Michigan Law Review

Volume 57 | Issue 6

1959

Conflict of Laws - Tort - Lex Loci or Lex Domicilii to Determine Interspousal Capacity to Sue?

E. Roger Frisch S.Ed.
University of Michigan Law School

RECENT DECISIONS

CONFLICT OF LAWS—TORT—LEX LOCI OR LEX DOMICILII TO DETERMINE INTERSPOUSAL CAPACITY TO SUE?—Husband and wife, Wisconsin domiciliaries, were involved in an automobile accident in Illinois. *W* brought suit in Wisconsin against *H*'s insurer for alleged injuries resulting from the accident. The trial court dismissed the complaint on the ground that Illinois law was applicable and did not give one spouse a cause of action against the other for tort. On appeal to the Supreme Court of Wisconsin, *held,* reversed, one judge dissenting. The Illinois Married Women's Act[1] should be strictly construed as destroying only the remedy in the Illinois courts, but not the substantive right to relief; hence, the Wisconsin court may entertain the suit under Illinois law. *Bodenhagen v. Farmers Mutual Ins. Co.,* (Wis. 1958) 92 N.W. (2d) 759.

The prevailing position of the United States courts is that the rights of litigants are determined by the substantive law of the place of the tort.[2] And the question of interspousal immunity from or capacity to bring suit generally has been held to be substantive in character and hence to fall within the lex loci rule.[3] In fact, Wisconsin took the lead in establishing this pattern in *Buckeye v. Buckeye*[4] on facts substantially the same as in the principal case. The court in the principal case, however, only nominally applied the lex loci rule by construing Illinois law in a manner which licensed it to apply the law of Wisconsin (lex domicilii) to the question of interspousal capacity to bring suit.[5] Apparently the court was impressed with the need for a different rule in cases where the out-of-state tort strongly affects public policy in the state of domicile. This is consonant with the criticism of the rigid majority rule by writers[6] and two recent cases[7] which argue that the policy factors underlying the position for (or

[1] Ill. Rev. Stat. (1957) c. 68, §1: ". . . neither husband nor wife may sue the other for a tort to the person committed during coverture. . . ." As amended by act approved June 24, 1953. Ill. Laws (1953) p. 437. See note 13 infra.

[2] CONFLICT OF LAWS RESTATEMENT §§378, 379 (1934).

[3] Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931), notes, 31 COL. L. REV. 884 (1931), 44 HARV. L. REV. 1138 (1931), 29 MICH. L. REV. 1072 (1931), 79 UNIV. PA. L. REV. 804 (1931); Garlin v. Garlin, 260 Wis. 187, 50 N.W. (2d) 373 (1951); Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931); Dawson v. Dawson, 224 Ala. 13, 138 S. 414 (1931); *contra:* Pittman v. Deiter, 10 Pa. D.&C. (2d) 360 (1957), note, 4 WAYNE L. REV. 79 (1957). Cf. Emery v. Emery, 45 Cal. (2d) 421, 289 P. (2d) 218 (1955).

[4] Buckeye v. Buckeye, note 3 supra, is most often cited for this rule although Howard v. Howard, note 3 supra, and Dawson v. Dawson, note 3 supra, were decided in the same year and helped set the pattern.

[5] See notes 12, 13, 14 infra, and accompanying text.

[6] Ford, "Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement," 15 UNIV. PITT. L. REV. 397 at 426 (1954); COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 250 (1942); note, 4 WAYNE L. REV. 79 at 80 (1957); 22 A.L.R. (2d) 1248 at 1249 (1952).

[7] Pittman v. Deiter, note 3 supra. Cf. Emery v. Emery, note 3 supra.

against) allowing interspousal suits are of greater importance to the domiciliary state than to the fortuitous place of tort. The two factors commonly considered are the possibility of fraud on the insurer by interspousal collusion and the need to preserve domestic harmony by prohibiting interspousal suits.[8] Yet it would appear that if collusion presents a real problem it is primarily a matter of interest to the state where the insurance is issued[9] or to the insurer, which may avoid such suits itself by exceptions written into the policy.[10] The maintenance of domestic tranquility involves the rights, duties, disabilities and immunities incurred by the family relationship and thus is primarily a matter of domestic relations law rather than of tort law.[11] Clearly the state of domicile is the only state having a permanent interest in this family relationship of the parties; and the domestic harmony of the family will be more effectively preserved by determining their status according to the law where they reside, rather than a foreign law. But even though the court in the principal case reaches this favorable result, its approach seems questionable in terms of its construction of the Illinois statute. By its reliance on the lex loci rule, the court failed to reach the desirable result of establishing the lex domicilii rule as the determinant of interspousal capacity to sue. The court bases its decision primarily on the Illinois case of *Brandt v. Keller*[12] which construed the Illinois Married Women's Act (prior to the 1953 amendment) as abrogating a husband's common law immunity from tort suit by his spouse. It reasons that although Illinois amended this act to prevent a recurrence of the *Brandt* result, the amendment merely destroyed any remedy in Illinois courts,[13] but did not restore the substantive immunity from suit afforded the spouse at common law.[14] While the distinction between procedural and substantive rights in the area of conflict of laws is often quite nebulous, still the weight of authority indicates that the capacity to bring suit involves a substantive right.[15] Hence, the principal

[8] Ford, "Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement," 15 UNIV. PITT. L. REV. 397 at 400-401 (1954).

[9] See note, 42 VA. L. REV. 219 at 220 (1956).

[10] Pittman v. Deiter, note 3 supra.

[11] See note 7 supra.

[12] 413 Ill. 503, 109 N.E. (2d) 729 (1953).

[13] Principal case at 762. Since the original statute was recognized as having assured a cause of action in a wife against her husband for tort, the amendment could reasonably have been read as prohibiting any such suit. See note 1 supra. This interpretation of Illinois law as it now stands caused the court to consider its decision in Buckeye v. Buckeye, note 3 supra, as no longer correct.

[14] MADDEN, PERSONS AND DOMESTIC RELATIONS 221 (1931) cites the following to illustrate the nature of the husband's immunity from a tort suit by his spouse: "There is not only no civil remedy, but there is no civil right, during coverture, to be redressed at any time. There is, therefore, nothing to be suspended." And at 220: "No cause of action arose at all in favor of the wife, and it followed that she could not even after a divorce, sue him for a tort committed during coverture."

[15] "We are dealing with a substantive right. . . . The creation and extent of liability

case is disturbing in that it represents the effectuation of a desirable social policy by a misapplication of the lex loci rule. The court, recognizing the need for a different rule, could once again have established the pattern in this area by separating the tort problem from the domestic relations problem and then applying the lex loci rule to the former and the lex domicilii rule to the latter.

E. Roger Frisch, S.Ed.

in tort are fixed by the lex loci delicti commissi. . . . The law of that state creates, defines and limits her right of action. As she could not maintain this cause of action in that state, she cannot maintain it here." Bohenek v. Niedzwiecki, 142 Conn. 278 at 282, 113 A. (2d) 509 (1955); Coster v. Coster, 289 N.Y. 438 at 442, 46 N.E. (2d) 509 (1943).