

Conflicts of Laws as Applied to Tort Law in Wisconsin

Louis W. Staudenmaier Jr.

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Louis W. Staudenmaier Jr., *Conflicts of Laws as Applied to Tort Law in Wisconsin*, 44 Marq. L. Rev. 557 (1961).
Available at: <http://scholarship.law.marquette.edu/mulr/vol44/iss4/7>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

CONFLICT OF LAWS AS APPLIED TO TORT LAW IN WISCONSIN

INTRODUCTION

In resolving the rights of parties involved in a tort action where there is a conflict-of-laws problem present, a decision must be made as to which procedural and which substantive law will govern. The *Lex Fori*, the law of the forum where the action is brought, controls the remedies of the parties and determines what procedural law is applicable.¹ The *Lex Loci Delicti*, the law of the place where the tort was committed, governs generally the substantive rights of parties.² In the last few years there has been a trend toward application of the *Lex Domicilii*, the law of the domicile of the parties, in place of the *lex loci*. To date the use of *lex domicilii* has been limited strictly to the issue of the capacity of family members to sue one another in tort for personal injury. Which "conflict-of-laws" rule the forum state will apply becomes important when the state of domicile and the state where the tort occurred have different substantive law. It will be the purpose of this paper to explore the various ramifications of this problem.

THE EXTENT OF APPLICATION OF LEX DOMICILII

In 1959 the Wisconsin Supreme Court held in *Haumschild v. Continental Casualty Co.*³ that henceforth in tort actions, the law of domicile would be applied in determining any incapacity to sue based on a family relationship. In this case, the plaintiff was injured in an automobile accident due to the negligence of her husband while both were traveling in California. Both parties were domiciliaries of Wisconsin. Prior to this decision, the question of capacity to sue would have been decided by resort to the substantive law of California,⁴ but the court overruled six cases and partially overruled two others in holding that Wisconsin substantive law would control this issue.⁵

¹ RESTATEMENT, CONFLICT OF LAWS, §585 (1934).

² RESTATEMENT, CONFLICT OF LAWS, §378 (1934). The reason for the usual rule of tort liability has been stated by Justice Holmes in *Western Union v. Brown*, 234 U.S. 542, 547 (1914):

. . . it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery.

³ 7 Wis. 2d 130, 95 N.W. 2d 814 (1959).

⁴ Under California law a wife may not sue her husband in tort. *Peters v. Peters*, 156 Cal. 32, 103 Pac. 219 (1909).

⁵ Cases overruled by *Haumschild*: *Buckeye v. Buckeye*, 203 Wis. 248, 234 N.W. 342 (1931); *Forbes v. Forbes*, 226 Wis. 477, 277 N.W. 112 (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 230 (1956). Cases partially overruled: *Nelson v. American Employers' Insurance Co.*, 258 Wis. 252, 45 N.W. 2d 681 (1951); *Jaeger v. Jaeger*, 262 Wis. 14, 53 N.W. 2d 740 (1952).

While the legal writers are practically unanimous in their approval of the rule in *Haumschild*,⁶ few courts have so held to date. Apparently the first state to apply *lex domicilii* was California. In *Emery v. Emery*,⁷ one defendant was driving the family automobile at his father's direction. The car was involved in an accident in the state of Idaho and the driver-defendant's unemancipated minor sisters, passengers in the car, were injured. They brought suit against both their father and brother, as did their mother who attempted to recover for medical and other care she had rendered. The parties were all domiciled in California. The court held that although Idaho substantive law governed as to the degree of negligence to be proved, California law would be applied to determine whether any disabilities or immunities existed because:

That 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.⁸

In the case of *Pittman v. Dieter*,⁹ a widow was permitted to sue her husband's estate for injuries sustained by her in an accident in which her husband was killed. The accident occurred in Florida where such action was barred.¹⁰ The parties were domiciled in Pennsylvania, whose substantive law also denied the right to sue.¹¹ The court felt that the reason for the rule was to preserve domestic harmony and since this expressed a policy of domestic relations the law of domicile would govern. Recognizing the fact that such actions are rarely prosecuted unless liability insurance is present, the court felt the real issue was "whether the possibility of collusion is so great as to outweigh the logical reasons for bringing the suit,"¹² and decided that it was not, especially since the husband was now deceased.¹³

⁶ See, among others, COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT LAWS*, 250, 346 (1949); Seavey, *Torts*, 34 N.Y.U.L. REV., 517, 527 (1959); Page, *Conflict of Law Problems in Automobile Accidents*, 1943 WIS. L. REV. 145; Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 IND. L. J. 297 (1958); Schoetz, *Conflicts of the Law of Torts in Wisconsin*, 31 MARQ. L. REV., 127 (1947).

⁷ 45 Cal. 2d 421, 289 P. 2d 218 (1955).

⁸ *Id.* at 428, 289 P. 2d at 223.

⁹ 10 Pa. D. & C. 2d 360, 26 U.S.L. Week 2120 (Pa. Ct. of Com. Pleas, Phila. Cty. 1957).

¹⁰ *Corren v. Corren*, 47 So. 2d 774 (Fla. 1950).

¹¹ *Shoyer v. Shoyer*, 36 Pa. D. & C. 673 (Philadelphia County Ct. 1939) states the Pennsylvania view on this issue.

¹² *Pittman v. Dieter*, *supra* note 9, at 2120. At least one state, New York, has taken legislative steps to regulate the problem. In 1937, section 167 (3) of the New York Insurance Law was enacted. It provided that "no policy or contract shall be deemed to insure against any liability of an insured because of death or of injuries to his or her spouse or because of injury to or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy." For a discussion of the effect of this

In *Koplik v. C. P. Trucking Corporation*,¹⁴ plaintiff was injured due to defendant's negligence in an accident occurring in New York. Thereafter the parties were married and subsequent to the marriage plaintiff commenced her action in New Jersey, where they were both domiciled. Although a New York statute permitted such actions,¹⁵ the New Jersey court held that:

... it is sensible and logical to have disabilities to sue and immunities from suit arising from the family relationship determined by reference to the law of the state of the family domicile *when the suit is brought in that state* [Italics added].¹⁶ Otherwise the *lex loci* will be permitted to interfere seriously with a status and a policy which the state of residence is primarily interested in maintaining.¹⁷

Since New Jersey substantive law did not permit tort actions between spouses,¹⁸ a demurrer to the complaint on this ground was sustained.

A different form of reasoning has been used in the federal courts in arriving at the same result. In *Alexander v. Alexander*¹⁹ an action was brought by a wife against her husband, both being resident of South Carolina, for malicious prosecution allegedly occurring in Florida. The Florida common law, preventing actions between spouses for tort, was deemed to have been abrogated by the "equal protection" clause of the Fourteenth Amendment, and thus plaintiff could maintain the action against her husband.

In the case of *Morin v. Letourneau*,²⁰ plaintiff was injured due to defendant's negligence while they were traveling in Massachusetts. Both parties were domiciled in New Hampshire, whose substantive law permits actions between spouses for personal torts. Following the accident, but before the lawsuit, plaintiff and defendant were married. While the court did apply *lex loci*, i.e., Massachusetts' substantive law,²¹

statute on a conflict-of-laws problem, see Note in 15 WASH. & LEE L. REV. 266 (1958).

¹³ Thus, in one case, Pennsylvania changed not only its conflicts rule but also its substantive law concerning the capacity of one spouse to sue the other.

¹⁴ 27 N.J. 1, 141 A. 2d 34 (1958).

¹⁵ N.Y. DOM. REL. LAW, Sec. 57.

¹⁶ None of the other states to apply *lex domicilii* to date has placed this limitation on the rule. This might lead one to believe that New Jersey is simply applying *lex fori*, but an older case in that state, *Clement v. Atlantic Casualty Insurance Co.*, 13 N.J. 439, 100 A. 2d 273 (1953), would probably dispel that notion. In that case an injured wife was allowed to sue her husband's insurer in a direct action for a tort that occurred in New York, although the plaintiff and her husband were New Jersey domiciliaries. This clearly shows that New Jersey does not deny the remedy, but only denies the right of one spouse to sue another.

¹⁷ *Koplik v. C. P. Trucking Corp.*, *supra* note 14, at 40.

¹⁸ *Kennedy v. Camp*, 14 N.J. 390, 102 A. 2d 595 (1954).

¹⁹ 140 F. Supp. 925 (W.D.S.C. 1956). This issue was not contested on appeal; see 229 F. 2d 111 (4th Cir. 1956).

²⁰ 102 N.H. 309, 156 A. 2d 131 (1959).

²¹ *Lubowitz v. Taines*, 293 Mass. 39, 198 N.E. 320 (1935), held that one spouse

they determined that the marriage did not, under that law, extinguish plaintiff's cause of action which arose prior to the marriage. However, in *dicta*, Justice Duncan stated that:

Recent developments in the field of conflict of laws indicate support in interspousal or family suits, arising out of wrongs committed in foreign jurisdictions, for the view that the rights of the parties should be determined in accordance with the law of the domicile of the parties. [Citing the *Emery*,²² *Koplik*,²³ *Haumschild*, and *Bodenhagen*²⁴ cases, as well as several law review articles].

However none of these decisions have been referred to by the parties and we find no occasion for purposes of this case either to adopt or censure the views which they advance.²⁵

Thus, the New Hampshire Court has opened the door to actions between spouses based on torts committed in states where such actions would not be permitted. Wisconsin, in the *Haumschild* decision, became the latest state to adopt the rule of *lex domicilii*.

APPLICATION OF THE HAUMSCHILD RULE

Since prior law has been reversed in Wisconsin, it becomes necessary to examine the practical aspects of the new conflicts rule as set down in *Haumschild*.

As motorists travel through the various states they are probably unaware that the law changes as they cross state lines. For example, Wisconsin's substantive law permits interspousal tort actions²⁶ and its conflicts rule in tort actions is to apply the substantive law of the domicile of the parties to this question.²⁷ New York's substantive law also permits suits between husband and wife²⁸ but the conflicts rule in that state is to apply the *lex loci* to this matter.²⁹

Illinois, on the other hand, has a statute denying the right of one spouse to sue the other in tort,³⁰ and its conflicts rule is to apply the law of the state where the tort occurred, even if it conflicts with Illinois' substantive law.³¹

could not maintain an action against the other for torts committed in Massachusetts.

²² *Emery v. Emery*, *supra* note 7.

²³ *Koplik v. C. P. Trucking Corp.*, *supra* note 14.

²⁴ *Haumschild v. Continental Casualty Co.*, *supra* note 3 and *Bodenhagen v. Farmers Mutual Insurance Co.*, 5 Wis. 2d 306, 95 N.W. 2d 822 (1960); a case similar in its facts to the *Haumschild* case, which, on rehearing, was held to be governed by the rule in *Haumschild*.

²⁵ *Morin v. Letourneau*, *supra* note 20, at 132.

²⁶ WIS. STAT., §246.07 (1959), as construed in *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475 (1926); WIS. STAT., §246.075 (1959).

²⁷ *Haumschild v. Continental Casualty Co.*, *supra* note 3.

²⁸ N.Y. DOM. REL. LAW, §57. For a complete list of states which permit actions between husband and wife, and which do not, see Comment, 31 So. CAL. L. REV., 431 (1958).

²⁹ *Coster v. Coster*, 289 N.Y. 438, 46 N.E. 2d 509 (1943).

³⁰ ILL. REV. STAT. ch. 68, §1 (1953).

³¹ *Whitney v. Madden*, 400 Ill. 185, 79 N.E. 2d 593 (1948).

Minnesota's substantive law also refuses to permit interspousal tort actions but the conflicts rule applied in that state is hybrid in nature. While Minnesota generally looks to the *lex loci*, it will refuse to permit tort actions between spouses even should the *lex loci* permit the action, on the ground that such suits violate the strong public policy of the state.³² Minnesota is then, in effect, applying *lex fori* to the question, rather than *lex loci* or *lex domicilii*. Several hypotheticals will serve to illustrate the conflicts problem as to the rights and remedies of persons in the several states.

A. WHERE HUSBAND AND WIFE ARE WISCONSIN DOMICILIARIES

While traveling in Illinois a husband and wife are involved in an automobile accident and the passenger-wife is injured due to the husband's negligence. The wife brings suit in Wisconsin. Under the rule in the *Haumschild* case, the wife can maintain her action, because Wisconsin will apply *lex domicilii*, i.e., the substantive law of Wisconsin, to the issue of capacity to sue.³³

If the wife sues in Illinois, the state where the tort occurred, under Illinois' present conflicts rule, that court will apply the *lex loci*,³⁴ and the Illinois statute³⁵ will prevent the wife from bringing her action.³⁶

B. WHERE HUSBAND AND WIFE ARE ILLINOIS DOMICILIARIES

While the parties are motoring through Wisconsin, the wife is injured due to her husband's negligence. If the plaintiff brings her action in Illinois, the Illinois Court will presumably apply *lex loci*.³⁷ Since under Wisconsin law the action is maintainable,³⁸ the Illinois Court will permit her to sue.³⁹

But if under these same facts, the wife commences her action in Wisconsin, the suit must be dismissed. The Wisconsin Court is bound

³² Only four states are known to have taken this position, and one, New York, has since reversed its position by statute. *Kyle v. Kyle*, 210 Minn. 204, 297 N.W. 744 (1941); *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604 (1935); *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E. 2d 597 (1936), but N.Y. DOM. REL. LAW, §57 now permits such actions.

³³ *Supra* note 26.

³⁴ *Whitney v. Madden*, *supra* note 31.

³⁵ *Supra* note 30.

³⁶ Whether the Illinois married woman's act denies the right or merely the remedy of one spouse against another is apparently still a moot point. The Wisconsin court in *Bodenhagen v. Farmer's Mutual Insurance Co.*, *supra* note 24, originally decided that the immunity was procedural in nature, but on rehearing reversed themselves and refused to take a stand. The Illinois cases thus far have been inconclusive.

³⁷ *Whitney v. Madden*, *supra* note 31.

³⁸ *Supra* note 26.

³⁹ This assumes that Illinois does not apply the *Renvoi* principle. *Renvoi* is a doctrine of conflict of laws developed in the nineteenth century which states generally that a court, when it must resort to the law of another state, will adopt the conflict-of-laws rule of the other state to determine what substantive law is applicable. For an exhaustive study of the doctrine, see Schreiber, *The Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523 (1917).

to apply the law of the parties' domicile,⁴⁰ and Illinois, the state of domicile, prohibits interspousal actions.⁴¹

C. WHERE HUSBAND AND WIFE ARE MINNESOTA DOMICILIARIES

Wife is injured due to her husband's negligence while they are in Wisconsin. The wife has no cause of action in Wisconsin, because Minnesota, the state of domicile, prohibits interspousal actions in its substantive law.⁴² If she starts her action in Minnesota, she will still be barred, because of that state's strong public policy against interspousal suits.⁴³

If, however, the wife can overcome jurisdictional problems,⁴⁴ she can sue in Illinois or some other state which applies *lex loci*.⁴⁵ Her suit should then be maintainable since Wisconsin substantive law, the *lex loci*, permits interspousal suits.

D. WHERE HUSBAND AND WIFE ARE NEW YORK DOMICILIARIES

The wife is injured due to her husband's negligence while in Illinois. She has no cause of action in either New York or Illinois since the conflicts rule in both states is to apply *lex loci*,⁴⁶ and *lex loci* is the substantive law of Illinois, which law forbids actions in tort between spouses.⁴⁷

But plaintiff can maintain her action if she brings it in a Wisconsin Court of general jurisdiction. Since the state of domicile, New York, permits such suits,⁴⁸ Wisconsin must apply that law and also permit the suit. Under the new Wisconsin law for jurisdictional requirements,⁴⁹ obtaining in personam jurisdiction would be merely a matter

⁴⁰ Haumschild v. Continental Casualty Co., *supra* note 3.

⁴¹ *Supra* note 30. See Gawlik v. Gawlik, Judge H. L. Neelen, 270-433, (Cir. Ct. Milwaukee Cty., Feb. 2, 1960). Cited in 21 MIL. BAR ASSOC. GAVEL 38 (1960).

⁴² MINN. STAT., §519.01, as construed in Karalis v. Karalis, 213 Minn. 31, 4 N.W. 2d 632 (1942).

⁴³ Kyle v. Kyle, *supra* note 32.

⁴⁴ If the parties are neither domiciled in the forum state, nor did the tort occur there, the wife may have difficulty getting in personam jurisdiction. But since such suits rarely occur when a liability insurer is not in the picture, the chances are excellent that the plaintiff can get service of the insurer in some favorable state wherein the insurer does business.

⁴⁵ Presumably any state would allow the action to be maintained, except those states which apply *lex domicilii*, and the three states listed in footnote 32, *supra*.

⁴⁶ Coster v. Coster, 289 N.Y. 438, 46 N.E. 2d 509 (1943); Whitney v. Madden, *supra* note 31.

⁴⁷ *Supra* note 30.

⁴⁸ *Supra* note 15.

⁴⁹ WIS. STAT., §262.01 (1959):

This chapter shall be liberally construed to the end that actions be speedily and finally determined on their merits. The rule that statutes in derogation of the common law must be strictly construed does not apply to this chapter.

§262.04 (2):

A court of this state having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in §262.05 or §262.07 and in addition either:

of the husband and wife coming within the boundaries of the state and the plaintiff getting personal service of a summons on her husband.⁵⁰

In each of the foregoing situations whether or not there is liability depends on where the action is commenced. An attorney confronted with a conflict-of-laws problem in this area should be most careful in choosing his forum.

This brings to light the problem of "forum shopping." A plaintiff whose domicile has substantive law more favorable to him than is the *lex loci*, may wish to bring his suit in Wisconsin in order to get the benefit of his home state's law. He thus becomes a "forum shopper,"⁵¹ a non-taxpaying additional burden on the Wisconsin Courts. Thus while this practice is deplored in *Haumschild*,⁵² the rule in that case would appear to foster it.

LIMITATION ON THE HAUMSCHILD RULE

In setting down the new conflict-of-laws rule in Wisconsin, that questions of interspousal capacity to sue in tort were to be governed by the law of domicile of the parties, Justice Currie carefully limited its applicability:

Perhaps a word of caution should be sounded to the effect that the instant decision should not be interpreted as a rejection by this court of the general rule that ordinarily the substantive rights of parties to an action in tort are to be determined in the light of the law of the place of wrong. This decision merely

-
- (a) A summons is served upon the person pursuant to §262.06; or,
(b)

§262.05:

A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to §262.06 under any of the following circumstances:

- (1) In any action whether arising within or without this state, against a defendant who when the action is commenced:
(a) Is a natural person present within this state when served; or
(b)

§262.06:

A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in §262.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:

- (1) Except as provided in sub. (2), (sub. (2) refers to disabilities, e.g., age of the defendants, and is immaterial for our purposes) upon a natural person:
(a) By personally serving the summons upon the defendant either within or without this state.
(b)

⁵⁰ This premise assumes the constitutionality of the above cited provisions. This liberal statute has not as yet been tested.

⁵¹ . . . a litigant . . . is open to the charge of forum shopping whenever he chooses a forum with slight connection to factual circumstances surrounding his suit." *Rayco Mfg. Co. v. Chicopee Mfg. Corp.* 148 F. Supp. 588, 592 (S.D.N.Y., 1957).

⁵² "' . . . forum shopping' [should be] discouraged rather than tolerated." *supra* note 3, at 139, 95 N.W. 2d at 819.

holds that incapacity to sue because of marital status presents a question of family law rather than tort law.⁵³

This limitation will certainly curtail the efficacy of the *Haumschild* rule. While a Wisconsin Court will permit a wife to bring an action against her husband, for any other questions of substantive law it will look to the state where the accident happened. Several facets of the substantive law of negligence torts have different application in the various states. The result then in a case with a conflict of laws problem tried in Wisconsin may be a potpourri of the *lex loci* and *lex domicilii* sufficient to nullify any value the *Haumschild* rule might have had.

The area where this problem will become most apparent is in the field of the so-called "guest statutes". These generally provide that a passenger in a motor vehicle has no cause of action against his driver unless the driver has been guilty of gross negligence.⁵⁴ About twenty-six states to date have adopted guest laws with varying degrees of enforcement.⁵⁵ Included among these are the neighboring states of Illinois,⁵⁶ Indiana,⁵⁷ and Michigan.⁵⁸ Thus, with a husband and wife domiciled in Wisconsin but traveling in Illinois when the passenger-wife is injured, complications arise. If the wife starts her action in Wisconsin against her husband and/or his insurer, her complaint will at least survive a demurrer on the ground of incapacity to sue. But she must plead and prove wilful or wanton misconduct on the part of her husband in order to recover because this is what Illinois substantive law requires. Whereas, had the accident occurred in Wisconsin, proof of ordinary negligence would have been sufficient to permit a recovery by the wife. The incongruity of the situation is evident.

Another area of automobile tort law in which the question of *lex loci* or *lex domicilii* becomes important is the contributory or comparative negligence of the plaintiff as a defense. While Wisconsin has had a form of comparative negligence statute since 1931,⁵⁹ only a few states have enacted similar statutes.⁶⁰ Most states have continued to follow the Common Law rule that contributory negligence is a complete de-

⁵³ *Id.* at 140, 95 N.W. 2d at 819.

⁵⁴ ILL. REV. STAT., Ch. 95½, §9-201 (1958):

No person riding in or upon a motor vehicle or motorcycle as a guest . . . shall have a cause of action . . . against the driver or operator of such motor vehicle . . . for injury, death or loss, in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator. . . .

⁵⁵ The most up-to-date collection of guest statutes is in 3 Wyo. L. J. 225 (1949) and 34 IND. L. J. 338 (1959) which give the names of the states that have adopted one.

⁵⁶ *Supra* note 54.

⁵⁷ BURN'S IND. STAT., §47-1021 (1952).

⁵⁸ MICH. COMP. LAWS, §256.29 (1948).

⁵⁹ WIS. STAT., §331.045 (1959).

⁶⁰ NEB. REV. STAT., §25-1151 (1933); S.D. LAWS, Ch. 160, p. 184 (1941); MISS.—CODE, §1454 (1942); ARK. STAT. 27-1730.1, 27-1730.2 (1957).

fense to an action in tort.⁶¹ Even these disagree as to whether the defendant must plead and prove the contributory negligence, or whether the plaintiff must prove his freedom from it.⁶²

There is also wide cleavage on the question of contribution between joint tort-feasors. Wisconsin, both in its case law⁶³ and statutes,⁶⁴ has always permitted contribution actions by the joint tort-feasor who has indemnified the injured party against the other. Some twenty states⁶⁵ now have statutes abrogating the common law,⁶⁶ and permitting contribution, while a few more have followed this tack without benefit of statute.⁶⁷

Other facets of substantive tort law which are handled in varying manners in different states, and which may also tend to confuse the relief available to a plaintiff, are the application of the doctrine of *res ipsa loquitur*, the availability of survival and wrongful death actions, and the questions of imputed negligence as regards agency, assumption of risk, and joint venture.

POSSIBLE EXTENSION OF THE HAUMSCHILD RULE

Because of the anomalous situation generated in Wisconsin by the *Haumschild* rule and its limitation,⁶⁸ which requires partial application of the law of domicile and partial application of the *lex loci* it may be appropriate to discuss the feasibility of a shift by Wisconsin (and other states as well) to a full application of the substantive law of the domicile of the parties. Such a position would have at least some slight historical basis in Wisconsin. In *Anderson v. Milwaukee and St. Paul R. Co.*,⁶⁹ in an action for personal injury occurring in Iowa, our Court refused to follow an Iowa statute granting a cause of action but instead applied Wisconsin substantive law which denied the action. The reason for this was stated by Chief Justice Ryan:

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. 'A person suing in this country must take the law as he finds it. He cannot, by virtue of any

⁶¹ *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

⁶² Most states say contributory negligence is an affirmative defense, to be alleged and proved by the defendant. But in a few states absence of a contributory negligence is part of the plaintiff's proof, e.g., *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 58 N.E. 367 (1900).

⁶³ *Ellis v. Chicago & N.W. R. Co.*, 167 Wis. 392, 167 N.W. 1048 (1918).

⁶⁴ WIS. STAT., §§272.59, 272.61 (1959).

⁶⁵ For a partial list, see Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 Wis. L. Rev. 365.

⁶⁶ *Merryweather v. Nixan*, 8 Term Rep. 186 (1799), held that there was no right of contribution between joint tortfeasors.

⁶⁷ *Duluth, M. & N. R. Co. v. McCarthy*, 183 Minn. 414, 236 N.W. 766 (1931); *Quatray v. Wicker*, 178 La. 289, 151 So. 208 (1933); *Davis v. Broad St. Garage*, 191 Tenn. 320, 232 S.W. 2d 355 (1950).

⁶⁸ *Supra* note 53.

⁶⁹ 37 Wis. 321 (1875).

regulation of his own country, enjoy greater advantages than any other suitor here. . . . He is to have the same rights which all the subjects of this kingdom are entitled to.' [Quoting Lord Tenterden in *De la Vega v. Vianna*, I. Barn. and Ad. 284].⁷⁰

This decision was later overruled⁷¹ and Wisconsin joined the majority of the states in applying *lex loci* with consistency to questions of substantive law until the *Haumschild* decision was handed down.

The limited value of the rule in *Haumschild* has already been pointed out. The harshness of the law of some foreign states, e.g., guest statutes and contributory negligence as a complete defense, is hardly mitigated when the only deviation from the foreign law is permitting plaintiff's complaint to survive a demurrer. The only state where an individual can participate in the law making process is his domicile. It is the only state with which he is connected in a permanent way. In considering his potential liabilities and rights to recover for injury, he will think in terms of the only law with which he is familiar, the law of his state of domicile.

It must be remembered that the conflict of laws rule of applying *lex loci* developed long before the advent of the automobile, when the absence of an individual from his home state or country was much more infrequent than it is today. Consequently there is a present need for an individual to understand his legal rights and duties and not to have them changed every time he crosses a state line. Further, his liability insurance premiums can be more accurately computed since the insurer, knowing the domicile of its policyholder, can better evaluate potential losses to be suffered defending these insureds.

Another valid reason for a complete shift to application of *lex domicilii* in interstate tort cases is the difficulty encountered in determining the boundaries of the family law concept. Will Wisconsin, under the limited *Haumschild* rule, have *lex domicilii* only govern the capacity of one spouse to sue the other, or will it also cover the questions of parental immunity and a child's immunity from suit by a parent? If *lex domicilii* were to be applied in toto, the problem of where to draw the line in defining the family concept would not be present.

On the other hand, the aim for uniformity and predictability throughout the various states will be thwarted if one or more states begin applying the substantive law of the state of domicile while the majority of the states continue to follow *lex loci*. The matter of divided domicile of the parties to the action may engender serious problems.⁷²

⁷⁰ *Id.* at 322.

⁷¹ *Bain v. Northern Pacific R. Co.*, 120 Wis. 412, 98 N.W. 243 (1904).

⁷² At least one writer in the field has come up with a proposition to be applied where it appears that the laws of two or more domiciliary states are involved: COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS*, at p. 345 (1949). ". . . I am quite willing to say that it seems to me that it would be

One other factor to be considered is the lack of impetus to date. No case except possibly the *Morin*⁷³ case, has yet come out actually applying the entire substantive law of the domicile to an interstate tort problem. Legal writers, with a few exceptions, are not advocating the unlimited application of *lex domicilii*.⁷⁴ However, they agree substantially that *lex domicilii* should apply to determine the question of one spouse's capacity to sue the other for personal injury. It was largely due to this advocacy that *Emery*,⁷⁵ *Koplik*,⁷⁶ and *Haumschild* were decided as they were. It is dubious whether, without a campaign of this sort, *lex domicilii* will ever come to be the applicable conflicts rule.

CONCLUSION

The possibility that Wisconsin (and other) courts may in the near future complete the divorce from *lex loci* and apply solely the *lex domicilii* as the substantive law as regards interstate torts has been explored. While there are still several obstacles in the path of such a determination, not least important of which is the utter lack of case law favoring this position, such a result could become a reality should a deserving case be carefully and astutely presented.

LOUIS W. STAUDENMAIER, JR.

sensible to adopt whichever of the two (or more) domestic rules is more favorable to the plaintiff. After all, the defendant did act for his own purposes, and his act caused the damage; if the domestic rules of one of the states would impose liability, if all had happened there, why not allow a recovery?"

⁷³ *Supra* note 20.

⁷⁴ Seavey, *Torts*, 34 N.Y.U.L. REV. 527 (1959); Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474 (1956); Comment, 15 WASH. & LEE L. REV. 266, (1958); Packel, *Backward and Forward in Conflicts*, 31 TEMP. L. Q. 117 (1957). But *cf.* Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 IND. L. J. 297 (1958); Page, *Conflict of Law Problems in Automobile Accidents*, 1943 WIS. L. REV. 145, both of which seem to advocate a complete shift to application of *lex domicilii*.

⁷⁵ *Supra* note 7.

⁷⁶ *Supra* note 14.