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## McMILLAN v. McMILLAN: CHOICE OF LAW IN A SINKHOLE

Doug Rendleman\*

IN *McMillan v. McMillan*,<sup>1</sup> the Supreme Court of Virginia reaffirmed its adherence to the place-of-injury rule in resolving choice-of-law problems in tort cases and rejected the modern choice-of-law methodology now used in a majority of jurisdictions. The Court based its decision on the “uniformity, predictability, and ease of application of the Virginia rule,”<sup>2</sup> even though application of the rule in *McMillan* gave effect to an interspousal immunity that the Court had previously abandoned as a matter of Virginia law.<sup>3</sup>

This article discusses the place-of-injury rule and the more flexible modern approach.<sup>4</sup> It then examines the *McMillan* decision and concludes that the Supreme Court missed an excellent opportunity to overrule an anachronistic doctrine.

### I. THE PLACE-OF-INJURY RULE

Social and economic life spills over political boundaries. Many events, transactions, and relationships are connected with two or more political jurisdictions that uphold different legal doctrines. When events produce different legal consequences in various jurisdictions, disputants shop for a favorable forum. The neutral adjudicator must choose one of the competing doctrines adduced by the self-interested adversaries. This inquiry is called choice of law. The judge's task is exacerbated by the jurisdictional complexity of the federal system and the need to consider the impact of procedural rules on the substantive purposes of the judicial system.

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<sup>1</sup> 219 Va. 1127, 253 S.E.2d 662 (1979).

<sup>2</sup> *Id.* at 1131, 253 S.E.2d at 664.

<sup>3</sup> See *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971). See note 35 *infra*.

<sup>4</sup> See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971) (quoted respectively in notes 47 & 27 *infra*). In this article, “Second Restatement” is used in lieu of the formal title.

Justice Story's influential views dominated American choice-of-law theory well into the present century.<sup>5</sup> Story perceived the sovereignty of the states as mutually exclusive. According to this theory, each state possesses full power to bind persons and property within its territory, but the force that a state's laws receive elsewhere depends solely on whether other jurisdictions choose to defer to those laws. This territorial perspective became known as the vested rights theory because it deems a right of action acquired within the territory and under the law of one state to be fixed and vested as against the law of any other jurisdiction.<sup>6</sup> Story's views were eventually incorporated into the first Restatement of Conflict of Laws<sup>7</sup> and achieved almost universal acceptance.<sup>8</sup>

In tort actions, the territorial or vested rights approach to choice of law holds that the law of the place where the alleged wrong was committed, or *lex loci delicti*, determines the defendant's liability.<sup>9</sup> To identify the governing jurisdiction, a judge simply characterizes the issue as one of tort law and determines the site of the injury. Courts adopted this approach in the belief that it would lead to uniform and predictable results.<sup>10</sup>

The notion that the place-of-injury rule is easy to apply and produces certain results has proved, however, to be an illusion. In theory, the place-of-injury rule identifies the controlling jurisdiction without referring to the content of the domestic law of the forum or any other jurisdiction. A review of the case law demonstrates that, in fact, courts have often refused to apply foreign doctrines that violate the public policy of the forum, even when territorial choice-of-law rules clearly call for the application of foreign law.<sup>11</sup>

<sup>5</sup> See J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20, 23 (2d ed. Boston 1841) (1st ed. Boston 1834).

<sup>6</sup> See R. LEFLAR, AMERICAN CONFLICTS LAW § 86, at 173 (3d ed. 1977).

<sup>7</sup> See RESTATEMENT OF CONFLICT OF LAWS § 377, Comment a (1934). See generally *id.* §§ 377-390.

<sup>8</sup> See, e.g., RESTATEMENT IN THE COURTS 293-300 (perm. ed. 1945). Professor Beale also adopted the vested rights approach in his own influential treatise. See 2 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 378.2 (1935).

<sup>9</sup> See RESTATEMENT OF CONFLICT OF LAWS § 378 (1934) ("The law of the place of wrong determines whether a person has suffered a legal injury.").

<sup>10</sup> See *Babcock v. Jackson*, 12 N.Y.2d 473, 478, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746-47 (1963) (discussing and rejecting the place-of-injury rule).

<sup>11</sup> See, e.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928); *Hudson v. Continental Bus System, Inc.*, 317 S.W.2d 584 (Tex. Civ. App. 1958). See also R. LEFLAR, *supra* note 6, § 43; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAW § 3.6 (2d

Imaginative judges have circumvented odious applications of the place-of-injury rule by characterizing particular issues as procedural or as turning on substantive law other than tort, and they have thereby manipulated choice-of-law principles so as to favor the law of the forum.<sup>12</sup> For example, in *Kilberg v. Northeast Airlines, Inc.*,<sup>13</sup> a New York court faced a domiciliary's wrongful death action involving an airplane crash in Massachusetts. Refusing to apply a Massachusetts statute limiting damages in such cases, the court ruled that the measure of damages is a remedial or procedural question to be decided under local law.<sup>14</sup> Similarly, in *Haumschild v. Continental Casualty Co.*,<sup>15</sup> the Supreme Court of Wisconsin permitted a woman to sue her husband for injuries sustained in an automobile accident in California and thus declined to recognize California's interspousal immunity doctrine. The court held that the capacity of spouses to sue one another is a question of "family law" controlled by the law of the domicile.<sup>16</sup>

In resorting to characterization, a judge accepts the premises of the vested rights rule and merely switches labels to achieve a palatable result. The use of such conclusory labeling inevitably leads to capricious decisions.<sup>17</sup> Would the *Haumschild* court recognize California's immunity doctrine if the wife sued a California driver, instead of her husband, and the defendant impleaded the husband for contribution as a joint tort-feasor? If the case were

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ed. 1980); notes 14 & 16 *infra*.

<sup>12</sup> See generally RESTATEMENT OF CONFLICT OF LAWS § 332 (1934) (law of the place of contracting governs the validity of a contract); *id.* § 372 (law of the place of performance governs the right to damages for breach of contract and the measure of damages); *id.* § 585 ("All matters of procedure are governed by the law of the forum.").

<sup>13</sup> 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

<sup>14</sup> *Id.* at 39-42, 172 N.E.2d at 528-29, 211 N.Y.S.2d at 135-38. The clear predicate of the *Kilberg* decision was "New York's public policy prohibiting the imposition of limits on . . . damages," a policy the court described as "strong, clear and old." *Id.* at 39, 172 N.E.2d at 528, 211 N.Y.S.2d at 135-36. To implement that policy, the court resorted to the traditional choice-of-law rule that the law of the forum determines whether a particular issue is substantive or procedural. *Id.* at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

<sup>15</sup> 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

<sup>16</sup> *Id.* at 137-40, 95 N.W.2d at 818-19. Underlying this decision were "strong reasons of public policy . . . for supplanting [the place-of-injury] rule by a better one which does not unnecessarily discriminate against the citizens of our own state." *Id.* at 138, 95 N.W.2d at 818.

<sup>17</sup> See R. WEINTRAUB, *supra* note 11, § 6.15, at 298-99; Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237, 253 (1962).

litigated in a California court, could the defendant, as third-party plaintiff, defeat the husband's immunity defense by invoking Wisconsin family law? The results of such disputes would be very much in doubt and might contravene the substantive policy of the *Haumschild* decision.<sup>18</sup>

Ultimately, characterization proves an unsatisfactory technique for solving choice-of-law problems because it yields inconsistent results and serves substantive policies in an unpredictable manner. Many courts have recognized the intellectual shallowness and practical arbitrariness of a method that skirts, rather than rejects outright, the rigid place-of-injury rule. In growing numbers, courts are discarding the traditional rule and turning instead to an analysis that expressly weighs substantive policies and applies the law of the jurisdiction having the greatest policy interest in the matter.<sup>19</sup>

## II. THE MODERN APPROACH

### A. *The Babcock Decision*

An explicitly policy-oriented approach to resolving choice-of-law issues in tort cases first gained judicial acceptance in *Babcock v. Jackson*,<sup>20</sup> decided by the New York Court of Appeals in 1963.<sup>21</sup> A New York guest passenger filed suit in a New York court against a New York host driver for an accident that occurred in Ontario. The plaintiff's allegation of ordinary negligence stated a claim under New York law, but the trial court duly applied the place-of-

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<sup>18</sup> See note 16 *supra*.

<sup>19</sup> See generally R. WEINTRAUB, *supra* note 11, § 6.15, at 301 (describing characterization as "an important bridge between the rigid territorialism of place-of-wrong and a new policy-oriented analysis").

<sup>20</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>21</sup> The *Babcock* court drew from a preliminary draft of the Second Restatement the proposition that "[t]he 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." *Id.* at 482, 191 N.E.2d at 283-84, 240 N.Y.S.2d at 749-50 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963)). While the draft of the Second Restatement accurately summarized the real meaning of the better authorities, see, e.g., notes 14 & 16 *supra* and accompanying text, *Babcock* was the first decision to reject squarely the place-of-injury rule, see Trautman, *A Comment*, 67 COLUM. L. REV. 465, 467 (1967). The same court had earlier led a move away from traditional choice-of-law rules in contract, see generally note 12 *supra*, toward the "center of gravity" inquiry endorsed in *Babcock*, see *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), discussed in *Babcock v. Jackson*, 12 N.Y.2d at 479, 191 N.E.2d at 282, 240 N.Y.S.2d at 747.

injury rule and dismissed the action because Ontario law immunized the host from liability to the guest except on a showing of gross negligence.

Reversing the trial court's decision, the court of appeals held New York law controlling as to the applicable standard of liability. The appellate court first noted that New York contacts dominated the guest-host relationship. The trip began and would have ended in New York; both parties were domiciled in New York; and the vehicle was registered and presumably insured in New York.<sup>22</sup> By contrast, the only Ontario contact was the fortuitous site of the accident.<sup>23</sup> The court then rejected the vested rights doctrine in favor of a more flexible inquiry:

"The vice of the vested rights theory", it has been aptly stated, "is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved". More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. . . .

. . . .

. . . Justice, fairness and the "best practical result" may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context" and thereby allows the forum to apply "the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'" <sup>24</sup>

Finally, the court found that New York's policy of compensating tort victims outweighed whatever minimal interests Ontario might have asserted to the contrary.<sup>25</sup>

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<sup>22</sup> 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. The facts in *Babcock* are comparable to those confronted by the Virginia Court in *McMillan*. See notes 33-36 *infra* and accompanying text.

<sup>23</sup> 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

<sup>24</sup> *Id.* at 478, 481-82, 191 N.E.2d at 281, 283, 240 N.Y.S.2d at 746, 749 (citations omitted).

<sup>25</sup> See *id.* at 482-85, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750-52. The court observed: "Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction."

### B. *The Second Restatement*

The *Babcock* decision accords with the choice-of-law method developed in the Restatement (Second) of Conflict of Laws.<sup>26</sup> Section 145 of the Second Restatement molds a choice-of-law test for tort cases that applies the law of the jurisdiction possessing the "most significant relationship" with the issue.<sup>27</sup> This method calls for the court to weigh the jurisdictions' competing interests by examining the policies underlying the doctrines in conflict. In *Babcock*, for example, New York's policy of compensating residents who fall victim to negligent conduct by fellow residents clearly outweighed Ontario's policy of limiting the liability of host drivers, for the case involved no citizen or insurer whom Ontario had a valid interest in protecting.

Since *Babcock*, twenty-seven states, Puerto Rico, and the District of Columbia have abandoned the place-of-injury rule as dispositive of choice-of-law issues in tort cases,<sup>28</sup> while ten states have

*Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

<sup>26</sup> See note 21 *supra*.

<sup>27</sup> The Second Restatement directs courts to consider "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered," and to evaluate these factors "according to their relative importance with respect to the particular issue." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145. These specific considerations are to be marshaled in the service of more general principles set forth in § 6 of the Second Restatement. See *id.*; *id.* § 6 (quoted in note 47 *infra*).

<sup>28</sup> See *Gaither v. Myers*, 404 F.2d 216 (D.C. Cir. 1968); *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968); *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *First Nat'l Bank v. Rostek*, 182 Colo. 437, 514 P.2d 314 (1973); *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980); *Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); *Witherspoon v. Salm*, 142 Ind. App. 655, 237 N.E.2d 116 (1968), *rev'd on other grounds*, 251 Ind. 575, 243 N.E.2d 876 (1969); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973); *Beaulieu v. Beaulieu*, 265 A.2d 610 (Me. 1970); *Pevoski v. Pevoski*, 371 Mass. 358, 358 N.E.2d 416 (1976); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Turner v. Pickens*, 235 So. 2d 272 (Miss. 1970); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969); *Schneider v. Schneider*, 110 N.H. 70, 260 A.2d 97 (1969); *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970); *Issendorf v. Olson*, 194 N.W.2d 750 (N.D. 1972); *Fox v. Morrison Moter Freight, Inc.*, 25 Ohio St. 2d 193, 267 N.E.2d 405, *cert. denied*, 403 U.S. 931 (1971); *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974); *Defoor v. Lematta*, 249 Or. 116, 437 P.2d 107 (1968); *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966); *Fernandez v. American Sur. Co.*, 93 P.R.R. 28 (1966); *Brown v. Church of the Holy Name of Jesus*, 105 R.I. 322, 252 A.2d 176 (1969); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979); *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 555 P.2d 997



decided to retain that rule.<sup>29</sup> The trend against the place-of-injury rule has apparently gained renewed momentum in the last year, with two jurisdictions adopting the "most significant relationship" test<sup>30</sup> and another moving to reconsider the traditional rule.<sup>31</sup> Now that the place-of-injury rule is demonstrably the minority view, more courts can be expected to reject the vested rights doctrine and to adopt the majority's policy-oriented rule.

### III. VIRGINIA REAFFIRMS THE PLACE-OF-INJURY RULE

The Supreme Court of Virginia chose to retain the traditional place-of-injury rule in *McMillan v. McMillan*.<sup>32</sup> *McMillan* posed a factual pattern that other courts and commentators have seen as the "easy case" that demands adoption of a policy-oriented approach: a lawsuit between residents of the forum state concerning an accident that occurred in another jurisdiction.<sup>33</sup> This section examines the *McMillan* decision and concludes that its rationale is unconvincing and that the Court failed to understand the virtues of the modern approach.

#### A. The McMillan Decision

In 1975, Glenna McMillan was injured while a passenger in an

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(1976); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

<sup>29</sup> See *St. Pierre v. St. Pierre*, 158 Conn. 620, 262 A.2d 185 (1969); *Friday v. Smoot*, 58 Del. 488, 211 A.2d 594 (1965); *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966); *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969); *Petrea v. Ryder Tank Lines, Inc.*, 264 N.C. 230, 141 S.E.2d 278 (1965); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964); *Heidemann v. Rohl*, 86 S.D. 250, 194 N.W.2d 164 (1972); *Winters v. Maxey*, 481 S.W.2d 755 (Tenn. 1972); *McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662 (1979).

<sup>30</sup> See *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979). See also *Riley, Abandonment of Lex Loci Delicti in Texas: The Adoption of the Most Significant Relationship Test*, 33 Sw. L.J. 1221 (1980).

<sup>31</sup> See *Sterie v. Southfield Leasing, Inc.*, 407 Mich. 908, 285 N.W.2d 39 (1979) (granting leave to appeal).

<sup>32</sup> 219 Va. 1127, 253 S.E.2d 662 (1979).

<sup>33</sup> See *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (discussed at notes 20-25 *supra* and accompanying text); *Sedler, Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1033 (1977) (quoted in text accompanying note 59 *infra*); *Trautman, supra* note 21, at 467. Professor Weintraub maintains that facts like those in *McMillan* raise only "spurious" conflicts of law, as the foreign jurisdiction has no valid interest in precluding recovery. See R. WEINTRAUB, *supra* note 11, § 6.9, at 278-79. See note 55 *infra*.

automobile driven by her husband David on a social visit in Tennessee.<sup>34</sup> Charging that the accident was caused by the joint negligence of David and the unidentified driver of a second vehicle, Glenna filed suit against them both in the Virginia circuit court. Under the domestic law of Virginia, a plaintiff may recover damages when injured in an automobile accident caused by a spouse's negligent conduct.<sup>35</sup> Tennessee, however, retains an interspousal immunity doctrine barring such an action.<sup>36</sup> The trial court, applying the place-of-injury rule to resolve the choice-of-law issue, sustained David's defense of interspousal immunity and dismissed the action.<sup>37</sup>

On appeal, the plaintiff urged the Supreme Court to abandon the place-of-injury rule in favor of the modern rule exemplified by *Babcock* and the Second Restatement.<sup>38</sup> The Court, however, affirmed dismissal of the action and expressly refused to adopt the modern rule.<sup>39</sup> The brief opinion emphasizes the "uniformity, predictability, and ease of application"<sup>40</sup> of the traditional rule and criticizes the policy-centered approach as "susceptible to inconsistency, particularly when, as here, the issue involves the substan-

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<sup>34</sup> The accident occurred 300 yards from the Virginia-Tennessee border, at the entrance to a bridge connecting the two states. Brief for Appellant at 2, *McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662 (1979).

<sup>35</sup> See *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971). In *Surratt*, the Supreme Court abolished Virginia's interspousal immunity doctrine with respect to personal injuries inflicted in automobile accidents. *Id.* at 193-94, 183 S.E.2d at 201-02. See generally Note, *Intrafamily Tort Immunity in Virginia: A Doctrine in Decline*, 21 WM. & MARY L. REV. 273 (1979). See also *Korman v. Carpenter*, 216 Va. 86, 216 S.E.2d 195 (1975) (rejecting interspousal immunity in wrongful death action for the murder of a spouse). *Surratt* and *Korman*, however, are exceptions to a general rule recognizing interspousal immunity in Virginia. *Counts v. Counts*, 221 Va. 151, 154-55, 266 S.E.2d 895, 896-97 (1980) (barring husband's action against ex-wife for injuries sustained at her instigation in a murder-for-hire scheme), discussed in Wadlington, *Virginia Domestic Relations Law: Recent Developments*, 67 VA. L. REV. 351, 354-55 (1981).

<sup>36</sup> See *Wooley v. Parker*, 222 Teun. 104, 107-11, 432 S.W.2d 882, 883-84 (1968), cited with approval in *Childress v. Childress*, 569 S.W.2d 816, 817-18 (Tenn. 1978).

<sup>37</sup> See 219 Va. at 1129, 253 S.E.2d at 663. Glenna received a judgment of \$150,000 against the unidentified driver. Letter from Carl E. McAfee, attorney for plaintiff McMillan, to author (July 30, 1980) (copy on file with the Virginia Law Review Association).

<sup>38</sup> In regard to issues of intrafamily immunity, the Second Restatement notes that "[t]he applicable law will usually be the local law of the state of the parties' domicile." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169(2) (1971).

<sup>39</sup> 219 Va. at 1128, 1131, 253 S.E.2d at 663, 665.

<sup>40</sup> *Id.* at 1131, 253 S.E.2d at 664.

tive existence of a cause of action in tort."<sup>41</sup>

The Court's characterization of the modern rule betrays an imperfect understanding of that approach. The basic premise of current theory is that a court should give effect to the law of that jurisdiction whose policies are most intimately involved in the question at hand.<sup>42</sup> The Court, however, made no apparent effort to evaluate the relative interests of Tennessee and Virginia in regard to whether spousal immunity should apply in *McMillan*. Instead, the Court assumed that the method espoused by the Second Restatement turns solely on "an analytical examination of the facts of each case to determine what law should govern the parties' substantive rights."<sup>43</sup> The opinion seems to conclude that the "most substantial relationship" test mechanically applies the law of the jurisdiction having the greater number of contacts with the case, regardless of the nature of those contacts.<sup>44</sup> In short, the Court failed to differentiate arbitrary contact-counting from a method that inquires into the policies implicated in the choice of law.

The *McMillan* Court quoted section 145 of the Second Restatement, which lists such physical contacts as the place where the wrongful conduct or injury occurred, the place where the parties reside, and the place where the parties' relationship is centered.<sup>45</sup> Section 145, though, merely supplements section 6,<sup>46</sup> which sets forth the guiding principles of the "most significant relationship" inquiry and instructs the adjudicator to consider, among other things, the "relevant policies" of the forum and "other interested states."<sup>47</sup> Thus, the methodology of the Second Restatement re-

<sup>41</sup> *Id.*

<sup>42</sup> See notes 24-27 *supra* and accompanying text.

<sup>43</sup> 219 Va. at 1129, 253 S.E.2d at 663.

<sup>44</sup> Commentators who support the modern methodology have acknowledged the danger that it will degenerate in practice to mere contact-counting. See, e.g., R. LEFLAR, *supra* note 6, § 136, at 278; *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws* (Currie), 63 COLUM. L. REV. 1212, 1233-34 (1963); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 244 (1963).

<sup>45</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), quoted in *McMillan v. McMillan*, 219 Va. at 1129-30, 253 S.E.2d at 663-64.

<sup>46</sup> See *id.*; *id.* § 6 (quoted in note 47 *infra*).

<sup>47</sup> The general principles are set forth as follows:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the appli-

quires the judge to select the state with the "most significant relationship" in two steps: First, to identify the relevant contacts and, second, to evaluate the contacts in light of the policies of the conflicting doctrines. The Supreme Court recognized only the first step and then quickly returned to the place-of-injury rule.

### B. Consistency under the Modern Approach

The Supreme Court failed to examine its assertion that the modern approach produces decisions less consistent and predictable than those resulting from the wooden place-of-injury rule. As evidence of the inconsistency ascribed to the modern approach, the *McMillan* Court cited the New York case of *Kell v. Henderson*<sup>48</sup> as irreconcilable with the earlier opinion of the New York Court of Appeals in *Babcock*. *Kell* involved the converse situation from that presented in *Babcock*: a guest passenger was injured while the parties, both of whom were residents of Ontario, were visiting New York.<sup>49</sup> Although *Babcock* might be read as favoring the application of Ontario law in these circumstances, the *Kell* court held that New York law controlled the applicable standard of liability.<sup>50</sup> The *McMillan* Court, quoting Professor Leflar, found the apparent contradiction between the two cases "indicat[ive] [of] the manipulative possibilities that inhere in the *Babcock* approach."<sup>51</sup>

*Babcock* and *Kell* are poor representatives of the current choice-

cable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

*Id.* § 6.

<sup>48</sup> 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966), *discussed in* *McMillan v. McMillan*, 219 Va. at 1131, 253 S.E.2d at 664.

<sup>49</sup> 47 Misc. 2d at 992-93, 263 N.Y.S.2d at 648.

<sup>50</sup> *Id.* at 995-96, 263 N.Y.S.2d at 650-51.

<sup>51</sup> 219 Va. at 1131, 253 S.E.2d at 664 (quoting R. LEFLAR, *supra* note 6, § 91, at 184). The Court failed to note that although Professor Leflar decries the inconsistency of New York's decisions, he prefers the *Babcock* approach to the vested rights rule. See Leflar, *Choice of Law: A Well-Watered Plateau*, LAW & CONTEMP. PROB., Spring 1977, at 10, 21. See also note 58 *infra* and accompanying text.

of-law method. Like many judicial innovations, the *Babcock* opinion was imprecisely stated because the court wrote on a clean slate. As such, the opinion "produced inevitable confusion in the later cases."<sup>53</sup> Other courts have been careful to learn from New York's mistakes and have developed the consensus reflected in the Second Restatement.<sup>52</sup> New York, however, continues to err. It announced procrustean rules in advance of concrete lawsuits presenting well-defined issues.<sup>54</sup> Moreover, *Kell* leaves the New York court vulnerable to the criticism that it has reduced the central governmental-interest analysis to a preference for residents over nonresidents or, in short, to "self-serving parochialism."<sup>55</sup>

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<sup>53</sup> Leflar, *supra* note 51, at 19. See Rosenberg, *An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 461-62 (1967).

<sup>52</sup> See notes 26-31 *supra* and accompanying text.

<sup>54</sup> See R. WEINTRAUB, *supra* note 11, §§ 6.20 to .21; Sedler, *supra* note 33, at 994.

<sup>55</sup> von Mehren, *Choice of Law and the Problem of Justice*, LAW & CONTEMP. PROB., Spring 1977, at 27, 34 (1977). See also Leflar, *supra* note 51, at 20. This criticism, however, may reflect a superficial analysis of *Kell*. See R. WEINTRAUB, *supra* note 11, §§ 6.9 to .10. See also Trautman, *supra* note 21, at 467, 472-73. Plainly, the Ontario driver did not suspend his instinct for self-preservation and drive about negligently (but not recklessly) in New York in reliance on the protection of the Ontario guest statute. On the other hand, New York has a valid interest in imposing liability on nonresidents who engage in risk-creating conduct within its borders. Cf. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (applying California law to determine the measure of damages in a Mexican's wrongful death action involving an accident in California). New York may also be interested in compensating nonresidents injured there to prevent them from becoming wards of the state and to protect their local creditors. Finally, New York courts may perceive Ontario's guest statute as a harsh anachronism and consider it their duty to apply the "better law" to residents and nonresidents alike. See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Gagne v. Berry*, 112 N.H. 125, 290 A.2d 624 (1972); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). Arguably, however, the notion that the forum must do justice according to its own standards, regardless of the policies of other interested jurisdictions, smacks of the territorial view of sovereignty that underlies the vested rights rule, see generally note 5 *supra* and accompanying text, and ignores the interest-balancing that is central to modern choice-of-law theory, see generally notes 20-27 *supra* and accompanying text.

Under the "most significant relationship" test, *Kell* is a harder case than *Babcock* or *McMillan*. When, as in *Babcock* and *McMillan*, the fortuitous situs of an accident provides the sole contact with a foreign jurisdiction, that jurisdiction has no valid interest in barring recovery, and any conflict on that point of law is therefore "spurious." See R. WEINTRAUB, *supra* note 11, § 6.9, at 278. See also *Babcock v. Jackson*, 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750 (quoted in note 25 *supra*). When, as in *Kell*, however, the parties may be using the forum to circumvent the law of their domicile, the interests of the foreign jurisdiction become more significant and may pose a "real" conflict. See R. WEINTRAUB, *supra* note 11, § 6.15, at 298; Trautman, *supra* note 21, at 467. Conversely, the interests of the forum state are diminished by the fact that "the social and economic consequences of the accident will be felt in [the domicile]." Sedler, *supra* note 33, at 1035. Nevertheless, the

It has already been shown that courts laboring under the vested rights doctrine often produce inconsistent results in striving to avoid unjust applications of the rule.<sup>56</sup> Moreover, the inconsistency that the Virginia Court attributed to the operation of the modern rule does not appear to have occurred. Professor Sedler's careful study of the "policy-centered" courts that have abrogated the vested rights approach reveals that these courts agree on the way to solve almost all of the typical practical problems.<sup>57</sup> Professor Leflar has reached a similar conclusion, finding that "modern decisions, regardless of exact language, are substantially consistent with each other."<sup>58</sup>

### C. *Is a Policy-Oriented Approach Needed?*

The developing law is clearest in actions where two residents have an automobile accident in a foreign jurisdiction where a guest statute or an interspousal immunity doctrine is in effect, and return to litigate in their home state, which permits recovery. Professor Sedler's survey of recent choice-of-law decisions reveals that all states that have espoused the modern methodology uniformly hold that "when two residents of the forum are involved in an accident in another state, the law of the forum applies."<sup>59</sup>

Thus, the *McMillan* pattern—spouses from a nonimmunity state litigating as adverse parties claims arising from an accident that occurred in an immunity state—has become a textbook illustration of the urgent need to reject the place-of-injury rule.<sup>60</sup> Professor Weintraub even suggests that, in this setting, enforcing a foreign immunity may deny equal protection by irrationally distinguishing the plaintiff from other injured forum residents based solely on the fortuitous situs of the accident.<sup>61</sup> Indeed, some states that retain the place-of-injury rule carve out an exception and refuse on grounds of local policy to apply foreign intrafamilial immunity doctrines.<sup>62</sup>

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majority follows *Kell* and applies the law of the forum. *Id.*

<sup>56</sup> See notes 11-18 *supra* and accompanying text.

<sup>57</sup> See Sedler, *supra* note 33, at 1032-41.

<sup>58</sup> R. LEFLAR, *supra* note 6, § 109, at 219.

<sup>59</sup> Sedler, *supra* note 33, at 1033 (emphasis omitted).

<sup>60</sup> See R. WEINTRAUB, *supra* note 11, § 1.1, at 1; *id.* § 1.5, at 8; *id.* § 6.9, at 278.

<sup>61</sup> *Id.* § 9.4, at 547.

<sup>62</sup> See *Williams v. Williams*, 369 A.2d 669 (Del. 1976) (parental immunity); *Sweeney v.*

*McMillan* itself illustrates the absurdity of not implementing the law of the forum in such cases. In 1971, the Supreme Court abolished interspousal immunity in automobile accident cases, relying on the pervasiveness of insurance coverage and the strong policy of compelling wrongdoers to compensate their victims.<sup>63</sup> Tennessee chooses to maintain that immunity, notwithstanding modern insurance practices,<sup>64</sup> in the belief that immunity preserves family harmony.<sup>65</sup> *McMillan*, though, involved Virginia spouses and a Virginia insurer; Tennessee's interests were not at stake. Thus, by adhering to the arbitrary place-of-injury rule in *McMillan*, the Court subordinated important Virginia policies to Tennessee interests that, in the circumstances, were merely abstract.

Even if the modern approach failed to produce uniform results, the *McMillan* decision would be unjustified. Modern analysis clearly does fail to provide quick answers to *all* hard choice-of-law problems. To its credit, though, current theory focuses the court's attention on the critical policies underlying doctrines in conflict. *McMillan*'s place-of-injury rule may be simple and even relatively predictable, but it is also highly arbitrary and ignores the intricacies of life. The outrageous results that the traditional rule produces make its supposed certainty a dubious virtue. Moreover, as Professor Weintraub has stated:

[I]n shaping legal rules to apply to the complexities of the human condition, a quest for absolute certainty and complete simplicity is a child's dream. Rigid, simple rules produce irrational and dysfunctional solutions to variable, complex problems. Legal rules should be, perhaps inevitably must be, rules that produce socially desirable solutions to the problems to which those rules are addressed and that also are feasible for the members of a learned profession to administer. The place-of-wrong rule focuses on the one contact, injury, that, in unintentional tort cases, is most likely to be unrelated to the policy of any tort rule. The price paid for the simplic-

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Sweeney, 402 Mich. 234, 262 N.W.2d 625 (1978) (parental immunity); N.C. GEN. STAT. § 52-5.1 (1967) (interspousal immunity). See also note 38 *supra*.

<sup>63</sup> See authorities cited note 35 *supra*. See also Smith v. Kauffman, 212 Va. 181, 183-84, 183 S.E.2d 196, 193-94 (1971) (citing modern insurance practices in support of the abrogation of parental immunity in automobile accident cases).

<sup>64</sup> See Childress v. Childress, 569 S.W.2d 816, 819 (Tenn. 1978).

<sup>65</sup> See Wooley v. Parker, 222 Tenn. 104, 107-08, 432 S.W.2d 882, 883-84 (1968) (quoting Lillienkamp v. Rippetoe, 133 Tenn. 57, 59, 179 S.W. 628, 628-29 (1915)).

ity of that rule is, therefore, too high.<sup>66</sup>

Certainty and predictability are now developing as the courts apply policy-oriented tests to current choice-of-law problems in tort cases. "This body of law," Professor Leflar observes, "is being lifted up by the courts to a well-watered plateau high above the sinkhole that it once occupied."<sup>67</sup>

#### IV. CONCLUSION

The Supreme Court of Virginia has stated that "[t]he nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice."<sup>68</sup> The Court's summary reaffirmation of the place-of-injury rule in *McMillan v. McMillan* reveals no such scrutiny; as a result, choice of law in Virginia is left in Leflar's "sinkhole." The Court squandered an excellent opportunity to join the majority of jurisdictions in rejecting the capricious place-of-injury rule in favor of a more modern policy-oriented approach and to raise Virginia's choice-of-law theory to the plateau where it now rests elsewhere.

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<sup>66</sup> R. WEINTRAUB, *supra* note 11, § 6.19, at 312.

<sup>67</sup> Leflar, *supra* note 51, at 26.

<sup>68</sup> *Surratt v. Thompson*, 212 Va. 191, 193, 183 S.E.2d 200, 202 (1971) (quoting *State v. Culver*, 23 N.J. 495, 505, 129 A.2d 715, 721 (1957)).