Marquette Law Review

Volume 43
Issue 1 *Summer 1959*

Article 11

1959

Conflict of Laws - Law of Domicile as Controlling Over Interspousal Immunity Rule of Place of Wrong

Tom Sawyer

ness or good faith of the taker, so also may different appellate tribunals disagree as to when paper becomes "obviously stale." It is not suggested, presumably, that "staleness" is a matter to be determined solely on the basis of whether or not "banks and stores frequently cash checks" older than a given number of days; for, if that were true, the time requirements of N.I.L. 53 and 186 would descend to the level of the poorest practice of merchants, and thereby be virtually extinguished. But neither, on the other hand, can the word "stale" be applied to the problem literally or objetively, as signifying a state of physical dehydration.[18]

The preferable course would probably have been to follow the established current of authority in submitting the question of good faith to the trier of fact for determination under all of the circumstances, giving to his determination of the ultimate question the usual weight and significance. The ultimate outcome of the case might well have been the same, but the uniform law of the subject would thereby have been spared a highly dubious source of future confusion.

TOM SAWYER

Conflict of Laws: Law of Domicile as Controlling Over Interspousal Immunity Rule of Place of Wrong—A woman, allegedly the wife of the driver, was injured in a vehicle being operated in California. The alleged husband and wife were at that time domiciled in Wisconsin. The wife brought an action in Wisconsin against the driver and his insurer. The trial court granted summary judgment against the plaintiff on the ground that, under California law,[1] one spouse is immune from suit in tort by the other spouse. On appeal, *reversed*:

[18] "Stale: being in some stage of decay, as meat or egg . . . being in a state of dryness, as bread . . ." FUNK & WAGNALL'S NEW STANDARD DICTIONARY (1946);
"In the language of the courts of equity, a 'stale' claim or demand is one which has not been pressed or asserted for so long a time that the owner or creditor is chargeable with laches, and that changes occurring meanwhile in the relative situation of the parties, or the intervention of new interests or equities, would render the enforcement of the claim or demand against conscience." BLACK'S LAW DICTIONARY (3rd ed. 1933).
The literal application of these definitions would tend to permit almost any period of delay, under the court's rule in the principal case.

[1] Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Cubbison v. Cubbison, 73 Cal. App. 2d 437, 166 P. 2d 387 (1946); Paulus v. Bauder, 106 Cal. App. 2d 589, 235 P. 2d 422 (1951). There is no specific California statute on this subject, the cases holding that the common law immunity is preserved under the familiar married women's property acts, except in property litigation.

[2] The principal case expressly overrules "at least six prior decisions of this court:" Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931); Forbes v. Forbes, 226 Wis. 477, 277 N.W. 122 (1938); Bourestom v. Bourestom, 231 Wis. 666, 285 N.W. 426 (1939); Garlin v. Garlin, 260 Wis. 187, 50 N.W. 2d 373 (1951); Scholle v. Home Mutual Casualty Co., 273 Wis. 387, 78 N.W. 2d 902 (1956); Hansen v. Hansen, 274 Wis. 262, 80 N.W. 2d 320 (1956); and "partially overrules two others:" Nelson v. American Employer's Insurance

> We are convinced that, from both the standpoint of public policy and logic, the proper solution of the conflict of laws problem, in cases similar to the instant action, is to hold that the law of domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship. *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d, 95 N.W. 2d 814(1959).

A majority of American courts hold that the law of the place of wrong determines whether a person has sustained a legal injury;[3] and that, if no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.[4]

The first departure from this traditional view came when a few cases[5] held that the law of the forum, under which inter-spousal suits were prohibited, controlled over an opposite policy of the place of wrong. It is, however, significant that the cases so applying the law of the forum did so only when the parties were domiciled in the state of forum. Thus, the chief ground of decision is "To recognize comity in this instance would contravene the public policy of this forum."[6]

A second departure from the general rule is that exemplified by the principal case, and is based upon the proposition that the capacity or incapacity to sue because of marital status is a question of family law and not tort law.[7] Under this concept the domiciliary state has the primary responsibility for establishing and regulating the incidents of the family relationship; and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Therefore, the forum state should balance the factors of family law which are primarily the concern of the domiciliary state and the tort isue which is determined by the law of the place of accident.[8]

There are today two predominant arguments against allowing such suits. Since the family is commonly a single economic unit, inter-spousal recoveries allow the wrong-doing spouse to benefit from his own wrong at the expense of the insurer.[9] California, a community property

---

Co., 258 Wis. 252, 45 N.W. 2d 681 (1951); Jaeger v. Jaeger, 262 Wis. 14, 53 N.W. 2d 740 (1952).

[3] REST., CONFLICT OF LAWS §378 (1934).

[4] REST., CONFLICT OF LAWS §384(2) (1934).

[5] Poling v. Poling, 116 W.Va. 187, 179 S.E. 604 (1935); Mertz v. Mertz, 271 N.Y. 466, 3 N.E. 2d 597 (1936); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941).

[6] Kircher v. Kircher, *supra* note 5.

[7] Emery v. Emery, 45 Cal. 2d 421, 281 P. 2d 218 (1955); Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A. 2d 34 (1958); Pittman v. Deller, 10 Pa. D. & C. 2d 360 (1957).

[8] Emery v Emery, *supra* note 7, the California court here declared Idaho's assumed parental and inter-family immunity "both fortuitous and irrelevant" when parties domiciled in the forum state sought to enforce liabilities arising out of an Idaho accident, and determined that California's own parental immunity did not extend to "wilful" torts.

[9] Green, *Protection of the Family Under Tort Law*, 10 HASTINGS L. J. 237 (1959); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927).

state,[10] attempted to meet this problem by passing a statute making any recovery in a civil personal injury suit exclusively the property of the recovering spouse.[11] Secondly, these suits tend to disrupt the tranquility of the home, as husband is pitted against wife.

In contemporary periodical comment,[12] the force of these arguments has been severely questioned, and the Restatement rule[13] criticized as inadequate and illogical. It is suggested that the question of an "immunity" is fundamentally nothing more than a declaration of capacity to sue or to be sued;[14] and, assuming that neither the law of the forum nor the law of the place of injury affords an acceptable basis of decision on this question, the writers propose the alternative of domiciliary policy. This thesis is attaining a widening scope of acceptance, as the principal case demonstrates; and its influence upon the forthcoming revision of the Restaurant of Conflicts is inescapable.

But there is room to question whatever the new proposal does not involve a rather dubious oversimplification. The proposal itself (adopted, substantially in toto, by the principal case) readily concedes the continued force of the established rule that the *lex loci delecti* controls in matters of substantive tort law. To separate from the law of tort one aspect of a single and fundamentally indivisible cause of action, simply by calling it a question of family law, is hardly more than a change of nomenclature. It might prove considerably more difficult to determine the precise new boundaries of the "family law" concept itself, traditionally limited to question of marriage, divorce, and child care.

It is argued, as the ultimate rationale of the change, that the state of domicile has "the primary responsibility for establishing and regulating the incidents of the family relationship . . ."[15] But of what efficacy in the discharge of this responsibility is the assertion of a bare right of suit, granting for the sake of argument the property of classifying such right as an "incident" of the family relationship? The only conceivable effect upon the family of giving such a right is to get the parties into court; leaving to the "fortuitous and irrelevant" law of a foreign jurisdiction the ultimate product of the litigation.

---

[10] CALIFORNIA CIVIL CODE §164 (1949).

[11] CALIFORNIA CIVIL CODE §163.5 (1957 Supplement). "All damages, special, and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person." This section was passed in 1957 and therefore has no bearing on the principle case.

[12] 15 U. PITT. L. REV. 397 (1954); 31 Temp. L. Q. 117 (1958); 4 WAYNE L. REV. 79 (1958); 33 IND. L. J. 297 (1958).

[13] *Supra* notes 3 and 4.

[14] Emery v. Emery, *supra* note 7, 28 P.2d at 222; Worell v. Worell, 174 Va. 11, 23, 27, 4 S.E. 2d 343 (1939); Dunlap v. Dunlap, 84 N.H. 352, 372, 150 Atl. 905 (1930).

[15] Emery v. Emery, *supra* note 7, cited with approval in the principal case, 95 N.W. 2d at 817.

The point is well illustrated in the principal case. Unlike Wisconsin, California has a "guest statute" of the familiar type,[16] restricting recoveries by a passenger-guest against the host to cases where the host is guilty of "intoxication or willful misconduct." Furthermore, California treats contributory negligence of the plaintiff as a bar to recovery,[17] whereas Wisconsin applied its comparative negligence system[18] to cases of ordinary (but not gross)[19] negligence.

The complaint in the principal case failed to allege "intoxication or willful misconduct," and hence would appear to have been subject to demurrer in any event, assuming that the California guest statute would apply.[20] But this circumstance is merely incidental to the point.

The central problem is that, having seen fit, without suggestion of counsel for either side,[21] to overturn the long established rule of conflicts, the court leaves Wisconsin's power to regulate the liability and recovery precisely where it was—in the lap of the California legislature and courts, which, by more stringent rules affecting other "incidents" of the action, can largely nullify Wisconsin's policy of liberality respecting inter-spousal suits.[22]

It would seem that, if a state is to assert a predominant power and authority to regulate the "incidents" of any status so broad and indefinable as that of the family, logical consistency and practical efficiency would require that such state go the whole way, usurping all the aspects of a foreign law which tend to contravene the policy of the domiciliary state respecting such litigation. The obvious problems which such a broad policy would involve: comity, full faith and credit, uncertain or divided domicile (diversity of citizenship), shifting domicile, forum shopping and all the rest should certainly occasion long deliberation before so radical a policy is embraced.

TOM SAWYER

---

[16] CALIFORNIA VEHICLE CODE §403 (1949) ". . . unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or willful misconduct of said driver."

[17] CALIFORNIA CIVIL CODE §1714 (1949).

[18] WIS. STAT. §331.045 (1957).

[19] Storlie v. Hartford Acc. & Ind. Co., 251 Wis. 340, 28 N.W. 2d 920 (1947)

[20] The case is unusual in that, as filed, the complaint failed to allege the disputed marital status of the parties in any fashion; defendants were therefore deprived of the ordinary opportunity to raise the defense of inter-spousal immunity by demurrer, and apparently felt so secure on this ground as to ignore the presumably curable pleading defect. The appellate decision also fails to raise the question.

[21] The concurring opinion of Fairchild, J. is largely grounded upon his feeling that such broad questions should receive full consideration, and that "we have not had the benefit of brief or argument upon the validity of the principle."

[22] "Thus the purely practical benefit to Wisconsin people which might appear at first blush to arise from the new rule will be limited." Concurring opinion of Fairchild, J., 95 N.W. 2d at 821.