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RULES OF CHOICE OF LAW VERSUS
CHOICE-OF-LAW RULES: JUDICIAL
METHOD IN CONFLICTS TORTS CASES

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I. Introduction

In their admirable casebook, Professors Cramton, Currie, and Kay observe that "American conflicts law in the middle 1970's seems to be divided between the adherents of the Currie version of interest analysis on the one hand and the proponents of narrowly drawn choice of law rules on the other." Currie's approach of interest analysis has indeed been the catalyst of the "modern revolution" in choice of law in this country and has resulted in the widespread abandonment of the broad, state-selecting rules of the original Restatement2 in favor of a view of

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choice of law that emphasizes considerations of policy and fairness to the parties. At the same time, as Professor Cavers pointed out so long ago in his seminal work on the choice-of-law process, "Lawyers are a rulemaking sect," and the "modern revolution" has not seen the disappearance of rule-oriented solutions. Quite to the contrary, it has been cogently argued by academic commentators, such as Professor Reese, that "[t]he development of rules should be as much an objective in choice of law as it is in other areas." Professor Reese maintains that the "current unpopularity of rules in choice of law" is an overreaction to the failure of the Restatement's rules, particularly in the torts and contract areas, and that it "[d]oes not mean that satisfactory rules cannot be devised in these areas, only that rules similar in


There have been no reported decisions squarely involving choice of law in torts in recent years coming from the appellate courts in Hawaii, Idaho, Montana, Nevada, Utah, Vermont, or Wyoming. The fourth circuit in Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847 (4th Cir. 1972), takes the view that Virginia continues to follow the "place of the wrong" rule, while the second circuit, in Marra v. Bushee, 447 F.2d 1282 (2d Cir. 1971), takes the view that Vermont would now follow the "state of the most significant relationship" approach. While there have been no decisions in this area by the Indiana Supreme Court in recent years, both the Indiana Appellate Court and the seventh circuit have concluded that Indiana would likewise now follow the "state of the most significant relationship" approach. See Watts v. Pioneer Corn Co., 342 F.2d 621 (7th Cir. 1965); Witherspoon v. Salm, 142 Ind. App. 655, 237 N.E.2d 116 (1968), rev'd on other grounds, 251 Ind. 575, 243 N.E.2d 876 (1969).

Putting Indiana and Vermont among the states that have abandoned the traditional approach and Virginia among the states that have not, the breakdown among the 50 states and the District of Columbia is as follows: 27 have abandoned the "place of the wrong" rule in favor of a "modern" approach; 18 have adhered to the "place of the wrong" rule; and six have not yet passed on the question.


character to those previously attempted are unlikely to prove successful." As Professor Rosenberg has so neatly put it, "The problem is to escape both horns of the dilemma by avoiding both unreasonable rules and an unruly reasonableness that is destructive of many of the values of law and that loses sight of the need for coordinating a multistate system, not merely vindicating substantive law policies."

The development and utilization of narrow, policy-based rules has been proposed as a "basic alternative" to interest analysis and its "ad hoc" approach to the solution of choice-of-law problems. The effort, led by Professor Reese, to develop such an alternative bore judicial fruit in the decision of the New York Court of Appeals in Neumeier v. Kuehner, a case involving a guest statute. The Neumeier court, in reliance on the views of Professor Reese and other rule-oriented commentators, set forth choice-of-law rules that could be extended by analogy to accident cases in which guest statutes are not at issue.

Since I am clearly an adherent of the Currie version of interest analysis, it should not be surprising that I would be highly critical of a rule-oriented approach to choice of law or that I have attacked such an approach elsewhere, both generally and in the context of the Neumeier rules. My criticism, however, goes to

6. Id.
8. As to the contention that interest analysis necessarily involves "ad hoc" solutions, see Reese, Chief Judge Fuld and Choice of Law, 71 COLUM. L. REV. 548, 559-60 (1971).
9. See generally Reese, supra notes 5 & 8.
11. Id. at 127, 286 N.E.2d at 457.
14. See generally id. at 208-16.
choice-of-law rules and to a rule-oriented approach to choice of law. There is a crucial distinction, in my view, between choice-of-law rules, such as those proposed by Professor Reese and articulated by the New York Court of Appeals in Neumeier, which are formulated a priori and then applied to the facts of particular cases, and rules of choice of law, which evolve from the decisions of the courts in actual cases and result from the normal workings of binding precedent and stare decisis. It is my contention that the courts should resolve conflicts problems on a case-by-case basis with reference to considerations of policy and fairness to the parties, and that in time, through the normal workings of binding precedent and stare decisis, a body of conflicts decisional law will emerge in each state. I call this process "judicial method." The policy-centered conflict of laws and the rules of choice of law that will emerge from judicial method differ sharply from the choice-of-law rules, howsoever narrow and policy-based they may be, that are formulated a priori to cover categories of cases and then are applied deductively to all cases coming within each category.

The alternatives, therefore, are not choice-of-law rules versus no rules and "ad hoc" decisions. The alternatives rather are choice-of-law rules developed a priori and applied deductively to particular cases versus rules of choice of law developed through the normal workings of binding precedent and stare decisis in the common-law tradition and applied to like cases with such extensions or modifications as the court deems appropriate. Whatever advantages claimed for choice-of-law rules will be equally realized by rules of choice of law. The rules of choice of law will not have the built-in disadvantages of (1) being developed in the abstract, without regard to the concrete situations and differing

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16. This theory has been developed more fully elsewhere. See generally Sedler, supra note 3; Sedler, Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method, 2 RUT.-CAM. L.J. 8, 9-17 (1970).
17. Primarily, the decision should be made in terms of the policies and interests of the involved states.
18. For examples of such choice-of-law rules, see Reese, supra note 5, at 327-32.
19. As to the relationship between case-by-case determination, on which interest analysis is based, and the common-law tradition, see B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 627 (1963).
20. See Reese, supra note 5, at 316-17.
policy considerations presented in particular cases,\textsuperscript{21} and (2) countenancing unsound results in a particular case by the application of a rule that "works well in the great majority of situations."\textsuperscript{22} In short, we do not need choice-of-law rules once we recognize that by applying judicial method to the conflict of laws we will have rules of choice of law.

In this article I will show how rules of choice of law in the torts area can be and have been developed by policy-centered courts\textsuperscript{23} in the context of deciding the cases that have come before them. I will also demonstrate that the rules of choice of law in torts, once they are analyzed from the perspective of judicial method, are \textit{substantially uniform} and that, with only few exceptions, there is relative agreement among policy-centered courts as to the proper solution to the kinds of problems that arise in practice. Such disagreement as there is can be likened to "majority-minority views" in other areas of law. It should be emphasized that my analysis is in terms of the \textit{results} that the courts have reached and not necessarily in terms of the explanations that the courts have given for their decisions or in terms of the particular choice-of-law methodology that they are applying.\textsuperscript{24} As I have

\begin{quote}
\textsuperscript{21} As to the problems this may produce, see the discussion of the application of the \textit{Neumeier} rules in practice in text accompanying notes 71-77 infra.
\end{quote}

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\textsuperscript{22} Professor Reese states: "A choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results. Good rules, like other advantages, have their price." Reese, supra note 5, at 334. As he also put it:

More specifically, the fact that a choice of law rule which has stood the test of experience would lead on some rare occasion to the application of the law of a state which is not that of greatest concern, or would result in the disregard of other multistate or local law policies, is not an adequate reason why the rule should not be applied on that occasion. Perfection is not for this world. The advantages which good rules bring are worth the price of an occasional doubtful result.

\textit{Id.} at 322 (footnote omitted).
\end{quote}

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\textsuperscript{23} I equate "policy-centered" with "abandonment of the traditional approach."
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\textsuperscript{24} In this regard I have taken the same approach as was employed by Professor Ehrenzweig in the ascertainment of what he called "true rules," in that I have focused on results rather than on language or doctrine. See generally R. CRAMTON, D. CURRIE, & H. KAY, supra note 1, at 306; Ehrenzweig, \textit{A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"} 18 \textit{OKLA. L. REV.} 340 (1965). There clearly is a similarity between Professor Ehrenzweig's concept of "true rules" and my concept of "rules of choice of law." Both concepts look to the practice of the courts in deciding the cases that arise before
discussed at length elsewhere, the courts that have abandoned the traditional approach—regardless of the particular methodology that they purport to apply—in practice generally make the choice-of-law decision with reference to the policies and interests of involved states and considerations of fairness to the parties. Moreover, whenever the courts have concluded that they have a real interest in applying their own law in order to implement the policies reflected in that law, they have almost invariably applied their own law. In other words, in practice the courts have been applying the “Currie version of interest analysis.” The rules of choice of law that have emerged are rules developed within the framework of interest analysis and thus properly may be analyzed with reference to the policies and interests of the forum and the other involved states.

The reason that rules of choice of law can be developed from the courts’ decisions in actual cases is that conflicts cases tend to fall into certain fact-law patterns. While these patterns are very obvious in the torts area, they are apparent in other areas as well. An analysis of the policies and interests of the involved

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26. The majority of courts purport to follow the Restatement (Second)'s “state of the most significant relationship” approach or Professor Leflar's choice-influencing considerations, although some explicitly follow interest analysis. See generally R. Leflar, American Conflicts Law ch. 11 (1968); Leflar, More on Choice Influencing Considerations, 54 Calif. L. Rev. 1584 (1966); Leflar, Choice Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267 (1966).
27. I use the term “real interest” in contradistinction to a hypothetical or possible interest. The forum has a real interest in applying its law to implement the policy reflected in that law when that policy would be significantly advanced by its application in the particular case. See Sedler, supra note 13, at 221.
28. Furthermore, when the question was raised, the courts have found that this produces no unfairness to the other party. See, e.g., Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).
29. In the contracts area, for example, it is possible to construct fact-law patterns with reference to the states where the parties reside, the states where significant events involving the transaction occurred, and the interest of each
states in a particular case can be related to the fact-law pattern presented in that case, and the decision can be applied directly or analogously to another case presenting the same or a similar fact-law pattern. Similarly, in deciding conflicts cases and in developing rules of choice of law, the courts also set forth principles, as they do in other areas of law, and these principles likewise serve as a guide to the resolution of future cases.

In the torts area, the fact part of the fact-law pattern relates to 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. The law part relates to whether the law in question allows or denies recovery, whether it reflects an admonitory or a compensatory policy or both, and whether it involves other considerations, such as those applicable to worker’s compensation. Thus a case may present a fact-law pattern of an injury in a nonrecovery state involving two parties from a recovery state, an injury in a recovery state involving two parties from a nonrecovery state, or an injury in either a recovery or nonrecovery state involving parties from both recovery and nonrecovery states. A case may also involve a law reflecting an admonitory policy, which may give rise to a different interest mix than would be present in the same fact pattern if the law reflected only a compensatory policy.

It is from these fact-law patterns that rules of choice of law emerge. As will be demonstrated, not only do the courts of one state decide cases presenting the same fact-law patterns the same way, even when different substantive laws are involved, but also the courts of different states, with only limited exceptions, tend to decide cases presenting the same fact-law patterns in the same way. What has resulted in the torts area is a fairly uniform series of rules of choice of law that are followed, with only some disagreement, by all courts that have abandoned the “place of the wrong” rule.

I will first discuss choice of law in torts cases in New York and in California in order to illustrate clearly the difference be-

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30. For a discussion of the considerations applicable to worker’s compensation, see Sedler, supra note 16, at 72-75. As we will see, these considerations have resulted in a “uniform” rule of choice of law.
tween the use of choice-of-law rules, as reflected in the Neumeier rules adopted by the New York Court of Appeals, and the development of rules of choice of law on a case by case basis through the use of judicial method, as has taken place in California. I will then discuss the development of rules of choice of law in torts in twelve other states: Illinois, Iowa, Kentucky, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, and Wisconsin. By and large, I will be discussing only cases dating from the time when the particular state expressly abandoned the "place of the wrong" rule. Cases involving different fact-law patterns have arisen in these states, although the extent of conflicts litigation—not always proportioned to the state's size or population—has varied significantly from state to state. I have also tried to achieve some geographical balance. Since a number of conflicts cases arise in federal courts due to the continued existence of diversity jurisdiction, I have included the decisions of the federal courts located in the selected states. I have treated these decisions as decisions of the state intermediate appellate or lower courts since the federal courts are equally bound under Erie Railroad Co. v. Tompkins and Klaxon Co. v. Stentor Electric Manufacturing Co. to follow the decisions rendered by the highest state court. While formulating the rules of choice of law within the framework of interest analysis, I will make reference to the methodology that the particular court is "formally" following and indicate when this methodology may have influenced the result in a particular case.

Since my focus will be on the development of rules of choice of law, I will not discuss at length my agreement or disagreement with the particular rules of choice of law. In the final section of this article, I will discuss what may be called the general rules of choice of law in the torts area—the rules that have emerged from the decisions of the courts in these states—and will include decisions supporting these rules of choice of law from other states. I will also point up the areas in which there are "majority" and "minority" views.

My thesis then is that judicial method, once it is properly understood and applied to the process of deciding conflicts cases, will lead to rules of choice of law that have all of the claimed

31. 304 U.S. 64 (1938).
32. 313 U.S. 487 (1941).
advantages of choice-of-law rules without their built-in disadvantages. Since these rules of choice of law have been developed in practice within the framework of interest analysis, I will demonstrate that there is no inconsistency between the approach of interest analysis and the use of "rules" in deciding conflicts cases. As long as the "rules" are rules of choice of law rather than choice-of-law rules, the "conflict" between the "adherents of interest analysis" and the "rulists" may turn out to be false indeed.\(^3\)

II. A TALE OF TWO STATES

A. New York: The Rocky Road to Choice-of-Law Rules—and the Rocky Road Thereafter

When the New York Court of Appeals heralded the "modern revolution" in choice of law by its decision in Babcock v. Jackson\(^34\) to abandon the "place of the wrong" rule, as might be expected, it did so somewhat gingerly, taking an eclectic approach that "contained some comfort for all critics of the traditional system."\(^3\) This eclectic approach, mixing interest analysis and factual contacts, when applied to subsequent cases, resulted in seemingly inconsistent decisions in Dym v. Gordon\(^3\) and Macey v. Rozbicki.\(^3\) This uncertainty appeared to be resolved, however, when the court, which had straightforwardly applied interest analysis in areas other than guest statute immunity,\(^3\) came down, albeit by one vote, in favor of interest analysis in

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33. A consideration of the "conflict" between those adherents of interest analysis, such as myself, who favor the application of the forum's law in the case of what Currie called the "true conflict," and those who have developed alternative means of resolving the true conflict is not necessary in the context of the present writing. However, as we will see, in practice most courts apply their own law in the "true conflict" situation.

Tooker v. Lopez. In Tooker the court held that New York law applied when a New York plaintiff and a New York defendant were involved in an accident in a guest statute state irrespective of the factual contacts that the transaction had with that state. Professor Reese has used the New York experience to illustrate what he considers to be the unsoundness of interest analysis. He noted that "[b]ecause of the uncertainty and unpredictability it engendered, the court has been deluged by appeals and wracked by dissent." It was in reaction to this "uncertainty and unpredictability" that the Neumeier rules were promulgated.

With all due respect to Professor Reese and to the New York Court of Appeals, I would suggest that there would not have been any "uncertainty and unpredictability" if the court as an institution had consistently applied interest analysis from the time it decided Babcock. The court should have formulated a rule of choice of law in that case with reference to the policies and interests of the involved states, particularly the policy and interest of New York, the state in which both parties resided. The rule of choice of law that the court could have formulated in Babcock, based on its holding in that case, is that when two parties from New York, a state that would allow recovery, are involved in an accident in a state that would not allow recovery, New York law applies. That rule of choice of law would have governed Dym, Macey, and Tooker, which involved the identical fact-law pattern, and likely would have avoided appeals on the choice-of-law issue in those cases. In any event, this is the rule of choice of law that the court formulated in Tooker and subsequently em-

40. Reese, supra note 5, at 318.
42. Although the composition of the court had changed a number of times during these years, the result in Neumeier can only partly be attributed to a change of personnel from the time Tooker was decided. See Sedler, supra note 12, at 131.
43. Although the factual situations differed, all three cases involved two parties from a recovery state (New York) and an accident in a nonrecovery state.
44. It should be noted that the number of cases involving choice of law is miniscule in any event, so that the elimination of all appeals in these cases would have no appreciable effect on the appellate courts' workload or on settlement practices in accident cases.
bodied in the first Neumeier rule so that it remains in effect today.\(^4^6\)

That rule of choice of law—later converted into part of a choice-of-law rule in Neumeier—was based on the principle that since only the parties' home state had an interest in applying its law on the point in issue, its law should apply; or in terms of Currie's interest analysis, in the case of a false conflict, the forum should apply the law of the only interested state. In light of this principle, the holdings in Tooker and Babcock could be extended to any other accident case without regard to the substantive issue on which the laws differed and without regard to the New York residence of the parties: when two parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed.\(^4^6\) The broader principle, relating to interest analysis, is that when only one state is interested in applying its law on the point in issue—in other words, the false conflict situation—its law should be applied.\(^4^7\) This principle has in fact been consistently

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\(^4^5\) See also Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967). In Pahmer v. Hertz Corp., 36 App. Div. 2d 252, 319 N.Y.S.2d 949 (1971), aff'd on other grounds, 32 N.Y.2d 119, 296 N.E.2d 243, 343 N.Y.S.2d 341 (1973), the accident occurred in California, involving a New York plaintiff who was a passenger in an automobile leased from Hertz, a national corporation with its principal office in New York. Although the particular vehicle was registered in California, it was insured under a master policy issued by an insurance company with its principal office in New York. The court held that for purposes of tort liability Hertz was a New York defendant and that the case was controlled by Tooker. See also Franklin v. Nelson Freightways, Inc., 408 F. Supp. 670 (E.D.N.Y. 1976); Stein v. Siegel, 50 App. Div. 2d 918, 377 N.Y.S.2d 580 (1978); Cunningham v. McNair, 48 App. Div. 2d 546, 370 N.Y.S.2d 577 (1975); Gyory v. Radgowski, 82 Misc. 2d 553, 369 N.Y.S.2d 583 (1974). In Juodis v. Schule, 79 Misc. 2d 955, 361 N.Y.S.2d 605 (1974), two New York parties were involved in an accident in Connecticut, and under Connecticut law the plaintiff was limited to no-fault recovery and barred from maintaining a tort action. In the context of ruling on a motion to amend the pleadings, the court noted that New York had recently enacted a no-fault law and held that Connecticut law would apply on the issue of no-fault recovery and the resulting exemption from tort liability.

\(^4^6\) See Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967) (involving, however, New York parties). This rule, stated with reference to residence rather than with reference to recovery, is in effect embodied in the first Neumeier rule.

\(^4^7\) New York as a recovery state was interested in applying its law to allow its resident injured elsewhere to recover, since the social and economic consequences of the accident and of allowing or denying recovery would be felt in New York. Conversely, no policy of the state of injury would be advanced by applying its law and denying recovery in favor of a New York defendant, since
followed by the New York Court of Appeals in other cases. 48

In Miller v. Miller, 49 the New York Court of Appeals was presented with a different fact-law pattern. As a result of the negligence of a Maine defendant, a decedent from New York, a state that imposes no limitation on wrongful death recovery, was killed in an accident in Maine, a state that did impose such a limitation. 50 The court, although divided on the question, applied New York law because of New York's interest in allowing recovery, 51 and because, as the court took pains to explain, the application of New York law on this issue did not produce unfairness for the Maine defendant or his insurer. 52 The rule of choice of law, if the court had chosen to formulate one, could have been expressed broadly or narrowly, depending on how far the court wanted to go in that case. The rule could have been that whenever a New York plaintiff is injured or killed by an out-of-state defendant in the latter's home state, New York law allowing recovery will apply, assuming that this is not unfair to the defendant. The rule, however, could have been limited to wrongful death recovery, although there would seem to be no sound reason for so limiting it. The principle on which such a rule of choice of law would be based is that the forum should apply its own law whenever it has a real interest in doing so, provided only that the application of its law is not unfair to the other party or the other party's in-

48. See note 38 supra.
50. At the time of the suit the defendant had changed his residence to New York, but in my view the result would have been the same in the absence of a change of residence. For a discussion of this point, see Sedler, Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts, 57 Iowa L. Rev. 1229, 1236-37 (1972).
51. Whenever the plaintiff is from a recovery state and the defendant is from a nonrecovery state, a true conflict is necessarily presented, since both states are interested in applying their own law on the ground that the social and economic consequences of allowing or denying recovery will be felt in the home state. See Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).
52. The insurance policy covered accidents in every state and did not distinguish between liability for personal injuries and liability for wrongful death. As Professor Weintraub had emphasized, insurance companies are not "unfairly surprised" by being held to liability for automobile accidents under the law of a particular state. R. Weintraub, Commentary on the Conflict of Laws 206 (1971).
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surer.\textsuperscript{53} The broader rule of choice of law, not limited to wrongful death recovery, could be extended to all situations in which a New York plaintiff is killed or injured elsewhere due to the negligence of an out-of-state defendant. In the event that New York is a disinterested third state,\textsuperscript{54} the broader rule could apply to all situations in which a recovery state plaintiff is killed or injured by a nonrecovery state defendant in the latter’s home state.\textsuperscript{55}

These two situations were the only fact-law patterns in the torts area that the New York Court of Appeals had dealt with prior to \textit{Neumeier}. Lower New York courts, however, had dealt with another fact-law pattern in which two parties from a nonrecovery state had been involved in an accident in New York and had held that New York law, allowing recovery, applied.\textsuperscript{56} The policy behind this rule of choice of law was based on New York’s supposed interest in allowing recovery to a nonresident injured in New York.\textsuperscript{57}

In \textit{Neumeier}, the New York Court of Appeals was presented with a third fact-law pattern, that of a plaintiff from a nonrecovery state, Ontario, injured by a defendant from a recovery state, New York, in the plaintiff’s home state. In terms of interest analysis, this situation is described as the “unprovided-for case,” in which neither state is interested in applying its law on the point in issue.\textsuperscript{58} The court made it clear that it considered recovery

\textsuperscript{53} This principle, in turn, incorporates Currie’s view as to the proper resolution of the true conflict.

\textsuperscript{54} This would be the case when, for example, neither the plaintiff nor the defendant was a New York resident or the corporate defendant did not have its principal place of business in New York.


\textsuperscript{57} I do not consider this interest to be a real interest; but as we will see, the majority of the courts that have passed on this question do, and they have applied their own law to allow recovery.

\textsuperscript{58} The plaintiff’s home state is not interested in applying its law because its policy is to protect defendants, and the defendant is not a resident of that state, while the policy of the defendant’s home state is to protect plaintiffs, and the plaintiff is not a resident of that state. If the accident occurred in the defendant’s home state, it could be argued—although I disagree—that the state was interested in applying its law to allow recovery to a nonresident injured
improper here and could have so held by formulating a third rule of choice of law, based on the fact-law pattern presented in that case: when a plaintiff from a nonrecovery state is injured by a defendant from a recovery state in the plaintiff's home state, recovery will not be allowed. Instead, the court abandoned judicial method and promulgated three choice-of-law rules, two and one-half of which had nothing to do with the case before it. The additional rules were applicable to guest-host immunity and presumably were capable of extension to all accident cases.

The first Neumeier rule is that when the guest-passenger and the host-driver are domiciled in the same state and the car is registered there, the law of that state should control and determine the standard of care that the host owes to his guest. This choice-of-law rule incorporates the rule of choice of law promulgated in Babcock and Tooker, in which the fact-law pattern involved recovery state parties involved in an accident in a nonrecovery state. To this extent, the Neumeier court simply restated existing law. In effect, however, it also reversed the rule of choice of law promulgated by lower New York courts in a different fact-law pattern in which parties from a nonrecovery state were involved in an accident in New York, a recovery state. Since the court of appeals had not previously decided such a case and was not required to decide it in Neumeier, the promulgation of a rule to cover this fact-law pattern is completely inconsistent with the role of a court following judicial method in the common-law tradition.

The second Neumeier rule, dealing with the situation of a plaintiff from a recovery state injured by a defendant from a guest statute state, was framed with reference to the location of the accident: if the accident occurred in the plaintiff's home state, the law of that state applied, but if it occurred in the defendant's

59. "Was the New York rule really intended to be manna for the entire world?" 31 N.Y.2d at 130, 286 N.E.2d at 458, 335 N.Y.S.2d at 71 (quoting Reese, supra note 8, at 563).

60. 31 N.Y.2d at 128, 286 N.E.2d at 457, 335 N.Y.S.2d at 70.

61. See Sedler, supra note 12, at 133-35.

62. The court stated that the law of the plaintiff's home state would apply "in the absence of special circumstances," which the court did not undertake to define. 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.
home state, the law of that state applied, and the guest statute defense would be recognized. If the court intended that the second Neumeier rule extend beyond the guest statute situation, and there is no logical reason it should not have, the court thereby engaged in a sub silento overruling of Miller v. Miller. In Rosenthal v. Warren, however, in which a New York victim was killed in Massachusetts due to the negligence of a Massachusetts defendant, a divided second circuit, applying New York law, held that the Neumeier rules did not apply to limitations on wrongful death recovery because of New York’s “strong public policy” against limiting liability in this area. In the same case, a federal district court had held that the Neumeier rules did not apply to charitable immunity either, so that New York law governed because of New York’s interest in allowing recovery to the estate of a victim from New York against a Massachusetts charity.

The third Neumeier rule dealt with the unprovided-for case and covered both the situation in which the accident occurred in the plaintiff’s home state and the situation in which the accident occurred in the defendant’s home state. The court said that the rule had to be “less categorical,” but presumptively the law of the

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63. Id. at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70. In Pryor v. Swarner, 445 F.2d 1272 (2d Cir. 1971), the plaintiff was a resident of New York, the defendant was a resident of Florida, a guest statute state, and the accident occurred in Ohio, also a guest statute state. The trip began in Ohio and was to end in New York. The second circuit, applying New York conflicts law, held that New York would not allow recovery. The court based its decision on Judge Fuld’s concurring opinion in Tooker, in which he set forth the rules that were subsequently adopted by the court in Neumeier. See also Hancock v. Holland, 63 Misc. 2d 811, 313 N.Y.S.2d 455 (1970) (Georgia guest statute applies to claim by New York plaintiff injured in Georgia while a passenger in an automobile operated by a Georgia defendant).

64. 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). This overruling should also apply to Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), on the assumption that Northeast Airlines was a “resident” of Massachusetts, where it apparently had its principal place of business.

65. 475 F.2d 438 (2d Cir. 1973).

66. Id. at 442-45. The court’s position in this diversity case was the same as that of a lower New York state court interpreting New York law, as set forth by the New York Court of Appeals.

67. Rosenthal v. Warren, 374 F. Supp. 522 (S.D.N.Y. 1974). In holding that New York law would apply on the issue of charitable immunity, the district court gratuitously noted that Massachusetts’ charitable immunity rule was “regressive” and had since been repealed.
state where the accident occurred applied unless "it can be shown that displacing [the] normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for the litigants." In *Neumeier*, this rule required the application of Ontario law denying recovery, whereas if the accident had occurred in New York, New York law, allowing recovery, would have applied.

The difficulty in applying categorical rules to particular fact situations is demonstrated by the post-*Neumeier* experience of the lower state courts and the federal courts in New York. On the assumption that the *Neumeier* rules would apply to all accident cases, as the lower state courts and New York federal courts have assumed, *Miller* would seem to be overruled unless the second circuit is correct in reading a wrongful death exception into the second *Neumeier* rule. In *Rogers v. U-Haul Co.*, the appellate division was faced with a situation of an Alabama resident killed in a Pennsylvania accident as a result of the negligence of a New York driver. The New York driver was operating a vehicle owned by U-Haul, a nationwide concern doing substantial business in New York. Under New York law, U-Haul would be vicariously liable for the negligence of the driver, but under Pennsylvania law it would not. The court did not discuss U-Haul's liability under Alabama law. Applying the third *Neumeier* rule, the court held that Pennsylvania law governed because the parties were from different states.

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68. 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.
70. This was so held in the pre-*Neumeier* case of Frummer v. Hilton Hotels Int'l, Inc., 60 Misc. 2d 840, 304 N.Y.S.2d 335 (1969) (English rule of comparative negligence applies in favor of New York plaintiff injured in England due to the negligence of an English defendant).
In terms of interest analysis, if Alabama law would have imposed vicarious liability, Rogers would present a false conflict and New York law would have applied. Since U-Haul would be considered a New York defendant for tort liability purposes because of its substantial business in that state, this case would have involved the same fact-law pattern as Tooker, namely two parties from recovery states, albeit different ones, involved in an accident in a nonrecovery state. This situation was clearly presented in Chila v. Owens, in which the plaintiff was from New Jersey, a recovery state, and the defendant was from New York, a recovery state, and the accident occurred in Ohio, a guest statute state. Because the plaintiff and defendant were from different states, the third Neumeier rule, applicable by its own terms, would have required that the court have looked to Ohio law. The court, however, treated the case as presenting a false conflict and applied the first Neumeier rule even though the parties resided in different states. In Rogers the court applied the third Neumeier rule without further inquiry and, in so doing, may have produced the anomaly of applying the law of the "uninterested" state to deny recovery solely because the parties were from different recovery states. If the parties had been from the same recovery state, the plaintiff would have recovered.

Professor Reese has argued that "[a] choice of law rule that works well in the great majority of situations should be applied even in a case where it might not reach ideal results. Good rules, like other advantages, have their price." This price would not have had to have been exacted if the New York Court of Appeals in Neumeier had been faithful to the common-law tradition of judicial method and had developed rules of choice of law based on its decisions in actual cases. Instead, by promulgating choice-of-law rules, the court may have overruled one of its own prior decisions and clearly overruled prior decisions of lower New York courts. The Neumeier decision covered cases that had not yet...


76. This would be true unless the court found the case to come within the third rule's "exception."

77. See note 22 supra.
arisen and forced lower state courts and federal courts in New York to fit future cases within the constraints of the categorical rules.

To illustrate this point more clearly, let us pretend that the Neumeier rules had not been promulgated and determine what the state of conflicts law would be in New York if the decisions of the court of appeals and the lower courts had been framed in terms of rules of choice of law. Looking to the decisions of the court of appeals, the following rules would be in effect:

1. When two parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed under Babcock and Tooker.78

2. When a New York resident is killed or injured by a defendant from a nonrecovery state in the latter's home state, New York law allowing recovery will be applied, assuming this produces no unfairness to the defendant or the defendant's insurer. This rule is consistent with Miller if Miller applies beyond the wrongful death situation.79

3. When a plaintiff from a nonrecovery state is injured by a defendant from a recovery state in the plaintiff's home state, recovery will not be allowed under Neumeier.80

Looking to the decisions of lower New York courts prior to Neumeier, the following additional rules would be in effect:

78. Although these cases involved New York residents, in the Kilberg "spinoffs" the court had treated parties from other recovery states in the same way as it had treated New York residents and allowed unlimited recovery. See Long v. Pan Am. World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); cf. Heaney v. Purdy, 29 N.Y.2d 157, 272 N.E.2d 550, 324 N.Y.S.2d 47 (1971) (when a New York resident was prosecuted in an Ontario court on the complaint of another New York resident, Ontario law applied on the question of liability for malicious prosecution; it appeared that liability would not be imposed under either New York or Ontario law).

79. The rule is limited to New York plaintiffs because it is only in that situation that New York would be faced with the question of whether to apply its own law. If a plaintiff residing in another recovery state sued a nonrecovery state defendant in New York, the situation presented would be that of the true conflict arising in a disinterested third state, and no rule should be formulated to cover this situation until it arises.

80. Strictly speaking, Neumeier dealt with a New York defendant. However, the court's obvious hostility toward allowing recovery to a plaintiff whose home state did not protect him would likely carry over to bar recovery against out-of-state defendants as well. A contrary result in this situation was reached in Van Dyke v. Bolves, 107 N.J. Super. 338, 258 A.2d 372 (App. Div. 1969).
(4) When two parties from a nonrecovery state are involved in an accident in New York, New York law, allowing recovery, will be applied.\textsuperscript{51}

(5) When a plaintiff from a nonrecovery state is injured by a defendant from a recovery state in the defendant’s home state, the law of the defendant’s home state, allowing recovery, will be applied.\textsuperscript{52}

If these rules of choice of law had been in effect, there would have been no question as to the results in \textit{Rosenthal v. Warren} and \textit{Chila v. Owens}. The second circuit would have been bound by \textit{Miller} to apply New York law in \textit{Rosenthal}; if \textit{Miller} were to be overruled, it was up to the New York Court of Appeals to do so when a case presenting that question came before it. In \textit{Chila} the court without question would have allowed recovery under the \textit{Babcock-Tooker} rule. In \textit{Rogers} the court would have looked to Alabama law to see if it imposed vicarious liability. If it did, the case would have been controlled by \textit{Babcock} and \textit{Tooker}, since both parties were from recovery states, as in \textit{Chila}. If Alabama would have denied recovery, the holding in \textit{Neumeier} would seem to apply by analogy, and recovery should be denied.

In arguing for the necessity of choice-of-law rules, Professor Reese has stated:

Throughout the ages the development of rules has been one of the primary objectives of the common law judge. This has been so because of the advantages that rules bring. Perhaps the most obvious of these benefits are certainty and predictability, important factors not only for those planning future transactions but also for those confronting either lawsuits or problems of how much to offer or accept by way of settlement. An equally important advantage of rules is the fact that they greatly facilitate the judicial task. All that a judge need do when deciding a question covered by a rule is to select the proper rule and then, after gaining an understanding of its provisions, to apply it.\textsuperscript{53}

However, when Professor Reese refers to the “primary objectives of the common law judge,” he is referring to judicial method—the development of rules on a case-by-case basis through the normal workings of binding precedent and stare decisis. It is only the area

\textsuperscript{51} See note 56 supra.
\textsuperscript{52} See note 70 supra.
\textsuperscript{53} Reese, supra note 5, at 316-17.
of conflict of laws in which it is proposed that courts should promulgate categorical rules a priori, as the New York Court of Appeals did in Neumeier. The post-Neumeier experience, as reflected in Rosenthal, Chila, and Rogers, indicates that a priori rules, even if supposedly narrow and policy-based, have not enhanced predictability in New York and certainly have not served to "greatly facilitate the judicial task." They may also produce unsound results, as they possibly did in Rogers and clearly would have done in Chila if the court had applied them literally.

The New York experience clearly demonstrates the unsoundness of the promulgation of choice-of-law rules and the desirability, in contrast, of the development of rules of choice of law based on the normal workings of binding precedent and stare decisis. It may be too late to hope for a return to judicial method in New York, but New York's experience with choice-of-law rules in the wake of Neumeier should cause other states to hesitate before embarking on such a course.

B. California: Consistency and Rules of Choice of Law

At the opposite pole from New York, in terms of approach to choice of law as well as geography, is California. The California Supreme Court has consistently applied interest analysis to the solution of choice-of-law problems and in the process has developed clear rules of choice of law in the torts area. Prior to

84. In First Nat'l Bank v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973), in which an accident involving parties from Colorado, a state not having a guest statute, occurred in South Dakota, a guest statute state, the Colorado Supreme Court adopted the first two Neumeier rules. Had the court proceeded in terms of judicial method, it would simply have held that when Colorado parties are involved in an accident in another state, Colorado law applies.

85. A priori rules do not appear to be so narrow when they must be applied in the context of particular situations, and the policies on which they are purportedly based are what may be called "choice of law" rather than "substantive" policies, that is, policies other than those reflected in the laws of the involved states.

86. Only Colorado has followed New York's lead in Neumeier.

87. Any discussion of conflicts law in California must make reference to the comprehensive study of Professor Horowitz. See Horowitz, The Choice of Law in California: A Restatement, 21 U.C.L.A. L. Rev. 719 (1974). Professor Horowitz has undertaken to review the choice-of-law decisions of the California courts in all areas, including the "pre-modern" cases, and has set forth the principles on which he believes those decisions have been based. In his view,
Babcock, it held that when California law allowed recovery and California parties were involved in an accident in a nonrecovery state, California law would be applied.88 The California Court of Appeal had held that when nonresident parties from a recovery state were involved in an accident in California, the law of their home state applied.89 In the post-Babcock case of Reich v. Purcell,90 an Ohio plaintiff91 was killed in a Missouri accident by a California defendant, and only Missouri law imposed a limitation on wrongful death recovery. The California Supreme Court held that the limitation would not be recognized. The rule of choice of law that emerges, expressed with reference to recovery rather than with reference to California residence, is that when two parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed. Since California is expressly committed to interest analysis, the principle on which the rule of choice of law is based is that when only one state is interested in applying its law on the point in issue in order to implement the policy reflected in its law—the false conflict—the law of that state will be applied. In accordance with this rule of

California will apply the law of the only interested state in the case of the false conflict. In the case of the true conflict, it will attempt to accommodate the conflicting interests. Id. at 723. Since I am concerned only about the results in actual cases and have limited my analysis to the “modern” tort cases, I am not in a position to judge fully the accuracy of Professor Horowitz’s conclusions. Bernhard v. Harrah’s Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), is the one recent tort case that clearly presented a true conflict, in which California concluded that it had a real interest in applying its own law and that another state did as well. California, while purporting to reconcile conflicting interests, resolved the conflict by favoring its own interests. Its behavior in this regard is similar to that of most other courts when faced with a true conflict. I tend to question purported reconciliations of conflicting interests, since in practice the forum almost always prefers its own policy and interest. A more extensive discussion of Professor Horowitz’s conclusions is beyond the scope of the present writing.

88. Emery v. Emery, 45 Cal. 2d 421, 489 P.2d 218 (1955); Grant v. McAlliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953). For a discussion of these cases, see Horowitz, supra note 87, at 731-32.
90. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
91. Interestingly enough, the decedent was on his way to California when the accident occurred, but the court assumed that he had not yet acquired a California domicile and was not willing to look to the post-accident acquisition of a California domicile by his survivors.
choice of law, lower California courts have applied the law of the recovery state both when California parties were involved in an accident in a nonrecovery state\(^2\) and when California was a "disinterested third state."\(^3\)

In *Bernhard v. Harrah's Club*,\(^4\) the California Supreme Court was faced with a true conflict in which a California plaintiff was injured in California by intoxicated patrons of a Nevada gambling establishment operating close to the California border and soliciting California customers. Plaintiff sought to hold defendant gambling establishment liable under the California Dram Shop Act.\(^5\) Although the court purported to resolve the true conflict by the "comparative impairment" principle,\(^6\) the court's approach was the same as that of most other courts when resolving true conflicts, namely resolving the conflict in favor of the application of the forum's law. *Bernhard* emphasized that the application of California law was foreseeable to the Nevada defendant because of its proximity to California and its solicitation of California customers. As in substantive law areas, it is possible to fashion a rule of decision limited to the precise facts of the case. Apart from the "comparative impairment" question, however, it is sound, at least for purposes of predictability, to fashion a broader rule of choice of law from this case: when a California plaintiff is injured in California by a defendant from a nonrecovery state, California law will apply, as long as the application of California law was foreseeable to the defendant.\(^7\) The principle

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\(^2\) Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972) (defendant munitions manufacturer was doing substantial business in California, and its Mexican affiliate was not a party, although defective shell causing the accident was manufactured and purchased in Mexico); Kelly v. Von Koznick, 18 Cal. App. 3d 805, 96 Cal. Rptr. 184 (1971).

\(^3\) Fuller v. Greenup, 267 Cal. App. 2d 10, 72 Cal. Rptr. 531 (1968).


\(^5\) No issue was raised as to the power of California to subject the defendant to suit in California. Yet the same "foreseeability" considerations that would justify the application of California substantive law here would justify the exercise of jurisdiction under California's tort long-arm act. See Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

\(^6\) For a discussion of the "comparative impairment" principle, see Horowitz, *supra* note 87, at 749-58.

\(^7\) In *Moore v. Greene*, 431 F.2d 584 (9th Cir. 1970), the ninth circuit, sitting as a California court, held that when letters, allegedly libelous of a California resident and causing him emotional distress, had been sent from
on which this rule of choice of law is based is that the forum will apply its own law whenever it has a real interest in doing so, as long as the application of its law is not unfair to the other party. This is the same principle relied on by the New York Court of Appeals in *Miller* to justify the application of New York law in the case of a New York victim who was killed by a nonrecovery state defendant in the defendant's home state.

*In Hurtado v. Superior Court of Sacramento County,* the California Supreme Court held that when a victim from a nonrecovery state was killed in California by a California defendant, California law, allowing unlimited recovery for wrongful death, applied. The court strongly intimated that California law would apply simply because the defendant was a resident of California and subject to unlimited liability under its law. Furthermore, in response to the argument that California's "total governmental interest" required that the law of the plaintiff's home state, limiting recovery, be applied, the court also found a "deterrent" interest in applying California law because the accident occurred in California. In any event, in view of the fact-law pattern presented in *Hurtado*, the rule of choice of law that the court promulgated must be limited to the situation in which an accident occurs in California: when a plaintiff from a nonrecovery state is injured or killed in California by a California defendant, California law, allowing recovery, applies.

The fourth rule of choice of law in the tort area in California, based on the appellate court decision in *Howe v. Diversified Builders, Inc.*, is in accord with the universal practice of the courts: the tort liability of an employer to an employee covered Arizona to places in California and elsewhere, California law applied to determine the defendant's tort liability. The court emphasized California's interest in applying its law to allow recovery to its resident injured there. Since the defendant sent the letters into California, the application of California law was foreseeable.

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98. 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).

99. Recovery would be allowed in this situation under the third Neumeier rule, since the accident occurred in the defendant's home state.

100. 11 Cal. 3d at 581-82, 522 P.2d at 670-71, 114 Cal. Rptr. at 110-11.

101. *Id.* at 582, 552 P.2d at 872, 114 Cal. Rptr. at 111. For a discussion of the "total governmental interest" argument in this situation, see Ratner, Choice of Law: Interest Analysis and Cost Contribution, 47 S. Cal. L. Rev. 817 (1974). Compare the discussion of *Hurtado* in Horowitz, supra note 87, at 745, n.74.

by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.\textsuperscript{103}

The rules of choice of law in effect in California, then, based on the decisions of the California courts in actual cases, are as follows:

1. When two parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed under Reich.

2. When a California plaintiff is injured in California because of an act done elsewhere that created a foreseeable risk of harm in California, California law, allowing recovery, applies under Bernhard.

3. When a plaintiff from a nonrecovery state is injured in California by a California defendant, California law, allowing recovery, applies under Hurtado.

4. Based on Howe, the tort liability of an employer to an employee covered by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.

In contrast to New York, California has developed clear rules of choice of law based on the courts' decisions in actual cases. Judicial method, which has been cast aside in New York, operates with full vigor in California.

Equally significant are the tort choice-of-law questions that are still open in California because cases presenting those questions have not yet been decided by the California courts. Again, the California approach reflects the way courts are supposed to operate in the common-law tradition, and the "uncertainty" this produces is no different than the "uncertainty" in any other area of law, where cases presenting particular issues have not yet arisen. There has been no case involving two parties from a nonrecovery state injured in California when California law allows recovery. California is committed to interest analysis, and should such a case arise, the court would therefore make the choice-of-law decision with reference to its assessment of the policies and interests of the involved states. Since courts elsewhere have disagreed over the proper resolution of this question,\textsuperscript{104} it is hard to

\textsuperscript{103} For a discussion of the reasons for this rule, see Sedler, supra note 16, at 72-75.

\textsuperscript{104} See notes 283-85 infra and accompanying text.
predict how the issue would be decided in California. In California, however, unlike New York, it will be decided only when it arises. Similarly, there has been no case in California like Miller or Rosenthal in which a California plaintiff was injured or killed by a nonrecovery state defendant in the latter's home state. Guidance in such a case may be found in the decision in Bernhard, although that case is not directly on point because there the injury occurred in California. Nonetheless, the principle that the forum will apply its own law whenever it has a real interest in doing so, as long as the application of its law is not unfair to the other party, should apply here. In my view, this principle was the basis of the Bernhard rule of choice of law. Hurtado strongly intimated that California would apply its own law in the Neumeier situation, in which a plaintiff from a nonrecovery state is injured by a California defendant in the plaintiff's home state.

In this section of the article, I have demonstrated the difference between choice-of-law rules and rules of choice of law. The contrasting experiences of New York and California indicate clearly the advantages of formulating rules of choice of law and of applying judicial method to the solution of conflicts problems. I will now proceed to a discussion of the development of rules of choice of law in torts in other states that have abandoned the traditional approach to choice of law.

III. The Development of Rules of Choice of Law in Torts: A State by State Analysis

In the states chosen for this analysis, torts cases involving different fact-law patterns have arisen affording these jurisdictions opportunities to fashion more than one rule of choice of law. Cases dealing with admonitory torts bring into play differ-

105. It was this principle, rather than the application of the "comparative impairment" principle, on which the Bernhard rule was based.

106. In In re Paris Air Crash, 399 F. Supp. 732 (C.D. Cal. 1975), the court held, based on the Hurtado rule, that California law would govern the wrongful death claims of all victims of an air crash due to a defect in an airplane that was designed and manufactured in California.

107. I have tried to locate all of the reported torts conflicts cases decided by the state and federal courts in each state. Starting with the cases with which I was familiar, the so-called "leading" cases, I relied on the state digests and the West key number system. The key numbers that I used were Action 17,
ent policy considerations and give rise to their own special rules of choice of law. A number of these states purport to follow the Restatement (Second)‘s “state of the most significant relationship” approach; others purport to follow Professor Leflar’s choice-influencing considerations. As pointed out previously, however, in practice all of the courts that have abandoned the traditional approach, regardless of whatever “modern” approach they purport to follow, generally refer to the policies and interests of the involved states in deciding the choice-of-law question and apply their own law whenever they have a real interest in doing so. The particular approach adopted by the highest state court must be followed and applied by lower courts and federal courts in the state, and this approach may affect the result in particular cases. These variations will be discussed as they arise. On the whole, however, the rules of choice of law can be formulated in terms of the policies and interests of the involved states and, more particularly, in terms of residency and nonresidency and recovery and nonrecovery. The state-by-state analysis will proceed in alphabetical order.

A. Illinois

In Ingersoll v. Klein, the Illinois Supreme Court abandoned the “place of the wrong” rule, adopted the state of the most significant relationship approach, and held that when Illinois parties were involved in a fatal accident in Iowa, Illinois law,
which would not impose substantive liability, applied. The holding was in accord with an earlier case, Wartell v. Formusa, in which the court held that Illinois law barring spousal suits applied when Illinois spouses were involved in an accident in a recovery state. These are the only two tort choice-of-law cases decided by the Illinois Supreme Court after Babcock. Since these cases were based on the Illinois residence of the parties, the rule of choice of law emerging from them should be stated in those terms: when Illinois parties are involved in an accident in another state, Illinois law applies. The Illinois Appellate Court has applied that rule to the issue of guest-host immunity when Illinois residents are involved in an accident in another state and has held that Illinois law applies both when it is more favorable to the plaintiff and when it is more favorable to the defendant. This court has also held that Illinois law applies to bar recovery on the basis of contributory negligence when Illinois parties are involved in an accident in a comparative negligence state.

When an Illinois plaintiff was injured by a nonresident defendant in the latter's home state, an Illinois federal court held that Illinois would not recognize a limitation imposed by the law of the defendant's home state on the amount of damages recoverable on the ground that such a limitation would be against its "public policy." The court noted that the failure to recognize the limitation would not be unfair to the defendant. The same court held, however, that under the state of the most significant relationship test, the standard of care was to be determined by the

Mississippi River.

113. 34 Ill. 2d 57, 213 N.E.2d 544 (1966).
114. In Graham v. General U.S. Grant Post, 43 Ill. 2d 1, 248 N.E.2d 657 (1969), the Illinois Dram Shop Act was held to constitute a functionally restrictive substantive rule, inapplicable to an accident occurring in another state involving an Illinois victim, although the intoxicating liquor was served by an Illinois tavern-keeper in Illinois. See Sedler, Functionally Restrictive Substantive Rules in American Conflicts Law, 50 S. Cal. L. Rev. 27, 55-57 (1976).
118. The accident occurred on a hunting safari in Mozambique.
law of the place where the accident occurred. In another case, the Illinois Appellate Court applied the higher standard of care imposed by the law of Indiana, the place of the accident, in a suit by an Illinois plaintiff against an Indiana defendant. In terms of interest analysis, this case presented a false conflict: the admonitory policy reflected in Indiana's standards of scaffold construction would be advanced by application of Indiana law to scaffold accidents occurring in Indiana, while no policy of Illinois would be advanced by applying Illinois law to deny recovery in such an accident.

There have been two federal court cases in Illinois involving intentional torts in the conflicts of laws area. One case dealt with false representations made in Illinois to an Illinois plaintiff who entered into an employment contract covering work in Illinois and other states. The other case involved misappropriation of trade secrets of a Wisconsin corporation by a corporation having its principal place of business in Michigan. Illinois was a disinterested third state because the alleged misappropriation occurred in Michigan. Since in both cases the place where the act and the harm occurred coincided, the resulting rule of choice of law is the same as the rule for admonitory torts: when the act and harm occur in the same state, the law of that state applies. However, the courts approached the question in both cases in terms of "what law governs" and did not indicate the extent to which, if any, the laws of the involved states differed.

Finally, in Illinois, as elsewhere, it has been held that the tort liability of an employer to an employee who is covered by worker's compensation is determined by the law of the state in which the employer has taken out worker's compensation to cover the particular employee.

120. It was not clear whether the standard of care under the law of Mozambique was higher or lower than that existing under Illinois law. If it were lower, in terms of interest analysis, the case would present a true conflict. If it were higher, it would present the "unprovided-for" case.


122. The court also applied Indiana law to bar a claim for indemnity asserted by the Indiana defendant against the plaintiff's Illinois employer. Id. at 617, 358 N.E.2d at 333.


The rules of choice of law in tort in effect in Illinois, as developed in the cases discussed, are as follows:

1. When Illinois parties are involved in an accident in another state, Illinois law applies.126

2. When an Illinois plaintiff is injured in another state by a resident of that state, Illinois law applies on the measure of damages.127

3. When an Illinois plaintiff is injured in another state by a resident of that state, the law of the state that imposes a higher standard of care on the defendant applies.128

4. In the case of admonitory torts, when the act and the harm occur in the same state, the law of that state applies.129

5. The tort liability of an employer to an employee covered by worker's compensation is determined by the law of the state in which the employer has taken out worker's compensation to cover the particular employee.130

It should be noted that since only two cases in the torts area, both presenting the same fact-law pattern, have been decided by the Illinois Supreme Court, the other rules of choice of law in that state must be considered tentative. The second rule has been framed only in terms of the measure of damages, since that is how a federal court, applying Illinois law, framed it. In addition, the fourth rule of choice of law posited is necessarily limited in scope, because it was not developed with reference to the content of the differing laws. On the whole, then, rules of choice of law in the torts area cannot be said to have been "extensively developed" in Illinois.

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127. See note 119 supra.

128. See Jackson v. Miller-Davis Co., 44 Ill. App. 3d 611, 358 N.E.2d 328 (1976). Since the standard of care imposed by the state of injury in Pancotto was not known, the case is of limited authority.

129. See Wilhoite v. Fastenware, Inc., 354 F. Supp. 856 (N.D. Ill. 1973); Crown Indus., Inc. v. Kawneer Co., 335 F. Supp. 749 (N.D. Ill. 1971). The holdings in both of these cases likewise are of limited authority since there was not a clear conflict of laws in either case.

B. Iowa

Like Illinois, Iowa is explicitly committed to the state of the most significant relationship approach and, also like Illinois, has held that its own law applies whenever Iowa parties are involved in an accident in another state. Berghammer v. Smith presented the Iowa Supreme Court with the “unprovided-for” case in regard to a claim for loss of consortium. At the time the accident occurred, the law of Minnesota, where the plaintiff and her spouse resided, did not recognize an action for loss of consortium. Both Illinois, the home of the defendant, and Iowa, the place of the accident, recognized the cause of action, but the court held that Minnesota law applied. Therefore, the resulting rule of choice of law is that when the plaintiff’s home state does not recognize a claim for loss of consortium, the claim will not be allowed. The rule is expressed in these terms because in Berghammer such a claim was allowed by the laws of both the defendant’s home state and the state of the injury. If the law of the defendant’s home state did not recognize such a claim, the defendant’s state would be interested in applying its law on the point in issue in order to protect its resident and insurer from liability. That different fact-law pattern would give rise to a different interest mix.

In Foster v. Day & Zimmerman, the eighth circuit held that when the fuse of a defective grenade was manufactured in

131. Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Flogel v. Flogel, 257 Iowa 54, 133 N.W.2d 907 (1965); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965). In Fabricius, the court said that the law of the state of injury applied on the question of negligence. This statement is frequently made by the forum when it applies its own law on the issue as to which a conflict exists. In my view, this statement means that the laws of the state of the injury relating to the rules of the road and the like apply as datum. As datum, they relate to the factual question of whether the party’s conduct was negligent rather than to whether substantive liability will be imposed. See Fells v. Bowman, 224 So. 2d 109 (Miss. 1973). See generally Kay, Conflict of Laws: Foreign Law as Datum, 53 CALIF. L. REv. 47 (1965).

132. 185 N.W.2d 226 (Iowa 1971).

133. The court decided, however, that the change in Minnesota law recognizing the action applied retroactively to allow recovery in the instant case, although Minnesota had refused to apply the change retroactively.

134. If the law of the plaintiff’s home state did not recognize the claim for loss of consortium either, a false conflict would be presented.

135. 502 F.2d 867 (8th Cir. 1974).
Iowa, and the grenade exploded at an army base in Georgia, injuring a Washington plaintiff, Iowa law, imposing strict liability, applied. This holding illustrates the application of the principle that the state in which an act occurs has an interest in applying its admonitory or regulatory policy to impose liability. Assuming that the corporate manufacturer is considered to be a resident of the state in which the manufacture took place, in effect Foster presents a false conflict. Similarly, in cases in which the act and the harm occur in the same state, the Iowa Supreme Court and a federal court in Iowa have held that the law of that state applies with respect to liability for admonitory torts.\footnote{136}

These cases developed the following rules of choice of law in tort in Iowa:

1. When Iowa parties are involved in an accident in another state, Iowa law applies.\footnote{137}
2. When the plaintiff's home state does not recognize a cause of action for loss of consortium, that claim will not be recognized.\footnote{138}
3. When the law of the state in which an act or omission occurs reflects an admonitory policy, the defendant will be held liable when the act causes harm in another state.\footnote{139}
4. In the case of admonitory torts, when the act and the harm occur in the same state, the law of that state applies.\footnote{140}

C. Kentucky

In the period between 1967 and 1972, the Kentucky Court of Appeals (now the Supreme Court) decided three conflicts torts

\footnote{136. Brooke v. Ranson, 376 F. Supp. 195 (N.D. Iowa 1974); Zeman v. Canton State Bank, 211 N.W.2d 346 (Iowa 1973). Zeman involved an Iowa plaintiff's claim that his property, situated in Minnesota, had been converted as a result of a sheriff's sale. There was no showing of what Minnesota law was, however, so Iowa law applied as the law of the forum. In Brooke, a case involving claims for alienation of affections, most of the alienating acts occurred in Maryland, where the parties had resided, although some occurred in Iowa after the spouse moved there. The court found that the alienation had been complete prior to the move to Iowa. However, in an action brought by the child for the alienation of the parent's affection, Iowa law applied, since the alleged alienating acts occurred in Iowa.}

\footnote{137. See note 131 supra.}

\footnote{138. See Berghammer v. Smith, 185 N.W.2d 226 (Iowa 1971).}

\footnote{139. See Foster v. Day & Zimmerman, 502 F.2d 867 (8th Cir. 1974).}

\footnote{140. See note 136 supra.}
cases, each presenting a different fact-law pattern. The court has specifically rejected the state of the most significant relationship approach in favor of a "sufficient enough contacts" approach, which means that Kentucky law will apply whenever the court concludes that Kentucky has an interest in applying its own law.\textsuperscript{141} In \textit{Wessling v. Paris},\textsuperscript{142} the court applied Kentucky law on the issue of guest-host immunity when two Kentucky residents were involved in an accident in a guest statute state. In \textit{Arnett v. Thompson},\textsuperscript{143} it applied Kentucky law to allow recovery when two residents from a nonrecovery state were involved in an accident in Kentucky. In \textit{Foster v. Leggett},\textsuperscript{144} a Kentucky resident was killed in an accident in Ohio in an automobile driven by an Ohio resident who worked in Kentucky and spent considerable time there. The trip began and was to end in Kentucky. The court held that Kentucky law applied on the issue of guest-host immunity.\textsuperscript{145} Although the court probably would have reached the same result in the absence of these factual contacts, the rule of choice of law may be limited to the precise situation presented in \textit{Foster}. Since all three cases involved either a Kentucky party or a Kentucky accident, the rules of choice of law will be framed entirely with reference to Kentucky. The Kentucky rules of choice of law in tort are as follows:

(1) When Kentucky parties are involved in an accident in another state, Kentucky law applies.\textsuperscript{146}

(2) When parties from a nonrecovery state are involved in an accident in Kentucky, Kentucky law, allowing recovery, applies.\textsuperscript{147}


\textsuperscript{142} 417 S.W.2d 259 (Ky. 1967).

\textsuperscript{143} 433 S.W.2d 109 (Ky. 1968).

\textsuperscript{144} 484 S.W.2d 827 (Ky. 1972).

\textsuperscript{145} To the same effect in a very similar factual situation is \textit{Bennett v. Macy}, 324 F. Supp. 409 (W.D. Ky. 1971). In \textit{Grant v. Bill Walker Pontiac-GMC}, Inc., 523 F.2d 1301 (6th Cir. 1975), the court, noting that Kentucky and North Carolina law probably did not differ on this point, held that when the accident occurred in Kentucky, killing a Kentucky resident, Kentucky law would apply to determine vicarious liability on the basis of a purported agency relationship created in North Carolina.

\textsuperscript{146} See \textit{Wessling v. Paris}, 417 S.W.2d 259 (Ky. 1967).

\textsuperscript{147} See \textit{Arnett v. Thompson}, 433 S.W.2d 109 (Ky. 1968).
(3) When a Kentucky plaintiff is injured by a defendant from a nonrecovery state in the latter's home state, Kentucky law, allowing recovery, applies, at least when the transaction has substantial factual contacts with Kentucky.\textsuperscript{148}

\textbf{D. Minnesota}

Although the Supreme Court of Minnesota is explicitly committed to the use of Leflar's choice-influencing considerations, the court has held that Minnesota law applies in all of the conflicts torts cases that have come before it. In the 1957 case of \textit{Schmidt v. Driscoll Hotel Co.},\textsuperscript{149} the court held that when a Minnesota tavern-keeper sold liquor to an intoxicated patron who caused an accident in Wisconsin injuring a Minnesota plaintiff, the Minnesota Dram Shop Act, imposing liability against the tavern-keeper, applied. Similarly, the court has held in subsequent cases that when Minnesota parties were involved in an accident in another state, Minnesota law, allowing recovery, applied.\textsuperscript{150} In \textit{Milkovich v. Saari},\textsuperscript{151} the court held that when parties from a guest statute state are involved in an accident in Minnesota, Minnesota law, allowing recovery, applies.

\textit{Schneider v. Nichols},\textsuperscript{152} was a case like the Kentucky case of \textit{Foster v. Leggett},\textsuperscript{153} in that the transaction, which resulted in an accident in North Dakota involving a Minnesota plaintiff and a North Dakota defendant, had substantial factual contacts with Minnesota. The court held that the plaintiff needed to prove only ordinary negligence and not the gross negligence required under the North Dakota guest statute. In \textit{Schwartz v. Consolidated Freightways},\textsuperscript{154} however, a Minnesota plaintiff was injured in an accident in Indiana involving trucks owned by Ohio corporations and traveling to states other than Minnesota. The trucking companies did business in Minnesota and thus were subject to suit

\begin{footnotesize}
\begin{enumerate}
\item[148.] See \textit{Foster v. Leggett}, 484 S.W.2d 827 (Ky. 1972).
\item[149.] 249 Minn. 376, 82 N.W.2d 365 (1957).
\item[151.] 295 Minn. 155, 203 N.W.2d 408 (1973).
\item[152.] 280 Minn. 139, 158 N.W.2d 254 (1968).
\item[153.] 484 S.W.2d 827 (Ky. 1972).
\item[154.] 300 Minn. 487, 221 N.W.2d 665 (1974).
\end{enumerate}
\end{footnotesize}
there, but the transaction in question had no factual connection with Minnesota. The court held that Minnesota law, allowing recovery on the basis of comparative negligence, applied. Assuming that Ohio law would have denied recovery, the case presented a true conflict. The application of Minnesota law can be sustained by the application of the "interest and fairness" principle: Minnesota has a real interest in applying its law allowing recovery to an injured Minnesota plaintiff irrespective of where the accident occurs. Since defendants did not "rely" on the Ohio or Indiana law of contributory negligence in causing the accident, there is no unfairness in holding them to the Minnesota standard. The rule of choice of law in this fact-law pattern then can be stated without regard to factual contacts: when a Minnesota plaintiff is injured in a nonrecovery state by a defendant from a nonrecovery state, Minnesota law, allowing recovery, applies, as long as this produces no unfairness to the defendant.

In Bolgrean v. Stitch, the plaintiff had moved from Minnesota to North Dakota, a guest statute state, and it was not clear where she was domiciled at the time of the accident. The defendant was a resident of Minnesota, a recovery state, and the accident occurred in South Dakota, a guest statute state. Finding it unnecessary to determine the plaintiff's domicile, the court imposed liability on the basis of the defendant's Minnesota residence. Similarly, in Allen v. Gannaway, some of the passengers were not clearly Minnesota domiciliaries. The vehicle was driven by a Minnesota defendant and was involved in an accident in Nevada, a guest statute state. The court held that Minnesota law, allowing recovery, applied. The rule of choice of law that emerges from these cases is that when the defendant is a Minnesota resident, Minnesota law, allowing recovery, applies irrespective of where the accident occurs or where the plaintiff resides. In deciding the unprovided-for case, then, the Minnesota courts, unlike those of New York, which follow the Neumeier rules, look solely to the defendant's Minnesota residence and impose liability on that basis.

The Minnesota rules of choice of law, stated with reference

155. 293 Minn. 8, 196 N.W.2d 442 (1972).
156. 294 Minn. 1, 199 N.W.2d 424 (1972).
157. This is the basis on which I would resolve the "unprovided-for" case. See Sedler, supra note 12, at 137-39.
to the application of Minnesota law allowing recovery, are as follows:

(1) When Minnesota parties are involved in an accident in another state, Minnesota law applies.\textsuperscript{158}

(2) When parties from a nonrecovery state are involved in an accident in Minnesota, Minnesota law, allowing recovery, applies.\textsuperscript{159}

(3) When a Minnesota plaintiff is injured in a nonrecovery state by a defendant from a nonrecovery state, Minnesota law, allowing recovery, applies as long as this result produces no unfairness to the defendant.\textsuperscript{160}

(4) When the defendant is a Minnesota resident, Minnesota law, allowing recovery, applies irrespective of where the accident occurs or where the plaintiff resides.\textsuperscript{161}

E. Mississippi

Although explicitly committed to the "state of the most significant relationship" approach, Mississippi has in practice focused on the policies and interests of the involved states rather than on factual contacts. Mississippi is generally a recovery state, and when Mississippi residents are involved in an accident in another state, Mississippi law, allowing recovery, applies.\textsuperscript{162} In Vick v. Cochran,\textsuperscript{163} the Mississippi Supreme Court faced a situation in which parties from Alabama, a guest statute state, were involved in an accident in Mississippi. Unlike the majority of the

\textsuperscript{158} See Schmidt v. Driscoll Hotel Co., 249 Minn. 376, 82 N.W.2d 365 (1957); note 150 supra.

\textsuperscript{159} See Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973).

\textsuperscript{160} See Schwartz v. Consolidated Freightways, 300 Minn. 487, 221 N.W.2d 665 (1974).

\textsuperscript{161} Allen v. Gannaway, 294 Minn. 1, 199 N.W.2d 424 (1972); Bolgrean v. Stitch, 293 Minn. 8, 196 N.W.2d 442 (1972).

\textsuperscript{162} Galloway v. Korzekwa, 346 F. Supp. 1086 (N.D. Miss. 1972); Fells v. Bowman, 274 So. 2d 109 (Miss. 1973); Turner v. Pickens, 235 So. 2d 272 (Miss. 1970); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968). In Fells, Mississippi parties were involved in an accident in Louisiana. To determine whether the defendant was negligent, the court looked to the Louisiana rules of the road relating to truck taillights and found that they were the same as those in effect in Mississippi, thus rendering harmless an instruction under the Mississippi rules. See note 131 supra.

\textsuperscript{163} 316 So. 2d 242 (Miss. 1975).
courts that have considered this fact-law pattern, Mississippi, correctly in my view, held that the law of the parties' home state, denying recovery, should be applied.\(^{164}\)

The decision in *Vick* may call into question the fifth circuit's earlier decision in *Wright v. Standard Oil Co.*\(^{165}\) In that case, an Indiana child was injured in an accident in Mississippi. The car was driven by the child's father, who was admittedly contributory negligent, and the other vehicle was owned by a Kentucky corporation. In a suit by the child's mother against the Kentucky corporation, the court applied Mississippi law, under which the mother had an action for the child's injury independent of that of the contributorily negligent father. Indiana law would have barred recovery by the mother. The court did not consider the Kentucky law on this point. If Kentucky, like Indiana, did not recognize a separate cause of action for the nonnegligent parent, the situation would have been that of two parties from a nonrecovery state involved in an accident in a recovery state. In *Vick*, the parties were from the same nonrecovery state, and recovery was denied. Since Mississippi purportedly applies the state of the most significant relationship approach, the fact that the parties in *Wright* were from different states might account for the inconsistent holdings. It is doubtful, however, that the *Vick* court was influenced by this factual distinction. If Kentucky recognized the claim of the mother, in terms of interest analysis, *Wright* would have presented the "unprovided-for" case, involving a plaintiff from a nonrecovery state injured by a defendant from a recovery state in a recovery state. If a case like *Wright* arose again, *Vick* would require that the court look to Kentucky law on the point in issue before making the choice-of-law decision.

The rule of choice of law that emerges from *Vick* is probably best expressed with reference to the residence of the parties: when both parties residing in the same state are involved in an accident in another state, the law of their home state applies. If the rule is expressed with reference to residence and recovery, it would be

\(^{164}\) See Sedler, *supra* note 141, at 382-83.

\(^{165}\) A different question would be presented if the law of the state of injury reflected an admonitory policy—for example, a law imposing liability for intentional torts—since the state of injury would have a real interest in applying its law to implement that policy whenever the acts occurred there. See Sedler, *supra* note 16, at 67-78.

\(^{166}\) 470 F.2d 1280 (5th Cir. 1972).
that when two parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed; but if two parties from a nonrecovery state are involved in an accident in a recovery state, recovery will not be allowed. If this is the rule of choice of law and Kentucky disallowed recovery, *Wright* should have been decided differently. This analysis of *Wright* clearly points up the desirability of formulating rules of choice of law narrowly and with reference to the precise fact-law patterns presented in the cases on which the rules are based. Since all other Mississippi conflicts cases involved parties residing in the same state, Mississippi's rule of choice of law should be formulated with reference to residence rather than with reference to recovery. The question of what law applies when parties are from different states should be left open until a case presenting that question actually arises. At the same time, it is also possible to formulate two rules relating specifically to Mississippi: (1) when Mississippi parties are involved in an accident in another state, Mississippi law applies; (2) when nonresident parties from the same state are involved in an accident in Mississippi, the law of their home state applies.

In regard to admonitory torts, the Mississippi Supreme Court held in *Tattis v. Karthans*

![Image](image-url)

that liability for a purely admonitory tort, such as "actionable words," causing no tangible harm to the victim, was to be determined by the law of the state where the act occurred. In *Hyde Construction Co., Inc. v. Koehring Co.*, however, a Mississippi federal court held that Mississippi law governed liability for abuse of process. In that case, a Mississippi plaintiff suffered tangible economic harm in his home state as a result of his inability to enforce a Mississippi judgment due to actions of a Mississippi defendant in another state.

The Mississippi rules of choice of law in torts derived from these cases are as follows:

1. When parties from one state are involved in an accident in another state, the law of their home state applies.
2. Liability for admonitory torts causing no tangible harm to the plaintiff is determined by the law of the state where the act

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167. 215 So. 2d 685 (Miss. 1968).
169. See *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975); note 162 *supra.*
occurred; when foreseeable tangible harm is caused to a Mississippi plaintiff in Mississippi by an act done elsewhere, Mississippi law, allowing recovery, applies. 176

F. Missouri

Missouri is also explicitly committed to the "state of the most significant relationship" approach, but again, like the other states following this approach, it has in practice focused on the policies and interests of the involved states rather than on factual contacts. Missouri does not have a guest statute, and in Kennedy v. Dixon 171 the Missouri Supreme Court held that when Missouri parties are involved in an accident in a guest statute state, Missouri law, allowing recovery, applies. There have been no cases in which Missouri law has denied recovery to parties from a recovery state injured in Missouri or to Missouri parties involved in an accident in another state. The rule of choice of law, therefore, strictly speaking, should be limited to the situation in which Missouri parties are involved in an accident in another state and Missouri law allows recovery. However, since all states have held that their own law applies when their residents are involved in an accident in another state, it is reasonable to formulate the Missouri rule of choice of law here with reference to Missouri residents.

Until very recently Missouri limited recovery for wrongful death. In State ex rel. Broglin v. Nangle, 172 a Missouri victim was killed in Texas due to the negligence of a Missouri corporation having its principal place of business in Texas. Texas would have allowed unlimited recovery for wrongful death. Applying the "state of the most significant relationship" test, the Missouri Supreme Court held that Texas law, allowing unlimited recovery, applied. 173 Treating the defendant as a Texas corporation, since it had its principal place of business in Texas, in terms of interest analysis, this would present the "unprovided-for" case. The court

171. 439 S.W.2d 173 (Mo. 1969).
172. 510 S.W.2d 699 (Mo. 1974).
173. By the time the case reached the Missouri Supreme Court, the Missouri limitation had been removed.
in effect held that in this situation the law of the recovery state applied.\textsuperscript{174} In \textit{Griggs v. Riley},\textsuperscript{175} the Missouri Court of Appeals held that when residents of Illinois, a guest statute state, were involved in an accident in Missouri, Missouri law, allowing recovery, applies.\textsuperscript{174} In \textit{General Dynamics Corp. v. Selb Manufacturing Co.},\textsuperscript{177} a misrepresentation suit involving two corporations that did business in a number of states, the eighth circuit held that Missouri would look to the law of Texas where the harm occurred and where the relationship between the parties was centered. The Missouri rule of choice of law that emerges with respect to admonitory torts is that when the act and harm occur in the same state, the law of that state applies.

The Missouri rules of choice of law in tort, based on these cases, are as follows:

1. When Missouri parties are involved in an accident in another state, Missouri law applies.\textsuperscript{178}
2. When parties from a nonrecovery state are involved in an accident in Missouri, Missouri law, allowing recovery, applies.\textsuperscript{179}
3. When a plaintiff from a nonrecovery state is injured by a defendant from a recovery state in the latter’s home state, recovery will be allowed.\textsuperscript{180}
4. In the case of admonitory torts, when the act and the harm occur in the same state, the law of that state applies.\textsuperscript{181}

\textbf{G. New Hampshire}

New Hampshire is explicitly committed to the use of Leflar’s choice-influencing considerations, but in practice it has clearly applied “straight interest analysis” to the resolution of conflicts.
problems. New Hampshire is a recovery state, except with respect to limitations on wrongful death, and its rules of choice of law in tort reflect both of these approaches. The rules will thus be expressed with reference to both residence and recovery. When New Hampshire parties are involved in an accident in another state, New Hampshire law, allowing recovery, applies. The cases on which this rule of choice of law is based involved the situation in which New Hampshire law allowed recovery. Yet in a case in which New Hampshire residents are involved in an accident in another state and New Hampshire law would not allow recovery, New Hampshire would probably apply its own law. An illustration might be that when a fatal accident between New Hampshire parties occurs in a state imposing no limitations on wrongful death recovery, New Hampshire law, limiting recovery, applies.

In cases in which two parties from a nonrecovery state were involved in an accident in New Hampshire, the New Hampshire Supreme Court has rendered conflicting decisions. In Johnson v. Johnson, the court applied the law of the marital domicile, Massachusetts, on the issue of spousal immunity to bar a claim by one Massachusetts spouse against the other for an accident occurring in New Hampshire. In Taylor v. Bullock, in which Massachusetts spouses had divorced subsequent to the New Hampshire accident, the court did not try to distinguish Johnson and yet held that Massachusetts law, which barred the suit despite the divorce, would not be applied. In Gagne v. Berry, the

182. In Hampton v. Exeter & Hampton Electric Co., 114 N.H. 589, 325 A.2d 778 (1974), the choice-influencing consideration of advancement of the forum's governmental interest would dictate the application of New Hampshire's law limiting liability for wrongful death to protect the New Hampshire defendant, while the choice-influencing consideration of application of the "better law" would lead to the application of Maine law, allowing unlimited recovery. The court came down on the side of advancement of the forum's governmental interests.


court held that when an accident involving Massachusetts residents occurred in New Hampshire, the issue of guest statute immunity was to be determined by the law of New Hampshire rather than Massachusetts. In my view, *Johnson* must be taken as having been overruled by *Taylor* and *Gagne*, so that the rule of choice of law in this situation is that when parties from a nonrecovery state are involved in an accident in New Hampshire, New Hampshire law, allowing recovery, applies.

In *Maguire v. Exeter & Hampton Electric Co.*, a Maine employee of a New Hampshire employer was killed in an accident in New Hampshire. The court held that New Hampshire law, limiting damages recoverable for wrongful death, applied. In *Stephan v. Sears, Roebuck & Co.*, the plaintiff, a New Hampshire resident in the summer and a Florida resident in the winter, was injured in New Hampshire due to a defect in a power saw manufactured in Michigan, ordered from a retailer in Georgia, delivered to the plaintiff's home in Florida, and shipped by him to his home in New Hampshire. The court held that New Hampshire's law of strict liability applied. The application of New Hampshire law was supported by the "interest and fairness" principle. New Hampshire had an interest in applying its law to allow recovery to its summer resident injured there, and it was foreseeable to the manufacturer and to the retailer, both of which did business on a national basis, that the power saw could be taken into any state and cause injury there.

All of these cases and the resulting rules of choice of law may be explained by the "interest and fairness" principle: New Hampshire will apply its own law whenever it finds that it has a real interest in doing so in order to implement the policy reflected in its law, so long as the application of its law is not unfair to the

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188. In *Gagne*, however, the court did not mention *Taylor*, but it cited *Johnson* and *Schneider* and said that the question of spousal immunity was to be determined by the law of the marital domicile. *Id.* at 128, 290 A.2d at 626. Strictly speaking, therefore, the rule should have a caveat in regard to spousal immunity.


191. Under *Gagne*, that interest would have existed because the injury occurred in New Hampshire, even if the plaintiff had been a nonresident. As the court noted in *Stephan*, "The injury which furnishes the bases of the counts on strict liability occurred here and we find no reason to apply any other law than ours." *Id.* at 251, 266 A.2d at 858.
other party. I have emphasized this point because the matter of "interest and fairness" was presented in a first circuit case, *Barrett v. Foster Grant Co.*, in which the court held that New Hampshire would not apply its own law in an interstate accident case involving a New Hampshire plaintiff. In *Barrett*, the plaintiff resided in New Hampshire and was employed by a New Hampshire contractor. He was injured while working for his employer in Massachusetts on land owned by a corporation having its principal place of business in Massachusetts. It was contended, perhaps questionably, that under New Hampshire law the landowner's duty of care to employees of independent contractors was higher than the duty imposed by Massachusetts law. New Hampshire clearly would have had a real interest in applying its own law to allow recovery, but the fairness of permitting recovery would have been questionable. It could be argued that the defendant might have conformed its conduct to the standard required by Massachusetts law at least in a "gestalt" sense. A landowner is generally familiar with the requirements of the law of the state where the land is situated and here would not expect to be required to take special precautions because an employee of an independent contractor was on the land. If *Barrett* is not explained with reference to the fairness problem, the resulting rule of choice of law would be that when a New Hampshire resident is injured in a nonrecovery state by a defendant from a nonrecovery state, recovery will be denied. Denial of recovery under these circumstances is, as we will see, clearly a "minority view."

The fact that the *Barrett* decision was rendered by the first circuit rather than by the New Hampshire Supreme Court also militates in favor of a narrow rule of choice of law. Therefore, the rule of choice of law resulting from *Barrett* will be framed with reference to the fairness consideration. With that understanding, the New Hampshire rules of choice of law in tort are as follows:

(1) When New Hampshire parties are involved in an accident

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192. 450 F.2d 1146 (1st Cir. 1971).
193. There were no New Hampshire cases recognizing such an expanded duty, and the first circuit, sitting as a New Hampshire state court, was understandably reluctant to find that it existed under New Hampshire law. Holding that Massachusetts law applied on this issue would avoid the necessity of its making such a finding.
in another state, New Hampshire law applies.\textsuperscript{194}

(2) When parties from a nonrecovery state are involved in an accident in New Hampshire, New Hampshire law, allowing recovery, applies.\textsuperscript{195}

(3) When a plaintiff from a recovery state is injured in New Hampshire by a New Hampshire defendant and New Hampshire law does not allow recovery, New Hampshire law applies.\textsuperscript{196}

(4) When a New Hampshire plaintiff is injured in New Hampshire because of an act done elsewhere that created a foreseeable risk of harm in New Hampshire, New Hampshire law, allowing recovery, applies.\textsuperscript{197}

(5) When a New Hampshire plaintiff is injured in a nonrecovery state by a defendant from a nonrecovery state and the defendant’s conduct may have been shaped with reference to the law of that state, the law of the defendant’s state applies on the question of standard of care.\textsuperscript{198}

\textbf{H. New Jersey}

Like California, New Jersey follows interest analysis without any qualification. Cases involving interstate accidents, decided by the state and federal courts in New Jersey, appear to be in congruence. When New Jersey parties were involved in an accident in another state, New Jersey law—which in the cases presented allowed recovery—applied.\textsuperscript{199} By the same token, recovery was allowed when a plaintiff and a defendant from different recovery states were involved in an accident in a nonrecovery state,\textsuperscript{200} and when two parties from a recovery state were involved in an accident in New Jersey, the law of which did not allow

\textsuperscript{194} See note 183 supra.
\textsuperscript{195} See notes 182-86 supra and accompanying text.
\textsuperscript{198} See notes 192-93 supra and accompanying text.
recovery on the point in issue. These holdings lead to two rules of choice of law: (1) when New Jersey parties are involved in an accident in another state, New Jersey law applies; (2) when two parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed.

In White v. Smith, a federal court in New Jersey was faced with the situation of a New Jersey accident involving Pennsylvania plaintiffs who were seeking to recover against the New York owner of a rented automobile. Vicarious liability would be imposed against the owner under the New York law, but it would not be imposed under either New Jersey or Pennsylvania law. Finding that the imposition of vicarious liability under New York law represented an admonitory policy that New York would be interested in applying to all New York automobile rentals, the court held that only New York was interested in applying its law on this point. The court found that the case presented a false conflict and applied New York law. On the other hand, in Henry v. Richardson-Merrell, Inc., thalidomide had been manufactured in New Jersey and tested in New Jersey as well as in forty-one other states. The third circuit held that this fact, standing alone, did not give New Jersey an interest in applying its tort law in a suit to recover damages for birth defects caused by ingestion of thalidomide. Plaintiffs from Quebec brought the suit on the theory that the drug was inherently defective, not that a defective batch had been manufactured in New Jersey. These cases illustrate the rule of choice of law, explicit in White, and

203. Id. at 136-37.
204. If an admonitory policy did not exist, it would present the "unprovided-for" case.
205. 508 F.2d 28 (3rd Cir. 1975).
206. The question arose in the context of determining whether the suit was barred by the Quebec statute of limitations. Although New Jersey does not have a borrowing statute, the New Jersey Supreme Court has held that if suit is barred by the statute of limitations of the state whose substantive law applies, it will be barred in New Jersey. Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973). If New Jersey substantive law would apply on any of the issues in the case, therefore, the suit would not be barred unless the New Jersey statute of limitations had expired, which it had not here. Since Quebec substantive law applied, however, the suit was barred by the Quebec statute of limitations.
following negatively from Henry, that when the law of the state in which an act or omission occurred reflects an admonitory policy, the defendant will be held liable when that act causes harm in other states.

In a suit against a New Jersey defendant for the wrongful death of a Pennsylvania victim as a result of an accident in New Jersey, a federal court in New Jersey applied New Jersey law, limiting survival recovery to pain and suffering from the time of injury to the time of death, rather than Pennsylvania law, allowing additional recovery for impaired earning capacity beyond that recoverable in the wrongful death action. The rule of choice of law in that case is that when a plaintiff from a recovery state is injured in New Jersey by a New Jersey defendant, New Jersey law, denying recovery, applies. In Van Dyke v. Bovyes, a New Jersey appellate court applied the New York rule imposing vicarious liability in favor of a New Jersey plaintiff injured in New Jersey in a vehicle owned by a New York defendant. This is the "unprovided-for" case with the accident occurring in the plaintiff's home state. The rule of choice of law emerging from this case is that when a plaintiff from a nonliability state is injured by a defendant from a liability state, the defendant will be held liable irrespective of where the accident occurs.

Finally, in 1958 the New Jersey Supreme Court promulgated the now "universal" rule of choice of law: tort liability of an employer with respect to an employee who is covered by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.

The New Jersey rules of choice of law in tort, based on the decisions of the New Jersey Supreme Court, the New Jersey appellate courts, and the New Jersey federal courts, all of which are in congruence, are as follows:
(1) When New Jersey parties are involved in an accident in another state, New Jersey law applies.

209. See note 30 supra.
211. See note 199 supra.
(2) When parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed.212
(3) When the law of the state in which an act or omission occurred reflects an admonitory policy, the defendant will be held liable when that act causes harm in another state.213
(4) When a plaintiff from a recovery state is injured in New Jersey by a New Jersey defendant, and New Jersey law does not allow recovery, New Jersey law applies.214
(5) When a plaintiff from a nonrecovery state is injured by a defendant from a recovery state, recovery will be allowed.215
(6) The tort liability of an employer to an employee who is covered by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.216

I. Oregon

The Oregon Supreme Court has, in three cases, dealt directly with choice of law in torts. In Casey v. Manson Construction & Engineering Co.,217 decided in 1967, the court abandoned the place of the wrong rule and adopted in its stead the Restatement (Second)'s "state of the most significant relationship" approach. In Casey, an Oregon victim was injured in Washington by the negligence of a Washington defendant. The court applied Washington law barring an action for loss of consortium, rather than Oregon law allowing such an action. In terms of interest analysis, Casey presented a true conflict. The Oregon Supreme Court thus became one of the few courts in recent years to follow a "modern approach" and to fail to apply its own law in a tort case that presented a true conflict.218 In DeFoor v. Lematta,219 decided in 1968, the Oregon Supreme Court applied the "state of the most significant relationship" approach to hold that Oregon law, which limited liability for wrongful death, governed a suit between Ore-

218. See notes 288-300 infra and accompanying text.
Idaho parties arising out of a fatal accident in a state that did not limit recovery. In dealing with the unprovided-for case, the Oregon Supreme Court in the 1973 case of Erwin v. Thomas\(^{220}\) qualified Oregon’s adherence to the “state of the most significant relationship” approach.\(^{221}\) In *Erwin*, a Washington resident was injured in Washington due to the negligence of an Oregon defendant. His wife brought suit in Oregon to recover for loss of consortium, an action barred by Washington law but allowed by Oregon law. The court held that since neither state was interested in applying its own law on the point in issue, Oregon would apply its own law as the law of the forum.

The rules of choice of law that emerge from these cases illustrate the operation of the principles of binding precedent and stare decisis. The authority of *Casey* may have been undercut by *Erwin*, and there may be a question as to whether the Oregon Supreme Court still adheres to the “state of the most significant relationship” approach. Nevertheless, the *holding* of *Casey*, which must be translated into a rule of choice of law for present purposes, remains unimpaired and must be followed by the lower courts and the federal courts in Oregon until overruled by the Oregon Supreme Court. The rule of choice of law in *Casey* is that when an Oregon plaintiff is injured by a defendant from a nonrecovery state in the latter’s home state, the law of the defendant’s state, denying recovery, applies. Of course, *Casey*, like any other precedent, can be distinguished with reference to its facts. The accident victim in *Casey* had been working in Washington for some weeks when the accident occurred, so the case might not be controlling if the Oregon plaintiff’s contact with the accident state was more “transitory.”\(^{222}\) Yet unless and until it is overruled by the Oregon Supreme Court, *Casey* stands for the proposition that when an Oregon plaintiff is injured by a defendant from a nonrecovery state in the latter’s home state, recovery will be denied. *DeFoor* clearly establishes the rule of choice of law that when Oregon parties are involved in an accident in another state,

\(^{220}\) 264 Or. 454, 506 P.2d 494 (1973).

\(^{221}\) The ninth circuit felt that Oregon had abandoned the “state of the most significant relationship” approach in the *Erwin* case. See Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 611-12 (9th Cir. 1975).

\(^{222}\) An example of such a situation would be when the plaintiff was injured while driving through that state.
Oregon law applies. Erwin, based on the forum’s application of its own law in the “unprovided-for” case, gives rise to the rule of choice of law that when an Oregon defendant is sued in Oregon, and Oregon law imposes liability, the defendant will be held liable.\(^\text{223}\)

In \textit{Davis v. Morrison-Knudsen Co.}\(^\text{224}\), a federal court in Oregon was faced with the situation in which the employee bringing a tort action against the employer worked both in Oregon and Idaho. In these circumstances the employer could elect to come under the Oregon worker’s compensation law, but he elected against such coverage, so that under Oregon law a tort action could still be maintained for work-related injuries. The employer did elect to come under the Idaho worker’s compensation law. The injury occurred in Idaho, and the employee received benefits there. In a tort action in Oregon, the court held that Oregon law applied and allowed the action. Since the employer was subject to the Oregon worker’s compensation law but had elected not to come under it, thereby remaining liable in a tort action, the holding is consistent with the rule of choice of law that the employer’s tort liability to an employee covered by worker’s compensation is determined by the law of the state where the employer has taken out worker’s compensation to cover the particular employee. In \textit{Davis} the rule of choice of law is interpreted quite properly to mean that when the employee works in more than one state and the employer is subject to the worker’s compensation laws of both states, the laws of both states must be consulted to determine the employer’s tort liability. If tort liability exists under the law of one of the states because the employer has rejected worker’s compensation coverage there, that state will allow a tort action against the employer.

\(^{223}\) In \textit{Myers v. Brickwedel}, 259 Or. 457, 486 P.2d 1286 (1971), a California defendant, while in Oregon, engaged in sexual relations with the spouse of a California plaintiff. Actions for criminal conversation had been abolished in California but not in Oregon. The Oregon Supreme Court held that jurisdiction attached in Oregon under its long-arm act, since the wrongful act had occurred there, but expressly reserved decision on the choice-of-law question. Oregon would clearly be interested in applying its law here to allow recovery, in order to implement the admonitory policy reflected in that law; but since the court expressly reserved decision on the choice-of-law question, the case cannot be said to establish a rule of choice of law.

Based on these cases, the Oregon rules of choice of law in torts are as follows:

1. When Oregon parties are involved in an accident in another state, Oregon law applies.\(^{225}\)
2. When an Oregon plaintiff is injured by a defendant from a nonrecovery state in the latter’s home state, recovery will be denied.\(^{226}\)
3. When the defendant is an Oregon resident, Oregon law, allowing recovery, applies irrespective of where the accident occurs or where the plaintiff resides.\(^{227}\)
4. When an employer subject to the worker’s compensation law of Oregon elects not to come under it, and the employee, working in Oregon and in a state where the employer has taken out worker’s compensation to cover that employee, is injured in the latter state, the employee may maintain a tort action against the employer under Oregon law.\(^{228}\)

**J. Pennsylvania**

Pennsylvania is explicitly committed to the “state of the most significant relationship” approach. The establishment of rules of choice of law in tort in Pennsylvania is complicated by the fact that the last case decided by the Pennsylvania Supreme Court was in 1970, and the more recent cases have been those decided by the third circuit and the federal courts in Pennsylvania. When Pennsylvania residents are involved in an accident in another state, Pennsylvania has held that Pennsylvania law applies.\(^{229}\) In other cases, the emphasis has been on the law of the state where the accident occurs. This approach appears to have been mandated by the Pennsylvania Supreme Court’s 1970 decision in *Cipolla v. Shaposka*.\(^{230}\) In that case, a Pennsylvania resident was injured in an accident in Delaware while he was a passenger in an automobile operated by a Delaware driver. The acci-

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\(^{225}\) See *DeFoor v. Lematta*, 249 Or. 116, 437 P.2d 107 (1968).

\(^{226}\) See *Casey v. Manson Constr. & Eng’r Co.* , 247 Or. 274, 428 P.2d 898 (1967).


dent occurred during a trip that began in Delaware and was to terminate in Pennsylvania. Suit was brought in Pennsylvania. In terms of interest analysis, the case, of course, presented a true conflict, as the court recognized, and Pennsylvania would have been justified in applying its own law under an "interest and fairness" test. The court, however, emphasized the lack of factual contacts that the particular accident had with Pennsylvania and held that Delaware law would apply on the issue of guest-host immunity. Pennsylvania, like Oregon, thus joined the few jurisdictions that follow a "modern approach" and fail to apply their own law in a tort case presenting a true conflict. The rule of choice of law that emerges from Cipolla is that when a Pennsylvania plaintiff is injured by a defendant from a nonrecovery state in the latter's home state, recovery will be denied, at least when the particular accident lacked factual contacts with Pennsylvania.

When a Pennsylvania plaintiff is injured in Pennsylvania by an act done elsewhere that foreseeably could cause harm in Pennsylvania, Pennsylvania law, allowing recovery, applies. This is illustrated by the decision of the third circuit in Suchomajcz v. Hummel Chemical Co. Hummel, a New Jersey manufacturer, sold chemicals to Christie, a New Jersey party. It was alleged that Hummel knew that Christie would use the chemicals to manufacture and sell firecracker assembly kits in violation of federal law and a federal court order forbidding him from shipping the kits into interstate commerce. A minor from Pennsylvania ordered the kit in response to a magazine advertisement. The child left the partially assembled kit in a park. Two days later, someone threw a match into the kit, which exploded. Two children were killed.

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232. For discussion of Cipolla, see Sedler, supra note 231, at 394-96, 402-03.

233. In Cavallaro v. Williams, 530 F.2d 473 (3d Cir. 1975), the third circuit, sitting as a Pennsylvania state court, held that when a Pennsylvania plaintiff and a New York defendant were involved in an accident in Maryland, Maryland law applied on the standard of care. The parties did not object to the application of Maryland law on this point, and the matter in question related more to a "rule of the road" than to substantive liability.

234. 524 F.2d 19 (3d Cir. 1975).
and four injured. Describing Hummel as "reverse Cipolla," the court held that Pennsylvania law, imposing liability on Hummel, applied. The court said that the Cipolla principle was that in the case of a true conflict, the law of the state where the accident occurred applies.

A year earlier, however, in Zurzola v. General Motors Corp., a divided third circuit did not apply Pennsylvania law in a case in which Pennsylvania had a real interest in doing so notwithstanding the fact that the accident occurred in Pennsylvania. New Jersey spouses were involved in an accident in Pennsylvania with a Pennsylvania driver. After being sued by the wife, the Pennsylvania driver sought to join the admittedly negligent husband as a third-party defendant in order to obtain contribution. Since New Jersey recognized spousal immunity, the husband would not be liable for contribution to the other driver. Pennsylvania had a real interest in applying its law on the question of contribution in order to allow contribution to a Pennsylvania driver involved in an accident there, and under the Cipolla rationale it would seem that Pennsylvania law should have applied. The majority, however, erroneously likened Zurzola to a case in which Pennsylvania had applied its own law denying recovery on grounds of spousal immunity when Pennsylvania spouses were involved in an accident in a nonimmunity state. The court held that New Jersey was the state of the most significant relationship on the issue of spousal immunity-contribution. While Zurzola is questionable and might very well be disapproved by the Pennsylvania Supreme Court, it establishes a rule of choice of law in the same manner as would a decision of a state intermediate appellate court: when the defendant is immune from contribution under the law of the marital domicile, contribution between defendant-spouse and the other defendant will not be allowed in a suit by the defendant's spouse against the other driver.

Pennsylvania also has held that New Jersey law applies when a claim for contribution is made by a Pennsylvania tortfeasor

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235. 503 F.2d 403 (3d Cir. 1974).
238. In the same situation, Wisconsin has held that its law allowing contribution applies in favor of the Wisconsin defendant. See note 260 infra.
against a New Jersey employer who paid worker’s compensation to the employee injured in a Pennsylvania accident. The employee was covered under New Jersey law, which immunized the employer against liability for contribution. This case presents another example of the rule of choice of law that the tort liability of an employer to an employee covered by worker’s compensation is determined by the law of the state where the employer has taken out worker’s compensation to cover the particular employee.

Based on these cases, the Pennsylvania rules of choice of law in tort are as follows:

1. When Pennsylvania parties are involved in an accident in another state, Pennsylvania law applies.
2. When a Pennsylvania plaintiff is injured by a defendant from a non-recovery state in the latter’s home state, the law of the defendant’s state, denying recovery, applies, at least when the transaction giving rise to the accident was not factually connected with Pennsylvania.
3. When a Pennsylvania plaintiff is injured in Pennsylvania because of an act done elsewhere that created a foreseeable risk of harm in Pennsylvania, Pennsylvania law, allowing recovery, applies.
4. When the defendant is immune from contribution under the law of the marital domicile, contribution will not be allowed in a suit by the defendant’s spouse against the other party to the accident.
5. The tort liability of an employer to a third party with respect to an employee covered by worker’s compensation is determined by the law of the state in which the employer has taken out worker’s compensation to cover the particular employee.

K. Rhode Island

Rhode Island, explicitly committed to Leflar’s choice-
influencing considerations, in practice makes the choice-of-law decision with reference to the policies and interests of the involved states. When Rhode Island parties are involved in an accident elsewhere, in accordance with the "universal" rule of choice of law, Rhode Island law applies. In *Turcotte v. Ford Motor Co.*, the first circuit held that when a Rhode Island victim was killed in Massachusetts as a result of a defect in a vehicle purchased in Massachusetts, Rhode Island law, imposing strict liability and allowing unlimited recovery for wrongful death, applied. Thus the rule of choice of law established by this case is that when a Rhode Island plaintiff is involved in an accident in a nonrecovery state, Rhode Island law, allowing recovery, applies, as long as allowing recovery produces no unfairness to the defendant.

In *Labree v. Major*, the Rhode Island Supreme Court was presented with the "unprovided-for" case. A plaintiff from Massachusetts, a guest-statute state, was injured in Massachusetts while a passenger in the automobile of a defendant from Rhode Island, a recovery state. Unlike the Oregon court in *Erwin*, which based its decision on forum preference, the Rhode Island Supreme Court in *Labree* based its decision on the fact that the defendant was from a recovery state. The resulting choice-of-law rule is that when the defendant is from a recovery state, recovery will be allowed irrespective of where the plaintiff resides or where the accident occurred.

In *Gravina v. Brunswick Corp.*, suit was brought in a Rhode Island federal court by a Rhode Island plaintiff to recover for invasion of privacy resulting from the unauthorized use of her name and photograph in an advertising flyer. The defendant had its principal place of business in Illinois, and the flyer was sent from Illinois. Since the Rhode Island Supreme Court had never

247. 494 F.2d 173 (1st Cir. 1974).
248. Ford had its principal place of business in Michigan, and the Michigan law relating to wrongful death recovery was the same as Rhode Island law. Ford argued for the application of Massachusetts law.
overruled an older case that refused to recognize the cause of action for invasion of privacy, the court was bound to hold that recovery would not be allowed under Rhode Island law. Illinois law, however, would have allowed recovery. The court emphasized the admonitory policy reflected in Illinois law that allowed such an action. While application of Illinois law in this case would not advance any compensatory interest of Illinois, it would advance this admonitory policy. By holding that Illinois law applied, the court illustrated the rule of choice of law that when the law of the state in which the defendant acted allows recovery in order to implement an admonitory policy, the law of the state where the act occurred will be applied to allow recovery for harm occurring elsewhere.

Finally, Rhode Island has also held that the tort liability of an employer to an employee who is covered by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.251

The Rhode Island rules of choice of law in tort are as follows:

(1) When Rhode Island parties are involved in an accident in another state, Rhode Island law applies.252
(2) When a Rhode Island plaintiff is involved in an accident in a nonrecovery state, Rhode Island law, allowing recovery, applies, assuming that allowing recovery produces no unfairness to the defendant.253
(3) When the defendant is from a recovery state, recovery will be allowed irrespective of where the plaintiff resides or where the accident occurred.254
(4) When the law of the state in which an act or omission occurred reflects an admonitory policy, the defendant will be held liable when that act causes harm in another state.255
(5) The tort liability of an employer to an employee who is covered by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.

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state where the employer has taken out worker's compensation to cover the particular employee.\textsuperscript{254}

\textbf{L. Wisconsin}

Most of the fact-law patterns arising in conflicts torts cases have been before the Wisconsin Supreme Court and the federal courts in Wisconsin. Although Wisconsin explicitly follows Leflar's choice-influencing considerations, in practice the courts have consistently applied Wisconsin law, except for the tort liability of an employer to an employee covered by worker's compensation.

As is true everywhere else, when Wisconsin parties are involved in an accident in another state, Wisconsin law applies.\textsuperscript{255} In \textit{Conklin v. Horner},\textsuperscript{256} residents of Illinois, a guest statute state, were involved in an accident in Wisconsin, a recovery state. The Wisconsin Supreme Court held that Wisconsin law applied. Similarly, in \textit{Zelinger v. State Sand & Gravel Co.},\textsuperscript{257} Wisconsin law, allowing contribution, was applied in favor of a Wisconsin defendant sued by an Illinois spouse as a result of a Wisconsin accident, even though the law of Illinois, which recognized spousal immunity, would not have allowed contribution against the negligent spouse.\textsuperscript{258}

Wisconsin limits the amount of damages recoverable for wrongful death, and Wisconsin federal courts have held that Wisconsin law applies whenever a Wisconsin defendant is sued, irrespective of whether the fatal accident occurred in Wisconsin.\textsuperscript{259}

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\textsuperscript{256} See \textit{Busby v. Perini Corp.}, 110 R.I. 49, 290 A.2d 210 (1972).

\textsuperscript{257} Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). In the pre-\textit{Babcock} case of \textit{Haumschild v. Continental Cas. Co.}, 7 Wis. 2d 130, 95 N.W.2d 814 (1959), the court, fashioning a "rule" that spousal immunity was "governed" by the law of the marital domicile, held that Wisconsin law allowing recovery applied when two Wisconsin spouses were involved in an accident in a spousal immunity state.

\textsuperscript{258} 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

\textsuperscript{259} 38 Wis. 2d 98, 156 N.W.2d 466 (1968).

\textsuperscript{259} See also Korth v. Mueller, 310 F. Supp. 878 (W.D. Wis. 1970); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). These cases effectively overrule \textit{Haynie v. Hanson}, 16 Wis. 2d 299, 114 N.W.2d 443 (1962), in which the court, following the "Haumschild rule," held that the question was "governed" by the law of the marital domicile.

or in the victim's home state.\textsuperscript{282} It is highly unlikely that a case presenting the latter fact-law pattern—that of a recovery state victim killed by a nonrecovery state defendant in the victim's home state—would be brought in the defendant's home state. The suit presumably could be brought in the victim's home state under that state's long-arm statute. Whatever the reason, a case was brought in a Wisconsin federal court, and faced with this true conflict, the court not surprisingly advanced Wisconsin policy and interest and applied Wisconsin law.\textsuperscript{283}

In \textit{Slawek v. Stroh},\textsuperscript{284} suit was brought in Wisconsin by the putative father, a resident of Pennsylvania, to obtain a declaration of paternity with respect to a child from Wisconsin. The mother, a Wisconsin resident, counterclaimed to recover for seduction, an action still recognized under Wisconsin law although abolished in Pennsylvania and in New Jersey where the sexual acts took place. The court held that Wisconsin law applied. Since the harmful effects of the seduction would be felt in Wisconsin, where the plaintiff resided, the case illustrates the operation of the rule of choice of law that when a forum resident is injured in the forum because of an act done elsewhere that creates a foreseeable risk of harm in the forum, the forum law, allowing recovery, applies. When presented with the "unprovided-for" case, in which a Wisconsin defendant injured a nonrecovery state plaintiff in a nonrecovery state, Wisconsin federal courts have held that Wisconsin law, allowing recovery, applies.\textsuperscript{285} Finally, as to the question of the liability of a coemployee for work-related injuries, the Wisconsin Supreme Court, in \textit{Hunker v. Royal Indemnity Co.},\textsuperscript{286} applied by analogy the rule of choice of law that holds that the tort liability of an employer with respect to an employee covered by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation covering that particular employee. In \textit{Hunker}, an Ohio plaintiff was injured in Wisconsin while riding in an automobile driven by an Ohio coemployee. The plaintiff received worker's compensation in Ohio, and under Ohio law the tort immunity also extended

\textsuperscript{263.} \textit{Id.}; Satchwill \textit{v. Vollrath Co.}, 293 F. Supp. 533 (E.D. Wis. 1968).
\textsuperscript{264.} 62 Wis. 2d 295, 215 N.W.2d 9 (1974).
\textsuperscript{265.} Decker \textit{v. Fox River Tractor Co.}, 324 F. Supp. 1089 (E.D. Wis. 1971); \textit{Angel v. Ray}, 285 F. Supp. 64 (E.D. Wis. 1968).
\textsuperscript{266.} 57 Wis. 2d 588, 204 N.W.2d 897 (1973).
to suits against coemployees for work-related injuries. Under Wisconsin law immunity did not extend to coemployees. Although Wisconsin sees a real interest in allowing recovery to a nonresident injured within its borders, this interest was inapplicable in the worker's compensation context. Wisconsin's compensatory policy would be satisfied by the injured worker's ability to recover under the Ohio statute. Therefore, the law of the state where the particular employee was covered by worker's compensation controlled. The rule of choice of law in Wisconsin on this point should be stated to reflect the fact that it includes the liability of a coemployee for work-related injuries.

The Wisconsin rules of choice of law in tort are as follows:
(1) When Wisconsin parties are involved in an accident in another state, Wisconsin law applies.
(2) When parties from a nonrecovery state are involved in an accident in Wisconsin, Wisconsin law, allowing recovery, applies.
(3) When a Wisconsin defendant is sued in Wisconsin to recover damages resulting from a Wisconsin accident, Wisconsin law, allowing contribution against a codefendant, applies, even though the law of the codefendant's home state would not allow contribution.
(4) When a plaintiff from a recovery state is injured by a Wisconsin defendant in an accident occurring in Wisconsin or elsewhere, Wisconsin law, denying recovery, applies.
(5) When a Wisconsin resident is injured in Wisconsin because of an act done elsewhere that creates a foreseeable risk of harm in Wisconsin, Wisconsin law, allowing recovery, applies.
(6) When a Wisconsin defendant injures a plaintiff from a nonrecovery state in a nonrecovery state, Wisconsin law, allowing recovery, applies.

268. Presumably the other states would agree on this point.
269. See Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 406 (1965).
271. See Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); note 260 supra.
(7) The tort liability of an employer to an employee covered by worker's compensation, as well as the liability of a coemployee for work-related injuries, is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee. 273

IV. RULES OF CHOICE OF LAW IN TORTS: THE PERSPECTIVE OF JUDICIAL METHOD

An analysis of the decisions in conflicts torts cases that have arisen in the courts of the states that have abandoned the traditional approach to choice of law leads to the conclusion that these courts have reached fairly uniform solutions. When the courts have differed, the differences are sufficiently clear as to indicate "majority" and "minority" views. In this section of the article, I will set forth what may be called the general rules of choice of law in the torts area. These are the rules that have emerged from the decisions of the courts in the fourteen states chosen for the state-by-state analysis. 274 They are also supported by decisions in the courts of the other states that have abandoned the traditional approach, and reference to these decisions will be made as well. The establishment of these general rules of choice of law in the torts area clearly demonstrates that judicial method can be applied to the conflict of laws and that when it is, rules, developed on a case-by-case basis through the normal workings of binding precedent and stare decisis, will exist in conflicts as they do in other areas of law. There may be disagreement with the particular rules or with the approach to choice of law under which they have been formulated. 275 The fact that the rules do exist, however, cogently demonstrates that the alternative is not categorical choice-of-law rules versus no rules, but rather categorical choice-of-law rules versus rules of choice of law. Let us now turn to the rules of choice of law in torts that have emerged from the decisions of the courts in actual cases.

275. See Hunker v. Royal Indemnity Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973).
276. With regard to New York, I will be referring both to the Neumeier rules and to the holdings in the actual cases.
277. Principally, this approach has been in terms of the policies and interests of the involved states and the forum's advancement of its own policies and interests.
One: When two residents of the forum are involved in an accident in another state, the law of the forum applies.

This is the most "universal" rule of choice of law and is followed by all of the states that have abandoned the traditional approach. When both parties are forum residents, the interest


The states not included in the state-by-state analysis: Alaska, see Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Arizona, see Moore v. Montes, 22 Ariz. App. 562, 529 P.2d 716 (1974); Colorado, see First Nat'l Bank v. Rostek, 514 P.2d 314 (Colo. 1973); Sabell v. Pacific Intermountain Express Co., 536 P.2d 1160 (Colo. Ct. App. 1975); District of Columbia, see Edmunds v. Edmunds, 355 F. Supp. 287 (D.C. 1972); Louisiana, see Jaggers v. Royal Indemnity Co., 276 So. 2d 309 (La. 1973); Maine, see Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Massachusetts, see Penoski v. Penoski, 358 N.E.2d 416 (Mass. 1976); North Dakota, see Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Ohio, see Moats v. Metropolitan Bank of Lima, 40 Ohio St. 2d 47, 319 N.E.2d 603 (1974); Fox
of the forum is the same irrespective of where the accident occurs since the social and economic consequences of the accident and of allowing or denying recovery will be felt in the forum. When the forum is a recovery state, in interest analysis terms the case clearly presents a false conflict because the state where the accident occurs would have no interest in applying its law to deny recovery. When the forum is a nonrecovery state, it can be contended that the state where the accident occurs does have an interest in allowing recovery to a nonresident injured there. This interest, however, is not important to the forum, which will apply its own law to advance its own policy and interest.

Two: When two parties from a recovery state, without regard to forum residence, are involved in an accident in a nonrecovery state, recovery will be allowed.

This rule of choice of law applies to the situation in which two parties from different recovery states are involved in an accident in a nonrecovery state. The rule also applies when two parties from the same recovery state are involved in an accident in a nonrecovery state and suit is brought in the nonrecovery state or in a disinterested third state. In terms of interest analysis, this case presents the false conflict, since the plaintiff's home state is interested in applying its law allowing recovery while the accident state generally has no interest in applying its law denying recovery in favor of a nonresident defendant.


282. It would have an interest if its law barring recovery represented an admonitory policy, but no cases involving this question have arisen.
Three: When two parties from a nonrecovery 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.283

When parties from a nonrecovery state are involved in an accident in a recovery state, the plaintiff will most likely bring suit in the recovery state, obtaining jurisdiction under its long-arm statute. In my own view, discussed more fully elsewhere,284 the state of injury has no real interest in applying its own law since the social and economic consequences of the accident will be felt in the victim’s home state. The majority of the courts passing on this question have seen it differently. These decisions may be explained simply in terms of the forum’s preference for its own “better law” in this situation.285 It may be anticipated that the courts will continue to differ on the proper solution in these cases.

Four: When a forum resident suffers injury in the forum either because of an act done there or because of an act done elsewhere that creates a foreseeable risk of harm in the forum, the forum will apply its own law allowing recovery.

Since the forum has a real interest in applying its law allowing recovery in favor of its resident injured in the forum, it will apply its own law, not only when the act causing injury occurs there,286 but also when an act done elsewhere creates a foreseeable

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283. Recovery was allowed in the following states: Kentucky, see Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Minnesota, see Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Missouri, see Griggs v. Riley, 489 S.W.2d 469 (Mo. Ct. App. 1973); New Hampshire, see Gagne v. Berry, 112 N.H. 125, 290 A.2d 624 (1972); Wisconsin, see Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

Recovery was denied in the following states: Mississippi, see Vick v. Cochran, 316 So. 2d 242 (Miss. 1975); New York (the second Neumeier rule is applicable if the parties are from the same state; if they are from different states, recovery probably would be allowed under the third Neumeier rule); North Dakota, see Mager v. Mager, 197 N.W.2d 626 (N.D. 1972).

284. See Sedler, supra note 141, at 382-83.

285. This is brought out most clearly in cases like Conklin and Gagne in which the choice-influencing consideration of the “better law” is explicitly discussed.

286. There are no cases directly dealing with this question, probably because the result would be so obvious that no one would bother to litigate it. The
risk of harm in the forum. Since it is foreseeable that an act done elsewhere can create a risk of harm in the forum state, there is no unfairness in requiring the actor to anticipate the application of the forum's law, even when the act takes place in a nonrecovery state.

Five: When a plaintiff from a recovery state is injured by a defendant from a nonrecovery state in the defendant's home state, the courts are divided, with the majority view appearing to be that the forum should apply its own law in the absence of unfairness to the defendant.

This situation, of course, presents the true conflict. The plaintiff's home state is interested in applying its own law allowing its resident to recover, while the defendant's home state is equally interested in applying its own law to protect the defendant and the insurer. Recovery was denied in Oregon in *Casey v. Manson Construction & Engineering Co.*, and in Pennsylvania in *Cipolla v. Shaposka*, both of which are comparatively "older" cases as choice-of-law cases go. In Kentucky, recovery was allowed in *Foster v. Leggett*, but in that case the transaction giving rise to the accident had extensive factual contacts with Kentucky. In New York the matter is confused because of

cases involving the question of whether a forum defendant is entitled to contribution from a nonresident under the forum's law are analogous, however. In that situation, Wisconsin and Ohio have applied their own law, but Pennsylvania has not. See *Zurzola v. General Motors Corp.*, 503 F.2d 403 (3d Cir. 1974); *Saalfrank v. O'Daniel*, 390 F. Supp. 45 (N.D. Ohio 1975); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968).


290. In *Kliner v. Weirton Steel Co.*, 381 F. Supp. 275 (N.D. Ohio 1974), the court held that when an Ohio victim was killed due to the negligence of a West Virginia defendant in West Virginia, the law of West Virginia, limiting the damages recoverable for wrongful death, applied.

291. 484 S.W.2d 827 (Ky. 1972).
the seeming inconsistency between the second Neumeier rule and the holding in Miller v. Miller,\textsuperscript{292} which the second circuit "reconciled" in Rosenthal v. Warren\textsuperscript{293} by carving out a "public policy" exception to Neumeier in wrongful death cases.\textsuperscript{294} Minnesota has applied Minnesota law in this situation without regard to Minnesota's factual contacts with the transaction giving rise to the accident,\textsuperscript{295} and the first circuit has held that Rhode Island would also apply its law.\textsuperscript{296} Under an "interest and fairness" test, the forum should apply its own law without regard to factual contacts, unless the application of its law would be unfair to the other party. Barrett v. Foster Grant Co.\textsuperscript{297} may illustrate the unfairness of the application of forum law. Since it will frequently be possible to obtain jurisdiction in the plaintiff's home state when a recovery state plaintiff is injured by a nonrecovery state defendant in the defendant's home state,\textsuperscript{298} litigation on this point is likely to continue. To the extent that the courts will forthrightly apply interest analysis to conflicts problems, the "interest and fairness" test will ordinarily lead to the application of the forum's law in this situation, and recovery will be allowed.

Six: When a plaintiff from a recovery state is injured by a defendant from a nonrecovery state, and suit is brought in the defendant's home state, the defendant's state will apply its own law, denying recovery.

When jurisdiction cannot be obtained in the plaintiff's home state, and the suit is brought in the defendant's home state, the defendant's state will apply its own law, since it has a real interest in doing so to protect its resident defendant and insurer. Practically all of the cases involve the situation in which the

\textsuperscript{292} 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).
\textsuperscript{293} 475 F.2d 438 (2d Cir. 1973).
\textsuperscript{294} See notes 65-67 supra and accompanying text.
\textsuperscript{295} See notes 152-53 supra and accompanying text.
\textsuperscript{296} See Turcotte v. Ford Motor Co., 433 S.W.2d 109 (Ky. 1968).
\textsuperscript{297} 450 F.2d 1146 (1st Cir. 1971).
\textsuperscript{298} This will be so either because the defendant enterprise is doing business in the forum or because the defendant may otherwise be subject to suit there, such as in New York under Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). After Shaffer v. Heitner, 433 U.S. 186 (1977), it is presumably no longer possible for the parties to arrange for personal service there, as was done in Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970). As to the status of Seider jurisdiction after Shaffer, see Sedler, Judicial Jurisdiction and Choice of Law in Interstate Accident Cases, 1978 WASH. U.L.Q. ___.
accident occurs in the defendant’s home state. Yet the interest of the forum in protecting its resident defendant and insurer is no different when the accident occurs in the plaintiff’s home state. In fact, in the one case in which the accident occurred in the plaintiff’s home state, the defendant’s home state applied its own law.

Seven: When the law of the state in which an act or omission occurs reflects an admonitory policy, the defendant will be held liable if that act causes harm in another state.

In this situation, the state in which the act or omission occurs has an interest in applying its own law in order to implement the admonitory policy reflected in that law. Ordinarily the state in which the harm occurs would have no interest in insulating the actor from liability, since the actor will usually be a resident of the state where the act or omission occurs. Such an interest could exist if the actor were a resident of the forum and the forum’s law did not impose liability. Cases presenting this situation, however, have not arisen. In the cases that have arisen, the courts have always imposed liability by applying the law of the state in which the act occurs.

Eight: When a plaintiff from a nonrecovery state is involved in an accident with a defendant from a recovery state, recovery will generally be allowed irrespective of where the accident occurs.

This rule of choice of law is stated in this way because, with the exception of Neumeier, the courts have allowed recovery in this situation even when the accident occurs in a nonrecovery state. It is generally agreed that recovery will be allowed when the accident occurs in a recovery state. In cases arising in Minne-

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302. Recovery is allowed in this situation under the third Neumeier rule.
sota, 303 New Jersey, 304 Oregon, 305 Rhode Island, 306 Washington, 307 and Wisconsin, 308 recovery has also been allowed when the accident occurred in a nonrecovery state. California has also indicated that, regardless of where the accident occurred, it would allow recovery whenever a California defendant is involved. 309 Since New York appears to be the only exception to this trend, 310 it seems fair to state that the general rule of choice of law is in favor of allowing recovery irrespective of where the accident occurred.

Nine: The tort liability of an employer to an employee who is covered by worker's compensation is determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee.

See also Hurtado v. Superior Court of Sacramento County, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); State ex rel. Broglin v. Nangle, 510 S.W.2d 689 (Mo. 1974).

303. See Allen v. Gannaway, 294 Minn. 1, 199 N.W.2d 424 (1972); Bolgrean v. Stitch, 293 Minn. 8, 196 N.W.2d 442 (1972).


307. See Johnson v. Spider Staging Co., 87 Wash. 2d 577, 555 P.2d 997 (1976) (when a Kansas resident was killed in Kansas due to the negligence of a Washington defendant, Washington law, allowing unlimited recovery for wrongful death, applied).

308. See note 262 supra.


310. In Patch v. Stanley Works, 448 F.2d 483 (2d Cir. 1971), a New Hampshire victim was killed in New Hampshire due to the negligence of a Connecticut defendant. The second circuit said that if the case had been brought in New Hampshire, New Hampshire would apply its own law, limiting recovery for wrongful death, rather than Connecticut law, allowing unlimited recovery. The question of what New Hampshire would do arose indirectly, since the second circuit was sitting as a Connecticut state court, and Connecticut would apply the law of New Hampshire as the law of the place of the wrong. The plaintiff argued that Connecticut would look to the "whole law" of New Hampshire, and it was in this context that the court concluded that New Hampshire would apply its own law on this question. Id. at 492.
This rule of choice of law is as “universal” as the rule that the state of the parties’ common residence will apply its own law to an accident involving those parties in another state. It illustrates the situation in which the courts have agreed that only one state has a real interest in applying its law on the point in issue. The policy of all states relating to worker’s compensation recovery and considerations of fairness to the employer are best served by looking to the law of the state in which the employer has taken out worker’s compensation to cover the particular employee.

These nine rules of choice of law in tort, or more accurately, rules of choice-of-law situations, are the product of the application of judicial method to the conflict of laws. They result from the decisions of the courts in actual cases and have evolved through the normal workings of binding precedent and stare decisis. The conflict of laws is said to be an area in which there is “extreme disagreement among both judges and commentators not simply over the details of choice-of-law policy but over the most fundamental principles of the subject.” When, however, the subject is approached with reference to the results reached in actual cases by the courts that have abandoned the traditional approach, rather than with reference to the explanation the courts give for their decisions or the particular methodology they are purportedly following, it is clear that there is relatively little disagreement among the courts over the proper solution to the kinds of conflicts torts problems that arise in practice.

In actuality, there is disagreement over only three of these nine rules of choice of law in tort. According to Rule Three, when two parties from a nonrecovery state are involved in an accident in a recovery state, the recovery state courts differ over whether to apply their own law or to defer to the policy of the parties’


312. R. Cramton, D. Currie, & H. Kay, supra note 1, at 7.
home state. According to Rule Five, when a plaintiff from a recovery state is involved in an accident with a defendant from a nonrecovery state in the defendant's home state and suit is brought in the plaintiff's home state, the majority of courts have employed an "interest and fairness" test and have applied their own law as long as it produces no unfairness to the defendant, as it usually does not. Although some courts disagree, the clear trend appears to be in favor of finding liability in this situation. When a plaintiff from a nonrecovery state is involved in an accident with a defendant from a recovery state, recovery will always be allowed when the accident occurs in the recovery state; and, with the exception of New York, recovery has been allowed when the accident occurs in the nonrecovery state as well. Far more significant than the disagreement over three of the rules is the fact that there has been general agreement among the courts on the other six rules of choice of law.

V. Conclusion

Judicial method, once it is properly understood and applied to the process of deciding conflicts cases, leads to rules of choice of law just as it does in other areas of law. It is these rules of choice of law that will furnish a guide to the resolution of future cases, and to that extent choice of law becomes more "certain and predictable." Most importantly, however, the rules of choice of law that result, unlike categorical choice-of-law rules, are based on the decisions of the courts in actual cases—decisions that were rendered with reference to considerations of policy and fairness to the parties and decisions that have been remarkably similar on the part of all courts called upon to make them. We do not need choice-of-law rules. We have rules of choice of law.