1-1-1987

Moffatt Hancock and the Conflict of Laws: An American-Canadian Perspective

Robert Allen Sedler
Wayne State University

Recommended Citation
MOFFATT HANCOCK AND
THE CONFLICT OF LAWS:
AN AMERICAN-CANADIAN PERSPECTIVE†

1 Introduction: The contributions of Moffatt Hancock to the conflict of laws

The illustrious career of Moffatt Hancock as a commentator on the conflict of laws spans the stages of development of modern conflicts law in the United States.‡ When Professor Hancock came from Canada to the United States in 1949 — after having established himself as somewhat of a 'conflicts maverick' in his home country§ — the American courts were still

* Professor of Law, Wayne State University
† A review of Studies in Modern Choice-of-Law: Torts, Insurance Land Titles by Moffatt Hancock, Marion Rice Kirkwood Professor of Law Emeritus, Stanford Law School (Buffalo: William S. Hein Company, 1984), pp xviii + 446, $45.00
‡ The stages of development of modern conflicts law in the United States may be summarized as follows: 1 / in the 1950s: adherence to the traditional approach with the use of 'manipulative techniques' and the changing of rules in some cases to produce functionally sound results; 2 / in the 1960s: beginning with Babcock v. Jackson 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963), the abandonment of the traditional approach, primarily with respect to the place of the wrong rule in torts cases, by many courts; 3 / in the 1970s: application of a policy-centred approach to the resolution of conflicts problems by the great majority of American state courts and extensive debate over the 'preferred' specific methodological approach to choice of law.
§ Throughout I will be using the term 'state' in the conflicts sense to refer to any geographic portion of the earth's surface having an independent system of law. In a federal system, such as the United States, each state of the Union, the territories, and the District of Columbia are 'states' for conflicts purposes, and in Canada each province and federal territory is a 'state' for conflicts purposes. Unitary systems, such as France and Italy, are also 'states' for conflicts purposes.

In the United States the federal courts have jurisdiction to hear cases where the parties reside in different states. In such cases, however, the federal courts must apply the law of the state in which they sit on most matters arising in the litigation, including conflicts questions. Klaxon v. Stentor Electric Mfg Co., 313 u.s. 487 (1941). Thus, a federal court hearing a 'diversity' case is treated as if it were a court of the state in which it is sitting.

In the introduction to this book, David F. Cavers, one of the most eminent American conflicts authorities, makes the following observations about the publication of Moffatt Hancock's book Torts in the Conflict of Laws in 1942: 'This volume, despite the distractions of wartime, commanded a considerable degree of attention and a distinguished array of reviewers whose appraisals were preponderantly favorable. What surprised its readers was that a Canadian author, then a member of the University of Toronto law faculty, should not only deplore the first rule in the authoritative Phillips v. Eyre [L.R. 6 Q.B. 1 (1870)] but should question the classification of "procedure" by the "internal law of either the forum or the place of wrong," and doubt the exploratory
following the traditional approach to choice of law. This approach was based on the concept of 'legislative jurisdiction' and consisted of broad, state-selecting rules designed to govern the choice of law decision within specified categories of cases. Hancock became an important addition to the ranks of the American conflicts scholars who were challenging the soundness of the traditional approach and advocating in its stead an approach to choice of law based on considerations of policy and fairness.

Unlike some of the earlier critics of the traditional approach, Hancock did not limit himself to exposing the theoretical inconsistencies and functional unsoundness of the traditional approach. But, unlike some of the other policy-oriented theorists, he did not try to develop a specific and comprehensive methodology for the resolution of choice of law problems either. Rather his focus was on identifying the factors that power of the vested rights theory. Moreover, Professor Hancock's avowed recognition of the role of social policy in Conflict of Laws moved one startled reviewer to an illuminating overstatement: "The main emphasis of the book is policy, policy, policy." MacIntyre, book review, 55 Harv. L. R. (1942) cited in introduction to Hancock Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles v (hereinafter Hancock).

Such an approach may be referred to generically as a policy-centred approach to choice of law. This approach rejects a priori rules that are to be applied to all cases within a particular category. Rather it looks to the fact-law pattern presented in the particular case and makes the choice of law decision in the light of the relevant social and economic policies found in the laws of the involved states and considerations of fairness to the parties. It embraces a number of specific methodological approaches to choice of law, all of which have as their basis considerations of policy and fairness. See generally the discussion of the policy-centred approach, especially as distinguished from a rules approach, in Sedler, Babcock v. Jackson in Kentucky: Judicial method and the policy-centred conflict of laws (1967) 56 Ky L.J. 27, at 57-63.

It has been said that earlier critics of the traditional approach, such as Walter Wheeler Cook (see, e.g., Cook, The logical and legal bases of the conflict of laws (1924) 33 Yale L.J. 457), Hessel Yntema (see e.g., Yntema, The Hornbook method and the conflict of laws (1928) 37 Yale L.J. 468), and Ernest Lorenzen (see e.g., Lorenzen, Territoriality, public policy and the conflict of laws (1924) 33 Yale L.J. 736), 'spent their entire careers attacking the Restatement' (the traditional approach was embodied in the original Restatement of Conflict of Laws, published in 1934) and were not able to offer a comprehensive approach in its stead. See Ehrenzweig, The Second Conflicts Restatement: A last appeal for its withdrawal (1965) 113 U. Pa. L.Rv. 1230, at 1231.

The most influential specific methodological approach to choice of law has been the interest analysis approach, developed by the late Brainerd Currie. See generally Currie Selected Essays on the Conflict of Laws (1963). Other important specific methodological approaches include Robert A. Leflar's 'choice influencing considerations' (see Leflar, Choice-influencing considerations in conflicts law (1966) 41 N.Y.U.L.R. 267, More on choice influencing considerations (1966) 54 Cal. L.R. 1584) and David F. Cavers' 'principles of preference.' See Cavers The Choice of Law Process (1965). These specific methodological approaches all fall within what I have referred to generically as a policy-centred approach. Some modern commentators also advocate the adoption of 'narrow policy-based rules.' See Reese, Choice of law: Rules or approach (1972) 57
should influence the choice of law decision in particular contexts, on demonstrating why no single factor should ever be dispositive of the choice of law decision,\(^7\) and on developing a sound analytical framework for the resolution of choice of law problems on the basis of considerations of policy and fairness.

What may be called the 'middle stage' of Hancock's career – the early 1960s – coincided with the modern choice of law revolution in the United States, which saw the great majority of American state courts abandoning the traditional approach in favour of what may be referred to generically as a policy-centred approach to choice of law.\(^8\) While these courts purportedly employ different and sometimes an amalgam of specific methodological approaches to choice of law,\(^9\) it can be demonstrated that in practice the courts are actually following the interest analysis approach, as developed by the late Brainerd Currie and refined by his followers.\(^{10}\) Or, to put it another way, the results reached in practice by the courts that have abandoned the traditional approach are generally consistent with Currie's interest analysis approach irrespective of what specific method-

\(^{7}\) Such as the place where the harm occurred in tort cases, as was required under the place of the wrong rule of the traditional approach, or the situs of the land with respect to any question involving immovables, as was required by the situs rule of the traditional approach.

\(^{8}\) The choice of law revolution began with the decision of the New York Court of Appeals in \textit{Babcock} v. \textit{Jackson}, supra note 1, in 1963. Twenty years later, my count indicated that of the fifty states and the District of Columbia, thirty-one had adopted a modern approach to choice of law, at least in torts cases, sixteen states continued to adhere to the traditional approach, and two states had not directly addressed the issue. Sedler, Interest analysis and forum preference in the conflict of laws: A response to the 'new critics' (1983) 34 \textit{Merc. L.R.} 593–4, n. 1.

\(^{9}\) Leflar has observed on this score: 'Most of the current cases follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law.' Leflar, \textit{Choice of law: A well-watered plateau} (1977) 41 \textit{Law \\& Contemp. Prob.} 10, at 10.

ological approach the courts are purportedly following.\textsuperscript{11} It can also be demonstrated that, at least in the torts area, the results that the courts reach in practice in cases presenting the same fact-law pattern\textsuperscript{12} are fairly uniform and can be expressed in terms of 'rules of choice of law.'\textsuperscript{13}

Almost from the beginning of the modern choice of law revolution in the United States, there has been extensive debate among academic commentators as to which specific methodological approach is the 'preferred' approach to choice of law.\textsuperscript{14} That debate is now at a record level of intensity. Much of the debate has centred around the soundness of Currie's interest analysis approach,\textsuperscript{15} which is not surprising, since, as Professor Herma Hill Kay has recently observed, 'Currie's work was at the cutting edge of the choice of law revolution that swept classroom and courtroom alike in the wake of the destruction of the traditional approach.'\textsuperscript{16}

Hancock did not directly join in this debate over the 'preferred'

\begin{thebibliography}{16}

\bibitem{12} The term 'fact-law pattern' refers to the relevant factual contacts of the involved states and the differences between the applicable laws. In the torts area, the fact part of the fact-law pattern includes the states where the parties reside, the state where the harm occurred, and if it differs, the state where the act or omission causing the harm took place.

\bibitem{13} On this point see generally Sedler, Rules of choice of law versus choice-of-law rules: Judicial method in conflicts torts cases (1977) 44 Tenn. L.R. 975. The most 'universal' rule of choice of law, followed by all the states that have abandoned the traditional approach, is that where two residents of the forum are involved in an accident in another state, the law of the forum applies. Ibid. 1033–4. Where the courts have differed on the result in particular fact-law patterns, the differences are sufficiently clear to indicate 'majority' and 'minority' views. For example, when two parties from a non-recovery state are involved in an accident in a recovery state and suit is brought in the recovery state, the courts are divided, with the majority view being that the forum should apply its own law allowing recovery. Ibid. 1035.


\bibitem{16} Kay, Review essay, supra note 10, 534
approach to choice of law, since his primary concern was not with developing a specific methodological approach for the resolution of all choice of law issues but with developing a sound analytical framework for resolving choice of law questions in particular contexts on the basis of considerations of policy and fairness. However, he is in agreement with the basic premise of Currie's interest analysis approach, that the starting point for choice of law analysis should be a consideration of the policies reflected in the laws of the involved states and the interest of each state, in the light of those policies, in having its law applied to the factual situation presented in a particular case. He and Currie, although working independently, were on parallel tracks as regards this starting point for choice of law analysis. He referred to this consideration of policies and interests as the 'functional approach' and constantly emphasized, as did Currie, that such consideration of policies and interests in the conflicts case was no different from the process of statutory construction and interpretation in the domestic case, when the courts had to decide on the reach of a statute in a case not clearly coming within its terms.

Hancock saw interest analysis or the 'functional approach' as having its efficacy in what Currie called the 'false conflict' situation, the case in which only one of the involved states had a real interest in having its law applied in order to implement the policy reflected in that law. In such a case Hancock, like Currie, contends that the application of the law of the

---

17 Cavers notes this point in the introduction. Hancock at v–vi. See also the discussion of this point in Kay, Review essay, supra note 10, 534–5. The dedication of Hancock's book includes 'to the memory of our friend Brainerd Currie.'

18 See generally Hancock, ch. 1.

19 See, e.g., Currie, supra note 6, 627, 727–8.

20 This emphasis appears throughout the book, and some of the essays have 'statutory construction' in their titles.

21 The term 'functional approach' has been used by other commentators to describe their specific methodological approaches to choice of law. See Weintraub Commentary on the Conflict of Laws (2d ed. 1980); Von Mehren and Trautman The Law of Multistate Problems (1965).

22 A state has a real interest in having its law applied in order to implement the policy reflected in that law when that policy will be significantly advanced by its application to the particular situation containing a foreign element. See the discussion in Sedler, supra note 10, 222–7.

23 To illustrate this point, Hancock uses the case of Williams v. Pope Mfg Co. 52 La. Ann. 1417, 27 So. 851 (1900). There a married woman domiciled in Mississippi brought a tort action in her own name in a Louisiana court to recover damages for a false imprisonment occurring in Louisiana. She could bring suit in her own name under Mississippi law but not under Louisiana law, since under Louisiana law her cause of action was considered community property. As Hancock demonstrates, the policy reflected in Mississippi law was directed towards Mississippi domiciliaries, while the policy reflected in Louisiana law was directed toward Louisiana domiciliaries, so that only Mississippi had a real interest in having its law applied on this issue in the case before the court. Hancock 3–8.
only interested state produces a functionally sound result, while the application of the law of the state that does not have a real interest in preference to the law of the state that does — as was so often required under the state-selecting rules of the traditional approach — produces a functionally unsound result. There is substantial agreement among academic commentators today that in the case of the false conflict the law of the only interested state should apply.

Once the false conflict is passed, however, Hancock looks for solutions that depart from those advocated under Currie's interest analysis approach. In the case of the true conflict — that is, the situation where both the involved states have a real interest in having their law apply in order to implement the policy reflected in that law — Currie maintains that the forum should apply its own law to advance its own policy and interest. Hancock, by contrast, advocates techniques of reconciliation, derived from a searching examination of the policy reflected in a rule of substantive law, including the strength with which the policy is held and the present-day soundness of that policy. He likewise advocates such

24 For example, since liability for tort was governed by the law of the place of the wrong, where two parties from a recovery state were involved in an accident in a non-recovery state, the law of the non-recovery state would be applied. However, the state, based solely on the fact that the accident occurred there, would have no interest in applying its law to enable a non-resident defendant to avoid liability to a non-resident plaintiff. The parties' home state, where the consequences of the accident and of allowing or denying recovery would be felt, in contrast, would have a real interest in applying its law to enable its resident plaintiff to recover. See the discussion of this situation in Hancock at 23-5.

25 It should be noted in this regard that there will not always be agreement over what is a false conflict. There is, for example, substantial disagreement over whether the state where an accident occurs has a real interest on that basis in applying its law to enable a non-resident injured there to recover. If two parties from a non-recovery state are involved in an accident in a recovery state, the parties' home state obviously has a real interest in applying its law to deny recovery, and will do so if the suit is brought there. See, e.g., Wartell v. Formusa 345 Ill.2d 57, 213 N.E. 2d 544 (1966); Fuerste v. Bemis 156 N.w.2d 831 (Iowa 1968). The plaintiff, however, can always sue in the state of injury, obtaining jurisdiction under the 'long-arm' act (the American equivalent of service ex juris). If the state where the accident occurs does not see itself as having a real interest in applying its law to enable a non-resident injured there to recover, it will treat the case as a false conflict and apply the law of the parties' home state denying recovery. See, e.g., Vick v. Cochran, 316 So.2d 242 (Miss. 1975). But if it does see itself as having a real interest in applying its own law, the case presents a true conflict, and that state will apply its own law. See, e.g., Arnett v. Thompson 433 s.w. 2d 109 (Ky. 1968).

26 See the discussion of the false conflict in Sedler, The governmental interest approach, supra note 10, 186-7.

27 Currie, supra note 6, 107-8, 148-9, 182. I agree fully with Currie that the forum should apply its own law in the true conflict situation (Sedler, supra note 10, 227-33) and maintain that this is the result that generally obtains in practice. Ibid. 231-3.

28 The techniques of reconciliation are developed fully in ch. 4 and are applied further in chs 5 and 6.

29 See the discussion infra 77-9.
techniques of reconciliation in the 'unprovided-for case,' the situation where neither of the involved states has a real interest in having its law applied in order to implement the policy reflected in its law.\textsuperscript{30} Again, Hancock's concern is with developing a sound analytical framework for resolving choice of law questions in particular contexts rather than with developing a specific methodological approach to choice of law.

_Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles_ contains twelve essays published between 1961 and 1979 and a final essay published in 1983. The essays included thus are those that coincide with the modern choice of law revolution in the United States and so set forth Hancock's views about choice of law during this contemporary period.\textsuperscript{31} The book can conveniently be divided into five parts.

The first two essays, 'Three approaches to the choice-of-law problem: The classificatory, the functional and the result-selective,' published in 1961, and 'The rise and fall of Buckeye v. Buckeye: Marital immunity for torts,' published in 1962, are in a sense foundational essays, discussing the generically different approaches to choice of law\textsuperscript{32} and setting forth Professor Hancock's advocacy of a policy-centred approach to choice of law.

The next four essays, 'Anti-guest statutes and marital immunity for torts in conflict of laws,' 'Anti-guest statutes: Realism in Wisconsin and rule fetishism in New York,' 'Measure of damages for torts,' and 'The effect in choice-of-law cases of the acquisition of a new domicile after the commission of a tort or the making of a contract,' were published between 1973 and 1979 and discuss choice of law in practice, primarily in the torts area, within the framework of the development of modern conflicts law in the United States. Essays 7 and 8, 'Canadian-American torts in the conflict of laws' and 'Torts choice-of-law problems resolved by statutory construction: The older English cases,' both published in 1968, reflect the 'Canadian component' of the book and compare the Anglo-Canadian approach to choice of law in torts cases with the development of modern conflicts law in the United States.

Essays 9 through 12, 'Choice-of-law problems resolved by statutory construction: Charitable testamentary gift cases,' 'Equitable conversion and the land taboo,' 'Full faith and credit to foreign laws and judgments in

\textsuperscript{30} See the discussion infra 81.
\textsuperscript{31} All Hancock's earlier works on the conflict of laws were published in Canadian journals.
 It would have been desirable if a complete bibliography of his works had been appended to the book
\textsuperscript{32} I consider the generically different approaches to choice of law to be a rules approach and a policy-centred approach. See the discussion, infra 75–6. See also the discussion of this point in Sedler, supra note 4, 60–3.
real property litigation: The Supreme Court and the land taboo,’ and ‘Conceptual devices for avoiding the land taboo in the conflict of laws,’ were published between 1963 and 1967 and see Hancock applying a policy analysis to property, conflicts questions, primarily those regarding land. The final essay, ‘The effect of a post-occurrence change of domicile upon a choice of law determining the validity of other-insurance clauses in an accident policy,’ was published in 1983 and is based on the United States Supreme Court’s decision in Allstate Insurance Co. v. Hague. In this essay Hancock discusses both constitutional limitations on choice of law in the United States and the significance of post-occurrence changes of domicile in choice of law analysis.

The essays as a whole demonstrate the outstanding contributions of Professor Hancock as a modern conflicts scholar. These essays are eminently readable, and Hancock’s views come across with clarity and precision. The first part of this review will discuss and analyse his views on choice of law, as reflected in these essays, and will demonstrate how they have made an enduring contribution to the thinking about conflicts problems in the United States. The second part will offer some observations, based on the ‘Canadian component’ of Hancock’s essays, on the possible influence of his views on the development of modern conflicts law in Canada.

2 Hancock’s views and the development of modern conflicts law in the United States

The first essay in the book, ‘Three approaches to the choice-of-law problem: The classificatory, the functional and the result-selective,’ is of great personal interest to me, because it strongly influenced my own thinking about the choice of law process. Its publication in 1961 coincided with my teaching Conflict of Laws for the first time in what was my first year of full-time law teaching. By luck I chanced upon the essay, and as I read it, I understood very clearly why the traditional approach to choice of law, or, as Hancock referred to it here, the classificatory approach, was a fundamentally inadequate way to deal with conflicts problems and why, if applied according to its terms, it would often lead to functionally unsound results in actual cases. This was because, as Hancock demon-

33 449 U.S. 302 (1981)
34 This discussion will take place with awareness of the inherent limitations in commenting on a legal system other than one’s own.
35 In my view, a result in a conflicts case is functionally unsound if it brings about the application of the law of a state in circumstances in which the application of such law would be considered to be objectively unreasonable. Where the policy reflected in the
strates so cogently in this essay, '[t]he classificatory analysis does not explicitly take into account the policies or purposes of domestic rules which loom so large in the functional approach'\(^{36}\) and because, 'by reason of their oversimplified, undiscriminating character, choice-of-law principles of the conventional type are a hopelessly inadequate set of verbal tools for deciding, discussing or even thinking about choice-of-law problems.'\(^{37}\) He also showed that to the extent that the application of the traditional approach could sometimes produce functionally sound results, this was because 'the very breadth of the choice-of-law categories sometimes permits alternative classifications so that the judge may exercise a measure of choice within the framework of the classificatory system.'\(^{38}\)

What Hancock was saying in very restrained language was that the traditional approach contained within it enough manipulative techniques to enable a court willing to employ them to achieve what it considered to be a functionally sound result in a particular case.\(^{39}\) Perhaps more than any other commentator, Hancock showed how courts following the traditional approach could and did use manipulative techniques to avoid the functionally unsound results that would follow from the 'correct' application of the rules of the traditional approach.\(^{40}\)

But he also showed the dangers in the use of manipulative techniques to achieve functionally sound results. As he points out in chapter 10, when discussing the use of the equitable conversion fiction as a manipulative technique to avoid application of the situs rule to determine succession to land,

> although courts have been able to reach satisfactory results by using the

---

\(^{36}\) Hancock

\(^{37}\) Ibid. 15

\(^{38}\) Ibid. 5

\(^{39}\) For further discussion of the use of manipulative techniques in practice, see Sedler, supra note 4, 48–53. For a discussion of the use of manipulative techniques in one state to avoid the application of the place of the wrong rule in tort cases, see Sedler, Choice of law in Michigan – A time to go modern (1978) 24 Wayne L.R. 829, at 839–47. When the Michigan Supreme Court abandoned the place of the wrong rule a few years later, it noted that '[t]he courts of Michigan have frequently departed from the lex loci in individual instances' and concluded that as a result the principal argument in favour of the place of the wrong rule – that it would provide certainty and predictability – 'in the real world no longer is tenable.' Sexton v. Ryder Truck Rental, Inc. 413 Mich. 406, 425, 432; 320 N.W.2d 843, 850, 854 (1982).

\(^{40}\) Examples of the use of manipulative techniques are found in most of the essays, and essays 10 and 12 are built around the use of manipulative techniques in land cases.
conversion doctrine to manipulate the situs formula, there are several risks involved in this practice. One of these is that an insensitive judge, failing to understand the evasive role of the conversion doctrine, may insist on dragging it into a case where it produces an absurd result. Alternatively, such a judge may naively permit some further manipulation of the conversion doctrine itself which destroys its efficacy as an escape device. In either situation his misunderstanding of the role of the conversion doctrine will probably have resulted from a basic insensitivity to the policies of the domestic laws involved.

In other words, as Hancock shows, the game may be overplayed, or it may not be played well enough.

Thus, his devastating criticism of the traditional approach concludes:

In some situations we find ourselves confronted by a set of elastic formulae which can be manipulated to produce almost any result desired, so the clues to a reasoned decision must be sought elsewhere. In other situations the conventional choice-of-law principles seem to create an almost insurmountable barrier to an otherwise sensible solution. In still other situations we find ourselves driven into a

41 \(\text{He illustrates this situation by a discussion of a case where the court refused to fall into this trap. In } \text{McCaughna v. Bihorn } 10 \text{ Cal. App.2d 674, 52 P.2d 1025 (Cal. App., 4th Dist. 1935), the testatrix, who died domiciled in Illinois, directed that her California land be sold and the proceeds distributed. Her holographic will would be invalid under Illinois law but valid under California law. However, an Illinois statute would have validated the will had it been executed in California. Since the will concerned land situated in California, Hancock contends that Illinois had not declared any policy antagonistic to the enforcement of this will by a California court. This being so, the application of this situs rule would produce a functionally sound result in this case, and Hancock applauds the California court for rejecting the equitable conversion fiction and applying California law. Hancock 316-318.} \)

42 \(\text{He illustrates this situation by a discussion of } \text{Norris v. Loyd } 183 \text{ Iowa 1056, 168 N.W. 557 (1918), where the matter in issue involved inheritance by pretermitted children, so that only the domicile would have a real interest in applying its law on this point. The situs could have brought about the effective application of the law of the domicile by using the equitable conversion fiction, since the will directed that the Iowa land be sold and the proceeds divided among the testator's children. The beneficiaries, however, elected to take the land, which theoretically worked a reconversion of the property. The Iowa court held that this reconversion required the application of Iowa law as the law of the situs, which Hancock considers to be an unsound result. Hancock 314-16.} \)

43 Hancock 314

44 Moreover, the different levels of court may not be playing the same game at the same time. In \text{Toledo Society for Crippled Children v. Hickock } 152 \text{ Tex. 578, 261 S.W.2d 692 (1953), for example, an Ohio domiciliary altered his will shortly before his death to leave Texas land to an Ohio charity. This disposition violated Ohio's deathbed disinheretance law but was valid under Texas law. Again, only Ohio had a real interest in applying its law to determine whether the land went to the decedent's Ohio heirs or to an Ohio charity. The lower courts in Texas used the equitable conversion fiction to bring about the effective application of Ohio law on this issue, but the state supreme court reversed, holding that the equitable conversion doctrine was inapplicable in the choice of law context and applying Texas law as the law of the situs. See the discussion of this case in Hancock at 225-38.} \)
kind of conceptual trap which prevents us from reaching a sound decision in one case without committing ourselves to a wrong decision in another.45

A very valuable contribution of this essay is Hancock's distinction between a functional approach and a result-selective approach, which, although it was not fully appreciated in 1961, has turned out to be very important subsequently. The functional approach, as he explains it, involves 'explicit emphasis upon domestic laws and policies as basic elements in the choice of law problem' and 'should enable commentators, judges and counsel alike to think their way to particular conclusions with a directness and conviction which, using the clumsy categories of choice of law principles, it would have been impossible to obtain.'46 He said that the methodology of the functional approach was that of 'statutory construction,' similar to determining the reach of a potentially applicable statute in a domestic case. If the policy reflected in the rule of substantive law would not be advanced by its application in the conflicts case, the law should not be applied, just as it would not be applied in that circumstance in the marginal domestic case.47

The functional approach works well, he says, when the policy reflected in the law of one of the involved states would be advanced by its application in the particular case but the policy reflected in the law of the other involved state would not be so advanced.48 However, when the policies reflected in the laws of both the involved states would be advanced by their application to the particular case, he says that the problem of which law should apply is not so easily resolved.49 In that circumstance he contends that 'judges are very likely to be influenced, consciously or unconsciously, by the same consideration which would guide their judgment in the domestic analogue,' and they 'are likely to consider which of the two competing rules will produce the most rational, convenient and just decision in the litigation before them.'50

The difference between the functional approach and the result-selective approach, then, is that the functional approach is based on a consideration of the policies and interests of the involved states and makes the choice of law decision depend on the extent to which each state's policy would be advanced by its application in the particular case. The emphasis

45 Hancock 15
46 Ibid. 2. He notes here, 'The most vigorous advocate today of the importance of the policies underlying domestic rules of law is Currie.'
47 Ibid. 4
48 Ibid. This is what Currie refers to as the 'false conflict.' See the discussion supra 66–7.
49 Ibid. 6–8. This is what Currie refers to as the 'true conflict.' See the discussion, supra 67.
50 Ibid 8
is on policy and interest and not on the 'quality' of the differing laws, so to speak. Under the result-selective approach, however, the 'quality' of the differing laws becomes important, and the choice of law decision is likely to be in favour of the 'better law'.

In this essay, Hancock himself did not come down in favour of either the functional approach or the result-selective approach. It was not necessary for him to do so at this time, since the courts in the United States had not yet abandoned the traditional approach. Here he was trying to explain what he considered to be the generically different approaches to choice of law and to demonstrate the inadequacy of the traditional or classificatory approach in comparison to the functional approach and the result-selective approach.

The second essay is built around the 1959 decision of the Wisconsin Supreme Court in *Haumschild v. Continental Casualty Co.*, where that court changed the rule as to the law governing questions of spousal immunity. In the earlier case of *Buckeye v. Buckeye*, that court, like all other American state courts, had characterized the question of spousal immunity as a question of 'tort,' to be determined by the law of the state where the accident occurred. In *Haumschild*, where spouses from Wisconsin, which did not recognize spousal immunity, were involved in an accident in California, which did, the Wisconsin Supreme Court characterized the question of spousal immunity as a question of 'family law,' to be determined by the law of the marital domicile, which here not coincidentally was Wisconsin. In so doing, the court introduced policy considerations into the choice of law process, saying that the policy behind a rule of spousal immunity was to protect marital harmony, so that the marital domicile was the state primarily interested in having its law applied on this issue. The court noted: 'We are convinced that, from both the standpoint of public policy and logic, the proper solution of the conflict of laws problem, in cases similar to the instant action, is to hold that the law of the domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship.' Thus, *Buckeye* was overruled, and the court formulated a new choice of law rule: questions of spousal immunity are characterized as questions of 'family law,' and the applicable law is that of the marital domicile.

The situation presented in *Haumschild* and *Buckeye* is the classic false conflict, where two parties from a liability state are involved in an accident in a non-liability state. The parties' home state has a real interest in

51 Ibid. 15
52 7 Wis.2d 130, 95 N.W.2d 814 (1959)
53 203 Wis. 248, 234 N.W. 342 (1931)
54 7 Wis.2d at 137, 95 N.W.2d at 818
applying its law to allow the injured plaintiff to recover, while the state where the accident occurs has no interest at all in applying its law to enable the out-of-state defendant to avoid liability. Hancock uses this case to explicate further his attack on the traditional approach. The only reason that courts had held for so long that questions of spousal immunity were determined by the law of the state where the accident occurred, he says, is that they were 'led astray by the standard choice of law principles.' He concludes: 'Because these concepts and principles took no account of the policy thrust of domestic statutes and confronted the court with false issues which effectively concealed them, the judges ended up with a result which has proven to be unsatisfactory.'

In retrospect, the Wisconsin Supreme Court's decision in *Haumschild* represents a transitional step in the evolution from the traditional approach to a modern, policy-centred approach to choice of law. As Hancock demonstrates in this essay, courts following the traditional approach, when faced with the situation of two forum residents involved in an accident in another state, had frequently resorted to manipulative techniques to bring about the effective application of the forum's law and to achieve what the courts considered to be a functionally sound result. In *Haumschild*, however, the court did not try to 'manipulate the system.' Rather it changed the characterization of the question and the resulting choice of law rule, and it formulated the new rule, at least in part, with reference to considerations of policy. This may be considered to be a

55 See the discussion in Hancock at 24-5.
56 Ibid. 30
57 Ibid.
58 Ibid. 34-8. He uses as an example *Mertz v. Mertz* 271 N.Y. 466, 3 N.E.2d 597 (1936). In that case spouses domiciled in New York, which at that time recognized spousal immunity as a defence to tort liability, were involved in an accident in Connecticut, which did not. When the injured spouse brought suit against the other spouse in New York, the New York Court of Appeals was required by the place of the wrong rule to look to the law of Connecticut where the accident occurred. The Court of Appeals held, however, that to recognize the cause of action under Connecticut law would be against New York's 'public policy.' For other examples of the use of manipulative techniques to bring about the application of the forum's law where two forum residents were involved in an accident in another state, see *Levy v. Daniels U-Drive Auto Renting Co.* 108 Conn. 333, 145 A. 163 (1928) (where a Connecticut driver rented a vehicle from a Connecticut rental company in Connecticut and caused an accident injuring a Connecticut victim in Massachusetts, the Connecticut court characterized the principal question as one of 'contract,' so as to bring about the application of Connecticut law imposing vicarious liability as the 'law of the place of contracting'); *Grant v. McAuliffe* 41 Cal.2d 859, 264 P.2d 944 (1953) (where a California victim and a California driver were involved in an accident in Arizona resulting in the death of the driver the California court characterized the question of whether the cause of action survived the death of the tortfeasor as one of 'procedure,' so as to bring about the application of California law, under which the cause of action survived, as the law of the forum).
transitional step towards the adoption of a policy-centred approach, which occurred in Wisconsin a few years later. Hancock also uses the *Haumschild* decision to demonstrate the difference between a classificatory or 'rules approach' to choice of law and a policy-centred approach. What the court in *Haumschild* did was to change the rule, and it based the change in the rule, at least in part, on considerations of policy, but what emerged was still a rule, which, like any rule, had to be applied to all cases coming within its terms. Dissatisfaction with the broad, state-selecting rules of the traditional approach, which was almost universal among academic commentators in the United States, did not necessarily mean dissatisfaction with a rules approach generally to the resolution of conflicts problems. The *Restatement of Conflict of Laws Second*, as originally conceived, changed the rules of the traditional approach, reflected in the first *Restatement*, but still embodied a rules approach, looking to a plurality of factors and expressed in terms of the 'state of the most significant relationship.' Other commentators have advocated 'narrow, policy-based rules,' including a rule that questions of spousal immunity should be determined by the law of the marital domicile.  

The problem with rules, as Hancock emphasizes in this essay, is that they require a 'package deal.' They go beyond the case that is before the court and are designed to provide an a priori solution to a case that has not yet arisen. He illustrates this point in the spousal immunity context by the example of the situation where two spouses from a spousal immunity state are involved in an accident in Wisconsin. He has consistently maintained that the state where an accident occurs has a real interest in applying its law to allow a non-resident injured there to recover and should apply its own law, even where both the plaintiff and the defendant are from a non-recovery state. While I strongly disagree with Hancock on this score, that is beside the point. Admittedly, the situation where two parties from a recovery state are involved in an accident in a non-recovery state is not, from a policy standpoint, identical to the situation where two parties from a non-recovery state are involved in an accident in a recovery state. In the former situation, the state of injury has no possible interest in

59 See *Wilcox v. Wilcox* 26 Wis.2d 617, 193 N.W.2d 408 (1965); *Heath v. Zellmer* 35 Wis.2d 578, 151 N.W.2d 664 (1967).  
60 As to the approach of the Restatement Second and its operation in practice, see Sedler and Cramton, supra note 9, ch. 5.  
62 Hancock 52–3. On this point, see also the discussion in Sedler, supra note 10, 210–16.  
63 Hancock 64–5.  
64 See the discussion in Sedler, *Judicial method is 'alive and well': The Kentucky approach to choice of law in interstate automobile accidents* (1973) 61 Ky L.J. 378, at 382–3.
applying its law to enable a non-resident defendant to avoid liability, while in the latter situation the state of injury could at least plausibly assert an interest in applying its law to allow recovery to a non-resident injured there. But a rule to the effect that questions of spousal immunity are to be determined by the law of the marital domicile is, as Hancock points out here, a 'package deal,' requiring the same result in both situations without any consideration of the possible interest of the state of injury in applying its law allowing recovery in the second situation.

Thus, in this essay, published at the eve of the modern choice of law revolution in the United States, Hancock warns against a rules approach, even as the rules are changing in a more 'progressive' way. 65 The alternative to the traditional or classificatory approach, as he emphasizes, is not 'better rules' but the rejection of rules and the adoption of an approach to choice of law that is based on considerations of policy and fairness.

Essays 3 to 7, which discuss choice of law in practice, primarily within the torts area, were written in the period 1973–9, after the modern choice of law revolution in the United States had taken hold. In these essays Hancock applies his analytical framework for resolving choice of law questions on the basis of considerations of policy and fairness to a number of the 'leading' contemporary torts choice of law cases. He is particularly concerned with developing techniques of reconciliation for the true conflict, the situation where both the involved states have a real interest in having their law applied in order to implement the policy reflected in the law. Currie maintained, and I agree, 66 that in the case of the true conflict, the forum should apply its own law, and this has been the result that has generally obtained in practice. 67 Hancock disagrees and looks for techniques of reconciliation to resolve the true conflict. The essence of these techniques of reconciliation is a searching examination of the policies reflected in the differing rules of substantive law, including the strength with which that policy is held by the respective states and the present-day soundness of that policy.

In the third essay, 'Anti-guest statutes and marital immunity for torts in conflict of laws,' Hancock begins by discussing the seminal case of Babcock v. Jackson, 68 which sparked the modern choice of law revolution in the United States. Babcock was again the classic false conflict situation, where two parties from New York, which did not have a guest statute, were

65 Hancock 53
66 See supra note 27.
67 See the discussion of this point in Sedler, supra note 10, 231–3.
68 12 N.Y.2d 473, 191 N.E.2d 279 (1963)
involved in an accident on a day trip to Ontario, which at that time did.\textsuperscript{69} In that case, the New York Court of Appeals squarely rejected the place of the wrong rule of the traditional approach, and held that the law of the parties' home state, New York, should determine the question of guest-host immunity.\textsuperscript{70} Hancock states:

The outstanding characteristic of the methodology adopted in \textit{Babcock v. Jackson} was its primary emphasis upon the policies and practical effects of the divergent rules involved. It also sought to provide a test to assist judges in making a choice between the divergent rules. This test was easily applied in the Babcock case because the facts obviously fell within the policy-determined range of the New York compensatory rule and outside that of the Ontario statute giving immunity to negligent host-drivers.\textsuperscript{71}

After discussing \textit{Babcock} and the 'easy' false conflict situation,\textsuperscript{72} Hancock quickly moves to his primary concern: 'What should a court


\textsuperscript{70} It was not necessary for the court in \textit{Babcock} to come down in favor of any specific methodological approach to choice of law, because the application of New York law on the issue of guest-host immunity would follow under any modern approach to choice law. In terms of interest analysis, it was the false conflict, since only New York had a real interest in applying its law to this case involving New York parties injured in a guest statute state. New York was also the 'state of the most significant relationship,' within the meaning of the \textit{Restatement Second's} approach, since all the factors the \textit{Restatement} considers relevant in tort cases except for the accident itself occurred in New York. The opinion of the New York Court of Appeals took an eclectic approach, mixing interest analysis and factual contacts and so 'contained some comfort for all critics of the traditional system.' Currie, Comments on \textit{Babcock v. Jackson} (1963) 63 Col. L.R. 1233, at 1234. For a discussion of post-\textit{Babcock} developments in New York, see Sedler, supra note 13, 983–94.

\textsuperscript{71} Hancock 60–1.

\textsuperscript{72} As stated previously, there is substantial agreement among academic commentators today that in the case of the false conflict the law of the only interested state should apply. See supra note 26. In practice, where the false conflict is brought in the disinterested state, as it occasionally is, the forum is likely to displace its own law in favour of the law of the only interested state. See, e.g., \textit{Schwartz v. Schwartz} 103 Ariz. 562, 447 P.2d 245 (1968). For a review of other cases in which the forum concluded that it did not have a real interest in applying its law and applied the law of the only 'really interested' state, see Sedler, supra note 10, 222–7.
committed to a policy-determined analysis of choice cases do when it appears that, though the factual contacts of a case bring it within the policy range of a rule of the forum, they also bring it within the policy range of a divergent rule of another state? Looking to what he saw some courts doing in particular cases presenting this true conflict and to the views expressed by some other commentators, he concluded that there were adequate techniques of reconciliation, so that it was not necessary for the forum to resolve the true conflict simply by its applying its own law.

The two major techniques of reconciliation advocated by Hancock are what he refers to as 'domestic construction analysis' and the 'better law' analysis. Under the 'domestic construction analysis,' the forum court should look to how it and the courts of the other involved state have construed their respective laws. If the applicable law of one of the states has been given a restricted construction, this would indicate that the policy reflected in that law is not strongly held in that state, so that this policy may properly be made to yield to the more strongly held policy of the other involved state in a conflicts case.

As a practical matter, where a conflict of laws exists between two American states, it is almost invariably because one state has enacted a statute that changes the common rule remaining in force in the other state. In the examples that Hancock uses in this essay, the conflict arises in the guest statute situation because one state has enacted a guest statute changing the common law rule of liability of all persons for ordinary negligence, while the other state has not, and in the spousal immunity situation the conflict arises because one state has enacted a statute abolishing the common law rule of spousal immunity, while the other has not. So, the forum court - which in all the cases that Hancock discusses is the state that imposes liability - should study how the courts of the guest statute state or spousal immunity state have interpreted their rule in the domestic context. He writes: 'If these states evince a trend toward giving the anti-guest statute or marital immunity rule a restricted construction, the judge may conclude that he would be fully justified in giving it a restricted construction in the choice case before him.'

In discussing the cases in which the defendant has asserted the guest statute of defendant's home state to avoid liability, although the accident

73 Hancock 64. As I would put it, in this situation both states have a real interest in applying their law in order to implement the policy reflected in that law.
74 Policy-weighing is also proposed as one of the means of resolving true conflicts by Professors Von Mehren and Trautman, supra note 21, 376–92.
75 See the discussion of this point in Sedler, supra note 8, 597–8. The same is true in Canada, of course, since the common law rules are the same in all the provinces.
76 Hancock 97
occurred in a liability state\textsuperscript{77} or the plaintiff was from a liability state,\textsuperscript{78} Hancock maintains that the guest statute had been given a limiting construction by the courts of the enacting state.\textsuperscript{79} He makes the same showing as to the spousal immunity rule of the defendant's home state in cases where spouses from an immunity state were involved in an accident in a recovery state.\textsuperscript{80} This being so, he contends that the conflict should be resolved in favour of the application of the law of the state allowing recovery. Since the rule denying recovery has been given a limited construction by the courts of the state having that rule, it should not be applied in a conflicts case where the law of the other involved state allows recovery.\textsuperscript{81}

Under the 'better law analysis,' the court should consider whether the substantive law of one of the involved states is anachronistic, whether commentators tend to favour or oppose it, and as evidence of its current unsoundness, whether it has been given a limited construction in the state where it is in force.\textsuperscript{82} Not unsurprisingly perhaps, Hancock concludes that guest statute immunity and spousal immunity are anachronistic and that under the 'better law' analysis they should be rejected in favour of the law of the state allowing recovery.\textsuperscript{83}

He continues to develop these techniques of reconciliation in the fourth and fifth essays. The cases he discussed fall into three typical fact-law


\textsuperscript{78} Such as\textit{Cipolla v. Shaposka} 439 Pa. 563, 267 A.2d 854 (1790)

\textsuperscript{79} Hancock 66-7 (Ontario guest statute involved in\textit{Kell}); ibid. 70-1 (Illinois guest statute involved in\textit{Conklin}); ibid. 72-5 (Delaware guest statute involved in\textit{Cipolla}). Hancock also makes the point that if a law such as a guest statute is repealed after the event in issue occurred, this is evidence that the policy reflected in the law was not strongly held at the time the event occurred. Ibid. 77-8.

\textsuperscript{80} Ibid. 84-90, 97-8

\textsuperscript{81} Although Hancock does not specifically discuss a limiting construction to the rule of the involved state that allows recovery, this technique of reconciliation would be equally applicable to such a rule. He states subsequently: 'While the term, true conflict case, is useful in making a preliminary analysis of policies and interests, it would be a great mistake to assume that, in all true conflicts cases, the strength and significance of the policies of the States concerned are always approximately equal. As the analysis of such cases in Part II has shown, the claim of one State to have its law and policy enforced sometimes appears much stronger, and more appealing and persuasive than that of the other.' Ibid. 140.

\textsuperscript{82} Ibid. 98, 141. As Hancock notes, the 'better law analysis' was developed by Leflar; see generally Leflar, supra note 6, as one of the choice-influencing considerations. Hancock 78. Leflar, however, subsequently appeared to discuss the 'better law analysis' as a description of judicial behaviour, not as a normative prescription. Leflar,\textit{The 'new' choice of law} (1972) 21 Am. L.R. 457, at 474.

\textsuperscript{83} Hancock 69-70, 98
patterns, two parties from a liability state are involved in an accident in a non-liability state; 2 /a liability state plaintiff is injured by a non-liability state defendant in the defendant's home state and suit is brought in the plaintiff's home state; 3 / a non-liability state plaintiff is injured by a liability state defendant in the defendant's home state. In the first situation Hancock maintains that the state of injury has a real interest in applying its law allowing recovery in favour of a non-resident injured there, so the true conflict is presented there, as it is in the second situation, where the plaintiff is from a liability state. The third situation presents what has been called the unprovided-for case: neither state has a real interest in having its law applied in order to implement that policy reflected in its law.

84 As to fact-law patterns in torts cases, see supra note 12.
85 Jurisdiction may exist in the courts of the plaintiff's home state either because the underlying transaction giving rise to the accident had some factual connections with the plaintiff's home state, so that jurisdiction may be based on forum-transaction contacts (see, e.g., Foster v. Leggett 484 S.W.2d 827 (1972), where the trip began in Kentucky and was to end there but the accident occurred in Ohio), or because the defendant had substantial connections with the forum, such as 'doing business' there, so that jurisdiction may be based on forum-defendant contacts (see, e.g., Schwartz v. Consolidated Freightways 300 Minn. 487, 221 N.W.2d 665 (1974), cert. denied, 425 U.S. 959 (1976), where the accident involving a Minnesota plaintiff and an Ohio corporation occurred in Ohio, but the corporation also did substantial business in Minnesota).

There are no reported cases involving the fact-law pattern of a recovery state plaintiff injured by a non-recovery state plaintiff in the plaintiff's home state. In that situation, the plaintiff will sue in the home state, obtaining jurisdiction under the long-arm act, and that court - regardless of the approach it takes to choice of law - will apply its own law, allowing recovery.

86 Hancock 46. Hancock says that this interest is not present in the case of wrongful death, since there is no danger that the victim will become a public charge in the forum, and since the payment will be directly to the beneficiaries and will not be available to satisfy the claims of local medical creditors. Hancock 131-2.

87 See the discussion of the unprovided-for case in Sedler, supra note 10, 189-90. In practice, it is the unprovided-for case that has given the courts the most difficulty. This is because the unprovided-for case cannot be resolved solely with reference to the interests of the involved states, since by definition neither state has an interest in applying its law on the point in issue. To put it another way, Currie's interest analysis methodology can identify the unprovided-for case, but it cannot as such provide a means for its resolution. My own view is that the unprovided-for case can ordinarily be resolved with reference to the common policy reflected in the laws of the involved states. Usually the point as to which the laws of the involved states differ involves a substantive rule that is an exception to the common policy reflected in what may be called the general law of both states. Since the state whose law represents an exception to that policy has no interest in having its law applied in the circumstances of the particular case, the common policy should come to the fore, and the exception should not be recognized. For example, since guest statute immunity represents an exception to the common policy of all states in allowing recovery for ordinary negligence, and since the only state interested in extending such immunity to the defendant, the defendant's home state, does not do so, the defence of guest statute immunity should not be
In all these situations, Hancock’s techniques of reconciliation generally end up in favour of application of the law of the state allowing recovery. Where the law shielding the defendant from liability is a guest statute, as it is in most of the cases discussed, he relies both on the limited construction given the guest statute by the courts of the enacting state and on the fact that guest statutes are anachronistic. In the unprovided-for case, he adds another technique of reconciliation, which results in the application of the law of the state allowing recovery. This may be referred to as the subsidiary policy of the law of the state denying recovery. He contends that the domestic law of a state like Ontario that at that time had a guest statute actually reflects two policies: one of allowing recovery for ordinary negligence in most cases and another of protecting host-drivers from suits for ordinary negligence by guest passengers. Since Ontario would have had no real interest in applying its host-protecting policy in favour of a non-resident defendant, the court should give effect to the subsidiary compensatory policy of Ontario law by allowing recovery.

Hancock’s analytical framework for resolving choice of law questions thus combines the functional and result-selective approaches that he identified in the 1961 article. The starting point in choice of law analysis is a consideration of the policies reflected in the laws of the involved states and the interest of each state in having its law applied to implement those policies in the particular case. Where only one state has a real interest in having its law applied, the law of that state should be applied. Where both the involved states have a real interest in having their laws applied — the true conflict — or where the policy reflected in the laws of neither state will be advanced by its application in the particular case — the unprovided-for case — he would resolve the choice of law issue by the use of techniques of reconciliation. The essence of the techniques of reconciliation is a searching examination of the policy reflected in a rule of substantive law, including the strength with which the policy is held and the present-day soundness of that policy. The two major techniques of reconciliation that follow are ‘domestic construction’ analysis and the ‘better law’ analysis. In the conflicts torts cases discussed by Hancock, these techniques of recognized.

---

88 See supra notes 77, 78.
89 Hancock 107–10
90 Ibid. See also the discussion at 121–2, concerning the anachronistic nature of limitations on liability for wrongful death, as well as guest statutes.
91 As applied here, this technique of reconciliation operates in the same manner as the common policy rationale that I favour. See supra note 87.
reconciliation almost always result in the application of the law of the state allowing recovery, because the law of the state denying recovery usually will have been given a limited construction by the courts of that state, and further will be found to be ‘anachronistic’ at the present time.

Hancock’s advocacy of techniques of reconciliation for the resolution of the true conflict accords with the predominant view among conflicts commentators today. Most commentators maintain that the result in a conflicts case should not differ depending on the forum in which suit is brought, so they reject Currie’s contention that the forum should always apply its own law in the case of the true conflict. While many other commentators have also developed solutions to the true conflict other than the application of the forum’s own law, Hancock’s techniques of reconciliation are perhaps the most directly policy-oriented, since they do not go beyond the policies reflected in involved laws themselves. They look to the strength of the policy embodied in the law and to the present-day soundness of that policy. The objective of these techniques of reconciliation, related to Hancock’s analytical framework for resolving choice of law questions, is to achieve a functionally sound result in the case before the court. This, I believe, is the purpose of the conflict of laws in the legal system and the proper role of a court in a conflicts case. Hancock has developed an analytical framework, including these techniques of reconciliation, that is indeed suitable for the performance of the court’s role in a conflicts case.

92 It has been observed that ‘[t]oday’s Great Quest in choice of law is for tools to reduce and to resolve true conflicts.’ Cramton, Currie, and Kay Conflict of Laws (3d ed. 1981) 291. Some of these methods include: Weintraub’s functional analysis (see generally Weintraub, supra note 21, summarized in Cramton, Currie, and Kay 376–9); Von Mehren and Trautman’s functional analysis, supra note 21 (summarized in Cramton, Currie, and Kay 373–6); Baxter and Horowitz’s comparative impairment (see Baxter, Choice of law and the federal system (1963) 16 Stan L.R. 1, Horowitz, The law of choice of law in California – A restatement (1974) 21 U.C.L.A.L.R. 719, summarized in Cramton, Currie, and Kay 291–7); Cavers’ principles of preference (see generally Cavers, supra note 6, summarized in Cramton, Currie, and Kay 341–7); and McDougal’s comprehensive interest analysis (see McDougal, Comprehensive interest analysis versus reformulated governmental interest analysis: An appraisal in the context of choice-of-law problems concerning contributory and Comparative Negligence (1979) 26 U.C.L.A.L.R. 439). Leflar’s choice-influencing considerations approach also may be viewed as a method of resolving true conflicts other than by the application of the forum’s own law.

93 I have always believed that academic commentators tend to take an unduly complex view of the choice of law process and tend to have a rather grandiose conception about the function of conflicts law in the legal system. The purpose of conflicts law, as I see it, is to provide functionally sound and fair solutions for those relatively few cases that arise in practice in which a court has to make a choice of law decision, and the proper role of the court is to make a functionally sound and fair decision in those cases. A court has to make a choice of law decision in an actual case only when 1 / the case is connected with more than one state and 2 / the laws of the involved states differ on the point in issue.
Nonetheless, I am in disagreement with him over whether the courts should employ techniques of reconciliation in the case of the true conflict. Like Currie, I maintain that in the case of the true conflict the forum should apply its own law. I have stated the reasons for my position elsewhere and will not repeat them here. Rather, I want to raise another question: what is the significance in practice of the techniques of reconciliation that Hancock proposes? My submission is that in the cases that do arise in practice, the results generally will not differ depending on whether the court employs his techniques of reconciliation or applies the law of the forum in the true conflict situation. And in fact, he almost appears to concede as much. He states:

That most cases have resulted in a decision to apply a rule of forum law favouring the plaintiff, does not mean that the judges have been indulging in a parochial preference for forum law. The obvious reason is that a plaintiff's counsel will normally bring his suit in a State whose pertinent rule of domestic law favours his client. He will also believe he can persuade the court to apply that rule because of contacts with the forum. Tort choice actions are very rarely brought in States whose law would favour the defendant.

Hancock is, of course, correct on this score. But if the techniques of reconciliation that he proposes have any efficacy in practice, it should not be necessary for the plaintiff to bring suit in the courts of the state whose substantive law favours the plaintiff. Where suit is brought in the defendant's home state – such as where jurisdiction cannot be obtained in the plaintiff's home state or counsel for the plaintiff failed to 'forum-shop for a more favourable law' – that court should apply techniques of reconciliation and should displace its own law even where it has a real interest in applying its law in order to implement the policy reflected in that law. This simply does not happen in practice. Whenever the suit has been brought in the defendant's home state and that state has a real interest in applying its own law in order to implement the policy reflected

These cases are relatively few in number, for two reasons. First, despite the fact that we live in a multistate world, most transactions, and thus most cases that arise in practice, are connected with only one state. Second, even when a case is connected with more than one state, most of the time the laws of the involved states will not differ on the point in issue. So, even when a case is connected with more than one state, in practice the case usually will not present a choice of law issue.

We are effectively in agreement as to how the court should resolve the unprovided-for case. See supra note 91.

See, e.g., Sedler, supra note 10, 227–33; Sedler, supra note 8, 635–44.

As Hancock notes above, astute counsel for the plaintiff will endeavour to bring suit in the forum whose law favours the plaintiff.
in that law, it has done so. Likewise, in practice the 'better law' analysis has invariably meant preference for the forum's 'better law.' Where the forum's law was the 'worse law' and the forum had a real interest in applying its law in order to implement the policy reflected in that law, the forum has done so.

Where the 'better law' analysis has proved important in practice is where two parties from a non-recovery state are involved in an accident in a recovery state. If suit is brought in the parties' home state, that state will apply its own law denying recovery. However, the plaintiff can always sue in the state of injury, obtaining jurisdiction under the 'long-arm act' (the American equivalent of service ex juris). In my view, the state of injury does not have a real interest in applying its own law to allow recovery, since in this day and age the accident victim will get back home and the consequences of the accident and of allowing or not allowing


Leflar himself recognized that this was likely to happen: 'It is evident that the search for the better rule of law may lead a court almost automatically to its own lawbooks. The idea that the forum's own law is the best in the world ... is unfortunately but understandably still current among some members of our high courts.' Leflar, Choice-influencing considerations in conflicts law (1966) 41 N.Y.U.L.R. 267, at 298–9. Similarly one court has given as its reason for rejecting the 'better law analysis' the fact that 'it would result in the application of the law of the forum in each case because every forum thinks it has created the best rule of law.' Tower v. Schwabe 284 Or. 105, at 110, 585 P.2d 662, at 664 (1978). The only case that research has disclosed where the forum has displaced its own law solely on 'better law' grounds is Bigelow v. Halloran 313 N.W.2d 10 (Minn. 1981), where in a suit involving a tort committed by a Minnesota defendant against an Iowa plaintiff in Iowa, the Minnesota rule barring an action for intentional torts after the death of either party was rejected in favour of Iowa's rule allowing the cause of action to survive. They very next year, however, in a purely domestic case, the Minnesota no-survival rule was declared to be violative of the equal protection clause of the state constitution. Thompson v. Estate of Petroff 319 N.W.2d 400 (Minn. 1982). So the decision in Bigelow v. Halloran displacing the Minnesota law on 'better law' grounds, in retrospect, was not very significant.

As the Iowa court noted in Fuerste v. Bemis, supra note 98, where in a suit between Iowa parties arising out of an accident in Wisconsin it refused to displace the Iowa guest statute in favour of Wisconsin's 'better law': 'It is not for us to consider which is the better law when the policy making body of the state has spoken ... Appellant believes the Wisconsin rule is the better law. When he asks us to apply it to this case in which all significant relationships are with the State of Iowa, he is in effect asking us to ignore all other considerations ... Such a rule would eliminate the necessity for determining which state had the strongest interest in the particular issue. The result reached in this manner might have no more relevancy to the interests of the state with the most significant relationships than the result reached by applying the law of the place of injury.' 156 N.W.2d 834.

recovery will be felt in the victim's home state. Therefore, I would submit that when the real interests of the involved states are considered, this case presents the false conflict in the same manner as the case where two parties from a recovery state are involved in an accident in a non-recovery state. Some courts have seen it this way and have applied the law of the parties' home state denying recovery. The majority of the courts passing on this question, however, have seen it differently and have applied their own law allowing recovery, sometimes emphasizing that their law was the 'better law.' If the forum does have a real interest in applying its own law, as Hancock maintains, then the application of the forum's law can be justified on this basis without regard to whether it is the 'better law.' But if the forum does not have a real interest, then the 'better law' consideration must be deemed to have produced a functionally unsound result. In any event, the 'better law' analysis does not have any efficacy in practice unless the forum is willing to displace its own law on the ground that it is not the 'better law,' which is something that virtually never happens in practice.

By the same token, the 'domestic construction' analysis is discussed by Hancock in the context of the forum state, which allows recovery, looking to whether the courts of the state whose law denies recovery have put a limiting construction on that law. If the forum has a real interest in applying its law and applies its law on that basis, the consideration of the limiting construction put on the law of the other state by the courts of that state turns out to be gratuitous. This technique of reconciliation has efficacy in practice only if a state is willing to displace its own law, despite a real interest in applying that law, because it has given its own law a limited construction. Again, this is not very likely to happen in practice.

102 See the discussion of this point in Sedler, supra note 64, 382-3.
103 See Vick v. Cochran 316 So.2d 242 (Miss. 1975); Mager v. Mager 197 N.W.2d 626 (N.D. 1972).
104 See Arnett v. Thompson 433 S.W.2d 109 (Ky 1968); 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). The 'better law' analysis was expressly employed in all these cases except Arnett.
105 Hancock 64-5. Currie also maintained that the state of injury had an interest in applying its law to enable the non-resident injured there to recover, because the non-resident might become a public charge and might have incurred debts to local creditors, which would be reimbursed out of the non-resident's tort recovery. Currie, supra note 6, 145, 149.
106 The California Supreme Court purportedly resolves the true conflict by looking to the 'comparative impairment' of the respective policies of the involved states. In Bernhard v. Harrah's Club 16 Cal.3d 313, 546 P.2d 719, cert. denied, 429 U.S. 859 (1976), California had a real interest in applying its law imposing liability against the seller of intoxicating beverages for harm caused by an intoxicated patron in favour of a California plaintiff injured by such an intoxicated patron in California. The defendant was a Nevada
My point, then, is that the techniques of reconciliation advocated by Hancock, like other methodologies for resolving the true conflict, do not have much significance in practice. They would be significant only if they led the forum court to displace its own law in a case where the forum has a real interest in applying its law in order to implement the policy reflected in that law. This does not happen in practice, and as I have demonstrated elsewhere, the results that courts reach in practice are generally consistent with the results favoured under the Currie version of interest analysis. Likewise, the results favoured by Hancock in the application of his techniques of reconciliation to the true conflict cases he discusses are also generally consistent with the results favoured by the Currie version of interest analysis. In these cases the plaintiff has brought suit in a state that in Hancock's view has a real interest in applying its law in order to enable the plaintiff to recover. If this is so, then the application of the law of that state is called for under Currie's version of interest analysis as well as under Hancock's techniques of reconciliation.

So, if Hancock's techniques of reconciliation, like Currie's interest analysis, seem to be plaintiff-oriented, it is because the plaintiff has
tavernkeeper who operated in close proximity to the California border and advertised extensively in California. The California court said that Nevada's policy would be 'comparatively less impaired' if it were required to yield in the particular case and applied California law imposing liability. I have used this case as an example of the situation where a court, purportedly applying techniques of reconciliation for the true conflict, skews those criteria in favour of the application of its own law. Sedler, supra note 10, 232–3.

In Offshore Rental Co. v. Continental Oil Co. 22 Cal. 3d 157, 585 P.2d 721 (1978), an employee of a California corporation was injured in Louisiana when he was inspecting equipment leased to a Louisiana corporation there. The California corporation brought suit against the Louisiana corporation in California, where it was doing business, to recover damages it had incurred by the loss of the employee's services. Louisiana, like practically every other state, does not recognize an action by the employer to recover for the loss of an employee's services. The plaintiff contended that such an action was recognized under California law, but the California Supreme Court had never expressly held that it was. In this case, the California Supreme Court assumed arguendo that such an action might exist, and if it did, a true conflict would be presented. It then applied the 'comparative impairment' technique of reconciliation and, referring to the plaintiff's claim as 'unusual and outmoded,' resolved the conflict in favour of the application of Louisiana law. It may be suggested that by yielding to Louisiana's interest in this 'throwaway' case, the California court would appear to be applying 'comparative impairment' evenhandedly while ensuring that California law would apply in a case such as Bernhard, where California in fact had a real interest in applying its law in order to implement the policy reflected in that law. See also the discussion of what the California Supreme Court did in Offshore in Kabnowitz, Comparative impairment and the better law: Grand illusions in the conflict of laws (1978) 39 Hastings L.J. 255 at 294–300; Kay, The use of comparative impairment to resolve true conflicts: an evaluation of the California experience (1980) 68 Cal. L.R. 577, at 586–91.

brought suit in the state whose law allows recovery. Currie favours application of the law of that state because of its real interest in applying its law to allow recovery, while Hancock is likely to favour application of the law of that state because the law of the other state denying recovery has probably received a limited construction and is probably 'anachronistic.'

My conclusion in this regard, then, is that interest analysis, as developed by Currie, and the analytical policy-based framework for resolving choice of law questions, including techniques of reconciliation for the true conflict, as developed by Hancock, generally lead to the same results in the torts cases that arise in practice. The only time that Hancock and Currie would reach a different result is in the fairly rare case where the law of the defendant's home state does not impose liability and suit is brought in that state. In that circumstance, the techniques of reconciliation advocated by Hancock could see the forum displacing its own law in favour of the law of the plaintiff's home state allowing recovery, while Currie maintains that the defendant's home state should apply its law denying recovery. In practice, the few courts faced with this case have thus far agreed with Currie.

The unifying theme of essays 9 through 12 is the applicability of policy analysis to property conflicts questions, primarily those regarding land. In retrospect these essays represent a very important contribution to an understanding of modern conflicts law in the United States. They demonstrate that policy analysis, originally developed in the context of resolving conflicts torts questions, can be applied with equal efficacy and validity to the resolution of all conflicts questions, including those in the more 'arcane' property area. The essential thrust of these essays is directed towards challenging the 'land taboo': the view that all questions relating to land must be determined by the law of the situs.

Hancock applies a policy analysis to typical conflicts questions concern-
ing land, such as what law should determine succession, and shows why the law of the situs frequently should not be applied to resolve such questions. This is because the connection between land and a state does not necessarily give rise to an interest on the part of that state in having its law applied to all questions involving that land. Currie made the point that a factual contact with a state does not necessarily give rise to an interest in having a particular rule of substantive law applied based solely on that factual contact. For example, the fact that an automobile accident occurred in a state does not give rise to an interest in having a rule of substantive law having nothing to do with regulating driving conduct—such as a guest statute—applied to determine rights and liabilities arising out of that accident. So too, the fact that land is located in a state does not necessarily give rise to an interest in having a rule of substantive law relating to land applied to determine rights and liabilities involving that land. Indeed, as Hancock demonstrates in these essays, the situs *qua* situs only has an interest in having its substantive law reflecting policies of land utilization and land title applied to questions involving land located there.

Hancock illustrates the unsoundness of the 'situs rule' primarily in the context of the use of the rule to determine succession to land. The use of the situs rule in this context finds its origin in the English common law, and unlike the situation prevailing in continental countries, reflects the concept of split succession: succession to immovables is governed by the law of the situs, while succession to movables is governed by the law of the decedent's last domicile. Rules affecting succession to land may or may not reflect a land utilization policy of the situs. The easiest point of comparison is the difference between a mortmain statute and a deathbed disinheritance statute. A mortmain statute does reflect a land utilization policy of the situs, because it is designed to promote free alienability of land. A deathbed disinheritance statute, by contrast, is designed to protect the heirs and legatees of the decedent from losing any bequest, whether of immovable or movable property, because of the decedent's 'deathbed concern for salvation.'

It follows under a policy analysis that the situs has a real interest in applying its mortmain statute to determine succession to situs land, notwithstanding that the affected parties are all non-residents, but does not have a real interest in applying its deathbed disinheritance statute solely on the basis of its connection with the land.

It also follows under a policy analysis that if the decedent is domiciled in a state that does have a deathbed disinheritance statute, that state has a

111 See the discussion of this point in Currie, supra note 6, 143–4.
112 See the discussion of the origins of the situs rule in Hancock 300–3. See also the discussion in McLeod *The Conflict of Laws* (1983) 414–15.
113 Hancock 226–8
real interest in having its law applied notwithstanding that the affected land is situated in another state. The all-embracing situs rule, however, requires not only the application of a mortmain statute of the situs but also the application of a deathbed disinheritance statute of the situs and precludes the application of a deathbed disinheritance statute of the decedent's last domicile. 114

In these essays 115 Hancock demonstrates the functional unsoundness of the situs rule and shows how it has often been avoided in practice by the use of manipulative techniques, particularly the fiction of equitable conversion. 116 More importantly, he uses the theme of the 'land taboo' to show how policy analysis can be applied to choice of law in the property area, and thus why policy analysis is the proper analytical framework within which to resolve all choice of law questions. These essays were written between 1963 and 1967, at a time when the modern choice of law revolution in the United States was just beginning, and policy-based analysis was being applied primarily in tort cases. The rules of the traditional approach, such as the situs rule to determine succession to land, presumably were still being applied in the property area. Indeed, even today relatively few conflicts property cases arise in practice. Perhaps this is because parties have conformed their conduct to the requirements of the presumably applicable law: for example, testators make sure that their testamentary dispositions of land conform to the requirements of the law of the situs. Sometimes, however, conflicts property cases do arise, and the courts sometimes apply a policy analysis to resolve the conflict. 117

In any event, in these essays Hancock applies a policy analysis to choice

114 Ibid. 228-30
115 Ch. 11, 'Full faith and credit to foreign laws and judgments in real property litigation: The Supreme Court and the land taboo,' deals with a problem of recognition of judgments in the United States — whether a decree of a state court involving land situate in another state is entitled to full faith and credit under art. IV, § 1 of the constitution. While older United States Supreme Court cases indicated that such decrees were not entitled to full faith and credit, it is assumed today that if the exercise of jurisdiction by a state other than the situs was valid as a matter of due process, full faith and credit requires recognition of that decree by the situs. See, e.g., Varone v. Varone 359 F.2d 769 (7th Cir. 1966) (sister-state decree to convey local land entered against defendant subject to the jurisdiction of that court is entitled to full faith and credit at situs).

116 Hancock 242-6, 309-18
117 See, e.g., Estate of Crichton 20 N.Y.2d 124, 228 N.E. 799 (1967) (law of the marital domicile, New York, determines the right of spouse to take against the will, although Louisiana, where the assets were located, treated assets as community property, giving greater rights to surviving spouse); Estate of Clark 21 N.Y.2d 478, 236 N.E.2d 152 (1968) (law of marital domicile, Virginia, determines the right of spouse to take against the will, although under law of New York, where the trust was being administered and where the assets were located, the spouse could not take against the will, and although the husband expressly stipulated in trust provision and will that New York law should apply).
of law issues involving land and demonstrates the circumstances where policy considerations lead to the application of the law of the situs and the circumstances where policy considerations dictate that the law of the situs should be displaced.\textsuperscript{118} He uses as his starting point some of the then contemporary conflicts property cases such as \textit{Toledo Society for Crippled Children v. Hickcock},\textsuperscript{119} where the situs of the land, Texas, applied its law to uphold a 'deathbed disinheritance' that was invalid under the law of Ohio, which was the state of the testator's domicile and the state where the charitable institution carried on all its activities. He demonstrates why Texas as the situs had no interest in applying its law on this point, because the matter in issue did not involve any land utilization policy of the situs.\textsuperscript{120}

He also engages in an interesting historical examination, showing how in the latter part of the nineteenth century some courts, by the use of manipulative techniques and the like, effectively applied policy analysis to conflicts questions involving land and avoided application of the situs rule.\textsuperscript{121} The lesson of these cases, he says, was lost in the twentieth century, as the commentators emphasized the 'technique of classification' and ignored the 'technique of statutory interpretation.'\textsuperscript{122}

Hancock maintains in these essays that the 'technique of statutory interpretation' or policy analysis, which was now being applied in the torts area, had equal efficacy and validity in the property area. He concludes:

It is common knowledge that in the field of torts leading American courts have pretty well abandoned the simplistic, traditional formula of the \textit{lex loci delicti commissi} and its concomitant escape devices ... In the usual case where the parties and the facts had connections with the forum and one other state, these courts have, in effect, approached the choice-of-law problem as a problem of statutory

\textsuperscript{118} It has been assumed that only the courts of this situs can constitutionally exercise jurisdiction to determine succession to situs land. In any event, in practice, proceedings involving succession to land will take place at the situs, so the question in practice is whether the situs will apply its law to resolve all questions relating to succession to land.

\textsuperscript{119} 152 Tex. 578, 261 S.W.2d 692 (1953), cert. denied, 347 U.S. 936 (1954)

\textsuperscript{120} Hancock 225–38

\textsuperscript{121} Ibid. 238–60

\textsuperscript{122} Ibid. 289–90. In ch. 10 he applies the same kind of analysis to \textit{In re McDougall's Will} 29 N.J. 586, 151 A.2d 540 (1959), aff'g per curiam 55 N.J. Super. 36, 149 A.2d 801 (App. Div. 1959), aff'g per curiam 49 N.J. Super. 485, 140 A.2d 249 (Morris County Ct. 1958). That case involved the validity of a holographic will executed by a testatrix domiciled in California, directing that her land in New Jersey be sold and the proceeds divided. The holographic will was valid under California law but not under New Jersey law. Although only California had an interest in applying its law on this issue (Hancock 299), the New Jersey courts, applying the situs rule and refusing to use the equitable conversion fiction, invalidated the will under New Jersey law. Ibid. at 318–21. Likewise, in ch. 11 he applies this analysis to \textit{In re Estate of Barrie} 240 Iowa 431, 35 N.W.2d 658, cert. denied, 338 U.S. 815 (1949), where Iowa, the situs, applied its law to resolve the question of whether the decedent, a resident of Illinois, had revoked her will.
construction by inquiring whether the case fell within the policy scope of the forum's domestic rule or that of the other state's rule. Courts approaching the cases in this way have been able to explain their decisions as rational reconciliations of the divergent laws and policies of the states concerned. There is no reason that a similar enlightenment should not spread into the field of real property transactions.\textsuperscript{123}

His hope was that the future would see judges 'distinguishing explicitly between those laws of the forum-situs whose policies require their application and those whose policies do not.'\textsuperscript{124}

Relatively little academic commentary in the United States has been devoted to the application of policy analysis to the resolution of conflicts problems in the property area. Perhaps this is because such questions rarely arise in practice. But it may also be because these essays of Hancock's have demonstrated the applicability of policy analysis to property conflicts questions so cogently that further demonstration of this point would be somewhat redundant.\textsuperscript{125}

\textsuperscript{123} Hancock 389
\textsuperscript{124} Ibid. 390
\textsuperscript{125} For the application of a policy analysis to conflicts property questions see also Weintraub Commentary on the Conflict of Laws (2d ed. 1980) ch. 8.

Some courts are now getting away from the 'land taboo' and the automatic application of situs law in land cases, and are explicitly applying a policy analysis to determine the applicable law. In \textit{Rudow v. Fogel} 426 N.E.2d 155 (Mass. App. 1981), the claimants were all residents of New York, and the land was located in Massachusetts. The conveyance of the land between family members in that case apparently would have given rise to a constructive trust under New York law, but not under Massachusetts law. The Massachusetts court, noting that it had 'rejected the notion that a single test is appropriate for determining which law governs all questions relating to a transaction' (426 N.E.2d 158), likewise rejected application of the law of the situs to determine the question presented in this case. It cited Hancock's article on 'Conceptual devices for avoiding the land taboo in the conflict of laws' (ch. 12) and said, 'The most important interest of the situs in land transactions is the protection of bona fide purchasers or other persons who rely on record title.' Ibid. 159. Since the matter in issue in that case did not relate to land title but to the obligations of family members with respect to property conveyed by one family member to another, New York, the domicile of the family members, rather than Massachusetts, the situs, was the state interested in having its law applied on this issue. Ibid. 160.

Likewise, in \textit{In re Estate of Janney} 498 Pa. 398, 446 A.2d 1265 (1982), the law of the decedent's domicile rather than the law of the situs was applied to determine the formal validity of the will. The decedent was domiciled in Pennsylvania and executed her will conveying New Jersey land in Pennsylvania. The will was formally valid under Pennsylvania law, but a New Jersey statute then in force would have voided the will because one of the beneficiaries was an attesting witness. The land had been sold, and the proceeds were before the Pennsylvania court for distribution. The court did not resort to the equitable conversion fiction but held simply that the will should be valid because 'no current policy of either state is offended by giving this testatrix her will.' 446 A.2d 1267. The court also noted: 'We do not doubt that the New Jersey courts, in probating a New Jersey will, may give only prospective effect to their new Code. We are
The final essay, 'The effect of a post-occurrence change of domicile upon a choice of law determining the validity of other-insurance clauses in an accident policy,' published in 1983, is built around the decision of the United States Supreme Court in *Allstate Insurance Co. v. Hague*, where the court defined clearly the present scope of constitutional limitations on choice of law. The constitutional test for the validity of the application of a state's law looks to whether the state 'has a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' One of the contacts discussed by the court in *Allstate* was the move by the insured's widow to Minnesota, the forum, after the incident. Prior to the accident the insured and his wife had lived across the state line in Wisconsin, but the insured drove the insured vehicle to his Minnesota workplace every working day. Three insurance policies covering the automobile were in effect. Under Minnesota law, 'stacking' was permitted, so that recovery would be permitted under all three policies. Under Wisconsin law, the widow purportedly would be limited to a single recovery. Minnesota applied its own law, allowing 'stacking.' The United States Supreme Court held that Minnesota had sufficient contacts with the parties and the transaction, so that application of its law was constitutional.

Hancock considered the significance of a post-occurrence change of domicile in the earlier essay, 'The effect in choice of law cases of the acquisition of a new domicile after the commission of a tort or the making of a contract.' The reason why the post-occurrence change of domicile would be relevant in choice of law analysis is that because of the change of domicile, the new domicile could have an interest in having its law applied in order to implement the policy reflected in that law. In *Allstate*, for example, because of the widow's post-accident move to Minnesota, that state would now have an interest in applying its law on the 'stacking' question in order to enable its new resident to obtain greater insurance.

Hancock suggests that it was possible that in the instant case Wisconsin law would not be interpreted as precluding 'stacking.' Ibid. 396–97.
recovery. So, the issue is whether interests for choice of law purposes should be determined in the light of post-occurrence changes of residence.

In the earlier essay, Hancock reviewed a number of actual and hypothetical cases presenting this problem and made the following observations: 1 / a distinction should be drawn between the situation where the application of the law of the post-transaction domicile would benefit the moving party and the situation where it would operate to that party's disadvantage; 2 / in the former situation, the state of the post-transaction domicile may have an interest in applying its law for the benefit of its new resident,129 but this could result in unfairness to the other party by allowing the moving party to improve his position by his unilateral post-transaction act; 3 / in the latter situation, if the case had originally presented a false conflict, the state of the new domicile would not have any interest in applying its law because of the move, and if it presented a true conflict, the new state's interest would not be strengthened or enlarged by the change of domicile.130

Hancock contended that where the application of the law of the new domicile would benefit the moving party, so as to convert the case from a false conflict into a true one, the law of the new domicile should usually be disregarded. This was because true conflicts were not easily resolved, and application of the law of the new domicile would usually involve some unfairness to the non-moving party.131 But where application of the law of the new domicile would not create a true conflict,132 or where a true conflict already existed,133 then some consideration should be given to the

129 This would be so in Allstate, since the effect of applying Minnesota law would be to allow a greater insurance recovery to the insured's beneficiary, who was now a Minnesota resident.
130 Hancock 175
131 Ibid. 76. I would submit, however, that the application of the law of the new domicile would only produce unfairness if the other party had relied on the law of the other state and that party's conduct would have been different if it could have been foreseen that the law of the new domicile would apply. See the discussion of this point in Sedler, supra note 10, 239-42.
132 He uses as an example of this situation an unprovided-for case, with the plaintiff from a non-recovery state and the defendant from a recovery state (see Erwin v. Thomas 264 Or. 454, 506 P.2d 494 (1973) and a post-occurrence move by the plaintiff to the recovery state. The move converts the case into a false conflict since the plaintiff's new domicile now has a real interest in applying its law to allow recovery. Hancock 158.
133 He uses as an example of this situation what he considers to be a true conflict, with parties from a state whose law upholds the validity of a marital exclusion clause in a liability insurance policy involved in an accident in a state that invalidates such clauses. Haines v. Mid-Century Insurance Co. 47 Wis.2d 442, 177 N.W.2d 398 (1970). If the parties subsequently move to the state where the accident occurs, that state's interest in applying its law to allow recovery is heightened, because the victim is now a resident of that state. Hancock 158-62.
plaintiff's change of domicile, possibly justifying application of the law of that state.\footnote{134}

In the later essay, Hancock applied the conclusions of the earlier essay to the factual situation presented in \textit{Allstate}. Here, in his view, a true conflict already existed at the time of the fatal accident. This was because Minnesota, based on the husband's connection with Minnesota as a long-standing member of its workforce, had a real interest in applying its law to allow his widow greater insurance recovery for his death.\footnote{135} The post-occurrence change of the widow's domicile to Minnesota increased that state's concern, and Hancock argues that effect should be given to a state's total concern in the light of the policies involved.\footnote{136} In the circumstances of \textit{Allstate}, therefore, he maintains that the application of Minnesota law on the 'stacking' issue produced a functionally sound result.\footnote{137}

Hancock's discussion of \textit{Allstate} in the concluding essay demonstrates most clearly the application of his analytical framework for resolving choice of law questions on the basis of considerations of policy and fairness. He shows how approaching choice of law questions within that analytical framework is likely to lead to functionally sound results in the

\footnote{134} Hancock 177-8. Hancock also emphasizes that effect should not be given to a post-occurrence change of domicile where this would be fundamentally unfair to the other party. He uses as an example the classic 'fundamental unfairness' case of \textit{John Hancock Mut. Life Ins. Co. v. Yates} 299 U.S. 178 (1936). There, the insurance contract had been entered into in New York, where the insured resided until his death. Under New York law a false representation as to prior medical care enabled the insurer to avoid liability on the contract. After the insured's death, the beneficiaries moved to Georgia, and in a suit on the contract there, the Georgia court applied Georgia law, under which the insurer would be held liable if the jury found that the false representation was not material. The application of Georgia law on this issue was fundamentally unfair to the insurer, since the insurer was entitled to assume that it did not have to be concerned about the accuracy of the information contained in the insured's application until the insured died and a claim was made by the beneficiaries. Had it known that a different standard was to be applied and that there would be an issue as to the materiality of the false representations, the insurer presumably would have taken steps to cancel the policy at an earlier time when proof of materiality was more likely to have been available. In \textit{Yates}, the United States Supreme Court held that application of Georgia law on this issue was unconstitutional. See also the discussion of \textit{Yates} in terms of fundamental unfairness in Sedler, supra note 127, 89-91.

\footnote{135} Hancock 407-10. My own view is that Minnesota's real interest in applying its law on the 'stacking' question was predicated primarily on the fact that the insured was a regular user of the Minnesota highways and the matter in issue concerned an automobile insurance policy covering vehicles that he regularly drove into Minnesota. Sedler, supra note 8, 642-3.

\footnote{136} Hancock 415

\footnote{137} And so disregarding the beneficiary's change of domicile would not resolve the true conflict. But the change of domicile heightened Minnesota's interest in applying its law to permit the widow to have the greater recovery. Hancock 415.
particular case. And this is perhaps his greatest contribution to the development of modern conflicts law in the United States. By identifying the factors that should influence the choice of law decision and establishing a sound analytical framework for making that decision, he has furnished guidance as to how functionally sound choice of law results can be achieved in actual cases.

3 Hancock and the development of conflicts law in Canada: A look to the future

In two essays, 'Canadian-American torts in the conflicts of laws,' and 'Torts choice-of-law problems resolved by statutory construction: The older English cases,' both published in 1968, Hancock tries to relate the Anglo-Canadian approach to choice of law in torts cases to the development of modern conflicts law in the United States. In these essays he continues the advocacy of a policy-centred approach to choice of law in Canada that marked the earlier stage of his career when he established himself as a 'conflicts maverick' in Canada. 138

The focal point of these essays is an attack on the double-barrelled Phillips v. Eyre formula for choice of law in torts cases, which requires that in order for the plaintiff to recover in tort the defendant's conduct must have been actionable under the law of the forum and 'not justifiable by the law of the place where it was done.' 139 As Hancock emphasizes, this formula suffers from the same fundamental defect as the place of the wrong rule of the traditional approach in the United States: 'Their chief vice, common to both, is that they are crude and simplistic, trying to resolve too many problems with a few words. They consequently point to sound results in some cases and unsound results in others.' 140

And, like the place of the wrong rule, the Phillips v. Eyre formula does not by its terms take into account the policies and interests of the involved states. Indeed, it would allow the application of the law of the forum in a

138 See supra note 2. In addition to Torts in the Conflict of Laws (1942), some of Hancock's other Canadian writings are Torts in the conflict of laws: The first rule in Phillips v. Eyre (1940) 3 U.T.L.J. 400; Choice-of-law policies in multiple contact cases (1943) 5 U.T.L.J.

139 'As a general rule, in order to found suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done.' Phillips v. Eyre [1870] L.R. 6 Q.B. 1, 28–9. Professor Hancock notes, 'These antiquated rules have been the subject of much criticism, especially when used as criteria for deciding choice-of-law cases in a Canadian province.' Hancock 181.

140 Hancock 197. He also notes that each rule 'has its own peculiar defects.'
case that has no connection whatsoever with the forum except that the defendant is subject to suit there. Hancock concludes:

It appears that for almost a century English and American courts have vainly experimented with various comprehensive formulae for resolving interstate tort cases, none of which have proven satisfactory. The number of different domestic rules and the number of different configurations of facts and laws is so great that no simple, comprehensive formula can rationally dispose of all the problems. Each case as it arises must be separately resolved by determining the policy range of each of the domestic rules involved. Simple, comprehensive formulae are actually more a hindrance than a useful guide because they distract the judge's attention from the real problems of ascertaining policy and policy range.

As courts in the United States were turning towards a policy-centred approach, it was obviously Hancock's hope that that approach would take hold in Canada as well. Nonetheless, these two essays, as well as his earlier work directed specifically towards the Canadian scene, can serve to furnish valuable guidance for the development of conflicts law in Canada in the future. Using these essays as a starting point, we may consider the relevance of the modern conflicts revolution in the United States to the future development of conflicts law in Canada.

The observations of an American commentator on this score obviously should be received with appropriate caution, and they are made with appreciation of the inherent limitations in commenting on a legal system other than one's own. At the outset, it is necessary to point out some very important structural differences between the Canadian and American legal systems.

Hancock uses the example of the situation where both the host and guest passenger were domiciled in Ontario and the accident occurred there, but the plaintiff brought suit against the defendant in Quebec, obtaining jurisdiction on the basis of personal service while the defendant was temporarily present there. In view of the Supreme Court of Canada's interpretation of the second branch of the Phillips v. Eyre formula (see the discussion infra 99–100), the Quebec court would have to apply Quebec law and allow recovery. Hancock notes, 'A more outrageous example of unfairness to a defendant and officious intermeddling with the legal concerns of a sister province would be difficult to conceive.' Hancock 183. If Quebec were an American state court in this situation, the application of its law would be violative of due process. See the discussion supra 92.

We will limit ourselves to choice of law in torts cases. The overwhelming majority of cases presenting conflicts questions in the United States are torts cases.
legal systems that may affect the development of conflicts law in Canada compared with such development in the United States.\textsuperscript{145}

These structural differences involve the different kinds of court systems and the different allocation of federal and provincial-state power in our two countries. In Canada the court system is unitary, so that the Supreme Court of Canada is the highest court of appeal for all of Canada and has the ultimate authority to decide all questions of provincial law. Since, in Canada as in the United States, there is relatively little legislative direction as to choice of law,\textsuperscript{146} choice of law is a matter of common law. This means that the Supreme Court of Canada, as the authoritative expositor of the law of each province, imposes a uniform common law of conflicts for each of the common law provinces and, as it has turned out, for Quebec as well.\textsuperscript{147} There is thus no opportunity for the court of appeal of one province to change the approach to choice of law in that province and thus to 'start a revolution.' If there is to be a fundamental change in the approach to choice of law in Canada, it will have to come from the Supreme Court. Of course, if such a change does come, it will be binding throughout Canada.

In the United States, by contrast, there is a dual system of federal and state courts, and the highest court of each state is the authoritative expositor of the law of that state. The only role of the United States Supreme Court in regard to choice of law is to set constitutional limitations on choice of law, and those limitations are minimal.\textsuperscript{148} Thus, the approach to choice of law in the United States can differ structurally from one state to another, and the modern revolution in choice of law in the United States began by first one state and then another abandoning the traditional approach.\textsuperscript{149}

\textsuperscript{145} The structural differences in the Canadian and American legal systems find their source in what I have elsewhere referred to as differences in the structure of constitutional governance. See the more detailed discussion in Sedler, Constitutional protection of individual rights in Canada: The impact of the new Canadian Charter of Rights and Freedoms (1984) 59 Notre Dame L.R. 1191, at 1195–1201.

\textsuperscript{146} See the discussion in McLeod, supra note 112, 14; Sedler and Cramton The Sum and Substance of Conflict of Laws (2d ed. 1981) § 1.2100.


\textsuperscript{148} See the discussion of this point in Sedler, supra note 127, 68–74. The United States Supreme Court recently referred to the due process clause and full faith and credit clause as 'provid[ing] modest restrictions on the application of forum law.' Phillips Petroleum Co. v. Shutts, supra note 127, 2978. The holding in that case was that the application of the forum's law to determine liability under a gas lease would be unconstitutional where the gas lease and the claimant had no connection with the forum.

\textsuperscript{149} For a review of the states that have abandoned the traditional approach and the year that each state, usually in the context of rejecting the place of the wrong rule in tort cases, abandoned that approach, see supra note 8.
Secondly, unlike the exclusive allocation of federal and provincial power in Canada under the Constitution Act, 1867, the United States Constitution does not allocate power to the states. In American constitutional theory, the sovereignty formerly possessed by the British Crown devolved upon each of the states at the time of independence, so American states do not depend on the federal Constitution as the source of their power. The states possess the general sovereign power, except to the extent that the federal Constitution prohibits or restricts a particular exercise of state power, which is very rare. As a practical matter, then, an exercise of state power, such as the application of a statute extraterritorially to activity occurring elsewhere, cannot be found to be ultra vires under the federal Constitution. If the fact situation in Interprovincial Co-Operatives Ltd v. The Queen in Right of Manitoba, for example, had arisen in the United States – if Manitoba had been New York, and Ontario and Saskatchewan had been Vermont and Pennsylvania – there would have been no constitutional objection to New York’s applying its statute to impose liability on the out-of-state polluters. In deciding on the application of its statutes to activities occurring in another state, then, an American state court does not have to take into account the possibility that such application will be constitutionally invalid.

Despite the structural differences between the Canadian and American legal systems, as discussed above, Hancock demonstrates in these essays that a policy-centred approach to choice of law is as suitable in Canada as it is in the United States. However, while he decries the continued reliance on the Phillips v. Eyre formula in torts cases, his analysis of Canadian conflicts torts cases with reference to the result that was produced under the application of that formula shows that in practice this formula may sometimes produce ‘the right result for the wrong reason.’

150 See generally United States v. Curtiss-Wright Export Corp. 299 U.S. 304 (1936). State sovereignty is affected by the federal constitution only in the sense that certain exercises of state sovereignty, such as the power to coin money or the power to impose customs duties, are specifically denied to the states or can only be exercised with Congressional approval, under art. 1, § 10, or are implicitly denied because the matter in issue is within the ambit of an exclusive federal power, such as the postal power. Regarding the allocation of federal and state power, the federal Constitution confers enumerated powers on the federal government and provides under the supremacy clause, art. vi, § 2, that in the case of a conflict between the exercise of federal and state power, the exercise of federal power prevails. The principle that the states possess the general sovereign power except as prohibited or restricted by the federal Constitution is textually embodied in the Tenth Amendment.

151 For the most part, exclusive federal powers are limited to matters that by their nature should be exercised by national authority, such as the power to declare war, or the power to coin money, and the postal power.

152 [1976] 1 S.C.R. 477

153 Hancock 198
further, it can be demonstrated that in the kinds of cases likely to arise in practice, the application of the Phillips v. Eyre formula will frequently produce the result that he favours.

Hancock refers to the ‘manipulation of the Phillips v. Eyre formula to obtain the desired result,’ and says that the most important case where this occurred was the leading case of McLean v. Pettigrew. This case, decided by the Supreme Court of Canada in 1945, is the last pronouncement on choice of law in tort cases by the Supreme Court of Canada, and thus is the starting point for the resolution of conflicts torts cases by the Canadian courts. McLean presented a fact-law pattern identical to that of Babcock v. Jackson, with two parties from Quebec, which does not have a guest statute, being involved in an accident in Ontario, which at that time did. While in Babcock, decided almost twenty years later, the New York Court of Appeals abandoned the place of the wrong rule and sparked the modern choice of law revolution in the United States, this kind of behaviour could not have been expected on the part of a Canadian court or an American court in 1945. However, American courts, when presented with the case of two forum residents being involved in an accident in another state, not infrequently resorted to manipulative techniques to bring about the application of the forum’s own law. In retrospect, it can fairly be contended that the Supreme Court of Canada’s interpretation of the second branch of the Phillips v. Eyre formula with reference to the oft-criticized Machado v. Fontes test in McLean was also a manipulative technique designed to achieve a functionally sound result in the particular case.

In terms of interest analysis, a case like McLean v. Pettigrew is the false conflict brought in the interested state. In a case such as this, the first branch of the Phillips v. Eyre formula enables the forum to apply its own law allowing recovery. The problem comes with the second branch of the formula, which requires the forum to look to the law of the place where the accident occurred. If ‘not justifiable where done’ within the meaning

154 Ibid. 193
156 See, e.g., Going v. Reid Brothers Motor Sales, Ltd. 35 O.R. 2d 210, at 204–205 (High Ct. 1982).
157 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963)
158 Hancock notes that in Babcock, ‘when the New York Court of Appeals decided to allow recovery by a guest in the teeth of the place of the wrong formula, the majority cited McLean as a decision upon almost identical facts supporting their conclusion.’ Hancock 193.
159 In Machado v. Fontes [1897] 2 Q.B. 231 (C.A.), the English Court of Appeal held that an act was ‘not justifiable’ under the law of the place where it was done, if that law imposed criminal liability on the actor, although the act was not civilly actionable. For a review of the criticism of Machado v. Fontes, see McLeod, supra note 112, 539, n. 94.
of the second branch means 'not actionable under the law of the place where the act occurred,' as the House of Lords subsequently held, and as appears to be the preferred academic interpretation, then the application of the Phillips v. Eyre formula in McLean would have produced the same result as the application of the place of the wrong rule would have produced in Babcock. Recovery would have been denied because of the Ontario guest statute, although Ontario would have had no interest in applying its guest statute to enable a Quebec or New York defendant to avoid liability to a Quebec or New York plaintiff. By following the 'not wrongful' interpretation of 'not justifiable' adopted by the English Court of Appeal in Machado v. Fontes, the Supreme Court of Canada in McLean was able to bring about the application of Quebec law on the issue of guest-host immunity. Since negligent driving was subject to criminal sanction in Ontario, the defendant's act was 'not justifiable where done,' and the second branch of the Phillips v. Eyre formula was satisfied.

160 Chaplin v. Boys [1971] A.C. 356 (H.L. 1969). In that case, the plaintiff and defendants were both British nationals on duty with Her Majesty's Armed Forces in Malta. The plaintiff was injured in a road accident due to the negligence of the defendant, who was insured in England by an English company. Damages for pain and suffering were recoverable under English law but not under Maltese law. In a suit against the defendant in England, the House of Lords held that English law should apply on the issue of damages recoverable, but there was substantial disagreement as to the basis on which English law should apply. In the course of the opinions setting out that disagreement, there were three votes for overruling Machado v. Fontes and holding that the Phillips v. Eyre formula required double actionability. See generally the discussion of this case in McLeod, supra note 112, 539–6.

What is most interesting to me as an American observer is that Chaplin v. Boys, like McLean v. Pettigrew, like Babcock v. Jackson, and like so many other American cases, presented the false conflict brought in the interested state, as well as the situation of two forum residents involved in an accident in another state. All these courts reached the same result in practice: the law of the forum allowing recovery applies. A majority of the House of Lords in Chaplin v. Boys could 'afford' to say that the Phillips v. Eyre formula required double actionability, since in that case tort liability was imposed under Maltese law and the effect of the application of the formula was to allow recovery under forum law. In order for the Supreme Court of Canada to reach that result in McLean, it was necessary for that court to interpret the second branch of the Phillips v. Eyre formula with reference to the Machado v. Fontes test. Neither the House of Lords in Chaplin v. Boys nor the Supreme Court of Canada in McLean was willing to abandon the Phillips v. Eyre formula, but neither court was willing to displace the law of the forum allowing recovery either. If the Supreme Court of Canada had interpreted the second branch of the formula as requiring double actionability in McLean, the law of the forum allowing recovery would have had to be displaced.

161 See McLeod, supra note 112, 539, n. 4. This interpretation has long been followed in Scotland. See e.g., M'Elroy v. M'Allister [1949] s.c. 110.

162 The court also held that it did not matter that the defendant had been acquitted on a charge of careless driving arising out of the accident, because the acquittal in the criminal action was not res judicata in the civil action. In Howells v. Wilson 69 Que. K.B. 92 (1966), Quebec parties were involved in an accident in Vermont, which had a guest statute. The Quebec court, applying the Phillips v. Eyre formula, relied on the fact that
Let us now consider the implications of the holding in *McLean v. Pettigrew* for other kinds of cases involving the now repealed Ontario guest statute, or an extant law that immunizes the defendant from tort liability because of the status of the parties.\(^{163}\) Let us posit a case where the defendant is from Ontario (which we will assume still has a guest statute) and the plaintiff is from Quebec— for example, a resident of Ottawa picks up a friend in Hull for an evening’s engagement, and there is an accident. If the accident occurs in Hull, the plaintiff will have no problem whatsoever. Suit can be brought in Quebec, with service ex juris being appropriate against the Ontario defendant.\(^{164}\) Since the accident occurred in Quebec, the *Phillips v. Eyre* formula is not applicable, and recovery is allowed under Quebec law.\(^{165}\)

Now suppose that the accident occurred in Ottawa. As a practical matter, the plaintiff will still be able to bring suit in Quebec. Service ex juris might be appropriate, since the underlying transaction giving rise to the accident had factual contacts with Quebec.\(^{166}\) In any event, as things now stand, in Canada jurisdiction may be founded solely on the basis of personal service within the province.\(^{167}\) The Ontario defendant can

\(^{163}\) Such as spousal immunity


\(^{165}\) The *Phillips v. Eyre* formula means that when the accident occurs in the forum the case is treated as if it were a domestic case regardless of the residence of the parties.

\(^{166}\) It can be contended that in such a case there was a 'real and substantial connection between the act and the forum' within the meaning of *Moran*. 1 S.C.R. at 408. In *Foster v. Leggett* 484 s.w.2d 827 (Ky. 1972), the trip involving an Ohio driver and a Kentucky passenger originated in Kentucky and was to terminate there. The fatal accident occurred in Ohio. We would say that in such as case there were forum-transaction contacts with Kentucky, so that the exercise of jurisdiction in Kentucky under a long-arm act (the American equivalent of service ex juris) was valid as a matter of due process. See the discussion in Sedler, *Judicial jurisdiction and choice of law in interstate accident cases: The implications of Shaffer v. Heitner*, 1978 Wash. U.L.Q. 329, at 332–3.

\(^{167}\) McLeod states the Canadian rule in this regard as follows: 'Any individual who is within a country may be served with a writ in an *in personam* action. An individual is present within a country (province) for the purposes of service, when he is physically present within the country, regardless of the intended duration or purpose of his stay, his nationality, his residence, or his domicile. The defendant must be present at the time the writ is served, and not the time it was issued, unless he left the jurisdiction knowing of the writ. The doctrine of *forum non conveniens* is often invoked to convince the court,
conveniently arrange to be present in Quebec, and so be served with process there in the suit brought by the Quebec plaintiff. In the light of McLean, the defendant's negligent driving in Ottawa could be found to be subject to penal sanction in Ontario and thus the defendant's act would not be 'justifiable where done' within the meaning of the second branch of the Phillips v. Eyre formula. Quebec law allowing recovery would then be applied by the Quebec court.

Quebec law allowing recovery would also be applied in the case where two Ontario residents are involved in an accident in Quebec. Again, service ex juris in Quebec is appropriate because the accident occurred there, and likewise because the accident occurred in Quebec, the Phillips v. Eyre formula is inapplicable. Hancock favours the application of

in its discretion, to decline to proceed with an action, because of the very tenuous nature of the presence necessary to establish jurisdiction.' McLeod, supra note 112, 80.

Since the decision of the United States Supreme Court in Shaffer v. Heitner 433 U.S. 186 (1977), it has been assumed that in the United States the exercise of jurisdiction on the basis of personal service in the state, without more, would be violative of due process. In Shaffer, the Supreme Court invalidated the exercise of quasi in rem jurisdiction, where, based on the presence of property in a state, the court exercised jurisdiction over a claim not related to the property. In so doing the court discarded the 'power myth' of jurisdiction and held that in all cases the exercise of jurisdiction had to satisfy due process standards of 'minimal contacts' and 'fundamental fairness.' As Weintraub has noted, 'transient presence in the forum as a basis for jurisdiction probably cannot stand scrutiny under this test.' Weintraub Commentary on the Conflict of Laws (3d ed. 1986) 151.

It may be queried whether the exercise of jurisdiction on the basis of personal service within the province, without more, would be subject to challenge under § 7 of the Charter. While § 7 pointedly omits property rights from the list of protected rights, it could be contended that a legal requirement that a party defend a case in court is an interference with 'liberty,' and that the exercise of jurisdiction on the basis of personal service alone is not 'in accordance with the principles of fundamental justice.' It will be interesting to see whether constitutional objections will be interposed to the exercise of jurisdiction on the basis of personal service alone.

This is what happened in Cipolla v. Shaposka 439 Pa. 563, 267 A.2d 854 (1970). The plaintiff was a resident of Delaware County, Pennsylvania, and the defendant was a resident of Wilmington, Delaware, just across the state line. The plaintiff and the defendant attended school together in Wilmington, and the accident occurred in Wilmington when the defendant was driving the plaintiff home. Delaware had a guest statute, while Pennsylvania did not. The plaintiff brought suit in Pennsylvania. The defendant was served there while he and the plaintiff were playing golf together, and it takes no feat of imagination to assume that this was prearranged. Ironically, this effort to obtain the application of Pennsylvania law proved unavailing, for in this case the Pennsylvania court applied Delaware law on the issue of guest-host immunity. Cipolla is a relatively early case, as modern American conflicts cases go, and it is one of the very few cases where the forum failed to apply its own law when it had a real interest in doing so. See generally the discussion of this case in Hancock 72-6 and Sedler, The territorial imperative: Automobile accidents and the significance of a state line (1971) 9 Duq. L.R. 394.
Quebec law allowing recovery in this situation. However, if I am correct in my view that Quebec has no real interest in applying its law to enable an Ontario plaintiff to recover against an Ontario defendant notwithstanding that the accident occurred in Quebec, then the application of the Phillips v. Eyre formula here would not produce a functionally sound result. In this situation, an American state court could apply the law of the parties' home state, denying recovery. But in Canada, because of the approach to choice of law followed in tort cases, the province where the accident occurred, here Quebec, must apply its law to any accident occurring there.

In the unprovided for case, such as where the defendant is from Quebec and the plaintiff is from Ontario, there will be recovery under Quebec law irrespective of where the accident occurred. If the accident occurred in Quebec, the Phillips v. Eyre formula is inapplicable and Quebec law applies. If the accident occurred in Ontario, the plaintiff can bring suit in Quebec, where the defendant resides, and in the light of McLean, there will be a finding that the act was not 'justifiable where done.' Again, in the unprovided for case, Hancock favours application of the law that allows recovery, and that result will obtain here.

However, as Hancock also demonstrates, the use of manipulative techniques may give rise to doctrine that, if consistently followed, will lead to some results that are not functionally sound. The Phillips v. Eyre formula, as interpreted in McLean, would require the application of Quebec law in a case involving an accident between an Ontario host and an Ontario passenger in Ontario so long as suit could be brought in Quebec. In such a case the Ontario defendant, who presumably wants the passenger to recover against the insurer, could conveniently arrange to be served in Quebec. Quebec law would apply, since the tort would be actionable if it had been committed in Quebec, and, in the light of McLean, it could be found to be 'not justifiable where done.' Such a result would be unconstitutional as between states of the United States, but it is far less clear that such a result would be violative of the Charter of Rights.

---

169 Hancock 46
170 Ibid. 110–12
171 See the discussion, supra 70–1.
172 See supra note 141.
173 Since the effect of the court's decision in this case would only be to impose liability for damages, it is difficult to see how it would interfere with a protected 'liberty' interest under § 7 of the Charter. The choice of law limitations imposed by the due process clause in the United States proceed upon the premise that a court's decision in private litigation affects property rights. And the Charter contains no equivalent of the full faith and credit clause, which also imposes some minimal limitations on choice of law in the United States.
A case presenting this situation actually arose before the Quebec King's Bench prior to McLean, and that court managed to avoid applying Quebec law. As Hancock puts it:

[S]ince the injury to the plaintiff occurred outside Quebec no rational claim whatever could be made for the application of Quebec law. Ontario, on the other hand, had a very strong claim for the application of its law, designed to protect host-drivers and their insurers, to a controversy between parties who both belonged to the Ontario political community. Why should Quebec, having no concern in the matter, assist Ontario people to evade the law of their province?

If a case such as this were to arise today, it would seem that the Quebec courts, unless they were to hold that such a result would be violative of the Charter, would be compelled under McLean to apply Quebec law and allow recovery. Such an absurd result might persuade the Supreme Court of Canada that it was time to reconsider its approach to choice of law in torts cases and to abandon the Phillips v. Eyre formula in favour of a policy-centred approach to choice of law. The result in McLean itself, of course, is fully consistent with a policy-centred approach, because only Quebec had any interest in applying its law in order to implement the policy reflected in that law.

Under the present state of the law in Canada, it would also seem that the forum is directed to apply its own law allowing recovery in every case involving an out-of-province accident, except where the defendant's conduct is lawful under the law of the place where it occurred. Any defences not going to lawfulness would have to be rejected, although the defendant would not incur tort liability under the law of the place where the accident occurred. For example, in Going v. Reid Brothers Motor Sales, Ltd., Ontario plaintiffs were injured in an accident in Quebec and brought a tort action against the defendants in Ontario. The corporate defendant had its head office in Ontario, and the individual defendant was a resident of Quebec. The defendants argued that the plaintiff should be limited to the recovery authorized by the Quebec Automobile Insurance Act, which would not include compensation for pain and suffering. The act also extinguished the right of the victim to maintain a tort action against persons responsible for the accident. This defence to liability under Quebec law was rejected, since the defendant's conduct,

174 Lieff v. Palmer, supra note 162
175 Hancock 195–7
176 Ibid. 195
177 Ibid. 209–12
178 Supra note 156
179 It does not appear from the facts how jurisdiction was obtained over the individual defendant.
while not actionable in tort under Quebec law, was not lawful under Quebec law.\textsuperscript{180} Here, as in the ordinary automobile accident situation, the negligent party's conduct would probably be subject to sanction under the highway traffic regulations of the province where the accident occurred.\textsuperscript{181} Thus, the conduct would not be 'justifiable where done,' under McLean, and the law of the forum, allowing recovery, would be applicable. The point I wish to emphasize is that the \textit{Phillips v. Eyre} formula, as interpreted in McLean, will quite frequently permit application of the forum's law allowing recovery in tort cases. The plaintiff will never bring suit in the province whose law denies recovery, since the law of that province would be applicable under the first branch of the \textit{Phillips v. Eyre} formula.\textsuperscript{182} Assuming that jurisdiction can be obtained in a forum whose law allows recovery, that province's law will be applied unless the defendant's conduct can be shown to be lawful under the law of the province where it occurred. In the ordinary automobile accident situation, the negligent party's conduct would probably be violative of the highway traffic regulations of that province, so such a showing could not be made.\textsuperscript{183} As I have pointed out previously, in the United States the plaintiff is very likely to sue in a state whose law allows recovery, and in practice the forum will usually apply its own law allowing recovery. As a practical matter, then, the results in conflicts torts cases in the United States and in Canada will frequently be the same: the law of the forum allowing recovery will be applied.

The \textit{Phillips v. Eyre} formula, like the rules of the traditional approach, does not by its nature distinguish between false conflicts and true conflicts. As pointed out previously, if one of the involved Canadian provinces had a guest statute, the Canadian plaintiff would sue in the province not

\textsuperscript{180} The Quebec Automobile Insurance Act by its terms applied to non-resident drivers injured in Quebec. Statutory motor vehicle accident schemes in Canada generally contain express legislative directives as to their application. See the discussion in McLeod, supra note 112, 558–9. This is true in the United States as well. See generally Kozyris, \textit{No-fault insurance and the conflict of laws – An interim update}, 1973 \textit{Duke L.J.} 1009.

\textsuperscript{181} The same would be true if the accident occurred in an American state. This is what happened in \textit{Howells v. Wilson}, supra note 162.

\textsuperscript{182} The suit would be brought there only if there was a possibility that the law of the province would be interpreted as allowing recovery. For example, the Ontario guest statute had been interpreted as not applying to a paying passenger, even though the driver was not in the business of carrying passengers for compensation. \textit{Lemieux v. Bedard} [1953] o.R. 837. See the discussion in Hancock 205–6.

\textsuperscript{183} As regards the defence of contributory negligence, McLeod states, 'Where the defence of contributory negligence is a complete bar to the plaintiff's action in the \textit{lex loci delicti}, the defendant's act will be justifiable according to the \textit{lex loci delicti} in the absence of penal sanction.' McLeod, supra note 112, 556. However, it would seem that ordinarily it could be shown that the defendant's conduct was subject to 'penal sanction,' because it was violative of the highway traffic regulations of that province.
having a guest statute, and that province would apply its law allowing recovery. However, if the Supreme Court of Canada were to abandon the *Phillips v. Eyre* formula in favour of a policy-centred approach, then the question arises as to how true conflicts would be dealt with in Canada. Hancock's techniques of reconciliation could be quite suitable for the resolution of true conflicts in Canada, especially since those techniques of reconciliation would be formulated by the Supreme Court of Canada and would be operative in the courts of each province.

In this regard, the structural differences between the legal systems of Canada and the United States might well suggest a different resolution to the true conflict in Canada than that which is favoured by Currie and myself for the United States. Currie maintained that it was improper for an American state court to sacrifice the real interests of that state in favour of those of another state. Experience indicates that, regardless of whether it would be improper for an American state court to do this, the courts are unwilling to do so and will generally apply their own law in the true conflict situation. In the United States, the state courts are considered an integral part of the government of the state and see themselves as having the responsibility to implement state policy. They are also supreme in the exposition of the law of each state, and the Supreme Court of the United States is not properly concerned with questions of state law. In Canada, by contrast, there is a unitary court system, with the Supreme Court of Canada at its apex, and all the courts of Canada are 'the Queen's courts.' So, the highest court of a Canadian province would not likely see itself as having the same responsibility to implement provincial policy as the highest court of an American state would with respect to that state's policy. More importantly, all the Canadian courts are subject to the binding authority of the Supreme Court of Canada in all matters, including choice of law.

So, if the Supreme Court of Canada were to adopt a policy-centred approach to choice of law, including techniques of reconciliation for the true conflict, as advocated by Hancock, those techniques of reconciliation could be applied by the courts throughout Canada. And it would not seem at all anomalous in a case presenting a true conflict between Ontario law and Quebec law for an Ontario court, applying the techniques of reconciliation propounded by the Supreme Court of Canada, to say that with respect to the matter in issue, the Quebec rule is 'better law.' My point, then, is that because of the structural differences between the legal systems of Canada and the United States, the techniques for the

---

184 Currie, supra note 6, 119-21, 182
185 Sedler, supra note 10, 227-33
resolution of the true conflict advocated by Hancock may be more suitable for and have greater efficacy in Canada than they would have in the United States.

A final consideration relating to choice of law in Canada involves the problem presented in *Interprovincial Co-Operatives, Ltd v. The Queen in Right of Manitoba*, 187 with respect to the extraterritorial application of provincial statutes. In that case, the Supreme Court of Canada, in a 4–3 decision, held that the application of a Manitoba anti-pollution statute to activities occurring in Ontario and Saskatchewan that had the effect of polluting rivers in Manitoba was ultra vires the province. Pigeon J., in an opinion joined in by Martland and Spence JJ., held that the province did not have the authority under either section 92(13) or section 92(14) of the Constitution Act, 1867, to create a cause of action for polluting waters in Manitoba, on the basis of activity occurring in other provinces that was lawful under the law of the provinces where the acts occurred. 188 In the view of Pigeon J., only Parliament could regulate interprovincial pollution, either under its power over fisheries under section 91(12) or under the residual legislative power. 189 He also said that the victims of pollution in Manitoba could enforce any common law rights they may have had against the out-of-province actors; by parity of reasoning, Ontario and Saskatchewan lacked the power to immunize actors in those provinces from common law liability for harm caused in another province. 190 Laskin C.J., joined by Judson and Spence JJ., dissented, concluding that the federal power over fisheries did not reach the protection of property rights in fisheries within a province, 191 and that the Manitoba statute as applied here was not ultra vires as reaching 'property and civil rights outside of the province.' 192

The decisive fourth vote was provided by Ritchie J. He agreed with Laskin C.J. on the issue of provincial versus federal authority. 193 But he contended that a province did not have the constitutional authority to apply its legislation extraterritorially to reach activity occurring in another province. In arriving at this conclusion, he expressly related conflict of laws principles to the scope of provincial legislative authority under section 92 of the Constitution Act, 1867. He contended that the scope of provincial legislative authority was limited by section 92 to the territorial boundaries of the province, so that, 'in considering the law

---

188 Ibid. 505
189 Ibid. 513–16
190 Ibid. 511–12
191 Ibid. 492–6
192 Ibid. 496–505
193 Ibid. 516–20
applicable in any particular case, the common law principles established in the general field of conflict of laws must govern. 194 Applying the second branch of the Phillips v. Eyre formula, he concluded that in this case the acts of the defendants were justifiable under the laws of Ontario and Saskatchewan, where they were done, so that they could form no basis of a damage action. 195 Thus, under the Royal Bank principle, 196 Manitoba was applying its legislation extraterritorially to interfere with rights created by the law of another province, which made such application ultra vires. 197 Laskin c.j., in contrast, contended that the Phillips v. Eyre formula was inapplicable here because the cause of action arose in Manitoba, where the harm occurred. 198 Likewise, Laskin saw the Royal Bank principle being limited to provincial laws invalidating contractual obligations valid in the province where they were made and having no applicability to the authority of a province to apply its legislation to extraprovincial activity causing harm within that province. 199

A few years ago I had the occasion to discuss Interprovincial before a combined Conflict of Laws-Constitutional Law class at Dalhousie Law School. I began by considering what would happen if a similar case arose before an American state court — for example, a New Hampshire defendant acting under licence from that state polluted waters in New Hampshire, which carried over into waters in Maine. As in Interprovincial, I posited a Maine statute imposing liability, with suit brought against the New Hampshire defendant in Maine. 200 I said that there was no question

194 Ibid. 521
195 Ibid. 521–4
196 Royal Bank of Canada v. The King [1913] A.C. 283. In that case, Alberta had guaranteed the construction bonds of a railroad company, incorporated in that province, which were sold in England. The bond proceeds were to be deposited in the Edmonton branch of the Royal Bank to the credit of the Alberta provincial treasurer. On the strength of the account, the branch made advances to the construction company, and the construction company assigned to Royal Bank as a security its interest in the proceeds of the bond issue. The Alberta legislature subsequently modified the prior legislation and declared that the special account was to be made a part of the general revenue of the province. The Privy Council held that the legislation was ultra vires the province because it affected 'civil rights outside the province.' According to Hogg, the holding in Royal Bank 'represented a very strict application of the extraterritorial limitation.' Hogg Constitutional Law of Canada (2d ed. 1985) 270. See also the discussion of extraterritorial legislation in Hertz, The constitution and conflict of laws: Approaches in Canadian and American law (1977) 27 U.T.L.J. 1, at 26, 29.
197 Interprovincial 524–5
198 Ibid. 500–1
199 Ibid. 502–3
200 I posited the situation where the defendant was also doing business in Maine. There is currently some dispute in the United States whether it is constitutionally permissible for a state to exercise jurisdiction under a long-arm act on the basis that the defendant's activity in another state could foreseeably and in fact did cause harm in the forum. See the discussion of this problem in Weintraub, Due process limitations on the personal jurisdiction of state courts: Time for change (1984) 63 Ore. L.R. 485, at 512, 520–32.
but that Maine would apply its own law allowing recovery, and that the application of Maine law in this situation would be fully constitutional.

It may be noted that in *Interprovincial* there was no choice of law issue before the Manitoba court. There was a legislative directive that the statute apply to this case, which the forum court was bound to respect. Assuming such a directive in our example, the Maine court would have to follow it as well. 201 Even in the absence of such a directive, however, Maine would apply its own law. In terms of interest analysis, this case presents a true conflict: Maine has a real interest in applying its own law to provide compensation for harm occurring to the users of the water in Maine, while New Hampshire has a real interest in protecting the New Hampshire actor from liability.

There would be no possible constitutional objection to Maine applying its own law in this case. First, as pointed out previously, American states possess the general sovereign power, so it cannot be a constitutional objection that they are applying their statutes extraterritorially to activity occurring in another state but having an effect in that state. Second, in the absence of direct conflict with federal legislation or federal pre-emption (negative implication), state regulation is constitutional although the matter being regulated also comes within the scope of federal power. 202 Third, it would not matter that the defendants' actions were authorized under New Hampshire law. Where two American states both have an interest in applying their own law, one state is ordinarily not required by the federal constitution to yield to the interest of another state. 203 Finally, the defendants could not legitimately rely on New Hampshire law to shield them from liability because it was foreseeable that their actions in New Hampshire could have an adverse effect in Maine. Therefore,

201 See the discussion of legislative directives as to the applicability of a statute in Sedler, Functionally restrictive substantive rules in American conflicts law (1976) 50 So. Cal. L.R. 27, at 60–1.
202 See the discussion supra 98.
203 See, e.g. Watson v. Employers Liability Assurance Corp. 348 U.S. 66 at 73 (1954); Pacific Employers Insurance Co. v. Industrial Accident Commission 306 U.S. 493, at 501–4 (1939). See generally the discussion of full faith and credit as a limitation on choice of law in Sedler, supra note 127, 92–100. There is also no state sovereignty limitation that would preclude a state from applying its law against a governmental entity of another state. Thus, in Nevada v. Hall 440 U.S. 410 (1979), the United States Supreme Court held that California could constitutionally apply its law in a tort action brought by California residents who were injured there through the negligence of a Nevada state employee who was driving a car in California on official business. Under California law there was unlimited liability, but under Nevada law the waiver of sovereign immunity extended only to suit in Nevada courts and liability was limited to $25,000. The Supreme Court stated: 'To require California either to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over non-resident motorists and full recovery. The Full Faith and Credit Clause does not require this result.' 440 U.S. 424.
consistent with due process, they could be subject to Maine law with regard to the consequences of those actions.\textsuperscript{204}

As the comparison between \textit{Interprovincial} and this hypothetical case indicates, the structural differences between the allocation of federal and provincial-state power in Canada and the United States may have some choice of law implications as well. As pointed out above, in the United States there can be no constitutional objection to a state's applying its legislation to activity occurring in another state that produced harmful effects in the former state. \textit{Interprovincial} indicates that there may be such a constitutional objection in Canada – that is, that in Canada there may be a constitutionally imposed territorial limitation of provincial legislative authority. If this is so, then the legislation of one province may be constitutionally inapplicable in a particular conflicts case, because the application of the legislation in the particular case would be to give it extraterritorial effect in another province.

Let me illustrate this problem by an example based on \textit{Moran v. Pyle Nat. (Can.) Ltd.\textsuperscript{205}} There, a resident of Saskatchewan was fatally injured in that province while removing a lightbulb manufactured by the defendant. The defendant did not generally carry on business in Saskatchewan; all its operations took place in Ontario, with components being manufactured in Ontario or in the United States. The defendant sold all its products to distributors, and some of them found their way to Saskatchewan. The victims' survivors brought an action against the defendant in Saskatchewan, alleging negligent manufacture. The Supreme Court of Canada upheld the plaintiffs' right to service ex juris, saying that there was a 'real and substantial connection between the tort and Saskatchewan.'\textsuperscript{206} The court also emphasized that it was foreseeable in this case that the product, which was put in national channels of distribution, could be used in Saskatchewan and cause injury there.\textsuperscript{207}

Let us suppose that in this case both Ontario and Saskatchewan had enacted statutes specifically regulating the products liability of manufacturers. Let us also suppose that under the Ontario statute the manufacturer was liable only on the basis of negligence and that under the Saskatchewan statute strict liability was imposed. Finally, let us suppose

\textsuperscript{204} Similar views were expressed by Laskin c.j. in \textit{Interprovincial} with respect to the propriety of the application of the Manitoba legislation in that case. \textit{Interprovincial} 498-501 (Laskin c.j., dissenting).

\textsuperscript{205} Supra note 164

\textsuperscript{206} \textit{Moran} 408

\textsuperscript{207} Ibid. 409. The 1975 Amendments to the Ontario Rules of Practice, r. 25 (1)(h) specifically authorize the exercise of jurisdiction in Ontario, with service \textit{ex juris}, where the claim is 'in respect of damage sustained in Ontario arising from a tort, or breach of contract committed elsewhere.'
that the plaintiff cannot prove negligence and relies on the strict liability provisions of the Saskatchewan statute. In terms of interest analysis, this case, of course, presents the true conflict, with Saskatchewan having a real interest in applying its law to enable the Saskatchewan victim to recover and Ontario having a real interest in applying its law to protect the Ontario manufacturer from liability.

Under the Phillips v. Eyre formula, the Saskatchewan court must deal with the question of the place where the 'act was done' within the meaning of the second branch of the formula. This question was not addressed by Pigeon J. in Interprovincial, since he saw that case as presenting solely the question of the extent of provincial legislative authority. Laskin c.j., on the other hand, said that Phillips v. Eyre was inapplicable in Interprovincial, because the tort arose in Manitoba. Ritchie J. took yet another approach, saying that while the tort was interprovincial in nature and the harm occurred in Manitoba, the question here was whether the acts done in Saskatchewan and Ontario amounted to actionable torts at all. In our example case, then, Laskin c.j. would say that Saskatchewan law applies as the law of the forum, while Ritchie J. would say that the defendant was not liable under the second branch of Phillips v. Eyre, because the non-negligent manufacture of a defective product was not actionable under Ontario law.

Now let us assume that the Supreme Court of Canada has abandoned Phillips v. Eyre and adopted a policy-centred approach in its stead. Let us also assume that this policy-centred approach includes the techniques of reconciliation advocated by Hancock, and that the application of the techniques of reconciliation in the example case would lead the court to conclude that Saskatchewan law should be applied. But if the Saskatchewan statute is applied here, it is being applied extraterritorially to hold the Ontario defendant liable for activity occurring in Ontario that was not actionable under Ontario law. This result would be precluded by the Pigeon and Ritchie opinions in Interprovincial. While the Pigeon opinion would logically preclude the application of an Ontario statute to bar common law remedies for harm occurring in Saskatchewan, this is not important here, since the Ontario statute incorporates the common law rule, and if the Saskatchewan statute is constitutionally inapplicable, the plaintiff could not recover. Under the Laskin opinion in Interprovincial, the Saskatchewan statute could be applied constitutionally.

208 Interprovincial 514–15 (opinion of Pigeon J.)
209 Ibid. 500–1 (opinion of Laskin c.j.)
210 Ibid. 521–5 (opinion of Ritchie J.)
211 The Pigeon opinion would seem to say that only Parliament could impose liability for harm caused by products that were distributed in the national market.
My point here is that the policy-centred approach to choice of law in the United States has developed within the framework of a constitutional system that imposes no limitations on the power of an American state to apply its legislation extraterritorially to activity occurring in another state. Indeed, so long as the application of a state’s law to activity occurring in another state is reasonable and not fundamentally unfair to the other party, such application is constitutionally unobjectionable, even if the injury did not occur in the former state. Should Canada in the future move in the direction of a policy-centred approach to choice of law, the Supreme Court of Canada will have to confront the choice of law implications of the extraterritorial application of provincial legislation holding of Interprovincial. With due deference, as benefits any observations from an outside commentator, it seems to me that in regard to matters falling within provincial authority generally there should be no constitutional limitation on the extraterritorial application of provincial legislation. Acts occurring in one province may have impact in another province, and proper accommodation of the interests of all of the provinces in the choice of law context can be achieved by the unifying authority of the Supreme Court of Canada.

This lengthy review essay is intended as a tribute to Moffatt Hancock and his illustrious career as a commentator on the conflict of laws. Perhaps it is an indication of his tremendous influence on our thinking about conflicts problems in the United States that I have used the occasion of this review to venture some thoughts about the future development of conflicts law in Canada and the valuable contribution that Professor Hancock’s ideas could make to that development.

212 Whether statutory or common law
213 Where a recovery state plaintiff is injured by a non-recovery state defendant in an automobile accident in the defendant’s home state, for example, and suit can be maintained in the plaintiff’s home state, that state may constitutionally apply its own law allowing recovery. Because it has a real interest in doing so, the application of its law is not ‘arbitrary,’ and because the defendant would not have relied on the law of the recovery state in causing the accident, the application of the law of another state is not ‘fundamentally unfair’ to the defendant. See the discussion of this point in Sedler, supra note 127, 72–3.
214 In Interprovincial, only Pigeon, Martland, and Beetz J. maintained that creating a cause of action for the pollution of rivers in Manitoba was not within provincial legislative authority.