California Choice of Law in Tort: Demise of Lex Loci Delicti--Reich v. Purcell

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It has been the general rule for many years that the law of the
place where an injury occurs determines the existence and extent of
any tort liability growing out of that injury regardless of where suit
is brought.1 This mechanical rule has not provided sufficient flex-
ibility2 to produce what the courts have deemed to be the "just"3
result in all cases. For example, suppose state A limits recovery in
suits for wrongful death to a maximum of $10,000 whereas State B
places no restriction on recovery in such suits. If two vacationing
residents of state B collide in state A with the resulting death of
one of them, must recovery in a suit for wrongful death brought in
state B be limited to $10,000? Application of the traditional rule
would dictate an affirmative answer even though the only contact
with state B was the fortuitous circumstance that the accident oc-
curred there.4 The purpose of this note is to examine judicial treat-
ment of this rule, with particular emphasis on the changing state of
the law in California.

The Rule of Lex Loci Delicti

At an early date American courts developed the maxim that the
law of the state where the injury occurred should supply the rules
determinative of the rights and liabilities growing out of that injury.6
Due to the fondness of early jurists to couch their maxims in Latin
the rule came to be known as lex loci delicti (the law of the place of
the wrong).6 The lex loci rule was based on the theory that al-
though the law of the foreign jurisdiction (the place of the wrong)
was of no force outside its boundaries, an act or omission proscribed
by its law occurring within those boundaries created a right or obli-
gation which any forum state was obligated to enforce.7

1 See, e.g., Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904); Western
Union Tel. Co. v. Brown, 234 U.S. 542 (1914); Loucks v. Standard Oil Co., 224
N.Y. 99, 120 N.E. 198 (1918). See also RESTATEMENT OF CONFLICT OF LAWS
§§ 377-90 (1934).
2 Cheatham, American Theories of Conflict of Laws: Their Role and
Utility, 58 HARV. L. REV. 361, 381 (1945) [hereinafter cited as Cheatham];
Weintraub, A Method For Solving Conflict Problems—Torts, 48 CORNELL L.Q.
215, 216 (1963) [hereinafter cited as Weintraub].
3 D. Cavers, THE CHOICE OF LAW PROCESS 66, 79 (1965) [hereinafter
cited as Cavers]; Currie, Survival of Actions: Adjudication versus Automat-
ination in the Conflict of Laws, 10 STAN. L. REV. 205, 209-10 (1958) [hereinafter
cited as Currie, Survival], in B. Currie, SELECTED ESSAYS ON THE CONFLICT
OF LAWS 128, 132-33 (1963) [hereinafter cited as Currie, Essays]; Weintraub,
supra note 2, at 216.
discussed in text accompanying notes 63-67 infra; Wise v. Hollowell, 205 N.C.
286, 171 S.E. 82 (1933).
5 Cases cited note 1 supra.
7 Cheatham, supra note 2, at 365.

[949]
The lex loci rule was based on a strictly territorial theory of law.\(^8\) The state where the allegedly tortious conduct occurred was thought to have exclusive jurisdiction to determine the existence and extent of any legal rights growing out of any act within its boundaries.\(^9\) The law of the place of the wrong was given no effect in a foreign forum state.\(^10\) Instead, it was theorized that an obligation or right was created in the state of the injury which became vested in the plaintiff and accompanied him to any other state where he might bring suit.\(^11\) It was this foreign-created right or obligation based on the entire block of foreign laws which the forum state was obligated to enforce.\(^12\) Thus when suit was brought in a state other than the place of injury, the forum court was governed strictly by the foreign-created right.\(^13\) This theory of enforcement of the foreign-created right is known as the vested-rights theory of conflict of laws.\(^14\)

The lex loci rule was favored since it provided certainty and uniformity of result,\(^15\) defeating any possible advantage to be gained by forum shopping.\(^16\) It was possessed of the further virtue of ease of application.\(^17\)

The rule produced an acceptable result in the simple case when all the elements and contacts comprising the tort occurred in one state and the only contact with the forum state was the fact that it was the place where suit was brought.\(^18\) However, when the tort involved various foreign contacts the result was often arbitrary and sometimes unjust.\(^19\) In application of the lex loci rule to a tort with multistate contacts, the law of the place of the wrong was applied without any assessment of the significance of the fact that the tort occurred where it did or any rational examination of the possible interests of other states in the decision of the issues involved.\(^20\) The rule lacked the flexibility to take these factors into account.

An example of the type of unjust result which the lex loci rule can produce is provided by the case of Carter v. Tillery.\(^21\) In this

\(^8\) Id.
\(^10\) Young v. Masci, 289 U.S. 253, 254 (1933); Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904); Cheatham, supra note 2, at 365-66.
\(^11\) See authorities cited note 1 supra.
\(^12\) There is no general agreement as to the source of this obligation to enforce the foreign-created right. Cheatham, supra note 2, at 382.
\(^13\) Id. at 381.
\(^14\) Id. at 363.
\(^17\) Cheatham, supra note 2, at 379.
\(^18\) Id.; W. Cook, supra note 9, at 313.
\(^19\) Weintraub, supra note 2, at 216.
\(^20\) Cavers, supra note 3, at 65; 2 Rabel, Conflict of Laws 333-35 (1947); Stumberg, Conflict of Laws 182-85 (3d ed. 1963) [hereinafter cited as Stumberg].
case the plaintiff was a guest in the defendant's private airplane. The plane trip originated in New Mexico and was intended to terminate at El Paso, Texas. However, the plane flew off course and landed in Mexico. While attempting to take off again the plane crashed in Mexico and the plaintiff was injured. Both the plaintiff and the defendant were residents of Texas, the state where the suit was brought. The Texas court held the law of the place of the wrong, Mexico, to be controlling. As a result the plaintiff was denied any recovery since the court found the remedy supplied by the law of Mexico to be so dissimilar from that afforded by the Texas courts that it could not be applied.22

Incensed by cases like Tillery, critics of the lex loci rule attacked the validity of the underlying vested rights theory.23 It was suggested that a court could not enforce an obligation created by the laws of another jurisdiction but could only enforce obligations it created itself.24 Under this theory, called the local law theory, the forum was said to have created an obligation which it patterned after the obligation which the place of the wrong would create.25 For example, if suit was brought in state B on an act or omission which occurred in state A, the right which the court of state B enforced was theorized to be a right created by state B itself, which it chose to pattern after

22 Apparently the plaintiff could not bring suit in Mexico since American citizens were not amenable to suits in that country. Stumberg, "The Place of Wrong" Torts and the Conflict of Laws, 34 Wash. L. Rev. 388, 390 (1959).

23 See, e.g., G. Cheshire, Private International Law 32-34 (1957); W. Cook, supra note 9, at 311-46; E. Lorenzen, Selected Articles on the Conflict of Laws 364 (1947); Cheatham, supra note 2, at 381; Cook, The Jurisdiction of Sovereign States and the Conflict of Laws, 31 Colum. L. Rev. 368 (1931); Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L.J. 736 (1924); Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881 (1951); Stumberg, Conflict of Laws—Foreign Created Rights, 8 Texas L. Rev. 173 (1935); Yntema, The Hornbook Method and the Conflict of Laws, 37 Yale L.J. 468 (1928).

"The basic theme running through the attacks on the lex loci delicti rule is that wooden application of a few overly simple rules, based on the outmoded vested rights theory cannot solve the complex problems which arise in modern litigation and may often yield harsh, unnecessary and unjust results." 15A C.J.S. Conflict of Laws § 12(2) (1967).

24 The two classic statements of the local law theory are those made by Judge Learned Hand and by Professor Walter Wheeler Cook: "[N]o court can enforce any law but that of its own sovereign, and when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs." Guinness v. Miller, 291 F. 769, 770 (S.D.N.Y. 1923). "[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected . . . . The forum thus enforces not a foreign right but a right created by its own law." W. Cook, supra note 9, at 20-21.

25 See authorities cited note 24 supra; Cheatham, supra note 2, at 367-68, 386.
the right which state A would create. The forum was no longer thought of as enforcing a foreign right but merely one of its own creation. It might appear to be merely a matter of semantics to argue whether the forum enforces the foreign-created right or one of its own creation which it chooses to pattern after the foreign right. However, it is important in imparting the opportunity for greater flexibility by the forum in determining the rights and liabilities of the parties. This is true since at some time the forum may not choose to pattern the right it creates after the foreign-created right.

The local law theory provided the theoretical opportunity to avoid application of the law of the place of wrong. However, because lex loci was firmly entrenched in American law, few courts were willing to completely disregard the rule prior to the 1960's. Instead, some courts sought and found methods of attaining flexibility without overruling the lex loci rule when its mechanical application would have produced an unconscionable result.

Methods of Avoiding Lex Loci Without Overruling

That the law of the place of the wrong is to be applied is only a partial statement of the lex loci rule, which might be more fully stated as follows: In tort cases the forum will apply the substantive law of the place of the wrong if that substantive law is not contrary to the public policy of the forum. It follows that there are three approaches which a court may use to avoid application of the rule in determining a particular issue in a case: (1) the court can find that application of the foreign rule would offend public policy; (2) the issue can be characterized as one of procedural law rather than substantive law; or (3) the issue can be characterized as something other than a tort issue.

Courts have hesitated to hold the law of the place of the wrong inapplicable as against the public policy of the forum. This is apparently true since such a holding strongly implies that the forum believes that the laws of the other state do not come up to its own minimal standards of fairness and justice. Thus courts have not applied the public policy exception unless application of the foreign rule offends "some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal." Avoiding application of the substantive law of another state through use of the characterization devices of the remaining two exceptions may carry a similar implication. However, since it is not as direct, the implication would be weaker and thus likely to be less offensive.

26 Stumberg, supra note 20, at 15.
28 See text accompanying notes 29-41 infra.
31 Id. 969-71. Avoiding application of the substantive law of another state through use of the characterization devices of the remaining two exceptions may carry a similar implication. However, since it is not as direct, the implication would be weaker and thus likely to be less offensive.
“pernicious and detestable” before the forum will refuse to apply it for public policy reasons.

The second approach arises from the fact that the *lex loci* rule requires only that the substantive law of the place of the wrong be applied. Consequently, courts began to characterize certain issues as matters of procedure which were deemed substantive for other purposes. Among those issues characterized as procedural have been statutes of frauds, measure of damages and survival of a tort claim.

The third approach involves a similar analysis where issues which possibly could be termed tort issues are characterized by the court as belonging to another area of the law which does not apply the *lex loci* rule for choice of law. For example, liability for damages caused by driving a rented car has been characterized as a contractual issue governed by the state where the contract was made rather than an issue of tort governed by the law of the place of the wrong. Similarly, a railway company's liability to a passenger for injuries resulting from a collision has been held to be contractual since the injury was a violation of defendant's obligation to carry the plaintiff safely to her destination. And the ability of a child to sue his parent for allegedly tortious conduct has been deemed an issue of family law governed by the law of the domicile.

It was primarily through the characterization device of these latter two approaches that courts injected some flexibility into choice of law in torts by avoiding application of the law of the place of the wrong when it would lead to what was thought to be an undesirable result. In order to attain this added flexibility the courts were often required to use somewhat questionable reasoning.

35 STUMBERG, supra note 20, at 133.
38 Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953), discussed in text accompanying notes 54-59 infra.
43 "The result of applying a single rule [lex loci] in so many different contexts has often been irrational, and worse unjust, decisions. Sporadically, a court has departed from the rigid standard rule to reach what it sensed was a just result. Too often, however, the 'reasons' articulated by courts for such departures have been so patently irrational and arbitrary as to invite widespread criticism of a proper result and make the choice between the disease and cure a difficult one." Weintraub, supra note 2, at 216.
44 E.g., for a criticism of the reasoning in Kilberg v. Northeast Airlines,
attacking this method of providing flexibility under the *lex loci* rule one legal scholar has noted that "it is a poor defense of the system to say that the unacceptable results that it will inevitably produce can be averted by disingenuousness if the courts are sufficiently alert."44

As mentioned above, one of the main advantages of the *lex loci* rule was stated to be the predictability and uniformity of decision it provided choice of law problems in tort. However, since there was no certainty that a particular court would not stretch and bend the facts to meet one of the exceptions to the rule, uniformity of result was by no means assured.46

Thus with the combined factors of the continuing, and perhaps increasing need for flexibility,47 the criticism of the reasoning being employed to achieve flexibility through the exceptions to *lex loci*,48 the decrease in predictability supplied by *lex loci*50 and the increased acceptance of the local law theory,51 the stage was set for states to eliminate completely the rule of *lex loci delicti*. Some did. The turn of the decade marked the beginning of the end for *lex loci delicti*.52

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44 Currie, *Notes*, supra note 42, at 176. Professor Currie prefaced the quoted material by stating: "A sensitive and ingenious court can detect an absurd result and avoid it; I am inclined to think that this has been done more often than not and that therein lies a major reason why the system has managed to survive. At the same time, we constantly run the risk that the court may lack sensitivity and ingenuity; we are handicapped in even presenting the issue in its true light; and instances of mechanical application of the rules to produce indefensible results are by no means rare." *Id.* at 175.

45 Text accompanying notes 15-17 supra.

46 *See* Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 206 (2d Cir. 1955) (dissenting opinion); Currie, *Notes*, supra note 42, at 175.

47 Some feel that with advances in the technology of communication, trade and travel the number of cases involving multistate contacts will increase. *See*, e.g., *Cavers*, supra note 3, at 12, 115.

48 Text accompanying note 20 supra.

49 Note 43 supra.

50 Text accompanying note 46 supra.


Lex Loci Delicti in California

The California court at an early date adopted the *lex loci* rule for choice of law in tort cases. Later it became a leader among those courts avoiding the rule's application to prevent an unjust result. In *Grant v. McAuliffe* the California Supreme Court heard a case which called for application of the *lex loci* rule but which, if applied, would have defeated the legitimate interests of the California residents involved. Application of the law of the place of the wrong would have denied the California plaintiffs a cause of action against the estate of the driver of the automobile which injured them in a collision in Arizona. The estate was being administered in California and all parties including the decedent were California residents. To apply the Arizona rule that a cause of action does not survive the death of the tortfeasor would seem to serve no purpose other than merely deciding the case. The California court apparently felt that denying the injured California residents recovery under these circumstances would be unjust; consequently, survival of a cause of action was characterized as procedural rather than substantive and California law allowing the suit was applied, despite much authority in California and elsewhere that such a survival aspect is a substantive element of the cause of action.

The next year California applied another characterization device in the case of *Emery v. Emery*. California characterized the issue of the capacity of a child to sue his parent for the latter's allegedly tortious conduct not to be an element of tort law, but rather a question of family law governed by the law of the domicile. In order to prevent the fortuitous and irrelevant place of injury from determining the result the *lex loci* rule was held not applicable. Thus, it seemed that the *lex loci* rule, as modified by the characterization devices, might provide adequate flexibility for California law. However, despite these instances of avoidance of application of the *lex loci delicti* rule in order to avoid unjust results, the rule was applied in 1957 to produce what seems to have been an unjust result. This was the case of *Victor v. Sperry*, involving a collision in Mexico.

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55 41 Cal. 2d 859, 264 P.2d 944 (1953).
56 Id. at 862, 264 P.2d at 946.
57 Id. at 861, 264 P.2d at 946.
58 *Currie, Survival, supra* note 3, at 215.
59 41 Cal. 2d at 864-65, 264 P.2d at 948.
62 Id. at 428, 289 P.2d at 223.
of two autos owned and operated by California residents. Plaintiff suffered damage to his spinal cord resulting in permanent partial paralysis. The California trial court assessed plaintiff's actual damages at $40,462. Damages allowable under Mexican law were computed at $6,135. The court of appeal affirmed the trial court's application of the lex loci rule and limited recovery to the lower amount merely because the negligent act and injury had occurred in Mexico.

**California Abrogation of Lex Loci Delicti**

In the 1967 case of *Reich v. Purcell*, California, following the lead of several other states, overruled its former cases relying on the *lex loci delicti* rule.

Like the *Victor* case, *Reich* involved a limitation on the damages that could be recovered. An automobile driven by the California defendant collided in Missouri with another automobile operated by plaintiff's wife, a resident of Ohio, who was killed in the accident. The parties stipulated that judgment for the wrongful death be entered in the amount of $55,000 or $25,000, depending on whether the $25,000 limitation on recovery for wrongful death in the Missouri wrongful death statute was applicable. California, the forum state and state of defendant's domicile, had no limitation on recovery for wrongful death. Ohio, the place of the domicile of plaintiff and of the decedent and place of administration of decedent's estate, also placed no limit on damages.

Noting the invalidity of the vested rights theory and the *lex loci* rule, the court stated that California had not in the past applied the *lex loci* rule when its application "would defeat the interests of the litigants and of the states concerned." To illustrate this point the court cited both the *Grant* and the *Emery* cases, making no mention of the characterization devices which were the apparent bases for each of these decisions.

The *Reich* opinion indicated that the uniformity of decision supplied by the *lex loci* rule should not be an overriding element in

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65 Id. at 520, 329 P.2d at 729.
66 Id. at 520, 329 P.2d at 730.
67 Id. at 521, 329 P.2d at 730. The Mexican law in effect at that time restricted recovery for temporary total disability to 75 per cent of his lost wages for a period not to exceed 1 year, with no wages in excess of 25 pesos ($2.00) a day to be taken into account. For permanent and total disability, lost earnings not to exceed 25 pesos per day for 918 days were allowed. Id.
68 Id. at 524, 329 P.2d at 732.
69 67 A.C. 560, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
70 See cases cited note 52 supra.
71 67 A.C. at 561, 432 P.2d at 728, 63 Cal. Rptr. at 32.
72 Id. at 561-62, 432 P.2d at 728-29, 63 Cal. Rptr. at 32-33.
73 Id. at 561-62, 432 P.2d at 728, 63 Cal. Rptr. at 32.
74 Id.
75 Id. at 562, 432 P.2d at 729, 63 Cal. Rptr. at 33.
76 Id. at 562-63, 432 P.2d at 729, 63 Cal. Rptr. at 33.
77 Id.
78 See text accompanying notes 55-63 supra.
choice of law. In addition, it stated that with more states abandoning *lex loci* each year the very uniformity that once was its primary virtue was now disappearing. The court then expressly overruled the *lex loci* doctrine.

### If No Lex Loci—What?

With the passing of the *lex loci* rule there is created a void which must be filled by an alternative method of deciding which law to apply to determine the outcome of cases involving torts with multistate contacts. The current problem for other courts and for legal practitioners is how this determination is to be made in the future. The guidelines laid down by *Reich* are few. The opinion merely states that the forum “must consider all of the foreign and domestic elements and interests involved... to determine the rule applicable.” The opinion does indicate, by example, how those elements and interests are to be examined.

The court identified the elements as follows: Ohio was the residence of plaintiffs and their decedents at the time of the accident and the place of administration of the decedents' estates; Missouri was the place of the wrong; and California was the residence of defendant and the forum state. The only issue to be decided was the measure of damages to be applied. Neither Ohio nor California placed a restriction on the amount of damages recoverable in a wrongful death action, while Missouri placed a $25,000 limit on recovery in such actions.

The opinion then proceeded to examine the interests of the respective states to determine which states' policies would be furthered by application of their respective laws. It was determined that it would serve no purpose for the California court to apply its rule that there is no limitation on damages. The policy behind such a provision is apparently to assure that survivors who are California residents will be adequately compensated for their loss. Since at the time of the tort the plaintiff-survivors were not California residents the policy behind the California law would not be furthered by its application. However, the court found that the policy of the

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79 67 A.C. at 564, 432 P.2d at 730, 63 Cal. Rptr. at 34.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id. at 561, 432 P.2d at 728, 63 Cal. Rptr. at 32.
85 OHIO CONST. art. I, § 19a; CAL. CODE CIV. PROC. § 377.
88 67 A.C. at 564-65, 432 P.2d at 730, 63 Cal. Rptr. at 34.
89 See Cavers, *supra* note 3, at 151.
90 67 A.C. at 564-65, 432 P.2d at 730, 63 Cal. Rptr. at 34. It should be noted that the plaintiffs moved to California after the accident and were
Ohio law in affording full recovery to survivors was furthered by its application in this case since the plaintiff-survivors were Ohio residents at the time of the tort.91

The remaining question was whether Missouri, the place of wrong, also had an interest in application of its law limiting recovery to $25,000. The court concluded it would not further the policy behind the Missouri law nor any other Missouri policy to apply the limitation on damages in this particular case.92 The limitation on wrongful death damages was established to avoid imposition of excessive damages on Missouri defendants.93 Since the defendant in this case was a resident of California, it seems that Missouri would have no interest in limiting his liability merely because the accident fortuitously occurred in Missouri rather than elsewhere.94 Thus the conflict of laws problem became no problem at all since there was no conflict. Only one state, of the states which had some contact with the case, had an interest in application of its law. The only rational result would be to apply the law of that state.95 This type of case, where there are several states whose law might be applied because of contacts with the tort, but only a single state whose policies would be furthered by application of its law has been termed a “false conflict” case.96 The Reich example should be a partial guide for practitioners and lower courts when future false conflict cases arise. However, other more complicated situations remain subject to uncertain resolution in California. An analysis of the apparent source of the reasoning in Reich may indicate the path to be followed in the future.

**Governmental-Interest Theory**

The Reich method of solving tort problems with multistate contacts is similar to a portion of a proposed “governmental-interest” approach which has been summarized in part as follows:

1. [Policy analysis step] When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert governmental interests. Accord, Gore v. Northeast Airlines, 373 F.2d 717, 723 (2d Cir. 1967) reversing the district court which had refused to apply New York law in favor of a New York decedent's widow merely because she moved to another state after the accident and before bringing suit.

91 67 A.C. at 565, 432 P.2d at 731, 63 Cal. Rptr. at 35.
92 Id.; see Weintraub, supra note 2, at 228.
94 See Cavers, supra note 3, at 299; Weintraub, supra note 2, at 216.
97 The term “governmental-interest” is the one used by Professor Currie. Currie, Comment, supra note 87, at 1241. The use of this term has been criticized as misleading and inaccurate. See A. Ehrenzweig, CONFLICT OF LAWS 350 (1962). Nevertheless, the term seems to have become established. See generally Cavers, supra note 3, at 98-102.
an interest in the application of those policies. In making these
determinations the court should employ the ordinary processes of
construction and interpretation.
2. [False conflict step] If the court finds that one state has an
interest in the application of its policy in the circumstances of the
case and the other has none, it should apply the law of the only
interested state.
3. [Conflict avoidance step] If the court finds an apparent con-
fusion between the interests of the two states it should reconsider. A
more moderate and restrained interpretation of the policy or interest
of one state or the other may avoid conflict.
4. [Forum law application step] If, upon reconsideration, the court
finds that a conflict between the legitimate interests of the two states
is unavoidable, it should apply the law of the forum.98

As stated above, there is no indication, other than various cita-
tions in Reich to works of those advocating a governmental-interest
approach,99 that the court is adopting this formula for determining
choice of law problems. However, a comparison with the process
used by the court yields the impression that the governmental-inter-
est theory had some influence on the method of deciding this
case.100 The California court, if it can be said to be following this
formula, was required to go only as far as the false conflict step
to decide the case. Adhering to the policy analysis step the court
inquired into the policies behind the laws relating to damages for
wrongful death101 and determined that only the policy of Ohio would
be furthered by application of its law.102 Accordingly it applied the
law of that state—the false conflict step.103

98 Professor Currie supplied this summary for inclusion in E. Chatham,
E. Griswold, W. Reese, & M. Rosenberg, Cases and Materials on Conflict of
Professor Currie is not alone in his approach to decision of conflicts cases
by inquiry into the terms and purposes of laws and whether the respective
purposes of each would be served by its application. Professor Currie's enun-
ciation of this approach was chosen because the court made reference in the
Reich decision to his writings and because of the workable, concise summary
available.
There is a high degree of similarity between Currie's approach and that
of Professor David Cavers, whose work, The Choice of Law Process (1965),
the Reich court also cites. 67 A.C. at 563, 432 P.2d at 729, 63 Cal. Rptr. at 33.
Professor Cavers admits at page 89 of his book that their approaches are
identical so far as a "false conflict" case is concerned. Cavers goes on to cite
several other conflicts scholars who he believes would take a similar approach.
Cavers, supra note 3, at 91-92.
99 Cavers, supra note 3; Currie, Essays, supra note 3.
100 See text accompanying notes 83-98 supra. It cannot be doubted that
at least one member of the court, the author of the Reich opinion, Chief
Justice Traynor, is favorably impressed by Currie's approach. See Traynor,
Is This Conflict Really Necessary, 37 Tex. L. Rev. 657, 667-68 (1957).
101 Text accompanying notes 86-93 supra. It should be noted that under
the governmental-interest approach, contrary to the lex loci rule, there is no
requirement that the laws of a single jurisdiction control all issues in a case.
Thus the Reich court implies that the laws of the place of the wrong may
control issues having to do with conduct within that state even though they
might not control the damages issue. 67 A.C. at 565, 432 P.2d at 731, 63 Cal.
Rptr. at 35.
102 Text accompanying notes 86-93 supra.
103 Text accompanying notes 94-95 supra. The reader of the Reich opin-
Whether California will adopt the fourth step in the formula, which calls for application of the law of the forum where a true conflict exists, cannot be answered on the basis of decisional law in California at this time. There is however, in the case of Bernkrant v. Fowler,\textsuperscript{104} some evidence that the California courts will not mechanically implement the \textit{forum law application step} without first attempting to apply the \textit{conflict avoidance step}. That is, the courts will not automatically apply their own law when at first glance there appears to be a genuine conflict between California's interest in applying its law and that of another state in applying its law. Rather, it appears that the courts will attempt to reconcile and avoid the conflict by a careful examination of the facts to discover whether the connections with the policies behind the respective laws are significant or relatively inconsequential.

\textit{Bernkrant} involved a contract rather than a tort, but the approach can be analogized to the tort situation. Involved was a conflict between the Nevada and California statutes of frauds. California required that a contract to make a will be in writing.\textsuperscript{105} The California court determined that Nevada law would not require a written instrument in this case.\textsuperscript{106} The contract in question was made in Nevada but the estate was being administered in California.\textsuperscript{107} The court subordinated California's interest in preventing fraudulent claims against estates\textsuperscript{108} to Nevada's interest in upholding the expectation of the parties that the laws of Nevada would control the validity of the contract made in Nevada.\textsuperscript{109} Looking at the practicalities of the matter, the opinion points out that the opposite conclusion would require parties similarly situated to examine and comply with the statute of frauds of every state where the testator might have been.
die domiciled. Despite this indication that California may apply the conflict avoidance step, there is not a sufficient basis in present California law to allow a rational prediction as to the adoption of the forum law application step of the governmental-interest theory.

**Conclusion**

The *lex loci delicti* rule failed to provide required flexibility, and its mechanical application to all choice of law cases in tort with multistate contacts at times created unjust results. It is submitted that the California courts took a step in the right direction by overruling cases relying on the *lex loci* rule. The courts are now free to state the true bases for their decisions without having to reason within the bounds of the exceptions of the *lex loci* rule.

However, this freedom may create new problems for the courts. Determination of the bases upon which courts are to choose between application of several possible laws will not be simple. A difficult task sometimes awaits the court which must ferret out the policy or policies underlying each of those laws and determine whether those policies would be furthered in the case at hand. An even more difficult task arises in determining when and how to avoid an apparent conflict between two or more states by giving a moderate or restrained interpretation to the policy of one.

This is in direct contrast to the simplicity, ease of application and relative certainty provided by the *lex loci* rule. As a result of the difficult inquiry into policy and the conflict avoidance procedure, results may be even less uniform under the governmental-interest approach than under *lex loci*. However, if courts continue to assess the contacts as they existed at the time of the tort there will be little advantage to forum shopping. Furthermore, the lack of predictability or certainty of result is less significant in the

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110 Id. at 595, 360 P.2d at 909, 12 Cal. Rptr. at 269. See also People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957), a case which employs a similar approach.

Professor Currie has termed the court's analysis in *Bernkrant* a brilliant example of a moderate and restrained interpretation of the policy behind the law and of the circumstances under which that law must be applied to effectuate the policy. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757 (1963).

111 See note 3 supra.


In many cases the result arrived at under the governmental-interest approach will be the same as under the *lex loci* rule since the application of the law of the place of injury may further some legitimate interest of that state. See, e.g., Schneider v. Schimmels, 1 Civ. No. 23857 (Calif. Ct. of Appeals, 1st Dist., filed Aug. 1, 1966) (the first case applying the Reich method).


114 Note 113 supra.

115 See text accompanying notes 15-17 supra.

116 Note 113 supra.

117 Note 89 supra.
torts field than in other areas of the law such as contracts, since the commission of most torts is unintentional and without advance reliance on the eventual determination of the parties' resulting legal rights.\footnote{Reese, Conflict of Laws and the Restatement Second, 28 LAW & CONTEMP. PROB. 679, 687 (1963).}

It is submitted that the California court reached the proper result in the \textit{Reich} case. The court restricted its discussion to that required to decide the case. The decision of the case was not difficult once the \textit{lex loci} obstacle was removed. It is perhaps unfortunate for future courts and California practitioners that the decision does not set forth any complete set of guidelines for the resolution of future cases. However, the reticence of the California court is understandable in view of the wide disagreement among writers in the field as to the proper approach to replace the \textit{lex loci} rule in tort choice of law,\footnote{Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 758 (1963).} the difficulty in formulating a general scheme with sufficient flexibility to cover all situations,\footnote{See Morris, The Proper Law of a Tort, 64 HARV. L. REV. 881, 885 (1951).} and the general confusion which has resulted from attempts of other courts to dictate such a scheme.\footnote{See Currie, Conflict, Crisis and Confusion in New York, 1963 DUKE L.J. 1, in Cuym, EssAys, supra note 3, at 690.} Perhaps choice of law with its myriad potential factual situations is an area of the law which is better dealt with on a case by case method.\footnote{See generally CAvers, supra note 3, at 110, CAvers, Changing, supra note 27, at 733 n.5; Currie, Notes, supra note 42, at 179; Reese, Comments on Babcock v. Jackson, 63 COLUM. L. REV. 1251, 1253 (1963).}

Despite the disadvantages of the governmental-interest approach the \textit{Reich} court has laid the foundation for a much more rational choice of law method than was possible under the \textit{lex loci} rule.\footnote{See Griffith v. United Air Lines, Inc., 416 Pa. 1, 23, 203 A.2d 796, 806 (1964), where a Pennsylvania court under similar circumstances stated: “We are at the beginning of the development of a workable, fair and flexible approach to choice of law which will become more certain as it is tested and further refined when applied to specific cases before our courts.”} It seems that with the adoption of the governmental-interest approach the chances are much less that there will be a recurrence of the type of unjust result which the \textit{Victor} case produced.

\textit{Alan E. Burchett*}

\footnote{\textsuperscript{118} Reese, Conflict of Laws and the Restatement Second, 28 LAW & CONTEMP. PROB. 679, 687 (1963).}
\footnote{\textsuperscript{119} Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 758 (1963).}
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