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Wallis v. Mrs. Smith's Pie Co.

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NOTE: WALLIS v. MRS. SMITH'S PIE CO.

> The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabitated by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer is quite lost when engulfed and entangled in it.[1]

An Arkansas man and a Pennsylvania truckdriver employed by Mrs. Smith's Pie Co., the defendant, were involved in a rear-end collision on a snowy December morning. Plaintiffs T.J. Wallis and his mother, Mary Wallis, were returning home to Arkansas from a trip to Ohio. While traveling in Missouri they ran into a heavy snowstorm. The right lane of the interstate had an accumulation of rain and snow, so Wallis pulled into the left lane. Defendant's truck, which was on its way to Oklahoma, also pulled over in that lane and struck plaintiff's car in the rear.

The plaintiffs brought an action in Arkansas against the defendant, a Pennsylvania corporation licensed to do business in Arkansas.[2] The application of the Arkansas law of comparative negligence was requested,[3] but the judge instructed the jury to apply the Missouri law, which allowed the complete defense of contributory negligence,[4] because the accident had occurred in Missouri. Missouri law required cars to travel in the right hand lane of traffic and any violation of that law, except under conditions not applicable to this case, was negligence per se.[5] Therefore, judgment was returned for the defendant.

The Arkansas Supreme Court, sitting en banc, reversed and remanded.[6] The court held that, in a tort case, a forum need not apply the law of the state where the cause of action accrued but is free to apply the substantive law of a state which it finds has a significant interest in the outcome of the action. *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977).

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1. Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 971 (1953).
2. Motor Carrier Act, Ark. Stat. Ann. §§ 73-1754, et seq. (Repl. 1957).
3. Ark. Stat. Ann. §§ 27-1763 to 65 (Cum. Supp. 1975). Arkansas' comparative negligence law requires the finder of fact to compare the negligence of the parties and award damages where the negligence of the defendant exceeds that of the plaintiff. Damages are reduced in proportion to the plaintiff's negligence.
4. Mo. Ann. Stat. § 509.090 (Vernon 1952) sets contributory negligence out as one defense which must be pled affirmatively.
5. Mo. Ann. Stat. § 304.015 (6) (Vernon 1973). Plaintiff admitted at trial that he was aware of this law.
6. Only Mr. Wallis' suit was remanded as the instruction was apparently not given for Mrs. Wallis.

The rules governing conflict of laws have undergone several changes through the country's history. Prior to the Civil War the doctrine of *lex fori* (law of the forum) was the predominant choice of law formula in tort actions. "It is a well-settled rule, founded on reason and authority, that the *lex fori* . . . furnish in all cases, *prima facie,* the rule of decision . . . ."[7] Most courts accepted the doctrine, never questioning the reason or authority supporting it. One court stated: "The action here is a personal action, for personal injury, governed by the *lex fori.* This is almost too familiar a principle for discussion or authority."[8] The virtue of this choice of law theory was in its ease of application[9] since each court merely applied its own law to suits brought in its jurisdiction.

The *lex fori* doctrine, however, was criticized because it refused to recognize the interest of other states in having their own laws enforced to protect their citizens and to further the interest of the state.[10] This was a problem in cases where liability arose only under the law where the accident occurred. Of particular importance was the case of a tort based on breach of a statutory duty. The law of the place should have been enforced in that situation, because that state had a police interest in having its law enforced.

The criticism of *lex fori* led to a movement toward *lex loci delecti* (law of the place of injury). As early as 1857 a New York court refused to apply its wrongful death statute to a Connecticut accident because "[w]hether an act or omission affords a right of action depends on the law of the place where it was done or omitted."[11] The trend toward the doctrine was expressed in dictum in an 1880 United States Supreme Court case, *Dennick v. Central Railroad.*[12] This case involved a suit by a plaintiff-administratrix to recover damages for the death of her husband. The injury occurred

7. Norris v. Harris, 15 Cal. 226, 253 (1860), *citing* Monroe v. Douglass, 1 N.Y. 816, 817 (1851). *See also* Field, *Outlines of an International Code* 439 (1872) and Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws,* 58 Mich. L. Rev. 637, 667 (1960).

8. Anderson v. Milwaukee & S.P. R.R., 37 Wis. 321, 322 (1875).

9. Comment, *Changes in Tort Conflict of Laws in Missouri,* 37 Mo. L. Rev. 268, 269 (1972) [hereinafter cited as Comment, *Changes*].

10. *See generally* Currie, *On the Displacement of the Law of the Forum;* 58 Colum. L. Rev. 964 (1958), *reprinted in* B. Currie, *Selected Essays on the Conflict of Laws,* 1, 9 (1963). English practice is to apply the law of the forum "until it is displaced by a different law with a greater claim to recognition, brought forward by a party wishing to take advantage of the difference . . . ." *See also* R. Weintraub, *Commentary on the Conflict of Laws* 200 (1971).

11. Vandventer v. New York & N.H. R.R., 27 Barb. 244, 246 (N.Y. App. Div. 1857). *See* Ehrenzweig, *supra* note 7, at 674.

12. 103 U.S. 11 (1880). *See also* Louis-Dryfus v. Paterson Steamships Ltd., 43 F.2d 824 (2d Cir. 1930); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904) (per Holmes, J.); Alabama G. S. R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892).

in New Jersey and the administratrix was appointed in New York. The New Jersey law, however, would allow recovery only if its courts appointed the administratrix. The Supreme Court allowed recovery, saying that trespass to the person was transitory and venue immaterial. The Court announced that "[w]henever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has the jurisdiction of such matters and can obtain jurisdiction of the parties."[13]

The Arkansas courts have always followed the *lex loci delecti* doctrine. The earliest tort case where a choice of law question was raised was *Carter v. Goode,*[14] decided in 1887. Plaintiff brought an action against defendant, who had shot plaintiff's mule. The incident occurred in the Cherokee Nation where it was not a trespass to shoot a mule. The court, in denying recovery, said that "[i]n order to maintain an action of tort founded upon an injury to person or property, the act which is the cause of the injury . . . must be actionable . . . by the law of the place where the injury is done."[15] A later case, *St. Louis, Iron Mountain & Southern Railway v. Brown,*[16] followed *Carter* in holding that "[t]he law of the place where the cause of action arose, and not the *lex fori* controls."

The basis of the traditional doctrine of *lex loci delecti* was the vested rights rule, developed most fully by Professor Joseph H. Beale.[17] His theory was that the right to recover damages in a tort action became vested in the plaintiff at the time and place of the injury and should thus be governed by the law of that place.[18] He felt that the single most significant factor[19] by which controlling law should be determined was the place where the incident occurred.[20] At the time Professor Beale developed his theory, it had a considerable amount of practical merit because "the situation in this country was such that people rarely crossed state boundaries. Under such

13. Dennick v. Central R.R., 103 U.S. 11, 18 (1880). *See* Ehrenzweig, *supra* note 7, at 674.

14. 50 Ark. 155, 6 S.W. 719 (1888).

15. *Id.* at 156, 6 S.W. at 720.

16. 67 Ark. 295, 54 S.W. 865 (1899). *See also* Western Cas. & Sur. Co. v. Independent Ice Co., 190 Ark. 684, 80 S.W.2d 626 (1935).

17. J. Beale, *Conflict of Laws* (1935). This three-volume treatise contains his most extensive writings on the subject.

18. *See* Restatement (First) of Conflict of Laws § 384 (1934). "(1) If a cause of action is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."

19. *See* Leflar's discussion of Beale. R. Leflar, *American Conflicts Law* 205 (1968).

20. *Id.*

circumstances, there was validity in a rule which presumed that persons changing jurisdiction were aware of the duties and obligations they were incurring because of such change."[21]

Professor Beale was the Reporter in charge of drafting the First Restatement of Conflict of Laws and influenced the Restatement to adopt his theories.[22] The adoption of Beale's theory, however, was not accepted by everyone; several members of the Advisory Committee resigned before the Restatement was completed in protest against Beale's rigid formulation.[23]

According to many courts the logic of *lex loci delecti* possessed the virtues of certainty, predictability, and uniformity of result.[24] Further, there was little danger of interstate judicial jealousy as the forum usually deferred to the place of wrong.[25] Ideally, no matter where a party sought to enforce a cause of action, the outcome would be the same. Thus, in a sense, the reasonable expectations of the parties in the outcome were protected.[26] This was not always the case in an accident claim because a resident of state *A* traveling through state *B* would have no such reasonable expectation since he would not intend to be injured. Thus, he could not predict that he would have a cause of action.

In such situations, adherence to *lex loci delecti* often led to harsh results. In *Logan v. Missouri Valley Bridge and Iron Co.*,[27] an Arkansas plaintiff was injured while working for the defendant, an Arkansas corporation which had an Arkansas contract to build a bridge from the Arkansas side of the river to Oklahoma. The plaintiff was hired and paid in Arkansas, but he was injured while working past midstream. The Arkansas court said that since the injury occurred past midstream, the place of injury was Oklahoma, and Oklahoma law must apply. Since Oklahoma law provided an exclusive remedy in workmen's compensation, the tort claim was dis-

21. Woodward v. Stewart, 104 R.I. 290, ____, 243 A.2d 917, 920 (1968). This case discussed the background of the vested rights theory.

22. R. Leflar, *supra* note 19, at 205. Ehrenzweig, *supra* note 7, at 668. *See also* Restatement (First) of Conflicts of Laws §§ 377-397 (1934).

23. *See* R. Leflar, *supra* note 19, at 205. *See generally* W. Cook, *The Logical and Legal Bases of the Conflict of Laws, passim* (1942). "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." B. Currie, *supra* note 10, at 6.

24. *See, e.g.*, Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 627; Heidemann v. Rohl, 86 S.D. 250, ____, 194 N.W.2d 164, 167 (1972); Mitchell v. Craft, 211 So.2d 509, 513 (Miss. 1968). *See also* R. Leflar, *supra* note 19, at 206.

25. *See* R. Leflar, *supra* note 19, at 317-319 and Comment, *Changes*, *supra* note 9, at 271.

26. Cheatham & Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 970-972 (1952).

27. 157 Ark. 528, 249 S.W. 21 (1923).

missed. If the court had applied Arkansas law, plaintiff's claim would not have been dismissed, as the Arkansas law at that time did not preclude tort actions for injuries covered under workmen's compensation.[28]

Arkansas continued to adhere to the rigid doctrine of *lex loci delecti* in *Wheeler v. Southwestern Greyhound Lines, Inc.*,[29] which involved an Arkansas passenger who had been injured in a bus mishap in Missouri and died in Arkansas about two weeks later. The Arkansas court held that an action for wrongful death must be based on the statute of limitations of the place where the injury that caused the death occurred. Arkansas had a two year statute of limitations on wrongful death actions at that time,[30] and Missouri had a one year statute of limitations. Since the action had not been brought within the time prescribed by the Missouri statute, the case was dismissed. The case, however, would not have been dismissed if Arkansas law had been applied as the suit had been filed within the two year period.

The application of guest statutes is another instance where following *lex loci delecti* may lead to harsh results. The Arkansas guest statute prohibits a guest riding in a motor vehicle from recovering damages when the vehicle is involved in an accident unless the operator was willfully or wantonly negligent.[31]

Dissatisfaction with the mechanical and arbitrary application of the *lex loci delecti* rule led a numer of courts to resort to various means by which the doctrine could be circumvented.[32] One escape device was to classify the conflict of laws question as procedural rather than substantive.[33] Since a forum court is not bound to follow

28. In 1948 Arkansas provided for an exclusive remedy in workmen's compensation. Ark. Stat. Ann. § 81-1304 (Repl. 1976).

29. 207 Ark. 601, 182 S.W.2d 214 (1944).

30. Pope's Dig. Ark. §§ 1277, 1278. The Arkansas Statute passed in 1957 provides a three-year statute of limitations. Ark. Stat. Ann. § 27-907 (Repl. 1962).

31. Ark. Stat. Ann. § 75-913 (Repl. 1957). The Arkansas guest statute was applied by the Louisiana court in Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So.2d 216 (1970) to deny recovery to a Louisiana plaintiff who had been a guest in a Louisiana car which was involved in a rear-end collision in Arkansas. The Louisiana appellate court had allowed recovery by applying Louisiana law, which had no guest statute requiring a showing of willfulness on the part of the driver. Johnson v. St. Paul Mercury Ins. Co., 218 So.2d 375 (La. App. 1969). The Supreme Court of Louisiana reversed and applied Arkansas law under the *lex loci delecti* principle, which resulted in a denial of recovery under the Arkansas guest statute. Case was subsequently overruled in Jagers v. Royal Indemnity Co., ___ La. ___, 276 So.2d 309, 312 (1973).

32. *See* R. Leflar, *supra* note 19, at 212; Cook, *Characterization in the Conflict of Laws*, 51 Yale L.J. 191 (1941); Lorenzen, *The Qualification, Classification, and Characterization Problem in the Conflict of Laws*, 50 Yale L.J. 743 (1941).

33. Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919); Restatement (First) of Conflict

the procedural law of the place of injury, forum law could be applied.[34] The Arkansas court, however, could not have used this device in *Wheeler v. Southwestern Greyhound Lines, Inc.*,[35] because statutes of limitations in wrongful death actions are generally classified as substantive rather than procedural.[36]

Another method used by the courts to circumvent *lex loci delecti* was to characterize the cause of action as sounding in something other than tort and to apply the choice-of-law rule of that action.[37] Renvoi was frequently used by the courts as an escape device.[38] This complicated and mysterious doctrine allows a court to resort to the foreign law of conflict of laws, which law may in turn refer the court back to the law of the forum. The courts also avoided resorting to *lex loci delecti* by arguing that the law of the state where the injury occurred was contrary to the strong public policy of the forum.[39]

These various means of circumventing *lex loci delecti* have not escaped criticism. One authority's view is that all the exceptions "are designed to reach results indirectly which could be reached directly by recognizing the *lex fori* as the rule primarily to be applied."[40] Another critic said that "[t]he principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating dis-

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of Laws § 584 (1934) stated, "The court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure."

34. *E.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (measure of damages classified as a procedural matter); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (survival of action is procedural); Huckaby v. St. Louis, I. M. & S. Ry., 119 Ark. 179, 177 S.W. 923 (1915) (questions relating to burden of proof are governed by the laws of the forum). *See also* Weintraub, *supra* note 10, at 45.

35. 207 Ark. 601, 182 S.W.2d 214 (1944). *See also* Nelson v. Eckert, 231 Ark. 348, 329 S.W.2d 426 (1959) (statute of limitations was substantive and governed by the place of injury, Texas).

36. R. Leflar, *supra* note 19, at 305.

37. *See* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (administration of decedents' estates); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958), *reprinted in* B. Currie, *supra* note 10, at 128.

38. *E.g.*, *In re* Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct. 1950), adhered to on reargument, 198 Misc. 1017, 100 N.Y.S.2d 371 (Surr. Ct. 1950); University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936). *See also* Griswold, *Renvoi Revisted*, 51 Harv. L. Rev. 1165, 1166-70 (1938).

39. *E.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (New York public policy against limiting damages in wrongful death actions basis for applying New York law). Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963) (New Hampshire court, on public policy grounds, refused to follow the Massachusetts law of interspousal immunity and applied New Hampshire's law which recognized no such doctrine).

40. Ehrenzweig, *supra* note 7, at 671.

tinction, and of true policy development in the conflict of laws."[41]

Other authorities have criticized this doctrine.[42] Subsequently, the demand for some better statement of the law developed in earnest.[43] It was felt that *lex loci delecti* was inconsistent with the Restatement's basic statement of method: "Each court . . . derives [its choice of law rules] from the same sources used for determining all its law: from precedent, from analogy, from legal reason and from *consideration of ethical and social need.*"[44]

One formula that emerged early in the quest for a better law was the dominant contacts or most significant relationship test.[45] Under this theory, the courts weighed contacts that the parties had with each state and the law of the state which had the dominant contacts was the law applied. The leading case using that theory was *Babcock v. Jackson,*[46] a New York guest statute case in which the court said that New York had the dominant contacts with the cause of action since both parties were domiciled in New York, were on a trip that began and would end in New York, and the accident occurred only fortuitously in Ontario. The test for applying the theory was a flexible one "in the sense that its key phrase, 'most significant contacts,' lacks an exactly defined content and so leaves room for the use of judicial discretion."[47]

Professor Brainerd Currie, the late modern conflicts scholar, sought to simplify conflicts law for forum courts. To this end he developed the governmental interest formula to determine the

41. Paulsen & Sovern, *"Public Policy" in the Conflict of Laws,* 56 Colum. L. Rev. 969, 1016 (1956).

42. W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942); B. Currie, *Selected Essays on the Conflict of Laws* (1963); E. Lorenzen, *Selected Articles on the Conflict of Laws* (1947); G. Stumberg, *Principles of Conflict of Laws* (2d ed. 1951); Cheatham & Reese, *Choice of the Applicable Law,* 52 Colum. L. Rev. 959 (1952); Yntema, *The Hornbook Method and the Conflict of Laws,* 37 Yale L.J. 468 (1927).

43. R. Leflar, *supra* note 19, at 219.

44. Restatement (First) of Conflict of Laws § 5, comment b (emphasis added). *See* Comment, *Changes, supra* note 9, at 271.

45. The nicknames "center of gravity" and "grouping of contacts" were also given to the formulas. R. Leflar, *supra* note 19, at 220.

46. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *Babcock* has been the subject of numerous studies, *e.g.,* Cavers, Cheatham, Currie, Ehrenzweig, Leflar, and Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 Colum. L. Rev. 1212 (1963). "After *Babcock* and *Griffith* [v. United Airlines, 416 Pa. 1, 203 A.2d 796 (1964)] lighted the way, other courts rushed to follow . . . . [A]t least 21 states have rejected the place-of-wrong rule in some context . . . ." R. Weintraub, *supra* note 10, at 234 (cases cited n. 36).

47. R. Leflar, *supra* note 19, at 222. Leflar adds that "[t]he formula affords no real basis for decision in the hard cases because it does not identify the considerations which control the flexibility that it allows, which move courts to go one way or the other within the formula."

choice of law.[48] Such interest would, for example, include the state's interest in the education, support, maintenance, and custody of a child. Currie's final conclusion on the matter was that if the forum state has a governmental interest in the application of its own laws, its laws should be applied regardless of the interests of other states.[49]

Having determined that courts should look at various factors besides the place of injury in deciding choice of law questions, commentators formulated lists of choice-influencing factors. Cheatham and Reese made the first thorough effort to list and analyze such considerations.[50] They used nine policy factors (listed in order of importance) to be considered in choosing the applicable law:

1. The needs of the interstate and international system;
2. Application of local law unless there is good reason for not doing so;
3. Effectuation of the purpose of relevant local rule in determining a question of choice of law;
4. Certainty, predictability, uniformity of results;
5. Protection of justified expectations;
6. Application of the law of the state of dominant interest;
7. Ease in determination of applicable law; convenience of the court;
8. The fundamental policy underlying the broad local law field involved;
9. Justice in the individual case.[51]

Professor Yntema listed seventeen policy considerations relevant to the choice of law process[52] and then reduced them to two

48. "The term governmental interest has been defined as the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and transaction, the parties or the litigation." B. Currie, *supra* note 10, at 621.

49. R. Leflar, *supra* note 19, at 224.

50. Cheatham & Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959 (1952). Professor Reese later added a tenth policy: "The court must follow the dictates of its own legislature, provided these dictates are constitutional." Reese, *Conflict of Laws and the Restatement Second*, 28 Law & Contemp. Prob. 679, 682 (1963). *See also* Restatement (Second) of Conflict of Laws § 6 (1969), for the Restatement list of relevant factors.

51. Cheatham & Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959 (1952).

52. Yntema, *The Objectives of Private International Law*, 35 Can. B. Rev. 721, 734-35 (1957). They include uniformity of legal consequences, minimization of conflicts of laws, predictability of legal consequences, the reasonable expectations of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the "stronger" law, cooperation among states, respect for interests of other states, justice of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity of national law, and ultimate recourse to the *lex fori*.

main groups: security and comparative justice.[53] Professor Cavers formulated principles of preference for courts to use as guides in resolving specific problems and fact situations involved in choice of law situations.[54]

In 1966 Professor Leflar developed a list of five factors which he felt were primarily significant:

1. Predictability of results.
2. Maintenance of interstate and international order.
3. Simplification of the judicial task.
4. Advancement of the forum's governmental interest.
5. Application of the better rule of law.[55]

Leflar has noted that:

> An approach which looks directly and specifically to the relevant choice-influencing considerations, rather than one looking to some formula supposedly derived from the considerations by earlier alchemists, has the virtue of enabling the judges to concentrate on all of the real values, as they see them, that are present in their case.[56]

Obviously some of Leflar's considerations will be more relevant to some types of cases than others. The first consideration, predictability of results, relates mainly to contracts made with reference to the law of a particular state. In this situation, justice would be served by applying the law of that state.[57] This consideration, however, has little applicability to automobile accident cases as they are not planned.

The second consideration is the maintenance of interstate and international order which requires reasonable orderliness and a good relationship among the states. Interstate travel between the states would not be impaired by the application of Leflar's method. In terms of automobile accident litigation, no more is required than that a court apply the law of a state which has a substantial connection with the causes of action being litigated.[58]

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53. *Id.*

54. Cavers, *The Choice-of-Law Process*, 139-203 (1965). "The Cavers approach illustrates cogently the possibility of using the policy evaluation process as a means of dealing with specific problems and narrow areas of decision." R. Leflar, *supra* note 19, at 243.

55. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 282 (1966).

56. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584, 1598 (1966).

57. R. Leflar, *supra* note 19, at 245.

58. Clark v. Clark, 107 N.H. 351, ___, 222 A.2d 205, 208 (1966).

Simplification of the judicial task is the third consideration. While the mechanical choice of using the law of the place of injury was easy to administer, it is usually easier for a forum court to apply its own more familiar law than any other.[59]

The fourth consideration is advancement of the forum's governmental interest. This is not necessarily synonymous with domestic law.[60] "In most private litigation the only real governmental interest that the forum has is in the fair and efficient administration of justice, which is usually true of automobile accident cases."[61] If two states have divergent interests, then advancement of the forum's interest must be accepted as one legitimate part of the choice-of-law process.[62]

The fifth and final consideration is the application of the better rule of law which in most situations is that which prevents harsh and unfair results and instead, furthers the interests of justice.[63] One authority noted that courts applying Leflar's "desiderata" to torts cases accord the better rule more weight than the other four factors.[64] While the better rule consideration may often lead the forum to apply its own law, this will not occur in all instances as judges will, in appropriate cases, recognize the forum law as an anachronism, a drag on the coattails of civilization.[65] This is especially evident in comparative versus contributory negligence choice.

Prior to 1976 approximately twenty-four jurisdictions had discarded the rule of the place of injury and applied one of the aforementioned analytical theories or processes.[66] One court noted that

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59. R. Leflar, *supra* note 19, at 250.

60. Clark v. Clark, 107 N.H. 351, ____, 222 A.2d 205, 208 (1966).

61. *Id.*

62. R. Leflar, *supra* note 19, at 254.

63. In contract situations the "better rule" will usually be the one that upholds a fair transaction into which the parties entered in good faith. *See* Lyles v. Union Planters Nat'l Bk., 239 Ark. 738, 393 S.W.2d 867 (1965); Cooper v. Cherokee Village Dev. Co., 236 Ark. 37, 364 S.W.2d 158 (1963); R. Leflar, *supra* note 19, at 255.

64. Juenger, *Torts Choice of Law in Michigan*, 52 Mich. S.B.J. 730, 733 n.1 (1973).

65. Fruend, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210 (1946).

66. First Nat'l Bk. v. Rostek, 182 Col. 437, 514 P.2d 314 (1973); Jagers v. Royal Indemnity Co., 276 So. 2d 309 (1973); Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972); Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Rungee v. Allied Van Lines, Inc., 92 Idaho 718, 449 P.2d 378 (1968); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967); Wartell v.

"[n]o American court which has felt free to re-examine the matter thoroughly in the last decade has chosen to retain the old rule."[67] The court admitted, however, that some courts have retained the doctrine in recent decisions. The court attributed the failure to reject it to legal paralysis, an unwillingness by the courts to adandon established precedent before they were sure that a better rule was available, and not to any belief that the old rule was a good one.[68]

The Arkansas court has not been struck by such paralysis. In 1966 the court was asked to overrule the *lex loci delecti* doctrine in *McGinty v. Ballentine Produce, Inc.*,[69] but chose to retain it. However, under almost any theory of conflicts law the court's choice of law would have been correct. The deceased was killed in a collision with defendant's vehicle in Missouri.[70] The plaintiffs first brought suit in Missouri and then in federal district court in Arkansas[72] and, finally, in an Arkansas court. The Arkansas Supreme Court affirmed the dismissal of the complaint. The court noted that the deceased was not an Arkansas resident; the administratrix was not appointed by an Arkansas court; the accident was not in Arkansas; in fact, the only contact with Arkansas was the defendant's place of business.[73] Under those circumstances the court said it would not allow the plaintiff "to shop around" to find some forum (Arkansas in this instance) which had a more favorable statute than that of Missouri.[74]

In the present case, *Wallis v. Mrs. Smith's Pie Co.*,[75] the Arkansas court departed from the mechanical application of the traditional *lex loci delecti* rule and applied the more flexible approach available through the use of Leflar's choice-influencing considerations in conflict of laws problems. The court noted that the *lex loci delecti* doctrine had been the subject of much criticism:

> [T]he vested rights doctrine has long since been discredited be-

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Formusa, 34 Ill. 2d 57, 213 N.E.2d (1966); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *See* Weintraub, *supra* note 10, at 234 n. 36.

67. Clark v. Clark, 107 N.H. 351, ____, 222 A.2d 205, 207 (1966).
68. *Id.*
69. 241 Ark. 533, 408 S.W.2d 891 (1966).
70. Glick v. Ballentine Produce, Inc., 343 F.2d 839 (8th Cir. 1965).
71. Glick v. Ballentine Produe, Inc., 396 S.W.2d 609 (Mo. 1965).
72. Glick v. Ballentine Produce, Inc., 343 F.2d 839 (8th Cir. 1965).
73. 241 Ark. 533, 408 S.W.2d 891 (1966).
74. *Id.* at 537, 408 S.W.2d at 893 (1966).
75. 261 Ark. 622, 550 S.W.2d 453 (1977).

> cause it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act.[76]

The more flexible approach was recognized by the Arkansas court[77] as being in accord with the Restatement Second of Conflict of Laws:

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to a particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.[78]

In addition to the Restatement, the Arkansas court relied heavily on the analysis of the Mississippi Supreme Court in *Mitchell v. Craft*.[79] *Mitchell* involved two Mississippi residents who were killed when their automobiles collided in Louisiana. The plaintiff-administratrix brought a wrongful death action against the defendant-administratrix in Mississippi. The defendant argued that the Louisiana doctrine of contributory negligence should be applied, but the Mississippi court, abandoning the *lex loci delecti* doctrine and applying the most significant relationship rule, affirmed the lower court's application of the Mississippi comparative negligence doctrine.[80]

The Arkansas court followed the *Mitchell* analysis of the Mississippi court,[81] particularly as it related to the five "choice-influencing considerations" set out by Professor Leflar.[82]

The Mississippi court (and later the Arkansas court)[83] viewed the first three considerations as having little relevance and found the advancement of the forum's governmental interest to be the

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76. *Id.* at 627, 550 S.W.2d at 456 (quoting Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743 (1963)).

77. Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 628, 550 S.W.2d 453, 456 (1977).

78. Restatement (Second) of Conflict of Laws § 146 (1971). The Restatement notes in a comment that the state whose interests are most deeply affected should have its law applied. *See* Restatement (Second) of Conflict of Laws § 6 *Choice-of-Law Principles*, 14 (1971). According to Leflar the Restatement intends that this consideration should control other choice-of-law considerations. Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 Ark. L. Rev. 199, 203 n.25 (1974).

79. 211 So.2d 509 (Miss. 1968).

80. *Id.* at 514.

81. Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 628, 550 S.W.2d 453, 456 (1977).

82. Leflar, *supra* note 55, at 282.

83. Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 629, 550 S.W.2d 453, 456 (1977).

primary consideration in determining the applicable law.[84] Actually, the court in *Mitchell* found that Louisiana had no interest in the controversy. Another important consideration to the Mississippi court was the better rule of law.[85] Thus the court resolved the conflicts of law issue by reasoning that the comparable negligence law of Mississippi was fairer and more equitable than Louisiana's law of contributory negligence.[86]

In order to help resolve the conflict of laws question in *Wallis,* the Arkansas court considered the circumstances surrounding the case.[87] Particularly the court noted that the action was brought by Arkansas residents against a foreign corporation authorized to do business in Arkansas. The only contact with Missouri was found to be the fortuitous occurrence of the accident on a Missouri highway while the parties were enroute to other states.

The court also relied heavily on an analysis of the fourth and fifth of Leflar's considerations, governmental interest and the better rule of law. With respect to the fourth consideration, the court found that it had a duty to further Arkansas' governmental interest.[88] Finding that the policy of Arkansas as manifested in its comparative fault statute[89] was to protect its injured residents by permitting compensation to a plaintiff even though his negligence contributed to his injury, the Arkansas court reasoned[90] that it could best further Arkansas' governmental interest in the welfare of its citizens through the application of its comparative fault statute.

In addition the court looked to the last of Leflar's considerations, the application of the better rule of law,[91] which weighed heavily in favor of comparative negligence. The court noted that "[t]he decided trend is away from the harsh application of the contributory negligence rule of law"[92] and further noted that approximately thirty-five jurisdictions, including Pennsylvania, the defendant's home state,[93] had enacted comparative negligence laws.

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84. Mitchell v. Craft, 211 So. 2d 509, 514 (Miss. 1968).

85. *Id.*

86. *Id.*

87. Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 628, 550 S.W.2d 453, 456 (1977).

88. *Id.* at 632, 550 S.W.2d at 458. A governmental interest is found where "there is a reasonable basis for application of the law of a state in order to effectuate the specific policy that it embodied." B. Currie, *supra* note 10, at 489.

89. 1973 Ark. Acts 303, §§ 1-3 (replaced by Ark. Stat. Ann. §§ 27-1764 to 65 (Cum. Supp. 1975)).

90. Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 632, 550 S.W.2d 453, 458 (1977).

91. *Id.*

92. *Id.*

93. 1976 Pa. Laws 152.

The court also recognized that, in the abstract, comparative negligence is fairer and results in a more economically equitable standard of liability.[94]

By abandoning the traditional doctrine of *lex loci delecti*, the Arkansas court has emerged from the "dismal swamp."[95] Now the court will be able to make a rational choice of governing law unencumbered by the rigid rule of the vested-rights school which totally lacked any substantive value.[96] The abandonment, however, does not simplify the court's solution of these problems. The adoption of this new rule, which does not afford the benefit of mechanical simplicity, will render the choice more demanding. At the same time, however, the flexibility provided for by *Wallis* will prevent the courts from being engulfed or entangled in the "quaking quagmires"[97] of conflict of laws.

The interest analysis approach will allow judges to give appropriate consideration to the particular facts of each case. With this new-found freedom, judges will be forced to analyze cases as they should have been analyzing them all along and to enunciate the real reasons for their decisions.

Carolyn Brack Armbrust

94. Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 632, 550 S.W.2d 453, 458 (1977).
95. Prosser, *supra* note 1, at 971.
96. *See* 39 Tul. L. Rev. 163, 178 (1964).
97. Prosser, *supra* note 1, at 971.