

PARENTAL IMMUNITY IN THE CONFLICT OF  
LAWS: LAW AND REASON VERSUS  
THE RESTATEMENT\*

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BARBARA AND JOYCE EMERY, two minors presumably domiciled in California, were injured in an automobile accident when driving through the state of Idaho with their brother at the wheel under their father's direction. In a negligence suit by the two girls against their father and brother, the California Supreme Court, speaking through Justice Traynor, unanimously reversed a judgment sustaining a demurrer based on defendants' parental immunity. The court so held under the law of California as the state of the parties' domicile, without regard to any rule to the contrary that might have prevailed in Idaho, the state of the "place of wrong."<sup>1</sup> For the second time within the last two years,<sup>2</sup> the California Supreme Court has thus rejected the proposition of the Restatement of the Law of Conflict of Laws that, "if no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."<sup>3</sup>

\* This is another paper in a series of articles mostly under this subheading in which I have tried with others to implement the conviction shared by most writers in this field that a "Restatement" of conflict of laws should remain limited to a painstaking analysis of the law governing narrow fact situations and avoid broad formulas. See my papers in 36 *Minn. L. Rev.* 1 (1951) (torts); 51 *Mich. L. Rev.* 345 (1953) and 2 *Am. J. Comp. L.* 167 (1953) (custody); 53 *Col. L. Rev.* 1072 (1953) (contracts); 42 *Cal. L. Rev.* 382 (1954) (support); 41 *Cal. L. Rev.* 383 (1953) (jurisdiction, with C. K. Mills); 65 *Yale L. J.* 289 (1956) (personal jurisdiction). Consult also Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws*, 15 *U. of Pitt. L. Rev.* 397 (1954); Shavelson, *Survival of Tort Actions in the Conflict of Laws: A New Direction?*, 42 *Cal. L. Rev.* 803 (1954); *The Statute of Frauds in the Conflict of Laws*, 43 *Cal. L. Rev.* 295 (1955); and in general Ehrenzweig, *American Conflicts Law in its Historical Perspective: Should the Restatement be "Continued"?*, 103 *U. of Pa. L. Rev.* 133 (1954); Ehrenzweig *El "Restatement" Americano de Derechos: Historia de un Fracaso*, [1954] *Cuadernos de Derecho Anglo-Americano* 37 (1954).

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<sup>1</sup> *Emery v. Emery*, 45 *Cal. 2d* 421, 289 *P. 2d* 218 (1955). The lower court had found Idaho law to the same effect, — *Cal. App. 2d* —, 284 *P. 2d* 150 (1955).

<sup>2</sup> Cf. *Grant v. McAuliffe*, 41 *Cal. 2d* 859, 264 *P. 2d* 944 (1953), applying, contrary to § 390 of the Restatement, a California survival statute to a tort suit by California residents upon an Arizona automobile accident.

<sup>3</sup> *Rest., Conflict of Laws* § 384 (2) (1934). Judge Goodrich states that "[n]o case in this country has been found where recovery in tort has been allowed for what was not the basis of an action by the *lex loci delicti*" (Goodrich, *Conflict of Laws* 262 [3d ed., 1949]). But the courts in such cases as *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 *Conn.* 333, 143 *Atl.* 163 (1928) have reached this very result by what Goodrich considers an "in-

This decision is the more significant as it focuses attention upon another instance<sup>4</sup> where this broad generalization of the Restatement, like its counterpart which would always grant recovery for causes of action "created" at the place of wrong,<sup>5</sup> seems to lack support not only in reason but also in the decided cases.

The California court properly disregarded the Wyoming case of *Ball v. Ball*,<sup>6</sup> where dismissal of a minor's petition for damages sustained in the crash in Montana of an airplane negligently piloted by his father was affirmed purportedly on the ground of the latter's parental immunity under Montana law. This decision can, and probably must, be rationalized on several grounds other than the application of the *lex loci delicti*. Not only did the court in that case stress the suspicion of the parties' collusion against defendant's liability insurer, but it apparently based its holding primarily on its own law, merely adding an alternative reference to Montana law doubtfully supported by secondary authority. Moreover, and probably decisively, the court assumed that both parties came from Montana, and that "if the defendant had remained in Montana, process from the Wyoming court could not have been available to reach him."<sup>7</sup> Clearly this decision left open the three crucial questions: whether the Wyoming court would have similarly decided had its law been different from the *lex loci delicti*; had it not suspected the defendant of collusion with the insurer; and, more pertinent for the present study, had the parties to the action been citizens of the forum state. On the other hand, in

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correct" contract characterization (Goodrich, *supra* at 280), and in the many decisions in which forum liability law has been imposed as "procedural." See more recently *Donahue v. Warner Bros. Pictures*, 194 F. 2d 6 (C.A. 10th, 1952) granting recovery under forum law in disregard of the dissenting judge's reliance on the Restatement rule; *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953); and consult generally, Ehrenzweig, *The Place of Acting in Intentional Multistate Torts*, 36 Minn. L. Rev. 1, 23 (1951). Rest., *Conflicts*, § 588 (1934) concerning the determination of "who may and who may not sue and be sued," apparently was not intended to include the present problem. See Goodrich, *supra* at 230, 262; 2 Beale, *Conflict of Laws* 1290, 1292 (1935).

<sup>4</sup> See in general Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 Tul. L. Rev. 4, 165 (1944); Ehrenzweig, *The Place of Acting*, *op. cit.* *supra* note 3; Binder, *Zur Auflockerung des Delikt—Statutes*, 20 Rabel's Z. 401 (1955) (a comprehensive comparative study including American law).

<sup>5</sup> There does not seem to have been any case in which recovery was had contrary to a parental immunity rule of the forum. If an analogy to the case law concerning interspousal immunity may be drawn, it seems significant that among the many cases decided in that field, there has not been a single one in which recovery was based on a law of the place of wrong contrary to both the law of the forum and the place of domicile. Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws*, 15 U. of Pitt. L. Rev. 397, 419 (1954). This analogy disregards, of course, the differing common law histories of the parental and the interspousal immunities. Consult Prosser, *Torts* 675 (2d ed., 1955).

<sup>6</sup> 73 Wyo. 29, 269 P. 2d 302 (1954). Cf. C. J. Kimball's dissent in *McKinney v. McKinney*, 59 Wyo. 204, 135 P. 2d 940 (1943).

<sup>7</sup> *Ball v. Ball*, 73 Wyo. 29, 35, 269 P. 2d 302, 303 (1954).

another case cited in the California decision, the Georgia court, holding properly joined an emancipated minor's suit against her resident father with a suit against the latter's nonresident employer to defeat removal, stated that "[u]nder the general rule, the law of the forum governs as to the parties and the right to sue, and this rule applies in actions between parent and child."<sup>8</sup>

Neither in these cases nor in the three other pertinent cases that have been found was the court faced with an established conflict between the law of the domicile or of the forum on the one hand, and that of the place of wrong on the other. In one case a New York trial court granted, under New York law, a motion to dismiss a minor's complaint against her father for damages sustained in an Arizona automobile accident, Arizona law to the contrary not having been proved.<sup>9</sup> And the District of Columbia court reversed, under Maryland law, the denial of a motion to dismiss a similar suit based on a Maryland accident, stressing that the issue of parental immunity had not been decided in the District and applying what it assumed to be Maryland law in "accord with the overwhelmingly prevalent rule."<sup>10</sup> In both cases the parties' domicile was apparently at the "place of wrong."

The only case seemingly supporting the Restatement rule is *Rines v. Rines*,<sup>11</sup> where the New Hampshire court, in the reverse situation of an automobile negligence suit by a mother against her (then adult) son, gave judgment on a verdict based in part on the charge that, under the applicable common law rule of Maine, the place of wrong, a parent had no cause of action against a child who was a minor at the time of the accident. Plaintiff was thus seemingly denied the benefit of the well-known New Hampshire rule of *Dunlap v. Dunlap*<sup>12</sup> disfavoring in certain cases parental immunity claimed by an insured defendant.<sup>13</sup> But, in evaluating the authority of the *Rines* case as establishing the priority of the *lex loci* over the law of the domicile, we cannot ignore the fact that at the time this case was decided, the New Hampshire court may have been ready to discard the *Dunlap* rule as it did three years later in *Levesque v. Levesque*,<sup>14</sup> thus restoring identity in this respect between the laws of the parties' domicile and the place of wrong.

<sup>8</sup> *Fowlkes v. Ray-O-Vac Company*, 52 Ga. App. 338, 340, 183 S.E. 210, 212 (1935).

<sup>9</sup> *Thickman v. Thickman*, 88 N.Y. Supp. 2d 284 (S. Ct., 1949). There does not seem to be any Arizona case law in point.

<sup>10</sup> *Villaret v. Villaret*, 169 F. 2d 677, 678 (App. D.C., 1948). "The precise question here presented has not been passed on by the Court of Appeals of Maryland." *Ibid.*, at 678.

<sup>11</sup> 97 N.H. 55, 80 A. 2d 497 (1951).

<sup>12</sup> 84 N.H. 352, 150 Atl. 905 (1930). Cf. Prosser, *Torts* 678 (2d ed., 1955).

<sup>13</sup> That the defendant in *Rines v. Rines*, 97 N.H. 55, 80 A. 2d 497 (1951), carried liability insurance appears from *Levesque v. Levesque*, 99 N.H. 147, 106 A. 2d 563 (1954), where the case was cited as authority against the relevance of liability insurance.

<sup>14</sup> 99 N.H. 147, 106 A. 2d 563 (1954).

These isolated cases become significant in the light of the results arrived at in a recent study relied upon in part by the California court, which concerns the closely related problem of "interspousal liability for automobile accidents in the conflict of laws."<sup>15</sup> It was shown in that study that American courts when purporting to deny recovery under the *lex loci delicti* have in fact generally decided in accordance with their own law; that in almost all of these cases the *lex fori* coincided with the law of domicile; and that where this was not the case, application of the law of the domicile would diminish forum shopping, confusion and hardship. That application of the law of domicile would assimilate American conflicts law to that prevailing elsewhere<sup>16</sup> would appear as a merely incidental, though significant, gain. More important, rationalization of a new domicile rule under the traditional place of harm rule<sup>17</sup> would help in establishing the long lacking harmony within the American conflicts law of compensatory torts.<sup>18</sup> Finally, recognition of the parties' domicile as a proper connecting factor in conflicts rules governing such torts would be a step in support of a more general trend now precariously balanced upon procedural characterization<sup>19</sup> or public policy.

The California Supreme Court has taken such a step by explicitly relating, as far as I can see for the first time, a torts conflicts rule to the law of the parties' domicile.<sup>20</sup> This step is in accord, I submit, with current trends toward a more rational distribution of automobile losses through insurance against what has become a liability for "negligence without fault."<sup>21</sup> In the light of these trends, suability of a parent by his minor child, as that between spouses, should realistically be determined by that law under which premiums based on

<sup>15</sup> Ford, *op. cit.* supra note 5.

<sup>16</sup> For English and Canadian law, consult Stumberg, *Conflict of Laws* 205, 210 (2d ed., 1951); Cowen, *The Locus Delicti in English Private International Law*, 25 *Brit. Y. B. Int. L.* 394 (1948); Robertson, *The Choice of Law for Tort Liability in the Conflict of Laws*, 4 *Mod. L. Rev.* 27 (1940); Spence, *Conflict of Laws in Automobile Negligence Cases*, 27 *Can. Bar Rev.* 661 (1949); Richardson, *Problems in Conflict of Laws Relating to Automobiles*, 13 *Can. Bar Rev.* 201 (1935); Heighington, *Conflict of Laws in Automobile Negligence Cases*, 14 *Can. Bar Rev.* 389 (1936). On Scottish law, consult Ehrenzweig, *Alternative Actionability in the Conflict of Laws of Enterprise Liability*, 63 *Jurid. Rev.* 39 (1951). For the civil law, consult 1 Rabel, *Conflict of Laws* (1945); Binder, *op. cit.* supra note 4, at 485, who suggests that even under a domicile rule statutory violations would remain subject to the *lex loci*.

<sup>17</sup> Cf. Ehrenzweig, *op. cit.* supra note 3, at 4.

<sup>18</sup> *Ibid.*

<sup>19</sup> See, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953); *Survival Statutes in the Conflict of Laws*, 68 *Harv. L. Rev.* 1260, 1263 (1955).

<sup>20</sup> For pioneering advocacy of this rule, see Cook, *The Logical and Legal Bases of the Conflict of Laws* 248, 345 (1949); Stumberg, *Conflict of Laws* 206 (2d ed., 1951); Falconbridge, *Essays on the Conflict of Laws* 832 (2d ed., 1954); *Functional Application of Conflicts of Law Rules in Tort Cases*, 44 *Yale L. J.* 1233, 1239 (1935).

<sup>21</sup> Cf. Ehrenzweig, *Negligence without Fault* (1951); Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 *Law & Contemp. Prob.* 445 (1950).

the incidence of such suits is most readily calculable by the parent's or spouse's liability insurer. This test points unambiguously to the insured's domicile rather than to the fortuitous place of forum or accident.<sup>22</sup> From this viewpoint if no other, it is undesirable (to quote the California court) that, as the Restatement would have it, "the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home."<sup>23</sup>

Here as in so many other fields of the law, the conflict of laws has furnished the stepping stone for another move forward in the common law. Having held California law applicable, Justice Traynor also found occasion to eliminate from the law of that state another facet of an obsolete doctrine, which, in purporting to preserve "domestic peace" by denying insurance recovery to an injured child, not only lacks a basis in reality and history,<sup>24</sup> but, in its indefensible absurdity, must foster the layman's all-too-rampant distrust of law and lawyers. "An uncompensated tort is no more apt to promote or preserve peace in the family than is an action between minor brother and sister to recover damages for that tort."<sup>25</sup> In fact, in Dean Prosser's words, quoted with approval by the court, "Domestic harmony will not be disrupted so much by allowing the action as by denying it."<sup>26</sup> In meeting the insurers' argument *in terrorem* stressing the danger of collusion between the insured and his child, the court finds that "the interest of the child in freedom from personal injury caused by the tortious conduct of others is sufficient to outweigh any danger of fraud or collusion."<sup>27</sup> It may be hoped that this reasoning as well as the ruling itself will not, as in this case, remain limited to "wilful or malicious torts."<sup>28</sup>

<sup>22</sup> It may well be that a similar solution may yet be found on similar grounds for the much litigated question as to the law applicable to guest claims. Compare, e.g., *Loranger v. Nadeau*, 215 Cal. 362, 10 P. 2d 63 (1932); and *Campbell v. Baskin*, 69 Nev. 108, 242 P. 2d 290 (1952), with *McLean v. Pettigrew*, [1945] 2 D.L.R. 65 (S. Ct. Can., 1944).

<sup>23</sup> *Emery v. Emery*, 45 Cal. 2d 421, 428, 289 P. 2d 218, 223 (1955). On this ground, it is submitted, this decision should be primarily based, rather than on the ground that the state of the domicile bears the "primary responsibility for establishing and regulating the incidents of the family relationship"; and is the "only state in which the parties can, by participation in the legislative process, effect a change in those incidents." *Ibid.*, at 428, 223.

<sup>24</sup> See Prosser, *Torts* 675 (2d ed., 1955); McCurdy, *Torts between Persons in Domestic Relation*, 43 *Harv. L. Rev.* 1030 (1930).

<sup>25</sup> *Emery v. Emery*, 45 Cal. 2d 421, 430, 289 P. 2d 218, 224 (1955). See in general Ford, *op. cit. supra* note 5, at 400.

<sup>26</sup> Prosser, *Torts* 677 (2d ed., 1955).

<sup>27</sup> *Emery v. Emery*, 45 Cal. 2d 421, 431, 289 P. 2d 218, 224 (1955). Consult in general Ford, *op. cit. supra* note 5, at 400, 423.

<sup>28</sup> *Emery v. Emery*, 45 Cal. 2d 421, 431, 289 P. 2d 218, 224 (1955).

But, here as in the distribution of automobile losses in general, tort litigation cannot be the final answer. Insurers are about to take a significant step forward by the introduction of extended "first aid clauses" in liability policies, which, by giving increased accident insurance protection to the child guest, will reduce tort claims. Until the completion of this process in an ultimate substitution of what I have referred to as "full aid" insurance<sup>29</sup> for tort liability and tort insurance, decisions such as those of the California Supreme Court will find deserved acclaim on the national scene among all those who prefer the slow growth of the common law in the hands of scholarly and courageous judges to the sterile "restatement" of ever obsolescent dogma.

<sup>29</sup> Ehrenzweig, "Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan (1954).