January 1988


Vernon A. (Bo) Melton Jr.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Conflict of Laws Commons, and the Torts Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol90/iss2/12

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
PAUL v. NATIONAL LIFE, 
LEX LOCI DELICTI AND THE "MODERN RULE": 
A DIFFERENCE WITHOUT DISTINCTION?

I. INTRODUCTION

The doctrine of lex loci delicti has been a long-standing rule of conflicts law when dealing with tort issues and the determination of whether to apply the law of the state where the tortious conduct took place or the law of the forum state. Traditionally, “the law of the place of wrong determines whether a person has sustained a legal injury”¹ and “[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”² The doctrine has come under attack in recent years, and many states have abandoned it, adopting one or more of the so-called modern rules instead.

Supporters of the traditional doctrine say its advantages include the following: ease of application, predictability of result, and uniform application of the same law to all injured parties.³ Lex loci, or, technically, lex loci delicti commissi, is based on the “vested rights” theory, which, even proponents of the lex loci doctrine agree, is outmoded and obsolete.⁴

Opponents of the doctrine believe that it should be abandoned in favor of one of the “modern rules” and say that it is harsh, unnecessary, and unjust because of its mechanical approach.⁵ In addition, there is no consideration of policy in the doctrine, it cannot solve the complex litigation problems of the day, and it ignores interests of other jurisdictions when their residents are involved in tort

². Id. at § 377.
³. See generally, Annotation, Modern Status of Rule that Substantive Rights of Parties to a Tort Action are Governed by the Law of the Place of the Wrong, 29 A.L.R.3d 603 (1970).
⁵. See generally, Annotation, supra note 3.
litigation arising from events occurring in other states. Those who argue in favor of abandoning lex loci state that the unbending application of the doctrine is usually not justified in unintentional tort cases because the place of occurrence of such a tort is mere happenstance.6

Variations of the "modern rules" are followed by states which reject the mechanical application of lex loci to every tort action involving more than one state. The "modern rules" have in common the theory that the applicable law is to be determined by considering "objective" factors. Thus, the rules require analysis of all factors to determine which law is applicable. They are not actually rules, since they employ a subjective analysis of objective factors. The choice of "better law" is a necessary component, implied or otherwise, of any approach which follows one of the "modern rules."

The "modern rules" impose a duty on the forum court to undertake an analysis of facts to determine which law governs.7 Some cases have held that the law of the forum should govern unless valid reasons exist to apply the law of the place of the wrong.8 Other cases have held that the law of the "predominantly concerned" jurisdiction applies.9 The different approaches to the "modern rules" often overlap and are combined with one another, and the rule is still somewhat transitional.10 The most frequent criticism of the "modern rules" is that they lead to forum shopping by plaintiffs.

The doctrine of lex loci was not necessary in England. As opposed to contracts, torts, and other substantive areas of the law, the study of conflicts of law is of fairly recent origin. In England, the unitary system of government did not allow conflicts to occur, and the selection of applicable law was simple because of the "early centralization of power in the king and the establishment of a common law

8. See Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972) (Any significant contact with the forum is enough; "most significant" contact is not necessary).
9. See generally, Griffith, 416 Pa. at 1, 203 A.2d at 796.
for the whole realm." The confusion which has developed since Justice Joseph Story's 1834 publication of *Commentaries on the Conflict of Laws*, the first comprehensive treatment in English on the subject, has led one casebook author to say that "[t]his may be one of the rare legal subjects about which a page of history is worth less than a blank sheet." Within the last twenty years, "the topic of choice of law has been reshaped to an incredible extent," and "the choice of law branch of conflicts . . . has recently exploded into jurisprudential smithereens." "[S]cholars disagree . . . over whether no rules are preferable to rules and over whether there is a body of conflicts principles that are coherent enough to be worth the . . . effort to restate them."

II. STATEMENT OF THE CASE

A recent West Virginia case, *Paul v. National Life,* reaffirmed the adherence of the West Virginia courts to the traditional doctrine of lex loci. In the *Paul* case, the administrator of an automobile passenger's estate instituted a wrongful death proceeding in West Virginia against the estate of the driver of an automobile involved in a one-car collision in Indiana. The driver's estate moved for summary judgment, alleging that the Indiana guest statute barred recovery because, while the statute required a showing of gross negligence, only simple negligence could be proved. The passenger's estate appealed the decision of the Circuit Court of Kanawha County, which held that recovery was barred under the traditional choice of law doctrine of lex loci. The Supreme Court of Appeals of West Virginia reversed the Circuit Court decision, holding that while West Virginia generally adheres to the doctrine of lex loci, the Indiana guest statute offended the public policy of West Virginia and would not apply in the case.

12. Id. at 4.
13. Id. at 6.
14. Id.
15. Id. at 7.
17. Id. at 550-51.
18. Id. at 551.
19. Id. at 556.
III. PRIOR LAW

A. The Traditional Doctrine

In a decision lending support to those who criticize the lex loci doctrine because of the unfair results obtained by its mechanical application, the Court of Appeals of Kentucky held in Stewart's Adm'x v. Bacon that "[a]n action for a tort committed in a foreign country will lie only when it is based upon an act which will be considered as tortious both by the law of the place where committed (lex loci delicti commissi) and by the law of the place where the court sits (lex loci fori) . . . ." Very few courts, however, have followed the lead of the Bacon case.

The "place" of the wrong in the lex loci doctrine is generally held to be where the injury or death was sustained. There is also authority for the proposition that "place" is where the wrongful act or conduct took place or where the last event occurred or the tort was completed. The "place" in the modern rules is determined by a balancing of the relative interests of the states involved.

B. The "Modern Rule"- Introduction

In Griffith v. United Airlines, Inc., a leading case for the "modern rule," the Supreme Court of Pennsylvania abandoned the traditional rule of lex loci. The court noted that the "lex loci delicti rule has been the subject of severe criticism in recent years." The court said that "[t]he basic theme running through the attacks on the place of the injury rule is that wooden application of a few overly simple rules, based on the outmoded 'vested rights theory,' cannot solve the complex problems which arise in modern litigation and may often yield

20. Stewart's Adm'x v. Bacon, 253 Ky. 748, 749, 70 S.W.2d 522, 523 (1934) (emphasis added).
25. See Griffith, id. at 12, 203 A.2d at 801 for an extensive listing of authorities which criticize the rule.

https://researchrepository.wvu.edu/wvlr/vol90/iss2/12
harsh, unnecessary, and unjust results." The court also noted that "[a]lthough the overwhelming majority of writers are opposed to retention of the . . . rule, there is disagreement as to the successor of that rule." "However . . . almost all authorities agree that there must be a policy analysis approach to replace the place of the injury rule."

The Griffith court also said that "[i]n the Supreme Court of the United States has favorably acknowledged the recent tendency of courts to depart from the place of injury rule in order to take into account the interests of the state having contacts with the issues and the parties." One might take issue with the term "favorably" in the foregoing quote and contend that the Supreme Court merely acknowledged the trend of courts to abandon lex loci. The Court made no judgment regarding the relative worth of an approach which takes into account state interests as opposed to the traditional approach.

While stating that the courts of Pennsylvania would now apply a "more flexible rule which permits analysis of the policies and issues underlying the particular issue before the court" and citing the case of Babcock v. Jackson, the first case abandoning the doctrine of lex loci, the court in Griffith failed to state precisely what rule it would follow. The court did state that "in evaluating qualitatively the policies underlying the significant relationships to the controversy, our standard will be no less clear than the concepts of 'reasonableness' or 'due process' which courts have evolved over many years." Following the analysis involved in the court's ultimate decision, however, one may conclude that the rule adopted was that of the "government interests" approach which will be discussed later.

The dissent in Griffith strongly disagreed with and was highly critical of the majority opinion. Chief Justice Bell felt that "the Court's
Opinion creates a new test or formula which has no clear and definite application to many factual situations which are certain to arise . . .” and that “the only thing certain about the new rule is that plaintiffs will bring their suits in or under the law of the State which allows them to collect the most damages.”35 Commenting on the exceptions to the application of lex loci, the Chief Justice said, “It is obvious, if we are to progress, that there will always be exceptions to every general rule or principle, and that neither the law nor the principle of stare decisis can or should be as immutable as the laws of the Medes and the Persians.”36

C. The “Dominant Contacts” or “Most Significant Relationship” Approach

There are various approaches to what constitutes the “modern rule.” The first is known as the “dominant contacts” or the “most significant relationship” approach.37 It gives the state with the greatest interest the ability to follow its policy.38 If the other state’s law is in conflict with a long-standing law of the forum state, the burden of proof which must be established to apply the law of the other state may be insurmountable.39 Some courts have said that they will not adopt the “most significant relationship” approach unless the policies and interests of the states are in substantial opposition to one another.40 There is disagreement among the commentators regarding the validity of the approach.41

35. Griffith, 416 Pa. at 29, 203 A.2d at 809 (emphasis in original).
36. Id. at 31, 203 A.2d at 810.
37. See Annotation, supra note 3, § 5(b). This is the approach recommended by the RESTATEMENT (SECOND) CONFLICT OF LAWS.
D. The "Government Interests" Approach

The second approach is known as the "government interests" approach.\textsuperscript{42} It is implicit in or a part of other approaches, but it is also a method in and of itself. It is different from the Restatement's approach, according to one commentator.\textsuperscript{43} It is concerned with the interests of the states and of the litigants. Relevant contacts are not ignored but are examined in conjunction with an analysis of the states' interest, the character of the cause of action, and the purposes of the rules considered.\textsuperscript{44} This approach has been the subject of much debate.\textsuperscript{45}

E. The "Choice-Influencing Considerations" Approach

A third approach is the "choice-influencing considerations" approach.\textsuperscript{46} It involves recognition of factors which have always influenced choice of law decisions at common law. The five relevant considerations include the following: (1) predictability of results; (2) maintenance of interstate order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) the application of the "better rule" of law.\textsuperscript{47} In practice, the fourth and fifth considerations are the most often used and are considered by many to be the key factors in a decision to apply the law of the forum court.

F. "False Conflicts"

Another manner in which some states deal with choice of law questions is to define the problem as a "false conflict."\textsuperscript{48} There is

\textsuperscript{42} See Annotation, supra note 3, § 5(c).
\textsuperscript{43} See Leflar, Comments on Reich v. Purcell, 15 U.C.L.A. L. Rev. 637-41 (1968); Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
\textsuperscript{46} See Annotation, supra note 3, § 5(d).
agreement that "false conflicts" exist, but confusion and disagreement as to what constitutes them. Some states examine the relevant government interests, and if there is no substantial conflict, they state that the conflict is either false or avoidable. This method has been criticized by commentators. These critics say that there may be a "false conflict of government interests," but not a "false conflict" of law.\textsuperscript{49} This approach involves a twofold finding: (1) Whether more than one state is interested in the outcome of the suit; and (2) if more than one state is interested, whether or not there is a conflict.\textsuperscript{50} Other authorities have defined a conflict as "false" when the laws in question are the same or reach the same result.\textsuperscript{51}

G. Confusion of Approaches

There are other approaches to the modern rule, but the four examined above are used most frequently. Whichever "rule" is followed, however, the factors analyzed in the decision-making process are not truly objective factors, but are subjective, and in certain cases analysis of the factors has created confusion. For example, in \textit{Wilcox v. Wilcox},\textsuperscript{52} a Wisconsin court held a Nebraska guest statute inapplicable, and applied Wisconsin law as controlling.\textsuperscript{53} The court said:

\[\text{[W]e now overrule ... cases ... that hold that the proper choice of law invariably is lex loci delicti. We believe that this will permit a reasonable and flexible approach that will allow the use of lex loci delicti, lex fori, or a combination of the two or the law of a third state if it is in the interests of sound legal administration and justice to do so.}\textsuperscript{54}\]

"It...appears that lex loci frequently is not applied where the policy of the forum state is offended, or the conscience of the forum court is shocked. The original Restatement, Conflict of Laws, recognized

\textsuperscript{49} See generally Ehrenzweig, \textit{A Counter-Revolution in Conflicts Law?}: From Beale to Cavers, 80 Harv. L. Rev. 377 (1966).
\textsuperscript{50} Id.
\textsuperscript{52} Wilcox v. Wilcox, 26 Wis.2d 617, 133 N.W.2d 408 (1965).
\textsuperscript{53} Id. at 621, 133 N.W.2d at 410.
this fact . . . .”55 While it recognized that the doctrine of lex loci should not invariably control, the court failed to reach a cognizant conclusion as to what doctrine would control its decision in future cases.56

H. Constitutionality of Choice of Law

As to the constitutionality of states choosing which law to apply, “[i]n recent years, the Supreme Court has stoutly declined to use the Constitution as a solvent for multi-state conflicts problems. Congress, too, has been wary about venturing to enact conflicts statutes imposing principles of nation-wide scope . . . .”57

The Supreme Court noted in Richards v. U.S.58 that “[r]ecently there has been a tendency on the part of some States to depart from the general conflicts rule . . . .”59 Commenting on a different but analogous problem, Justice Black said that “[i]n determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law.”60 While not addressing directly the constitutionality of allowing state courts to choose which conflicts rule to follow, the Court noted that “[d]espite the power of Congress to enact for litigation of this type a federal conflict-of-laws rule independent of the States’ development of such rules, we should not . . . assume that it has done so.”61

In a later case, Pearson v. Northeast Airlines, Inc.,62 a federal court did find, however, that a state having substantial ties to a transaction in dispute would have a legitimate constitutional interest in applying its own rule of law.63 “If, indeed, those connections are at

55. Id. at 623, 133 N.W.2d at 411.
56. Id. at 633-35, 133 N.W.2d at 417.
57. O. Reese and O. Rosenberg, supra, note 11, at 7.
59. Id. at 12.
60. Id. at 13, n.27.
61. Id. at 13.
63. Pearson, 309 F.2d at 559.
best tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law."

Finally, in Crider v. Zurich Ins. Co., the Supreme Court held that:

"[t]he states are free to adopt such rules of conflict of laws as they choose, [citation omitted], subject to the Full Faith and Credit Clause and other constitutional restrictions. The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state."

Based on these cases, there appears to be no problem with the constitutionality of choice of law doctrine, as long as a court complies with the restrictions of the Full Faith and Credit Clause and due process considerations.

I. "Exception by Characterization"

Some courts have overcome the unfairness arising in certain cases under lex loci by classifying issues as procedural rather than as substantive in nature. Instead of using the public policy exception to the doctrine, these courts have created an "exception by characterization." In Grant v. McAuliffe, the Supreme Court of California held that the matter of survival of a cause of action is a problem of procedural law, rather than substantive, and is governed by the law of the forum. The court noted the public policy exception to the lex loci doctrine, but chose not to apply the exception to this case. Instead, commenting that "'substance,' and 'procedure,'... are not legal concepts of invariant content," the court held that "a statute

64. Id.
68. See generally Annotation, supra note 3.
69. Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).
70. Id. at 862, 264 P.2d at 946.
71. Id. at 865, 264 P.2d at 948 quoting Black Diamond Steamship Corp. v. Robert Stewart & Sons, 336 U.S. 386, 397 (1949).
or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.\textsuperscript{72} The dissent in the \textit{Grant} case, quoting the foregoing passage, said that the characterization exception suggest[s] that the court will no longer be bound to consistent enforcement or uniform application of 'a statute or other rule of Law' but instead will apply one 'rule' or another as the untrammeled whimsy of the majority may from time to time dictate, 'according to the nature of the problem' as they view it in a given case.\textsuperscript{73}

Another means of "exception by characterization" in conflicts problems is to classify the action as one founded in contract law, rather than tort law, so the general rule is that the law of the forum applies (lex fori). In \textit{Levy v. Daniels' U-Drive Renting Co.},\textsuperscript{74} the action was classified as one in contract, rather than tort, to allow the plaintiff to recover under a Connecticut act which held persons renting or leasing vehicles liable for any damaged caused by the operation of the rented or leased vehicle.\textsuperscript{75} Massachusetts, where the accident which injured the plaintiff occurred, had no such provisions, and Massachusetts law would not have allowed recovery from the lessor of the vehicle.\textsuperscript{76}

In both \textit{Levy} and \textit{Grant}, the approach taken to the conflicts problem appears to be somewhat less than realistic. These types of cases lend credence to the view of proponents of the "modern rule" that lex loci either leads to unfair results or that the logic of the law must be twisted when difficult cases are presented in order for justice to prevail. A more valid and consistent solution to the problem is utilization of the public policy exception to the rule. Justice Traynor, commenting on the \textit{Grant} decision,\textsuperscript{77} said that he did not consider the case to be particularly well articulated, but that as a matter of policy, the proper result was reached.

\textsuperscript{72} \textit{Grant}, 41 Cal.2d at 865, 264 P.2d at 948.
\textsuperscript{73} \textit{Id.} at 868, 264 P.2d at 950 (Schauer, J., dissenting).
\textsuperscript{74} Levy v. Daniels' U-Drive Renting Co., 108 Conn. 333, 143 A. 163 (1928).
\textsuperscript{75} \textit{Id.} at 334, 143 A. at 164.
\textsuperscript{76} \textit{Id.}
J. The Public Policy Exception to Lex Loci

The public policy exception to the lex loci doctrine has been in existence since long before the Restatement of Conflict of Laws was drafted. The exception, recognized as early as 1817 in the case of Gardner v. Thomas,78 is also recognized in the Restatement.79 A comment to the Restatement explains that a court "applies the law of its own state, including its own conception of Conflict of Laws. It derives this law . . . from precedent, from analogy, from legal reason, and from consideration of ethical and social need."80 The Restatement itself says that "[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."81

In Schmidt v. Driscoll Hotel,82 the plaintiff, a minor, and his mother instituted a civil suit in Minnesota against the defendant for damages resulting from defendant's illegal sale of intoxicants to the driver of a car in which the plaintiff was a guest passenger. The driver lost control of his vehicle after becoming intoxicated in the establishment of the defendant and injured the plaintiff. The accident occurred in Wisconsin, which had no act such as the Civil Damage Act of Minnesota under which the defendant sued.83 The trial court found that the Minnesota Act required that the injury must occur within the state in order for plaintiff to recover under it and dismissed the action, citing Restatement, Conflict of Laws, sections 377 and 378.84

When the case was appealed to the Supreme Court of Minnesota, the court stated:

[If the principles expressed in Restatement, Conflict of Laws, Secs. 377 and 378, are held applicable to multistate fact situations like the present, then neither the laws of the state where the last event necessary to create tort liability took place nor the laws of the state where the liquor dealer's violations of the liquor statutes occurred

78. See Wilcox, 26 Wis. 2d at 623, 133 N.W.2d at 411 citing Gardner v. Thomas, 14 Johns. 134 (N.Y. 1817).
79. RESTATEMENT CONFLICT OF LAWS § 612 (1934).
80. RESTATEMENT CONFLICT OF LAWS § 5, comment b (1934).
81. RESTATEMENT CONFLICT OF LAWS § 612 (1934).
82. Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957).
83. Id. at 377, 82 N.W.2d at 367.
84. Id. at 378, 82 N.W.2d at 368.

https://researchrepository.wvu.edu/wvlr/vol90/iss2/12
would afford an injured party any remedy. . . . The result would be that here both the interest of Wisconsin . . . and the interest of Minnesota . . . in providing for the injured party a remedy would become ineffective . . . . We feel that the principles in [these sections] should not be held applicable to fact situations such as the present to bring about the result described and that a determination to the opposite effect would be more in conformity with principles of equity and justice.85

Citing cases from a number of jurisdictions in support of its conclusion, the court in essence invoked the public policy exception to lex loci.86 Rather than overruling prior cases or abandoning the doctrine, the result was achieved within the constraints of lex loci.

A later case, Pevoski v. Pevoski,87 involved the issue of interspousal tort immunity. Confronted with the question of the choice of applicable law, the court stated that “[i]n this Commonwealth, lex loci delicti has been firmly established as the general tort conflicts rule. [Citations omitted]. This rule has provided, and will continue to provide, a rational and just procedure for selecting the law governing the vast majority of issues in multistate tort suits.”88 However, the court continued, “we recognize that there also may be particular issues on which the interests of lex loci delicti are not so strong.”89 After discussing the New York case of Babcock v. Jackson,90 the Pevoski court concluded “that the issue of interspousal immunity should be governed in this present case by the law of this Commonwealth . . . ,” even though New York was the situs of the accident and New York law would not allow one spouse to recover from another.91 Massachusetts had eliminated “the anachronism of interspousal immunity . . . ,” and the state’s public policy would not tolerate spousal immunity from personal injury claims by the other spouse.92

In a recent federal case, Mizell v. Eli Lilly & Co.,93 the District Court of South Carolina found that although the cause of action arose in California, the tort theory of “market share” liability available in

85. Id. at 379, 82 N.W.2d at 368.
86. Id.
88. Id. at 359, 358 N.E.2d at 417.
89. Id.
92. Id.
California would not be applied in the suit because it would violate the public policy of the forum, and, therefore, the substantive law of South Carolina would be applied.\textsuperscript{94} As the reason for its decision, the court stated that "[i]t is a well settled exception to the traditional conflicts-of-law rule of lex loci delicti that the law of the forum and not the law of the place of the wrong is controlling whenever the law of the place of the wrong is contrary to the public policy of the forum state."\textsuperscript{95}

In a recent case involving a workmen’s compensation claim, \textit{Karimi v. Crowley},\textsuperscript{96} where the injury to the plaintiff occurred in Alabama, but the plaintiff and the defendant were both Georgia residents, the Court of Appeals of Georgia held that "the courts of this State will apply Alabama law as the lex loci only to the extent that such application would not offend the public policy of Georgia."\textsuperscript{97} The court found that in this case there existed a "compelling public policy matter which would override the application of the traditional principle of \textit{lex loci}."\textsuperscript{98}

IV. ANALYSIS

The Supreme Court of West Virginia, in \textit{Paul v. National Life},\textsuperscript{99} did something which most courts have failed to do when dealing with conflicts of law in torts cases. Instead of jumping on the bandwagon and abandoning the doctrine of lex loci delicti commissi in favor of the "modern rules" of the Restatement, Second, Conflicts of Law, the court demonstrated that lex loci does not require a harsh, mechanical application of the rule that the law of the place of wrong governs recovery in tort. Rather, the court applied the traditional public policy exception to the doctrine and achieved the same results that other jurisdictions had achieved by overruling the doctrine.\textsuperscript{100} The court used the established exception to lex loci instead of adopting the \textit{Restatement, Second, Conflicts of Law}."

\textsuperscript{94} \textit{Id.} at 596.
\textsuperscript{95} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 762, 324 S.E.2d at 584.
\textsuperscript{98} \textit{Id.} at 763, 324 S.E.2d at 585.
\textsuperscript{99} Paul, 352 S.E.2d at 550.
\textsuperscript{100} \textit{Id.} at 556.
statement, Second approach or any one of the array of "modern" approaches to questions of conflicts of law. By judicious use of the exception, the chief advantages of the rule, those of certainty, predictability, and consistency, were retained, while the chief disadvantages, those of injustice and unfairness when the rule is applied mechanically, were overcome. All that is required is that courts not apply the rule mechanically, but look instead at relevant policy considerations when difficult cases arise in the application of the rule.

The court noted that all landmark cases abandoning lex loci, which were cited by the defendant, involved guest statutes and other doctrines that had also been abandoned by most of the states since the resolution of the cases.101 The court was highly critical of the "modern rules" and felt that other jurisdictions had overreacted by abandoning lex loci. Commenting on the adoption of the "modern rule" by other states, the Paul court found that:

nearly half of the state supreme courts... have wrought a radical transformation of their procedural law of conflicts... to sidestep perceived substantive evils, only to discover later that those evils had been exorcised... by other means. Now these courts are saddled with a cumbersome and unwieldy body of conflicts law that creates confusion, uncertainty, and inconsistency, as well as complication of the judicial task. This approach has been like that of the misguided physician who treated a case of dandruff with nitric acid, only to discover later that the malady could have been remedied with medicated shampoo. Neither the doctor nor the patient need have lost his head.102

The Paul court's primary criticism of the "modern rule," other than the fact that the same results could be achieved within the parameters of the traditional rule, was the inconsistency of results obtained under the "modern rules."103 Citing inconsistencies in the application of the Restatement, Second, approach,104 the court concluded that

if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand. Having mastered marble,

101. Id. at 551.
102. Id. at 553.
103. Id.
we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of lex loci delicti today. However, we have long recognized that comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this state [citation omitted].

Addressing the concern of many commentators that exceptions to the rule of lex loci would lead to forum shopping by plaintiffs, the court limited its holding to cases where venue is proper under some provision besides W. Va. Code § 56-1-1(a)(4). This section provides that:

a) Any civil action or other proceeding, except where it is otherwise specifically provided, may hereafter be brought in the circuit court of any county:
   . . . .
4) if it be against one or more nonresidents of the state, wherein any one of them may be found and served with process, or may have estate or debts due him or them . . . .

Thus, "[t]his State must have some connection with the controversy above and beyond mere service of process before the rule we announce today will be applied." 108

The dissent in the Paul case was concerned that "we appear to be manipulating our conflict of law rule so that the insurance company loses." 109 Based on the foregoing discussion, however, regarding the applicable case law from other jurisdictions, it cannot be said that the majority of the court was forging a radical new path in the field of conflicts law. Rather, the majority merely found a means of utilizing existing doctrine, while making exceptions for extraordinary cases, as other jurisdictions have done. The mere fact that insurance companies are usually the defendants in tort actions of the type which create the difficult cases for traditional conflicts law doctrine does not mean that the court is exhibiting unfair prejudice against insurance companies by utilization of the public policy exception.

In Mellk v. Sarahson, a case very similar to Paul involving the application of a guest statute, 110 the Supreme Court of New Jersey

105. Paul 352 S.E.2d at 556.
106. Id. at 556 n.14.
109. Id. at 557 (Brotherton, J., dissenting).
did not abandon the rule of lex loci but merely utilized the public policy exception to the doctrine in the same manner as the West Virginia Supreme Court of Appeals utilized the exception in *Paul*.

The *Mellk* court stated that:

> the advantages of uniformity, certainty and predictability often attributed to the lex loci delicti approach must yield when an unvarying and mechanical application of this rule would cause a result which frustrates a strong policy of this State while not serving the policy of the state where the accident occurred.\(^\text{111}\)

*Paul* was not the first case in which West Virginia recognized the public policy exception to lex loci. In *Perkins v. Doe*,\(^\text{112}\) the plaintiffs were injured when the car in which they were riding was forced off the road in the state of Virginia. The Perkins' instituted a "John Doe" suit against the unknown driver of the other car in a West Virginia circuit court. The action was later removed by the Perkins' liability insurer to the federal court. The Perkins' were both residents of West Virginia, their vehicle insurance policy was delivered to them in West Virginia, and their car was licensed in West Virginia.\(^\text{113}\) The West Virginia uninsured motorist statute requires a physical contact between vehicles in order for coverage to apply.\(^\text{114}\) The Virginia uninsured motorist statute requires no such "touching" between vehicles.\(^\text{115}\) The court held that under the traditional doctrine of lex loci delicti, West Virginia courts apply the law of the place of the wrong in tort cases.\(^\text{116}\)

The case arose as a result of questions certified by the United States District Court for the Southern District of West Virginia. The question which is relevant to this discussion asks: "[D]oes the doctrine that lex loci must yield when it conflicts with the public policy of the lex fori bar Plaintiffs' claims?" [citations omitted].\(^\text{117}\)

The *Perkins* court answered that "this variation in the statutory language of the two states does not reflect such a conflict in public

---

111. *Id.* at 234, 229 A.2d at 629.
113. *Id.* at 712-13.
117. *Id.* at 715 n.1.
policy as to require that the law of the place of wrong must yield."

In response to the frequently cited justification for the physical contact requirement of the West Virginia uninsured motorist statute, prevention of fraud or collusion, the court said "that blindly enforcing the physical contact requirement might deter the informed motorist from taking evasive action in a treacherous driving situation. This certainly would not advance any public policy of the State of West Virginia."

Justices Brotherton and Neely dissented, with Justice Brotherton contending that "the action is not one based in tort, but one based on statute and contract, West Virginia statute, and contract." Therefore, the uninsured motorist provision of West Virginia should have applied, the dissent argued, not the Virginia provision.

*Thornsbury v. Thornsbury* is the leading West Virginia case dealing with the issue of which state's law to apply in difficult cases. The case was before the court as a result of the death of a sixteen-year-old girl. She was killed in an accident involving an automobile driven by her aunt in the state of Ohio. She was a guest passenger in the automobile, and the court noted that Ohio had a guest statute barring recovery, whereas West Virginia did not have such a statute.

The court stated that "[i]n an action prosecuted in this state for recovery of damages for personal injury or for wrongful death caused in a foreign jurisdiction, the substantive law of the foreign jurisdiction controls the right of recovery but the adjective law of this state is applied to and controls the remedy."

Referring to the doctrine of lex loci delicti, the court said that "[t]he rule applies with full force also in the application of the guest statute of the foreign state in which the cause of action arose."

118. *Id.* at 713 n.2.
119. *Id.* at 714 n.4.
120. *Id.* at 715.
121. *Id.*
123. *Id.* at 773, 131 S.E.2d at 715.
124. *Id.* at 774, 131 S.E.2d at 716.
125. *Id.* at 771, 131 S.E.2d at 714 (Syl. pt. 1).
126. *Id.* at 773, 131 S.E.2d at 715-16.
However, the court concluded that the degree of negligence necessary to satisfy the requirement of the foreign guest statute, that of wanton and willful misconduct, could be found by the jury to have been satisfied in this case.\textsuperscript{127} Therefore, no public policy exception to the doctrine of lex loci was needed or utilized. Also, the decision came at a time when automobile guest statues were more common than they are at present.

In a more recent case involving the application of a foreign guest statute to a resident of West Virginia, \textit{Ireland v. Britton},\textsuperscript{128} the West Virginia Supreme Court found that the minor plaintiff, a thirteen-year old boy, only needed to prove ordinary negligence in order to recover.\textsuperscript{129} The court based the decision on a case by the Virginia Supreme Court, \textit{Smith v. Kauffman},\textsuperscript{130} in which it was held that the standard of gross negligence used in the Virginia guest statute "does not apply to an injured guest passenger under the age of fourteen years and... recovery may be obtained on the allegation of ordinary negligence."\textsuperscript{131} Once again, the public policy exception to lex loci was not needed or utilized in order for the court to reach its decision.

\textbf{V. CONCLUSION}

Over twenty years after the decision in \textit{Wilcox}, the United States Court of Appeals for the Fourth Circuit demonstrated that the confusion engendered by the various approaches to the so-called "modern rule" persists. In the case of \textit{Klippel v. U-Haul Co. of Northeastern Michigan},\textsuperscript{132} the court stated that "conflicts of laws questions in tort cases are usually to be resolved on the basis of lex loci delicti. The New York courts will depart from that rule only in 'extraordinary circumstances' [citation omitted]. Refusals to enforce guest statutes of other jurisdictions ... are examples of such extraordinary circumstances."\textsuperscript{133}

\begin{itemize}
  \item \textsuperscript{127} Id. at 782, 131 S.E.2d at 720.
  \item \textsuperscript{128} Ireland v. Britton, 157 W. Va. 327, 201 S.E.2d 109 (1973).
  \item \textsuperscript{129} Id. at 332, 201 S.E.2d at 112.
  \item \textsuperscript{130} Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).
  \item \textsuperscript{131} Ireland at 111.
  \item \textsuperscript{132} Klippel v. U-Haul Co., 759 F.2d 1176 (4th Cir. 1985).
  \item \textsuperscript{133} Id. at 1180.
\end{itemize}
Since the New York case of Babcock v. Jackson led the way in abandoning the doctrine of lex loci in favor of the "modern rule", does the Klippel case tell us that many courts have followed the path of the "modern rule" only to eventually end up where they started, or, as the West Virginia Supreme Court of Appeals contends in the Paul case, was there any reason to follow the path in the first place, when the path of lex loci was well-worn and predictable? It seems that sometimes courts are too eager to abandon "old" rules of law when they perceive inequities in the law. However, as the Paul case demonstrates, many times these "old" rules are not as inequitable as they appear to be at first glance. Often, if a court were to take the time to fully research the issue, it would find that exceptions to the rules exist which, if utilized judiciously, allow the court to reach the desired result. Flexibility in the application of "harsh" rules is often reflected in exceptions to those rules, not only in the area of conflicts doctrine, but in all areas of the law where unyielding adherence to a doctrine may produce inequitable results.

It is an old saying that "haste makes waste." The Paul court is saying that those courts which have adopted the "modern rule" in favor of lex loci have indeed been too hasty in their decision. Now, when faced with the prospect of applying the "modern rule" to different factual situations, those courts are finding that the search for consistency in decisions is a true waste of time.

Perhaps a comment by Justice Cardozo concerning the lex loci doctrine is appropriate. "We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the present, the path of safety will be found."134

V. A. (Bo) Melton, Jr.