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CASE COMMENTS

Conflict of Laws—Interspousal Tort Immunity

$P$, husband of $D$, sued $D$ for injuries sustained in an automobile accident in which $P$ was a passenger in a car owned and driven by $D$. Both $P$ and $D$ were domiciled in Massachusetts. The accident occurred in New Hampshire, the forum in this action. The court was confronted with the problem of whether a spouse's domicile is controlling for choice of law as to interspousal immunity for tort, regardless of whether the law of the domicile grants or denies immunity. Held, yes. Common sense and justice combined to dictate a departure from the place of wrong rule. The interspousal law of Massachusetts has such a significant relationship to the issue in dispute as to overcome the preference ordinarily had for the application of New Hampshire law to determine the rights of persons injured on New Hampshire highways. Therefore, $P$ is denied recovery from $D$ in accordance with Massachusetts law. *Johnson v. Johnson*, 216 A.2d 781 (N.H. 1966).

A pronounced split of authority has developed in the last decade in the conflict of laws situation presented by the principal case. Courts must decide whether the law of the domiciliary state or that of the state in which the tort took place should control with regard to interspousal actions. The court in principal case took the position that the law of the state in which the couple is domiciled should control. An Illinois decision rendered recently with regard to a similar factual situation held likewise, *Wartell v. Formusa*, 213 N.E.2d 544 (Ill. 1966), while a Connecticut court held that the law of the state in which the tort occurred determines the rights of spouses to sue one another. *Landers v. Landers*, 216 A.2d 183 (Conn. 1966).

To understand the present day divergence of decisions a look at the history of the law in this area is necessary. At common law the wife's personal and property rights, the very legal existence of the wife, were regarded as suspended throughout the duration of the marriage. Husband and wife were regarded as one person, and it was impossible to maintain a tort action between them. Prosser, *Torts*, § 116 (3d ed. 1964).

In the United States statutes known as Married Women's Acts have been enacted in every jurisdiction. These statutes are designed
to secure to a married woman separate legal identity. The result has been to free the wife of the husband’s control of her property, and the courts generally agree that they enable her to maintain an action against her husband for any tort he committed against her property interests. 15 U. Prrr. L. Rev. 397, 399 (1954). However, less than half the jurisdictions in the United States allow an action for any personal tort between spouses, including actions for injuries resulting from negligence. Kleinfelter, *Interspousal Immunity in Pennsylvania—A Concept in Evolution*, 69 Dick. L. Rev. 143 (1964). Only nineteen states have construed the Married Women's Acts to authorize an action by either spouse for a personal tort committed by the other spouse, intentional or negligent. West Virginia has not. Prosser, *supra* at 880.

In the past this divergence of the law presented no problem because courts generally applied the rule of *lex loci delicti* to choice of law problems in tort cases. Note, 19 Ark. L. Rev. 168 (1965). The *Restatement, Conflict of Laws* § 378 (1934) provides that the law of the place of the wrong determines whether a person has sustained a legal injury. The application of *lex loci delicti* was to eliminate uncertainty in the choice of law programs. 4 Washburn L. J. 277 (1965). However, with regard to procedural questions the law of the forum controls. 19 Ark. L. Rev., *supra*.

With regard to tort actions, until 1955 the courts unanimously held that the effect of the family relationship between parties or the right to maintain an action was a matter to be determined by the law of the same jurisdiction referred to by the forum in order to determine the substantive existence of the cause of action aside from family relations. Annot., 96 A.L.R.2d 973 (1964). In *Bohenek v. Niedzwiecki*, 142 Conn. 278, 113 A.2d 509 (1955), the court stated that the right of the wife to sue her husband involved a matter of substance and that the creation and extent of liability in tort were fixed by the *lex loci delicti comissi*. This case involved a situation in which the situs of the tort forbade intrafamilial actions and the place of the domicile did not. In *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941), the court also followed the traditional viewpoint that the family relationship of the parties was one of the substantive factors going to the existence of the cause of action.

The trend away from the “place of injury rule” began with *Emery v. Emery*, 4 Cal.2d 421, 289 P.2d 218 (1955). Here the ques-
uestion arose as to whether to apply the law of the domicile state or the state in which the tort took place in determining whether an injured child could maintain an action against his parents. The court held that the domiciliary state has the primary responsibility for establishing and regulating the incidents of the family relationship. The court also stated that it is undesirable that the rights, immunities, duties and disabilities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries temporarily. Pennsylvania followed this decision two years later in deciding that the domestic law of Pennsylvania determines a widow's capacity to sue her husband in a personal injury action based on a tort which occurred in another state. *Pittman v. Deiter*, 10 Pa. D. & D.2d 360 (1957). In *Haumscchild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) the court, in holding that the law of the domicile should control, stated that the necessity of overruling prior decisions which followed *lex loci delicti* should not preclude adoption of the better rule in view of the trend of decisions in this area. Restatement (second), Conflict of Laws § 390g (Tent. Draft No. 8, 1963).

A recent draft of the Restatement of Conflict of Laws is among several authorities which can be found in support of this trend. Restatement, (second), Conflict of Laws § 390g (Tent. Draft No. 8, 1963). The American Law Institute suggests that whether one member of a family is immune from tort liability to another should be determined by the local law of the state of the domicile when the members have the same domicile. In *Cook, Logical and Legal Basis of Conflict of Laws* 249 (2d ed. 1949), Professor Cook states that once one discards the theory that only the law where the wrong took place should determine the legal consequence in an interspousal action, the remaining problem is a question of domestic relations policy. Therefore, the question is governed by the law of the state of domicile and not the law of the place of wrong.

There are still strong arguments against the modern trend of applying the rule of the domicile in determining the rights of the spouses to sue one another. A North Carolina court held that in a situation like that presented by the principal case, the crucial question is not that of the capacity of the spouse to sue, but the determination of whether she ever had a cause of action. If no cause of action arose at the place of the wrong there is no right

A new and different solution was advocated in Babcock v. Johnson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963). In this case the plaintiff and defendant were in an automobile accident in Ontario. Both were from New York, and the action was brought in New York. The appellate court reversed a decision based on an Ontario statute stating that the choice of law should reflect consideration of factors other than where the tort occurred. The court stated that a "most significant relationship" test should be applied in determining whether to use the law of the domicile state or the law of the state in which the tort took place. In criticism of the "most significant relationship" test, it has been stated that such an approach may be used by the forum to rationalize the choice of its own law rather than that of another forum. 19 Ark. L. Rev. supra at 175.

A fourth theory which has been advanced by a group of states even prior to 1955 is to refuse to follow the lex loci delicti rule on the ground that it is contrary to the public policy of the forum. West Virginia follows this theory. In Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935), a husband sued his wife in West Virginia for personal injuries sustained in an accident in Alabama allegedly caused by her negligent driving. The court, while recognizing lex loci delicti, stated that it must give way to lex fori when it comes into conflict with the public policy of lex fori. In Campbell v. Campbell, 145 W. Va. 245, 114 S.E.2d 406 (1960), the court applied the rule adopted in the Poling case. Michigan and Minnesota are in substantial agreement. Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941).

It is difficult to predict which of these views will ultimately prevail in interspousal actions. Although more states are gradually applying the law of the domiciliary state, the majority of courts still cling to the lex loci delicti rule. Whether the arguments against this rule are strong enough to overcome well established precedent in many jurisdictions is a question that only future decisions can answer.

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