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Conflict of Law of Torts in Wisconsin

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CONFLICTS OF THE LAW OF TORTS IN WISCONSIN

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I. INTRODUCTION

Progressive evolution of a particular legal field is typified in the treatment of Conflicts issues by the Wisconsin Supreme Court. By no means has the field been completely covered,[1] since many factual situations involving multiple state activity have not arisen, but through the demonstrable consequences and inferences of cases already decided, it is safe to aver that a 1930 admonition that Wisconsin assume leadership in following the theses of the American Law Institute has generally been effective, although not through the legislative method advocated.[2] Any complete treatment on Conflict of Laws[3] would necessitate a thorough investigation into all jurisdictions, but such is not the purpose of this article. This brief excursion into the torts field will attempt to answer where we have been and where we are; this paper seeks to supply the need of the Wisconsin practioner who has little time to explore this terrain, who is suddenly confronted with such a case, and who is puzzled by Chief Justice Winslow's comment in 1914:

> "That field of law which goes by the name of the conflict of laws is one of the most thorny and difficult fields to traverse. It is full of conflicting decisions, refined reasoning, and unsatisfactory results".[4]

II. HISTORY

The journey travelled by the Wisconsin court in the development of its present conclusions in this difficult field has been marked by conflicting decisions and variances with settled principles. An 1873 recognition[5] that an action in tort for an injury inflicted in another state was transitory, was rejected in 1875,[6] and the principle was not reestablished until 1904.[7] Our court has at one time imposed the

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[1] Wisconsin Annotations, Restatement of Conflict of Laws (1937).
[2] 15 Mrq. L. Rev. 37, 41 (1930).
[3] Cheatham, Dowling, Goodrich, Cases and Materials on Conflict of Laws (2d ed. 1941); Goodrich, Conflict of Laws (2d ed. 1938); Lorenzen, Cases on Conflict of Laws (4th ed. 1937); Stumberg, Conflict of Laws (1937); Beale, Conflict of Laws (1935); Restatement, Conflict of Laws (1934); Dicey, Conflict of Laws (5th ed. 1932); Story, Commentary on the Conflict of Laws (1834).
[4] Northwestern Mutual Life Insurance Co. v. Adams, 155 Wis. 335, 337, 144 N.W. 1108 (1914).
[5] Curtis v. Bradford, 33 Wis. 190 (1873).
[6] Anderson v. Milwaukee & St. Paul Rwy. Co., 37 Wis. 321 (1875).
[7] Bain v. Northern Pacific R. Co., 94 Wis. 191, 68 N.W. 661 (1896).

English "double standard"[8] and rejected entirely the doctrine of forum non conveniens.[9] There often has been a reluctance to use the lex loci delicti,[10] although the court has recognized the axiom, "The place of wrong determines whether a person has sustained a legal injury";[11] where no foreign law has been proved, the court has presumed that the lex fori and the lex loci delicti have been the same,[12] yet before the passage of Section 328 of Wisconsin Statutes,[13] the court has taken judicial notice of a non-pleaded foreign statute.[14] During the recent session of the Legislature, the Uniform Judicial Notice of Foreign Law Act was adopted so that the court was required to take judicial notice of the common law and the statutes of every state, territory, or other jurisdiction of the United States.[15] Fortunately the major detours have been traversed because the court has evolved a system in accordance with the majority viewpoint on this complex subject.

The language of the Wisconsin court in 1873 recognized our present rule in the following language:[16]

> "It further appears that the principal suit was brought to recover for injuries to the plaintiff's wife while attempting to get aboard the defendant's cars at a station in Michigan. It was doubtless an action sounding in tort, for an injury inflicted in another state, but still one transitory in its character and triable by the courts of this state . . . Those authoriites established the doctrine that courts of general jurisdiction entertain actions for personal injuries even where the act complained of was committed in another state".[17]

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[8] Bettys v. Milwaukee & St. Paul Rwy. Co., 37 Wis. 323 (1875). In England, a tort committed abroad must fulfill two conditions to be actionable. "In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and secondly, the act must not have been justifiable by the law of the place where it was committed." Carr v. Francis Times & Co., (1902) A.C. 176, 182.

[9] Chicago, Milwaukee & St. Paul Rwy. Co. v. McGinley, 175 Wis. 565, 185 N.W. 218 (1922); State ex rel. Smith v. Belden, 205 Wis. 158, 236 N.W. 542 (1931).

[10] "When the decisions of another state are offered in evidence to prove the law of that state the point decided is what is proven as law, and argument, illustration, wit, humor, or philosophy which may be found in such decision may be considered harmlss surplusage." Ruck v. Chicago, Milwaukee & St. Paul Rwy. Co., 153 Wis. 158, 140 N.W. 1074 (1913). In White v. Minneapolis, St. P. & S.S.M. Ry. Co., 147 Wis. 141, 133 N.W. 148 (1911), the court held that Illinois law governed the case, yet cited thirty-four Wisconsin cases compared to two Illinois decisions.

[11] Restatement, Conflict of Laws (1934), sec. 378.

[12] MacCarthy v. Whitcomb, 110 Wis. 113, 85 N.W. 707 (1901).

[13] For application, see: Hutzler v. McDonnell, 239 Wis. 568. 2 N.W. (2d) 207 (1942), *affirmed on rehearing*, 242 Wis. 256, 7 N.W. (2d) 835 (1943).

[14] Gebhart v. Holmes, 149 Wis. 428, 447, 135 N.W. 860 (1912).

[15] See: Chapter 363, Wisconsin Laws of 1947.

[16] "But the cause of action is transitory and citizens of other states have the same right to bring such action here as citizens of Wisconsin have." Burestom v. Bourestom, 231 Wis. 666, 670, 285 N.W. 426 (1939).

[17] Curtis v. Bradford, *supra.*

But two years later,[18] in causes of action arising from statutory rights conferred by foreign states, the Wisconsin court held that an action for personal injury was governed by the lex fori, arguing that a person suing in this state must take the law as he finds it, and citing English cases not directly in point.[19] The cases from 1875 to 1904[20] demonstrated that the English "double standard" was applied only to those cases where the cause of action in the lex loci delicti arose from a statutory right, because tort cases based on common law principles were actionable in our courts; where the lex loci delicti was neither pleaded nor proved, our court presumed the conditions of the "double standard" were fulfilled, by applying the statutory law of the forum to a tort action arising in another state.[21] The position during this period, however, proved unsystematic and inconsistent, and in 1904 the court reconsidered the entire phase of law and concluded:

> "We cannot avoid the conclusion that the statement that a personal right of action for a personal injury is governed by the lex fori, as applied to anything but the manner of enforcement, was inconsiderately made, and should be corrected, to the end that it may stand in our Reports in apparent conflict with the law as recognized everywhere else, and as applied by this court in at least tacit repudiation[22] of that statement. That case may doubtless stand as authority for what was in fact decided, namely, that the courts of this state may refuse to enforce even a personal cause of action which depends on the statute of another state radically different from the law in this, and repugnant to our public policy".[23]

This language served the purpose of clarifying the general doctrine together with the public policy qualification.[24] After the *Bain* case, the Wisconsin court has consistently agreed with the basic theory of the majority that the place of wrong determines whether a person has sustained a legal injury; capacity, rights and liabilities are now

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[18] Anderson v. Milwaukee & St. Paul Rwy. Co., *supra;* Bettys v. Milwaukee & St. Paul Rwy. Co., *supra.*

[19] 1943 Wis. L. Rev. 145, 152 (1943).

[20] Stetler v. Chicago & Northwestern Ry. Co., 49 Wis. 609, 6 N.W. 303 (1880). Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N.W. 664, 34 L.R.A. 503 (1896).

[21] MacCarthy v. Whitcomb, *supra.* The court actually enforced a foreign statute by presuming the Illinois statute was the same as the Wisconsin statute; this presumption, in fact, was correct.

[22] The court here referred to the *Eingartner* case, *supra,* which distinguished rather than repudiated the *Anderson* case, *supra.*

[23] Bain v. Northern Pacific R. Co., *supra.*

[24] Fox v. Postal Telegraph Cable Co., 138 Wis. 648, 120 N. W. 399 (1909). Here the defendant telegraph company negligently delayed delivery of a telegram sent by the plaintiff from New York to Illinois. The Wisconsin court allowed the plaintiff to recover despite a provision in the telegraph blank recognizable in New York and Illinois that the defendant would not be liable for delays in delivery.

governed by the law where the tort takes place to an extent that all criteria for choice of law in torts[25] are ignored except the "territorial basis of law".[26]

III. Pleadings and Proof[27]

It would be too great a burden on our courts to demand that they learn the procedure and the machinery for administering justice of every jurisdiction where a wrong takes place. Rules of evidence within a single jurisdiction are sufficiently difficult and involved without requiring the judge and lawyers to employ the rules of a foreign jurisdiction in a conflicts case; questions as to burden of proof fall within this burdensome category. These are procedural matters determined in Wisconsin by the law of the forum. The need for keeping the calendars clear and the requirement for certainty recommend this classification.

Courts are unanimous in the requirement that the foreign law be pleaded by the party who desires to rely thereon. But the process of proving a foreign law raises a number of disputable interesting questions. If the foreign law is to control, and if the court does not know it judicially, it must be proved the same as any other fact in issue.[28] When the injured plaintiff relies on the common law of the place of wrong, a presumption is raised by the Wisconsin court that the lex loci delicti is the same as the lex fori.[29] When the injured plaintiff relies on the statutes of the place of wrong, the Wisconsin court takes judicial notice of the statutes of the United States and all the states and territories thereof.[30]

> "The accident happened in the state of Illinois and the liability of the parties is therefore to be determined in accordance with the law of the state of Illinois. The plaintiff in his complaint set out the statutory law of Illinois relating to damages . . . but made no allegation respecting the common law of the state of Illinois, nor was any proof offered upon the trial with respect to the common law of the state of Illinois. The courts

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[25] David F. Cavers, "A Critique of the Choice-of-Law Problem," 47 Harv. L. Rev. 173 (1933); Lorenzen, "Tort Liability and the Conflict of Laws," 47 Law Quarterly Rev. 483 (1931).

[26] See opinion of Holmes J. in American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826 (1909); Goodrich, "Public Policy in the Law of Conflicts," 36 W. Va. L. Q. 156 (1930).

[27] In general, see: Samuel R. Wachtell, "Proof of Foreign Law in American Courts," (United States L. Rev. 1935, LXIX, 526); Chapters 263 and 327, Wis. Stats. (1945); Wigmore, Evidence (3d ed. 1940) secs. 564, 668, 690, 1213, 1218, 1271, 1680, 1684, 1703, 1697, 1953, 2536, 2558; '43 Wis. L. Rev. 145, 170 (1943); '44 Wis. L. Rev. 128 (1944).

[28] Wigmore, Evidence (3d ed. 1940) secs. 2536, 2558.

[29] Jensen v. Jensen, 228 Wis. 77, 279 N.W. 628 (1938); White v. Minneapolis, St. P. & S.S.M. Ry. Co., 147 Wis. 141, 133 N.W. 148 (1911).

[30] Section 328.01,, Wis. Stats. (1945); 1945 Wis. L. Rev. 192, 196 (1945); Hutzler v. McDonnell, 239 Wis. 568, 2 N.W. (2d) 207 (1942), *affirmed* in 242 Wis. 256, 7 N.W. (2d) 835 (1943).

> of this state take judicial notice of the statutes of the United States and of all the states and territories thereof. This, however, does not apply to the common law. If a party claims that his rights are to be determined in accordance with the law of another state, the law of that other state must be pleaded and proven as any other fact; otherwise the common law of the state where the injury occurred will be presumed to be the same as the law of the forum".[31]

Should the injured plaintiff fail to plead the lex loci delicti, he may amend his pleadings at any time to conform with the issue really tried.[32]

We thus see that a right based on statutory liability in the lex loci delicti has been treated much differently than a common law right of action. Until passage of the Uniform Judicial Notice of Foreign Law Act in 1947,[33] we had this distinction in Wisconsin: the foreign statute was a matter of "law" to be determined by the judge;[34] the foreign common law was a matter of "fact" to be determined by the jury.[35] Whether or not a foreign statute must be pleaded is not clear,[36] but a cautious counsel, relying on such statute, will not omit such allegation from his pleadings. No grave problems of proving the foreign statute are involved because the trial court must abide by Section 328.01, Wisconsin Statutes, although it is under no compulsion under the "full faith and credit" clause of the Act of Congress.[37]

In all cases where the right of action is based on foreign common law, counsel for plaintiff should affirmatively plead and prove such common law, although the Uniform Act requires the court to take judicial notice. The newness of the Uniform Act requires caution. And if counsel for defendant sets up an affirmative defense recognized by the lex loci delicti, he has the burden of pleading and proving such defense.[38] Expert witnesses, not necessarily members of the legal profession,[39] should be brought in to testify as to the common law of the place of injury,[40] but they must satisfy the trial judge that they are qualified from their personal knowledge.[41]

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[31] Switzer v. Weiner, 230 Wis. 599, 601, 284 N.W. 509 (1939).
[32] Stetler v. Chicago & Northwestern Ry. Co., 49 Wis. 609, 6 N.W. 303 (1880); Flanders v. Cottrell, 36 Wis. 564 (1874).
[33] Chapter 363, Wisconsin Laws of 1947.
[34] Wigmore, Evidence (3d ed. 1940) sc. 2558. Wigmore contends that the only sound policy is that both should be proved to the judge.
[35] Compare the language of *Switzer* case, *supra*, with Hite v. Keene, 149 Wis. 207, 134 N.W. 383 (1912), which was decided before the passage in 1921 of Section 328.01, Wis. Stats. (1945).
[36] *Compare* Gebhart v. Homes, 149 Wis. 428, 447, 135 N.W. 860 (1912) *with* MacCarthy v. Whitcomb, 110 Wis. 113, 85 N.W. 707 (1901).
[37] Rape v. Heaton, 9 Wis. 328 (1859), Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), Olmsted v. Olmsted, 216 U.S. 386, 30 S.Ct. 292, 54 L.Ed. 530, 25 L.R.A., N.S., 1292 (1910).
[38] Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).
[39] In England the qualified expert must be a member of the legal profession.
[40] Wigmore, Evidence (3d ed. 1940) sec. 564.
[41] Wigmore, Evidence (3d ed. 1940) secs. 668, 690.

Although the place of the tort governs the liability of the defendant, the sufficiency of the evidence to raise a question for the jury is determined by Wisconsin law.

> "While the liability of the defendant is to be determined by the laws of Minnesota, the law of the forum governs the proof in court of the facts alleged. In other words, the sufficiency of the evidence to raise an issue for the jury is to be determined by the law of Wisconsin".[42]

Even where the lex loci delicti demands that questions of fact should always be left to the jury, if the facts are clearly proven and there is no real dispute bearing on the question, it is for the Wisconsin court to say as a matter of law how the issue shuold be decided.[43] Thus the right to recover and the extent of liability are substantive matters to be determined by the lex loci delicti, and evidential matters are procedural and governed by the lex fori. This latter classification is applicable to the power of the judge to sum up evidence or comment on the evidence.

The Statute of Limitations[44] is considered procedural by the Wisconsin court, and the requirement of the statute is a condition precedent to bringing suit.[45] Thus if the action to recover is not brought within two years after the happening of the event, even if the lex loci delicti has a longer statutory period, the plaintiff is barred from the Wisconsin courts.[46] The period of limitation of actions of the forum determines whether the plaintiff is barred by lapse of time, not the law where the cause of action arose.[47]

The Wisconsin court has rejected the doctrine of forum non conveniens,[48] holding that the privileges and immunities clause of

[42] Hutzler v. McDonnell, *supra.* The court cited with approval, Restatement, Conflict of Laws (1934) sec. 595. This is one of the few cases where the court has referred to the Restatement. Has counsel been guilty of omission in the briefs? d

[43] Bourestom v. Bourestom, 231 Wis. 666, 673, 285 N.W. 426 (1939). Also see Edmund M. Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944).

[44] Section 330.19, Wis. Stats. (1945).

[45] Trochansky v. Milwaukee Electric Rwy. & Light Co., 110 Wis. 570, 86 N.W. 156 (1901); Voss v. Tittel, 219 Wis. 175, 262 N.W. 579 (1935).

[46] But see: Lorenzen, "The Statute of Limitations and the Conflict of Laws," 28 Yale L. J. 492 (1919).

[47] Compare: Krisor v. Watts, 61 F. Supp. 845 (1945). Judge Duffey held the plaintiff was not barred in the Wisconsin Federal District Court, although he would have been barred in the Wisconsin courts on an Illinois accident. Submitted this decision is wrong in light of the extension given Erie Rr. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938) in Sampson v. Channell, 110 F. 2d 754, 128 A.L.R. 394 (1940), *certiorari denied,* 310 U.S. 650, 60 S.Ct. 1099, 84 L. Ed. 1415 (1940), and in Guaranty Trust Co. of New York v. York, 326 U.S. 99, 89 L. Ed. 2079, 65 S.Ct. 1464, 160 A.L.R. 1231 (1944).

[48] Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 Col. L. Rev. 1 (1929). The New York courts have applied the doctrine in suits based on tort when the action arose outside the state between non-residents. Gregonis v. Phila. & Reading Coal & Iron Co., 235 N. Y. 152, 139 N.E. 223, 32 A.L.R. 6 (1923).

the United States Constitution (art. IV, sec. 2) requires the court to retain jurisdiction of all actions brought by nonresident natural persons,[49] although the United States Supreme Court has officially sanctioned the doctrine.[50] When a Wisconsin Supreme Court, on application of the plaintiff, in the exercise of its original jurisdiction by mandamus will compel the lower court to proceed with the trial.[51]

IV. Capacity

The capacity of a party to bring suit may be governed by the forum, by the domicile or by the place of wrong. In Wisconsin whether the party has capacity to sue is determined by the place of wrong. These cases most frequently arise in husband and wife situations where, either by the law of the marital domicile or by the law of the place of wrong, a wife is unable to sue her husband for personal injuries. In Wisconsin a wife can maintain an action against her husband for injuries sustained in a Wisconsin auto accident caused by her husband's negligence:[52] a husband, on the other hand, until 1947[53] could not sue his wife for negligence.[54] Several cases stress Wisconsin's adherence to the general rule in conflicts that the forum will apply the law of the state where the accident happened.

1) H and W are domiciled in State A, where the wrongful death statute gives W no right of action for her husband's death. H is injured in Wisconsin and dies in State A. W may successfully sue under the Wisconsin wrongful death statute in the Wisconsin courts.[55] "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place".[56]

2) W brings action against H in a Wisconsin court for personal injuries sustained while a passenger in H's automobile. The accident was a State A where a wife may not bring suit for personal

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[49] Chicago, Milwaukee & St. Paul Rwy. Co. v. McGinley, 175 Wis. 565, 185 N.W. 218 (1922). The Wisconsin court extends the rejection of the doctrine to nonresident corporations, giving them the same rights in her courts as resident corporations; Sections 182.02(2) and 226.11, Wis. Stats. place the court under this compulsion. State ex rel Smith v. Belden, 205 Wis. 158, 236 N.W. 542 (1931).

[50] Canada Malting Co. v. Paterson Steamships, 285 U.S. 413, 52 S.Ct. 413, 76 L. Ed. 837 (1932).

[51] State ex rel. Smith v. Belden, *supra,* clarifying the doubts in State ex rel. Aetna Ins. Co. v. Fowler, 196 Wis. 451, 220 N.W. 534 (1928).

[52] Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926).

[53] Section 246.075 has been created by Chapter 164, Wisconsin Laws of 1947, and permits a husband to recover damages from his wife for injuries sustained to his person by her wrongful act or neglect.

[54] Fehr v. General Accident Fire & Life Assurance Corp., 246 Wis. 228, 16 N.W. (2d) 787 (19445).

[55] The Wisconsin statute is applicable because the death was caused in this state. Rudiger v. Chicago, St. Paul, Minneapolis & Omaha Rwy. Co., 94 Wis. 191, 68 N.W. 661 (1896).

[56] Restatement, Conflict of Laws (1934) sec. 377.

injuries against her husband. After the commencement of the action, but prior to the date of trial, H and W were married. W has no right to bring the action.[57]

3) W sues her husband's employer for injuries received while riding as a guest in the defendant's truck. The accident was in State A where a wife may not bring suit for personal injuries against her husband. There are no decisions in State A determining if a wife may sue her husband's employer. The Wisconsin court decides in favor of W, citing Wisconsin cases to resolve the issue of the host-guest relationship and the ultra vires character of the transaction.[58]

4) W is injured in State A, where the wrongful death statute prohibits the bringing of an action in State A for death occurring outside thereof. This statute does not prohibit W from suing successfully in the Wisconsin courts which must accept jurisdiction under the privileges and immunities clause of the United States Constitution (art. IV, sec. 2).[59]

5) Husband and Wife are residents of State A, where a wife cannot maintain an action of tort against her husband. W is injured in a Wisconsin accident, and brings suit in Wisconsin. W may recover.[60]

6) Husband and Wife are domiciled in State A, where a wife cannot maintain an action of tort against her husband. The accident occurs in State B, where a wife can sue her husband in tort. W can sue H successfully in the Wisconsin courts.[61]

7) W brings suit in Wisconsin against her husband and two others, alleging they conspired in State A to damage her. Because in Wisconsin there is no civil action for conspiracy, the Wisconsin court will find in favor of H.[62] But the suit will be dismissed without prejudice, and W may successfully sue in a jurisdiction which recognizes the action for conspiracy.

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[57] Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931). This is Wisconsin's most famous conflicts case, and although the Wisconsin court may have misinterpreted Illinois law, it remains authority for the proposition that the capacity to sue is governed by the lex loci delicti. Noted in: 6 Wis. L. Rev. 103 (1931), 1943 Wis. L. Rev. 145, 166 (1943), 1944 Wis. L. Rev. 128 (1944), 31 Col. L. Rev. 884 (1931), 44 Harv. L. Rev. 1138 (1931), 29 Mich. L. Rev. 1072 (1931), 79 Pa. L. Rev. 804 (1931).

[58] Hensel v. Hensel Yellow Cab. Co., 209 Wis. 489, 245 N.W. 159 (1944).

[59] Sheean v. Lewis, 218 Wis. 588, 260 N.W. 633 (1935).

[60] Forbes v. Forbes, 226 Wis. 477, 277 N.W. 112 (1938).

[61] "But the cause of action is transitory and citizens of other states have the same right to bring such action here as citizens of Wisconsin have." Bourestom v. Bourestom, 231 Wis. 666, 670, 285 N.W. 426 (1939).

[62] Singer v. Singer, 245 Wis. 191, 14 N.W. (2d) 43 (1944).

V. The Unknown and the Known

In the previous sections of this article the general tenets have been discussed with little practical application to the ordinary situation confronting the practitioner. Although the terminology and classifications already defined should be an aid, enunciation to particular sets of facts should facilitate simplification in reference.

Almost all of the Wisconsin cases have involved railroad or automobile injuries sustained in another jurisdiction, with the result that many questions have not been decided by the Wisconsin court. It is axiomatic that the forum will not execute the penal laws of another,[63] yet we have had no occasion to determine what would be considered penal in the international sense by the Wisconsin court. We have recognized the precept that we will redress foreign wrongs except when opposed to our public policy, yet we only know that a clause in a telegraph blank that the defendant "shall not be liable for . . . delays in transmission or delivery . . . of any unrepeated message beyond the amount received for sending the same," is contra to our public policy.[64] How far does this exception extend? Ordinarily, a court will not take jurisdiction of a case arising out of a trespass upon land in another state,[65] but will the Wisconsin court feel compelled under the privileges and immunities clause of the United States Constitution to accept such suits?[66] If the issue were relevant, would the modern Wisconsin court hold "the measure of damages for a tort is determined by the law of the place of wrong"?[67] With the decisions at our disposal, an imaginary automobile journey may serve to illustrate the Conflict of the Law of Torts in Wisconsin.[68]

A, an Illinois resident, and B, a Minnesota resident, decide to journey in B's automobile from Milwaukee to Oklahoma City. While travelling through Minnesota, B negligently drives off the road and A is injured. If the suit were brought in Wisconsin, the distinction between a passenger and guest, and the measure of care demanded of a host, would be determined by Minnesota law. The law of the place in which the accident occured governs the rights and liabilities,

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[63] See, generally: Leflar, "Extrastate Enforcement of Penal and Governmental Claims," 46 Harv. L. Rev. 193 (1932).

[64] Fox v. Postal Telegraph Cable Co., 138 Wis. 648, 120 N.W. 399 (1909); compare, Restatement, Conflict of Laws (1934) sec. 414.

[65] Ellenwood v. Marietta Chair Co., 158 U.S. 105, 15 S. Ct. 771 (1895); Restatement, Conflict of Laws (1934) secs. 614, 615.

[66] Little v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 65 Minn. 48, 67 N.W. 846 (1896).

[67] Restatement, Conflict of Laws (1934) sec. 412; see, Sweet v. Chicago & N.W. Ry. Co., 157 Wis. 400, 147 N.W. 1054 (1914). Exemplary damages were not considered "penal" in Daury v. Ferraro, 108 Conn. 386, 143 Atl. 630 (1928) and Wallman v. Mead, 93 Vt. 322, 107 Atl. 396 (1919).

[68] See, generally: Page, "Conflict of Law Problems in Automobile Accidents," 1943 Wis. L. Rev. 145 (1943).

rather than the law in which the guest became a guest or the law of the state in which suit is brought.[69]

In Oklahoma, B negligently hits another car driven by his wife. Although in Minnesota, the marital domicile, a wife cannot maintain an action of tort against her husband, since she has capacity to sue in Oklahoma, the Wisconsin court will permit the suit. If contributory negligence will bar the wife's recovery in Oklahoma, the Wisconsin court will not apply its own Doctrine of Comparative Negligence, but will give the same effect to contributory negligence as the place of the accident.[70]

On the return journey A and B remain overnight in Duluth, Minnesota. B lends his car to A, who drives to Superior, Wisconsin to visit a friend. While in Wisconsin, A is stalled on the highway, and telephones B informing him of his plight. B sends C, a garageman normally in his employ, from Duluth. C has an accident in Wisconsin. Whether C is considered B's agent or an independent contractor is determined by Wisconsin law, because the Wisconsin court will give no extraterritorial effect to any Minnesota statute. The determination for vicarious liability depends upon the law of the state in which the accident takes place.[71]

It thus appears that Wisconsin is in line with the majority view that the lex loci delicti determines whether a person has sustained a legal injury, whether a person has capacity to sue, whether a person is responsible for the torts of another and whether an automobile passenger has assumed the risk of the driver's negligence. "Fairness demands that once one's rights and liabilities are settled under the law, those same rights and liabilities shall be the measure of legal obligation everywhere".[72] By giving an injured plaintiff no greater or less rights than he would have in the forum where the injury occurred, the Wisconsin court puts no premium on using her judicial machinery, yet this same impartiality benefits the plaintiff who only can secure service on the defendant within the jurisdiction.

VI. Corollary Problems

Directly related to Conflict of Torts are two problems which have not been emphasized because they involve both contract and tort. These are separate fields which demand more elaboration than the length of this article permits, but which should not be eliminated completely in any treatment of the general subject.

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[69] Jensen v. Jensen, 228 Wis. 77, 279 N.W. 628 (1938); Switzer v. Weiner, 230 Wis. 599, 284 N.W. 509 (1939); Hutzler v. McDonnell, 239 Wis. 568, 2 N.W. (2d) 207 (1942), *affirmed* 242 Wis.. 256, 7 N.W. (2d) 835 (1943).

[70] Bourestom v. Bourestom, 231 Wis. 666, 285 N.W. 426 (1939).

[71] Zowin v. Peoples Brewing Co., 225 Wis. 120, 273 N.W. 466 (1937).

[72] Goodrich, "Public Policy in the Law of Conflicts," 36 W. Va. L. Q. 156 (1930).

A. *Joinder of Policyholder and Insurer as Parties Defendant*[73]

Under the common law, a joinder of the insurer and insured was clearly improper because the action against the insurer was in contract, and the action against the insured was in tort: under the Wisconsin Statutes,[74] such joinder is allowed. The Conflicts problem arises when the third party claimant has no claim against the insurer under a "no-action" clause, until a final judgment has been recovered against the insured. Normally courts will not disregard the provision because it places upon the insurer a greater obligation than that contracted for, resulting in an impairment of contract between the parties, contrary to Section 10, Article I of the United States Constitution, and Section 12, Article I of the Wisconsin Constitution.[75] What effect then is given Section 260.11, Wisconsin Statutes?

Normally procedure, or the form of remedy, is governed by the lex fori: substance, or matter of right, is governed by the law of the place of the transaction. In resolving the distinction between substance and procedure, the Wisconsin court has held the right to join the insured and insurer as parties defendant under the statute is a matter of procedure to be governed by the lex fori,[76] although the results of Wisconsin decisions tend more to demonstrate the statute confers a substantive right which is governed by the lex contractus. No extraterritorial effect is given the statute when the policy has been issued outside the state, but when Wisconsin is the lex fori and lex contractus, it matters not what the lex delicti may be. For Wisconsin insurance contracts the third party claimant is treated the same as a third party beneficiary, and suit may be brought against the insurer alone, with no requirement of notifying or serving the insured. Applications of these general tenets are found in the following illustrations:

1) D, a State A resident, took out an accident policy with a "no-action" clause written in State A with I, insurance Company. In a Wisconsin accident, D injured P, who brought suit in a Wisconsin court joining D and I as parties defendant. I filed a plea in abatement, which the lower court overruled. The Supreme Court reversed, deciding the statute did not apply to this case.[77]

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[73] In general, see: 22 Marq. L. Rev. 75 (1938); 12 Wis. L. Rev. 531 (1937); 20 Marq. L. Rev. 158 (1936).

[74] Section 260.11, Wis. Stats. (1945).

[75] Byerly v. Thorp, 221 Wis. 28, 265 N.W. 76 (1936); 20 Marq. L. Rev. 158 (1936); 12 Wis. L. Rev. 531, 536 (1937).

[76] "Matters pertaining to the form in which the action is brought would seem clear instances of what relates to remedy, to be settled by the lex fori." Oertel v. Williams, 214 Wis. 68, 251 N.W. 465 (1934).

[77] Byerly v. Thorpe, *supra,* Kilocyn v. Trausch, 222 Wis. 528, 269 N.W. 276 (1936).

2) I, insurance company, issued in Wisconsin a policy with a "no-action" clause to a Wisconsin resident before the enactment of the statute. In a Wisconsin accident, D injured P, who brought suit in the Wisconsin courts joining D and I as parties defendant. The Supreme Court held that the Wisconsin statute was effective only against those policies entered into subsequent to the adoption of the statute.[78]

3) D, a Wisconsin corporation, was insured in Wisconsin by I, a State A insurance company. The policy contained a "no-action" clause and another clause which made void any provisions which conflicted with any statutory law. P, the injured plaintiff, successfully joined D and I. The court held the "no-action" clause was void from the very terms of the policy. Thus the interpretation of a personal contract is referable to the place where it is made.[79]

4) I, an insurance company, issued a policy in Wisconsin to D, a Wisconsin resident. P was injured by D in a State A accident. The court allowed P to bring suit only against I in Wisconsin, deciding that the forum rather than the lex loci delicti would govern the question of joinder.[80] Thus State A law, which would not permit such joinder or splitting of a cause of action, was inoperative on these facts, and when the Wisconsin court decided the pleading under the statute was procedural, it necessarily concluded there was no impairment of the right of contract.

5) In an action brought in Wisconsin to recover damages for the death of her husband in a State A accident caused by the alleged negligence of D, P joined I, the insurer of D. The decedant was a State A resident; D was a Wisconsin resident who contracted with a State B corporation for the policy in Wisconsin. State A did not permit an action in State A for death occurring outside the state; Wisconsin had no such law. Despite the "no-action" clause in the policy, and the embargo provisions of State A law, the Wisconsin court held Section 260.11, Wisconsin Statutes operative by permitting the joinder.[81]

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[78] Pawlowski v. Eskofski, 209 Wis. 189, 244 N.W. 611 (1932); 20 Marq. L. Rev. 158 (1936). If the retroactive test determines whether a statute is substantive or procedural, how can the Wisconsin court hold Section 260.11, Wis. Stats. to be procedural? See, Davis v. Mills, 194 U.S. 451, 24 S.Ct. 692, 48 L. Ed. 1067 (1904).

[79] International Harvester Co. v. McAdams, 142 Wis. 114, 124 N.W. 1042 (1910).

[80] Oertel v. Williams, *supra;* 1944 Wis. L. Rev. 133 (1944); 22 Marq. L. Rev. 75 1938); Lorenzen, Cases on Conflict of Laws (4th ed. 1937) 376; Restatement, Conflict of Laws (1934) sec. 592, comment (a); Goodrich, Conflict of Laws (2d ed. 1938) 191; Elliot v. Indemnity Insurance Co. of North America, 210 Wis. 445, 230 N.W. 87 (1930).

[81] Sheehan v. Lewis, 218 Wis. 588, 260 N.W. 633 (1935); 10 Wis. L. Rev. 78 (1934); 11 Wis. L. Rev. 46 (1935); 22 Marq. L. Rev. 75, 84 (1938).

B. *Workmen's Compensation*[82]

Under the common law the question whether an employee could recover from his employer in tort was contingent upon the law where the injury occurred, although between 1875[83] and 1904[84] Wisconsin refused access to her courts for extraterritorial injuries where the cause of action was a statutory right conferred by the lex loci delicti. By reason of a Workmen's Act,[85] an employer is responsible for bodily harm to his employees arising out of and in the course of their employment and irrespective of the negligence or wilful fault of either the employer or employee. The Wisconsin court has rejected the contract explanation in interpreting the result that the Wisconsin statute is applicable to an accident without the state,[86] yet the decisions chiefly rest on the contract relationship, the incidents of which may be defined by the place of entering into it.[87] In a recent Wisconsin Law Review article[88] this explanation was offered:

> "The theory of the Compensation Act was to charge the loss, fixed by statute, caused by industrial accident irrespective of the cause (self-inflicted only excepted), to the cost of the product. Under this plan the burden falls upon society at large, and is not borne entirely either by the employer or by the employee. The liability of the employer under the act is not tortious and is not contractual in the sense that it should be considered as a covenant or part of the contract, but it is purely statutory. The liability of the employer under the act being statutory, the act enters into and becomes part of the contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract."

The Conflict of Laws questions with regard to the Act have called forth many decisions, a few of which will be demonstrated by the following examples:

1) W, a Wisconsin resident, contracts in Wisconsin with C, a Wisconsin corporation, to work half-time in Wisconsin and half-time in State A. W is injured in State A and can recover in Wisconsin.[89]

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[83] See, generally: Dwan, "Workmen's Compensation and the Conflict of Laws," 11 Minn. L. Rev. 329 (1927); Dwan, "Workmen's Compensation and the Conflict of Laws—the Restatement and Other Recent Developments," 20 Minn. L. Rev. 19 (1935); Dunlap, "The Conflict of Laws and Workmen's Compensation," 23 Calif. L. Rev. 381 (1935).

[84] Anderson v. Milwaukee & St. Paul Rwy. Co., 37 Wis. 321 (1875).

[85] Bain v. Northern Pacific R. Co., 120 Wis. 412, 98 N.W. 241 (1904).

[85] Bain v. Northern Pacific R. Co., 120 Wis. 412, 98 N.W. 241 (1904).

[86] Chapter 102, Wis. Stats. (1945).

[87] Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 170 N.W. 275, 171 N.W. 935 (1919).

[88] C. J. Oten, Workmen's Compensation—Conflict of Laws, 1947 Wis. L. Rev. 139, 140. This is an excellent review of the general principles and the Wisconsin rules of interpretation of Chapter 102, Wis. Stats. (1945).

[89] Threshermen's Nat. Ins. Co. v. Industrial Commission of Wisconsin, 201 Wis. 303, 230 N.W. 67 (1930).

Thus if the employer and employee are Wisconsin residents, who therein formulate their contract, the act is inferred within the contract, and it is immaterial where the injury occurs.

2) W, a Wisconsin resident, contracts in Wisconsin with C, a Wisconsin corporation, to work full-time in State A. W is injured in State A and can recover in Wisconsin.[90]

3) W, a resident of State A, contracts in Wisconsin with C, a Wisconsin corporation, to work full-time in State A. W is injured in State A and cannot recover in Wisconsin.[91] This case emphasizes the importance of the employee's residency when the work is to be performed outside Wisconsin.

4) W, a resident of State A, contracts in State A with C, a State A corporation, to work in Wisconsin. W is injured in Wisconsin and can recover in Wisconsin.[92] Thus the act is applicable to every injury in Wisconsin, without regard to residency or the place where the employment contract was made.

5) W, a resident of State A, contracts in State A with C, a State A corporation, to work in Wisconsin. W normally works in Wisconsin but is injured while temporarily outside the state in the course of his employment. W can recover in Wisconsin.[93] This extension demonstrates that the place where the service is to be performed is a controlling factor.

6) W, a resident of State A, can recover in State A under her statute and can also qualify under the Wisconsin Act. Proceedings may be brought in Wisconsin.[94]

7) W, a State A employee, is injured in Wisconsin and is free to pursue his remedy in either state. The State A Workmen's Compensation Act provides that any lump sum settlement accepted by the injured employee will bar him from seeking recovery under another act. W seeks redress in State A and receives a lump sum settlement. He now pursues his remedy before the Wisconsin Industrial Commission, but cannot recover.[95]

8) W, a State B employee, is injured in Wisconsin and is free to pursue his remedy in either state. The State B Workmen's Com-

[90] Wisconsin Bridge and Iron Co. v. Industrial Commission of Wisconsin, 222 Wis. 194, 268 N.W. 134 (1936).
[91] Wandersee v. Industrial Commission of Wisconsin, 198 Wis. 345, 223 N.W. 837 (1929).
[92] Interstate Power Co. v. Industrial Commission of Wisconsin, 203 Wis. 466, 234 N.W. 889 (1931).
[93] Salvation Army v. Industrial Commission of Wisconsin, 219 Wis. 343, 263 N.W. 349, 101 A.L.R. 1440 (1935).
[94] Jutton-Kelly Co. v. Industrial Commission of Wisconsin, 220 Wis. 127, 264 N.W. 630 (1936).
[95] Magnolia Peroleum Co. v. Hunt, 320 U.S. 430, 64 S.Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943).

pensation Act has no provision concerning the extraterritorial effect of a State B award. W seeks redress in State B and receives a lump sum settlement. The settlement contract provides, "This settlement does not effect any rights that the applicant may have under the Workmen's Compensation Act of Wisconsin." The Wisconsin Commission grants credit against its award for the amount paid under the State B award. W now pursues his remedy before the Wisconsin Industrial Commission, and is entitled to any amount which is determined to be more than his State B award.[96]

[96] Industrial Commission of Wisconsin v. McCartin, — U.S. —, 67 S. Ct. 886 (1947), *overruling* McCartin v. Industrial Commission of Wisconsin, 248 Wis. 570, 22 N.W. (2d) 522 (1946). The Wisconsin court believed Magnolia Petrolium Co. v. Hunt, *supra,* controlled to the extent that the "full faith and credit" clause demanded that any lump sum settlement made the matter res adjudicata. The importance of the law of the state where the first award was given, was not magnified in the *Magnolia Petrolium* case. See: 1947 Wis. L. Rev. 139, 144.