate is not known until the entire process is complete, *i.e.*, characterization, selection of the connecting factor, localization of the connecting factor, the *renvoi* step, delimination of the proper law, and checking limitations on reference.

3. The process of primary characterization could be performed in accordance with an analytical jurisprudence, enlightened by a study of comparative law. Judge Traynor attempted this in *Emery*. As a general rule it is impracticable for mere comparative study cannot resolve differences.

4. Falconbridge advocated that the forum tentatively characterize a problem and study it through in light of tentative characterizations. This is sound as a statement of an intellectual process, but does not provide the guides by which the final choice is to be made. The suggested approach outlined in this article is intended to provide a guide by which to resolve various provisional characterizations undertaken in accord with Falconbridge's suggestion. See FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS c. 3 (1947) and his views as well as the alternatives are discussed in Morris, *Falconbridge's Contribution to the Conflict of Laws*, 35 CAN. B. REV. 610, 618-23 (1957).

appropriately considered in selecting the connecting factor and in carrying out the other steps of the choice of law process, though none of the steps are carried out in isolation since tentative choices are made and the consequences thought through in terms of all the policies which underlie the conflicts field.

As applied to the problem of family immunities, it is apparent that since the policy reasons given for family immunities are to insure family harmony and to protect parental discipline,[33] the problem should be characterized as one of family relations rather than one of capacity to sue or torts.[34]

It appears that a family relations characterization was actually employed by Judge Traynor. After first labeling the problem as one of capacity to sue,[35] he expressed the connecting factor as the family domicil for "disability to sue and immunities from suit because of a family relationship,"[36] thus, in substance, narrowing his initial characterization which would otherwise have encompassed all disabilities to sue for whatever reason. Therefore, under the *Emery* opinion, another type of capacity to sue question might call for the use of law other than that of the domicil.

*Emery v. Emery* must be accorded respect not only because of the method of characterization employed, but also because Judge Traynor expressly applied important choice of law policies in the selection of a connecting factor. Protection of justified expectations and the promotion of certainty and predictability appear to motivate his statement that,

> "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."[37]

A desire to apply the law of the state of dominant interest and to do justice to the parties is also evidenced:

> "That state [the domicil] has the primary responsbility for establishing and regulating the incidents of the

33. Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); and Smith v. Smith, 81 Ind. App. 566, 569, 142 N.E. 128 (1924); and see Farage, *Recovery for Torts Between Spouses,* 10 IND. L. J. 290 (1935).

34. If, as in civil law jurisdictions, capacity to sue were treated as a branch of the personal law, the problem could with some justification be characterized as capacity to sue. See 1 RABEL, CONFLICT OF LAWS 101, 315, 606 and c. 9 (1954).

35. Emery v. Emery, 45 Cal.2d 421, 428, 289 P.2d 218, 223 (1955).

36. *Ibid.*

37. *Ibid.*

> relationship and it is the only state in which the parties can, by participating in the legislative process, effect a change in those interests."[38]

Conflict of laws policies not articulated by the court also support its decision. One frequently used is to effectuate the policy of the broad field or fields of law involved.[39] The broadest policy of tort law is to compensate for injuries caused by conduct which justifies shifting the risk. The broadest policy of marital law here applicable is to maintain family harmony and discipline. The court thought this latter policy would not be ruffled by permitting recovery, and by applying its own law the court gave effect to the purpose of its local rules of law. Finally, the court applied the more vital, up-to-date policy.

The result was not only fair to the parties, it was also fair to the ultimate defendant— the liability insurer. Use of the law of the domicil will permit a more accurate computation of liability insurance premiums insofar as they are based on the possibility of such suits.[40] Further, insurance companies, like the parties, could participate in the legislative process and suggest necessary adjustments.[41]

Against all these considerations are opposed the principles of uniformity and predictability. In the *Emery* case these considerations were disregarded and justifiably so. The future in California is clear enough—the domicil rule will be applied. Nor is it a matter of overriding importance that recovery might be possible in California though not in the state of accident where the parties have had no prior

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38. *Ibid.*

39. Cheatham and Reese believe that this policy is applicable to the immunity problem, for they state,

> "The question whether spouses should be permitted to sue each other does not involve only the field of torts; instead it is concerned with the maintenance of marital harmony. The latter consideration is of concern primarily to the state where the spouses live and have their domicil." Cheatham and Reese, *supra* note 11 at 974-75.

40. Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement,* 23 U. OF CHI. L. REV. 474, 477-78 (1956); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement,* 15 U. OF PITT. L. REV. 397, 425 (1954). Ehrenzweig indicates that the need to reach liability insurance may be lessened in future years by the use of "first aid clauses" in liability policies which give increased protection to child guests. *Id.* at 479.

41. For combinations of the above reasons the result of *Emery* has long been advocated by learned commentators. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, 248, 345 (1949); FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS 832 (2d ed. 1954); STUMBERG, CONFLICT OF LAWS 206 (2d ed. 1951); Cheatham, *supra* note 11 at 974-75; Ehrenzweig, *supra* note 40 at 477; Ford, *supra* note 40 at 424; Comment, 44 YALE L. J. 1233, 1239 (1935). In addition to the above considerations it has been suggested that the domicil rule would tend to diminish forum shopping, Ford, *supra* note 40 at 425, indirectly support the trend toward use of domicil in survival cases, and would assimilate Ameriean law to that prevailing elsewhere, Ehrenzweig, *supra* note 40 at 477.

dealings which would have been expedited by clear understanding of which law would govern in any and all events. The only real cause for concern is that *Emery* generates uncertainty in states such as Indiana which have not yet passed on the family immunity question, and in states whose cases on point might now be reexamined. However, no stamp of disapproval can be given a decision on this ground else the common law would lose much of its ability to adjust to changing times and ideas and the potential value of using the 48 states as laboratories for limited experimentation would be lost. Some uncertainty of this kind is the price which must be paid for growth in the common law.

*Emery* is thus unquestionably a good decision for California. The question remains whether Indiana should and will follow suit. Its immediacy is highlighted by the fact that although Indiana still retains intra-family immunities,[42] Ohio[43] and Kentucky[44] are among the many states which permit negligence actions between spouses, and a recent Illinois decision permitted a child to sue his parents under a wrongful death statute.[45]

Suppose that a father domiciled in Illinois or California injures his minor child through wilful and wanton misconduct while the family is driving in Indiana and suit is brought in an Indiana court by the child against his father. At first blush it would seem quite odd for Indiana, out of concern for the family's harmony, to refuse to permit the action when the state of the family's domicil says that it is satisfied that family harmony will not be so disrupted as to justify a bar to recovery. Indeed, where the family is domiciled in California it might be a futile gesture to deny suit in Indiana since the child could bring suit in California, though perhaps at somewhat greater expense.

There are five obstacles to the adoption of the domicil rule by Indiana courts. First it may be contended in regard to the above example, or

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42. There are five Indiana cases on point.

*Married person does not have cause of action against spouse for personal tort*: Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896); Hunter v. Livingston, 125 Ind. App. 422, 123 N.E.2d 912 (1955) (action under guest statute; opinion requested Supreme Court to re-examine the Indiana cases with a view to permitting actions for personal torts between spouses; transfer was denied without opinion); Blickenstaff v. Blickenstaff, 89 Ind. App. 529, 167 N.E. 146 (1929).

*Children can't sue persons in loco parentis for personal torts*: Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924) (adult child could not sue father for acts of violence committed while child a minor); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901) (action against stepmother permitted for assault and battery). The Court in *Smith* indicated disapproval of language of *Treschman* indicating children might recover against their parents for acts of violence.

43. Damm v. Elyria Lodge No. 465, 158 Ohio St. 107, 107 N.E.2d 337 (1952).

44. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953).

45. Nudd v. Matsoukas, 7 Ill.2d 608, 131 N.E.2d 525 (1956).

when an Indiana family is injured in a reform jurisdiction and suit is brought in Indiana, that our rules of family immunity rise to the level of public policy within the meaning of that concept for conflict of laws. It would seem however, that to permit the action would not result in barbarity or frightfully unjust results, the interpretation recommended for the public policy rule by a recent article which reviewed the whole problem.[46] Thus in all likelihood Indiana would follow the reasoning of *Franklin v. Wells,*[47] the most recent case on point, which denied to immunity the stature of public policy, noting that,

> "The wife may sue her husband for dishonesty, for unlawful taking of her property, for debts he refuses to pay, or for any other such matters, even though such actions would produce 'public scandal of the family discord' as effectually as would the bringing of any tort action."[48]

Previous to *Franklin,* four cases had indicated that public policy was involved in family immunities.[49] However, dissents in two of these cases[50] pointed out that the majority was automatically reading a local rule into public policy and was not following the usually expressed standard that to permit the action would be contrary to good morals, natural justice, or prejudicial to the citizens of the state. In all probability the public policy theory was used by the majorities as a substitute for characterization of the problem as one of domestic relations calling for use of the law of the domicil, since in each of the cases the forum was the domicil.

The second objection to use of the domicil rule is the constitutional argument that Indiana could not refuse to enforce a defense which

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46. Paulsen and Sovern, *supra* note 12, at 1016. This matter could possibly be classified as public policy out of concern for the danger of fraud on the court to recover liability insurance. The courts, however, have dismissed this as an insifnificant objection. Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939). In *Rozell* the court stated that,

> "If it should appear that there is any foundation for the suggestion [that collusive claims would result from permitting suits between family members] a means of protection may be found in diligence on the part of the insurance carriers to ferret out and expose the fictitious claims and reliance may be placed on our courts and juries to detect and prevent a fraud." *Id.* at 257.

47. 217 F.2d 899 (6th Cir. 1954).

48. *Id.* at 901.

49. Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935).

50. Mertz v. Mertz and Kyle v. Kyle, *ibid.*

vested under the law of the place of tort. In *Baltimore v. Reed*[51] language can be found which supports such an argument.[52] In reply it should first be noted that the problem facing the court was whether to recognize the fellow servant defense applicable under the law of the place of tort, the court having determined without discussion that the fellow servant defense was a matter of tort law properly decided by reference to the law of the place of the tort.[53] The immunities problem, in contrast, clearly presents the initial questions of what kind of a problem faces the court, and what law should apply to that kind of problem. Further, the language of *Baltimore* should not be taken as an authoritative pronouncement to the contrary because, as pointed out in part I, it does not represent a viewpoint consistently adopted by Indiana courts.[54]

The third objection is that Indiana would be departing from the statement made in *Cincinnati, Hamilton and Dayton R.R. v. McMullen,*[55] that:

> "It is a familiar principle that a cause of action cannot be asserted in our jurisdiction for a wrong or injury which occurred in a foreign state unless an action might have been maintained in the jurisdiction where the injury occurred."[56]

This statement was broader than any required for the decision because the court's attention was directed towards the selection of a connecting factor for competing fellow servant rules,[57] a problem that the court had characterized, again without discussion, as one of tort law to be governed by the law of the place of injury. The authority of the statement as an Indiana legal premise is further weakened by the fact that it was articulated long before the local law theory came into prominence.

The fourth objection to the use of the domicil rule by Indiana courts

51. 158 Ind. 25, 62 N.E. 488 (1902).

52. *Supra* note 8.

53. Plaintiff had been injured in Illinois and sought to rely on an Indiana statute which purported to prohibit a railroad operating in Indiana from relying on the fellow servant defense when suit was brought by an Indiana citizen.

54. The court in *Baltimore* seems to have assumed the constitutional necessity of the vested rights theory. However, the Supreme Court of the United States has now made it clear that the Constitution grants the states a wide area of discretion in framing their choice of law rules. In most situations a choice is unconstitutional only when the law chosen has so little connection with the facts that its use is unreasonable. See *e.g.,* Carroll v. Lanza, 349 U.S. 408 (1955).

55. 117 Ind. 439, 20 N.E. 287 (1889).

56. *Id.* at 445-46.

57. *Id.* at 445. Similar statements appear in Burns v. Grand Rapids & Ind. R.R., 113 Ind. 169, 176 (1887); and Baltimore & O. S.W. Ry. v. Reed, 158 Ind. 25, 28, 62 N.E. 488, 489 (1902).

for matters of intrafamily immunity is that since to date only California employs the domicil rule, intrafamily litigation might not have the same outcome if brought in Indiana as if brought in the state of the tort (except where that was California). It is true that uniformity of result is usually an important consideration in choice of law. However, as previously stated, it must be weighed with other factors, and in tort cases uniformity of result (as distinguished from predictability of the result which would be reached in any of the forums in which suit might be brought) is less important than in cases where the parties have planned previous dealings with an eye to which law should govern, and concerning which the parties have developed justified expectations.

In addition, close examination of multi-state immunity cases indicates that if Indiana adopts the domicil rule the results will probably not be altered in the vast majority of cases to the prejudice of any deserving interest. If an Indiana plaintiff is injured in any state (except California) which permits intrafamily suits, action may be brought in that state under the non-resident motorist statute and defendant will be liable as now by use of a "tort" or "forum" connecting factor. If a non-resident from a state which does not permit family suits is injured in Indiana he will probably, as now, not be able to recover.[58] If the non-resident is from a state which has abolished the immunities, the defendant (or his insurance company) cannot complain if Indiana would, by applying the law of the domicil, carry out the state policy which governs the defendant while he is at home. Indeed it is possible that the result in even this situation would not be different, for Indiana might accept the doctrine of *renvoi*[59] and having looked to the law of the domicil, would apply the place of tort rule if the domicil, as forum, would have applied that rule.

The fifth objection is not directed to the domicil rule itself, but to its adoption by Indiana prior to abolition of family immunities. The

58. It is possible, of course, that if the Indiana courts characterized the problem of family immunity as one of domestic relations and applied the law of the domicil, other jurisdictions would interpret this as a holding that Indiana immunities are intended to apply only to Indiana domiciliaries and therefore should not be applied by other states which are referring to Indiana law solely because Indiana is the place of injury. However, only very rarely has the result in a conflict of laws case been different than it would have been under the domestic laws of either the forum or the state of reference. But for an example see Marie v. Garrison, 13 Abb. N. Cas. 210 (N.Y. 1883).

59. A court accepts the *renvoi* doctrine if instead of referring solely to the local law of the state of reference it also looks to its choice of law rules. No Indiana case has discussed *renvoi*. The RESTATEMENT OF THE CONFLICT OF LAWS, § 7 (1934), would permit *renvoi* where the matter involved land or divorce. Other authorities have recommended its use in a wide variety of situations. For a collection of the many articles on the problem see STUMBERG, CONFLICT OF LAWS 11, 12 and notes (2d ed. 1951).

argument is that although citizens from states which permit intrafamily suits would be benefited by the use of the domicil rule in Indiana because they could sue in Indiana for accidents which happened here, the only consequence to citizens of Indiana who are injured in states which have abolished the immunities is that they would lose the alternative now possible of bringing suit in Indiana. Their only choice would be to sue at the place of injury or in some third state which also applied the tort rule.

This objection is troublesome. A rule detrimental to Indiana citizens might be with us for years.[60] On the other hand, if the Indiana court adopts the tort rule and the immunities are subsequently abolished by the legislature, Indiana might find itself in the position of 10 other states which permit family suits as a matter of substantive law, but have refused to allow domiciliaries to sue one another where the tort occurred in a state which still adheres to the immunities.[61] Such a result is not constitutionally required and serves no purpose of conflict of laws, torts, or domestic relations.

It is probable and desirable that the legislature and groups which prepare legislative proposals will display an increasing awareness of the advisability of incorporating choice of law provisions in remedial legislation. Thus even if the court adopted a tort characterization while immunities remain in force, the legislature, if and when it removes them, might direct the courts to permit an intrafamily suit between Indiana domiciliaries no matter where the injuries occurred. Since both the place of tort and the domicil have sufficient interest in the outcome to apply their own law where that state is the forum, the statute might well provide that family relationships should not bar an action for personal injuries whenever the injury occurs in Indiana or when the family members are domiciled at the time of the accident in this state or in any state which does not immunize the defendant or the tortfeasor because of a family relationship.[62]

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60. Indeed, its initial statement might result in the dismissal of a suit by an Indiana wife who was injured elsewhere and who would find that the statute of limitations had run at the place of injury.

61. See Annot., 22 A.L.R.2d 1248 (1952).

62. In such a statute, the relevant domicil should be the domicil at the time of the accident, to promote certainty and insure against possible forum shopping via domicil changes.

In most cases all parties will have the same domicil. Where domicils differ, it usually would be indicative of a family breakdown and there would be even less reason to apply the immunities. However, to promote certainty and out of fairness to defendant's insurance company, liability should be imposed only when the family member who is defendant or tortfeasor is domiciled in a state which has abolished the immunities.

Such a statute might provide:

However, if the question of family immunities is presented to the court before the legislature acts, the court will be faced with the dilemma of adopting an appropriate rule for the present (probably the tort rule) while leaving the way open for a change to the domicil rule if the legislature abolishes immunities without stating a governing choice of law principle.

This dilemma might be resolved by the court under one of several theories. Professor Cook once proposed that where the law of the place of injury and the place of the action which caused the injury differed, the law most favorable to the plaintiff should be applied.[63] He reasoned that the most important fact was that the defendant had hurt someone. This theory could be applied, by analogy, to the injury-domicil choice. However, to date no court has expressly relied on Cook's suggestion, although results in several areas of conflict of laws are consistent with it,[64] and other writers have argued that characterization is and should be dictated by concern with the results.[65]

Somewhat less offensive to tradition is the theory that when considerations are otherwise evenly balanced, the forum should apply the law of a state which incorporates a more vital up-to-date policy and thereby avoid indirectly extending an anachronism.[66] Thus Indiana could apply the domicil rule whenever that would lead to application of the more up-to-date rule which abolishes the immunities. Even this, however, is such a wide departure from the traditional notion that choice of law embodies its own policies which are independent of the substantive laws concerned, that it is not likely to be adopted by the courts.

At the very least the Indiana court could make sure to indicate, if the tort rule is adopted, that it is neither the only constitutional rule, nor is it constitutionally necessary that only one connecting factor be employed in a tort action.

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"No cause of action for personal injuries or wrongful death shall be barred, and no defendant shall be immune from suit for personal injuries or wrongful death because the plaintiff and the defendant or the plaintiff and the tort-feasor are related as husband and wife, parent and child, as siblings, or are in any other family relationship, if the injury occurs in this state or if at the time of the injury the family member who is the defendant or the tort-feasor is domiciled in this state or in any state which at the time of the accident did not immunize the defendant or the tort-feasor because of a family relationship, provided, however, that this section shall not deprive a parent or person in *loco parentis* of his privilege of exercising reasonable parental discipline."

63. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 345 (1949).

64. *E.g.*, in usury cases Indiana has applied the law of whichever state would uphold the contract. Pancoast v. Travelers Ins. Co., 79 Ind. 172 (1881).

65. Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949).

66. Hoff, *The Intensity Principle in the Conflict of Laws*, 39 VA. L. REV. 437 (1953).

It can only be concluded that it will be a happier day for Indiana choice of law if the immunities are removed before the choice of law question reaches the courts. This may well come to pass since Indiana lawyers, aware of the present uncertainty regarding whether Indiana would refuse to enforce intrafamily actions based on accidents in other states, would probably prefer to avoid the question by advising their clients to sue at the place of injury. As to Indiana accidents, Indiana insurance companies, aware that intrafamily immunities may fall on their next court appearance, may be making attractive settlements in cases which might otherwise take the question to the appellate courts.

### *III. The Survival Dilemma*

If a party dies after an action has been commenced in Indiana courts, the cause may be "revived" on motion and continued by or against the personal representative or successors in interest of the deceased.[67] However, Indiana still retains the much criticized rule that if the personal injury plaintiff dies before his action is commenced, the cause of action dies with him.[68] If plaintiff's death is not caused by his personal injuries the wrongful death statute would not apply and only in a few family situations would a recovery of any kind be possible.[69] If the defendant dies before suit is commenced the damages recoverable in an action for personal injuries are limited to the reasonable medical, hospital, or funeral expenses plus up to $5000. Our neighbors, in company with about half of the states, permit personal injury actions to survive the death of either plaintiff or defendant, and do not impose limitations on the damages recoverable because of the death of the plaintiff.[70]

Although this situation creates an evident conflict of laws, no Indiana case has explicitly determined how the questions of survival, re-

67. IND. ANN. STAT. § 2-403 (1955).

68. "All causes of action shall survive . . . except actions for personal injuries to the deceased party." *Ibid.*

For criticisms of the rule and references to many other critical articles see Livingston, *Survival of Tort Actions, A Proposal for California Legislation,* 37 CALIF. L. REV. 63 (1949); Evans, *A Comparative Study of the Statutory Survival of Tort Claims for and Against Executors and Administrators,* 29 MICH. L. REV. 969 (1931).

69. The wrongful death statute applies only where "the death of one is caused by the wrongful act or omission of another." IND. ANN. STAT. § 2-404 (Supp. 1957). However, a father, or in some instances, the mother, could bring suit for injury to a child who had died from unrelated causes. IND. ANN. STAT. § 2-217 (Supp. 1957). See Hahn v. Moore, 133 N.E.2d 900 (Ind. 1956), *affd.,* 134 N.E.2d 705 (Ind. 1956). A husband would still be able to sue for loss of consortium after the death of his wife, though, as yet, a wife has not been given a similar right. Burk v. Anderson, 232 Ind. 77, 109, N.E.2d 407 (1952) (damages limited to the time between the commission of the injury and the death of the injured spouse).

70. ILL. ANN. STAT. c. 3, § 494 (Smith-Hurd 1943); KY. REV. STAT. § 411.140 (1948); MICH. STAT. ANN. § 27.684 (1938); OHIO REV. CODE §§ 2305.21 and 2311.21 (1954). For an analysis of the statutes of other states, see Livingston, *supra* note 68.

vival and damage limitations because of death should be characterized for purposes of conflict of laws, or what connecting factors should be employed.

Here as in the family immunity area, the most striking case, *Grant v. McAuliffe*,[71] is from California. In *Grant* an action was brought by a resident of California against the administrator of a California domiciled tortfeasor for injuries sustained in an accident which occurred in Arizona. Under Arizona law in force at that time if an action had not been commenced before the death of the tortfeasor a plea in abatement would be sustained. California law permitted the action to survive and in a four to three decision it was held that the law of California should be applied.

Thus did California once again dissent, this time from an almost solid block of cases denying recovery where the forum, which was the state of administration, permitted recovery but the place of injury did not.[72] These cases proceed on the vested rights theory that the right of recovery vested by operation of the law of the state of injury and what that state could give, it could take away or limit.

The considerations which impelled the holding in *Grant* are made reasonably clear in Judge Traynor's opinion but the exact scope of the decision is not clear. At first impression it seems that the court has held that the proper primary characterization is tort but that survival should be treated as a limitation on the scope of reference to the law of the place of tort because it is a matter of procedure.

If so, then the court has departed from the recommended use of that concept both under vested rights and local law theories. "Procedure" is to be reserved for those phases of a case which, even though a foreign rule of law is concededly applicable under the characterization and connecting factors employed by the court, cannot be conveniently administered except under local law which, ordinarily at least, would not have

71. See note 4 *supra*.

72. See Annot., 42 A.L.R.2d 1170 (1955). The annotation also reveals that where the action survived at the place of injury, though not at the forum, recovery has been permitted by most jurisdictions. Some have denied recovery on the ground of public policy or that the right to sue is a matter of procedure for which the forum has not provided machinery.

If the forum permits recovery and the action is filed before death, recovery is not denied even though the action would not survive by the law of the place of tort on the theory that revival is governed by the law of the forum as a matter of procedure. *Id.* at 1183.

Limitations on damages have been held governed by the place of tort: Luster v. Martin, 58 F.2d 537 (7th Cir. 1932); Helbrung v. Lafayette Loan & Trust Co., 102 F. Supp. 822 (N.D. Ind. 1951); and Zinn v. Ex-Cell-O Corp., 148 Cal.2d 56, 306 P.2d 1017 (1957).

a substantial bearing on the outcome of the suit.[73] "Procedure" used in any other way in the conflict of laws is typically an uncritical loan from local substantive law, or is merely a convenient concept to achieve a result indicated by policy factors which cannot be reached by conventional analysis. Yet California had held survival to be substance in a local law case involving retroactivity,[74] and Judge Traynor demonstrated in *Emery* that he was quite able to depart from conventional primary characterizations when analysis and policy indicated such departure was desirable. Since *Grant* was four to three, it is possible that Judge Traynor had to use "procedure," inappropriate though it may be, because it was the only concept familiar enough to win the votes needed for a majority.

If this is true, the opinion was written with a deft touch. Judge Traynor shaded his "procedure" case in such a way that it seems possible for California as forum in a suit brought against an ancillary administrator, to refer the question of survival to the law of the decedent's domicil at his death.[75] In effect, then, the case may well come to stand for the proposition that survival is a question of decedents estates, to be governed by the law of the decedent's domicil at death.

Characterization of the survival problem as one of the administration of decedents estates is consistent with a policy oriented method of characterization since the policies underlying survival and abatement are more closely associated with problems of decedents estates than they are

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73. Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 YALE L. J. 333, 344 (1933); and RESTATEMENT, CONFLICT OF LAWS, introductory note to chapter 12. Professor Sumner believes that classifying survival problems as procedure is not only incorrect but that it also violates the Due Process Clause. Sumner, *Choice of Law Governing Survival of Actions,* 9 HAST. L. J. 128, 129 (1958).

74. Cort v. Steen, 36 Cal.2d 437, 224 P.2d 723 (1950).

75. In the first place, at no point does Judge Traynor hold squarely that survival is a matter of procedure and hence the forum's law will be applied whenever it is in issue, regardless of the factual configuration. For although he states that survival is a question that should be governed by the law of the forum, he concludes his opinion with the closely guarded statement that,

> "When, as in the present case, all of the parties were residents of this state, and the estate of the deceased tort-feasor is being administered in this state, plaintiff's right to prosecute their causes of action is governed by the laws of this state relating to the administration of estates." 41 Cal.2d 859, 264 P.2d 944, 949 (1953).

And at another point he notes that responding to the alleged cause of action is one of the responsibilities of the administrator of the decedent's estate which should be governed by the laws of California, the estate being located there and letters of administration having been issued there.

If survival was procedure, all these factors would not be relevant, and Judge Traynor appears to have been aware of this for although he states that survival relates to the procedure, he adds that,

> "Basically the question is one of the administration of decedent's estates which is purely a local proceeding." *Ibid.*

of torts.[76] As Judge Traynor explained, the notion that causes of action die with the person had its origin in a penal concept of tort liability. With the death of a party, there was no possibility of inflicting a penalty. Today, however, damages for personal injuries are regarded as compensatory. Thus the death of the defendant has no significance and abatement has no meaning except as a device to protect the defendant's family, cut off from his earning potential, from a possible bankruptcy or a fraudulent claim.[77] Therefore survival and abatement should be characterized as problems of decedents' estates even though when recovery was a form of retribution they might have been characterized as tort, (or in very early days as procedure, on the ground that before enactment of statutes of limitation they provided a time limit on actions).

Regardless of its rationale, the court in *Grant* applied the fundamental policies of the broad fields involved, effectuated the purpose of local rules, applied the law of the state of dominant interest and more vital up-to-date policy and did justice to the parties insofar as all phases of domiciliary administration are controlled by the local legisalture. It is therefore not surprising that the result has met with approval.[78] Some concern has been expressed that a defendant might change his domicil in order to avoid a potential tort liability after his death.[79] This seems rather far fetched, especially in view of the widespread ownership of liability insurance and in any event could be controlled by subsidiary rules testing whether a move was bona fide.

All of which brings us to the question whether Indiana courts should and will follow *Grant*. It should first be noted that under the language of our survival statute the same choice of law rules will probably be applied to revival and to limitations on damages as to survival since all three depend upon the action surviving under the Indiana statute.[80]

If Indiana characterizes survival as a tort problem and applies the law of the place of injury, the estate of an Indiana plaintiff who died

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76. Note, 1 CALIF. L. REV. 468, 471 (1954).
"Since survival does not affect standards of conduct, it seems that on that issue the law of the place of wrong should not be controlling. . . . [The domicil] has the ultimate responsibility for disposing of the decedent's property, and it is there that his family and creditors are likely to be located." Note, 68 HARV. L. REV. 1260, 1264 (1955). To the contrary, that survival is a problem of the law of torts, see Sumner, *supra* note 73 at 139.

77. As to the plaintiff there may be the notion of preventing unjust enrichment to his survivors. See ATKINSON, WILLS, 685 (1953).

78. Note, 68 HARV. L. REV. 1260 (1955); Note, 1 U.C.L.A. L. REV. 380 (1954) (approving result but suggesting the matter was one for the legislature); Shavelson, *Survival of Tort Actions in the Conflict of Laws: A New Direction?* 42 CALIF. L. REV. 803 (1954); Note, 27 So. CALIF. L. REV. 468 (1954).

79. HANCOCK, TORTS IN THE CONFLICT OF LAWS 245 (1942).

80. IND. ANN. STAT. § 2-403 (1946).

from causes other than the accident before suit was instituted would be able to recover where the injury was suffered in one of the more than twenty-four states which permit the action to survive, even though the estate could not recover for an accident occurring in Indiana. The estate of an Indiana domiciled defendant would be liable for more than the $5000 limit where the tort occurred elsewhere. On the other hand if Indiana adopted domicil at death as the connecting factor, then the $5000 limit would always protect the estates of Indiana defendants, and the estates of Indiana domiciled plaintiffs could never recover in Indiana for personal injuries, though of course it might still be possible for suit to be brought in other states, particularly the place of injury. If the accident occurred outside Indiana it is unlikely that both plaintiff and defendant would be from Indiana, and so in net effect the domicil rule would impose little inconvenience on Indiana plaintiffs, who would probably be suing elsewhere under non-resident motorist statutes, but would add some protection for the estates of Indiana defendants.

However, since there is a strong current of feeling that the defendant is not entitled to this protection, it is doubtful that the Indiana courts would be so provincial as to select the domicil rule merely to afford protection to Indiana estates while removing it from the estates of non-resident tortfeasors whose home state does not place corresponding limits on damages. Yet if our statute is amended to create full responsibility and full rights of suit, despite death, it would seem that the domicil rule, perhaps coupled with the tort rule, as previously suggested for intra-family immunity reform, would best give the desired protection and responsibility.

In the meantime our courts are faced with the dilemma of holding the door open for an uncertain future, though as in the case of immunities, we may get legislation before judicial decision.[81] The reason here is that plaintiffs may prefer to sue Indiana defendants at the place of accident, where it is other than Indiana, in the hope that the forum would bypass the Indiana rule by using "tort" or "procedure" theories. And where the accident occurs in Indiana and the defendant has property elsewhere or an insurance policy which might be reached through a suit brought in another forum, plaintiff would probably sue there and hope that forum would apply its own law by calling survival a matter of procedure. Settlements may reflect these possibilities.

81. Use of the law of the place of tort is recommended in a note at 26 IND. L. J. 93 (1950), on the theory that the Indiana statute has no real policy basis.

## V. Conclusion

The California decisions may become leading cases and be followed by Indiana courts or by the General Assembly. They may become nothing more than oddities noted in law school casebooks. Minnesota and Arizona have rejected *Grant* in favor of the tort rule.[82] But there are indications of persistent growth of the domicil rule which will further intensify present dilemmas and possibly create new ones. For example, it has been noted that the law governing insurance contracts usually turns out to be the domicil of the insured.[83] The domicil has been used to determine whether a wife's cause of action is community property for the purpose of deciding whether her husband's contributory negligence should be imputed to her.[84] A lower Pennsylvania court recently applied the domicil rule to determine the right of a wife to sue her husband in tort.[85] It has been suggested that the domicil rule may one day be applied to govern the rights of guests in the automobile.[86] New generalizations may emerge from the current revision of the Restatement of the Conflict of Laws. The generative force of these developments in providing new choice of law rules or alternative choice of law rules designed to further policy reform will become increasingly strong as new generations of law students, schooled in local law theory, take their places in the bar, on the bench, and in the legislature.

Whatever the outcome, this much is clear: the problems will grow no less fascinating as we witness the clash of the remnants of "vested rights" and "fault" with the ever growing demand for adequate coverage of risk produced by the automobile.

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82. Allen v. Nessler, 247 Minn. 230, 76 N.W.2d 793 (1956); Rodriquez v. Terry, 79 Ariz. 348, 290 P.2d 248 (1955).

83. Ford, *supra* note 40 at 425.

84. Bruton v. Villoria, 138 Cal. App.2d 642, 292 P.2d 638 (1956); contra, that the place of tort governs, Traglio v. Harris, 104 Fed.2d 439 (9th Cir. 1939). In Indiana the contributory negligence of a spouse is not imputed simply because of the marital relation. Hoesel v. Cain, 222 Ind. 330, 53 N.E.2d 165, 169 (1944); Chicago, St. L. & P. R.R. v. Spilker, 134 Ind. 380, 33 N.E. 280 (1892); Louisville, N.A. & C. Ry. v. Creek, 130 Ind. 139, 29 N.E. 481 (1892); Spencer v. Pettibone, 117 Ind. App. 426, 70 N.E.2d 439 (1947).

85. Pittman v. Deiter, 26 U.S. L. WEEK 2120 (Pa. C.P. Court, Philadelphia County, Aug. 13, 1957). Approved in 11 ARK. L. J. 445 (1957).

86. Ehrenzweig, *supra* note 40, at 478, n. 22.