CHOICE OF LAW IN ARIZONA: SCHWARTZ v. SCHWARTZ, SOMETHING OLD, SOMETHING NEW, SOMETHING BORROWED . . .

JON R. COOPER

The Arizona Supreme Court's recent decision in *Schwartz v. Schwartz*[1] truly deserves the often abused appelation, "landmark decision." Through this decision the court joins a few enlightened jurisdictions,[2] virtually all of the nonjudicial authorities,[3] and the American Law Institute[4] in rejecting the lex loci delicti rule of choice of law. A husband and wife, domiciled in New York, were involved in an automobile accident in Arizona. The wife sued the husband in Arizona for negligence, and the trial court, applying Arizona law, denied recovery on the basis of interspousal immunity in tort, a doctrine which does not apply in the state of New York.[5] The wife appealed and the court of appeals affirmed. The Arizona Supreme Court, discarding the traditional lex loci delicti rule of conflict of laws, and applying the modern most significant relationship rule, vacated the court of appeal's decision[6] and remanded the case to the trial court, holding that New York law should govern the issue of interspousal immunity in tort.[7] As a necessary corollary[8] the court adopted the doctrine that a separate choice of law decision must be made for each issue of law in the case.[9] This doctrine, dépeçage,[10] was

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1 103 Ariz. 562, 447 P.2d 254 (1968).

2 *E.g.*, Reevesy v. Schulmeier, 303 F.2d 802 (5th Cir. 1962); Goldberg v. Faull, 275 F. Supp. 96 (E.D. Tenn. 1967); Magid v. Decker, 251 F. Supp. 955 (W.D. Wis. 1966); Pire v. Kortebein, 186 F. Supp. 621 (E.D. Wis. 1960); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Pittman v. Dieter, 10 Pa. D. & C.2d 360 (Phil. Cnty. 1957); Lederle v. United Serv. Auto. Ass'n., 394 S.W.2d 31 (Tex. Civ. App. 1965), *vacated per curium as moot*, 400 S.W.2d 749 (Tex. 1966); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

3 *See generally* Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397 (1954); Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237 (1962); Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORN. L.Q. 215 (1963); Comment, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212 (1963).

4 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

5 *See* Pryor v. Merchants Mut. Cas. Co., 12 Misc. 2d 801, 174 N.Y.S.2d 24 (Sup. Ct. 1958).

6 7 Ariz. App. 445, 440 P.2d 326 (1968).

7 Schwartz v. Schwartz, 103 Ariz. 562, 565, 447 P.2d 254, 257 (1968).

8 *See* Wilde, *Dépeçage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 363 (1968).

9 Schwartz v. Schwartz, 103 Ariz. 562 566, 447 P.2d 254, 258 (1968).

10 This term is derived from the French *dépeçer*, meaning to dissect or take to pieces. P. LAROUSSE, MODERN FRENCH-ENGLISH DICTIONARY 210 (1960).

announced without warning the lower courts that indiscriminate piecemeal application of elements of law from several jurisdictions to separate issues can lead to anomalous results.[11] These results may be such as could not be reached under the total body of law of any relevant jurisdiction and may be undesirable as a matter of policy.[12]

Perhaps one noteworthy accomplishment is all that can be expected of a single decision. While the holding of the *Schwartz* case establishes a very enlightened choice of law policy, which might have been qualified with a parenthetical caveat, the dictum of the case announces an unfortunately anachronistic policy of interspousal immunity. Without citation of authority, the court stated that "Arizona has adhered to the common law position that interspousal tort suits are not permitted."[13] Of course, if Arizona permitted such suits there would not have been a choice of law problem in *Schwartz*, and the case could not have been a vehicle for a dramatic step forward. Although at least as time tested as lex loci delicti,[14] the policy of arbitrarily and mechanically prohibiting actions between spouses is also ripe for abolition, since it is equally in disrepute with nonjudicial authorities[15] and has been rejected by several jurisdictions.[16]

The three facets of the *Schwartz* case, (1) the choice of law rule, (2) the doctrine of dépeçage, (3) the doctrine of interspousal immunity, will be discussed more fully under separate heads below.

I. ARIZONA CHOICE OF LAW DOCTRINE: SOMETHING NEW

Regardless of whether a particular jurisdiction subscribes to the doctrine of interspousal immunity in tort, care should be exercised by that jurisdiction not to disregard the legitimate interests of other jurisdictions in choosing the proper law to be applied to nondomiciliaries seeking redress in its courts.

Traditionally, the conflict of laws rule concerning tort actions has been that the law of the place where the tort occurs governs the determination of all the issues involved, including questions as to the right or capacity of a party to sue or be sued.[17] This is the common law view,

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[11] *E.g.*, Lillegraven v. Tengs, 375 P.2d 139 (Alas. 1962). *See* Wilde, *supra* note 8.

[12] *See* Wilde, *supra* note 8.

[13] 103 Ariz. 562, 563, 447 P.2d 254, 255 (1968).

[14] *E.g.*, Thompson v. Thompson, 218 U.S. 611 (1910). *See* Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423 (1966).

[15] *See* McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1931); Comment, *supra* note 14; 27 OHIO ST. L.J. 550 (1960).

[16] *E.g.*, Cramer v. Cramer, 379 P.2d 95 (Alas. 1963); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Brown v. Gosser, 262 S.W.2d 480 (Ky. Ct. App. 1953); Pryor v. Merchants Mut. Cas. Co., 12 Misc. 2d 801, 174 N.Y.S.2d 24 (Sup. Ct. 1958).

[17] *E.g.*, Hale v. American Fire & Cas. Co., 81 F. Supp. 273 (W.D. La. 1948);

referred to as lex loci delicti. This rule is founded on the vested rights doctrine,[18] under which the common law system of conflict of laws is viewed as having its underlying purpose in the recognition and enforcement of foreign-created rights. Consequently, when enforcement is sought of a so-called foreign tort claim, the claim is viewed as owing its existence to the law of the place where the tort occurred. Accordingly, if such an action did not exist or was not permitted at the place of the tort, no enforceable right was deemed to exist.[19]

The chief virtues of the lex loci delicti rule are its certainty, the facility of its application, and its predictability.[20] However, its application as a hard and fast rule is not always desirable.[21] For example, suppose a guest passenger and driver, both domiciled in State *X*, travel in the driver's automobile to State *Y* where the passenger is injured in an automobile accident caused by the driver's negligence. Assume further, that State *Y*, the state of injury, has a guest statute precluding a passenger from suing the negligent driver, while State *X*, the state of domicile, does not. If the passenger attempts to sue the driver, whether the action is brought in the state of injury or the state of domicile, a mechanical application of lex loci delicti would dictate that the state-of-injury's law be applied, which would preclude the action. This would result even though the state of both parties' domicile has the only interest in the question of whether the passenger, a guest in the driver's automobile, should be allowed to sue the driver for injuries sustained in the accident. The policy underlying a guest statute in any given jurisdiction has to do with allocation of risk of loss and permits parties to determine what kind of insurance to carry. This policy of risk allocation, however, is only relevant to the residents of the jurisdiction having the guest statute, and should not be imposed upon the residents of another jurisdiction. For this reason, in our example, the state-of-injury's only possible interests would be to deter negligent driving on its highways and to provide a degree of certainty of payment to resident medical personnel;[22] but these

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Bohenek v. Neidzwiecki, 142 Conn. 278, 113 A.2d 509 (1955); Pilgrim v. MacGibbon, 313 Mass. 290, 47 N.E.2d 299 (1943). *See* G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 186 (3d ed. 1963); RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

[18] *See* Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918). *See also* STUMBERG, *supra* note 17, at 183; M. HANCOCK, TORTS IN THE CONFLICT OF LAWS 32-36 (1942).

[19] *Cf.* Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). *See also* STUMBERG, *supra* note 17, at 183; HANCOCK, *supra* note 18, at 32-36.

[20] *E.g.*, Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Casey v. Manson Constr. & Eng'r Co., 428 P.2d 898 (Ore. 1967). *See* STUMBERG, *supra* note 17, at 199.

[21] *E.g.*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). *See generally* Comment, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212, 1254 (1963).

[22] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-931 (1956) which gives hospitals a

interests are negated by not allowing the action. The only way that any of the interests of the state of the injury could be served would be to allow the action.

Therefore, a mechanical application of the lex loci delicti rule may result in applying the law of a state having no real interest in the problem, at the expense of frustrating the public policy of the state that does have an interest.[23] For this reason, several states have discarded the rule, regardless of the issues involved, and have adopted the doctrine of most significant relationship.[24] Under this doctrine, the courts look to the policy reasons underlying the law and may apply the law of one jurisdiction to determine a certain aspect of the case, while looking to the law of a second jurisdiction to decide another.[25] This approach is meritorious in that it gives paramount control over the legal issues involved to the jurisdiction most intimately concerned with the outcome of a particular question.[26]

While the law of the place of the tort has traditionally been applied to determine the immunities and disabilities arising out of the family relationship,[27] application of the doctrine of most significant relationship

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lien upon "any and all claims for damages . . . on account of injuries . . . which necessitated such hospitalization." Similarly, even in the absence of such a statute, the state of injury would have a legitimate interest in any recovery that could be had from a negligent tort-feasor insofar as it could be appropriated to payment of resident medical attendants of the injured claimant.

[23] *E.g.*, Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958)(dictum); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[24] *E.g.*, Reeves v. Schulmeier, 303 F.2d 802 (5th Cir. 1962)(lex loci delicti rule circumvented in finding married woman's separate ownership of cause of action); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (limitation of damages); Schneider v. Schimmels, 256 A.C.A. 400, 64 Cal. Rptr. 273 (1967) (loss of consortium); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) (guest statute). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964); H. GOODRICH & E. SCOLES, CONFLICT OF LAWS § 92 (4th ed. 1964). This doctrine is sometimes referred to as the *center of gravity theory* or the *grouping of contacts theory*, *see* Schwartz v. Schwartz, 7 Ariz. App. 445, 440 P.2d 326 (1968).

[25] *See* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). *See also* Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Law: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397 (1954). The selective adoption of laws of different jurisdictions to apply to different issues of the same case has been termed *dépeçage*, and is discussed in Section II.

[26] *See* Magid v. Decker, 251 F. Supp. 955 (W.D. Wis. 1966); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). *See generally* Comment, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1212 (1963).

[27] *E.g.*, Jones v. Kinney, 113 F. Supp. 923 (W.D. Mo. 1953), *aff'd sub nom.* Jones v. Avco Mfg. Corp., 218 F.2d 406 (8th Cir.), *cert. denied*, 350 U.S. 826 (1955); Lucas v. Phillips, 205 Tenn. 444, 326 S.W.2d 905 (1957) (point conceded); Ball v. Ball, 73 Wyo. 29, 269 P.2d 302 (1954). *See also* cases collected in

will usually result in the court applying the law of the family domicile to control such aspects of a claim between members of the same family.[28] The first decision to clearly depart from the traditional rule was *Emery v. Emery*.[29] There a mother and daughters brought an action in California against the father and son for injuries sustained in an Idaho automobile accident. All parties were domiciled in California. Mr. Justice Traynor applied the law of California to determine whether any disabilities or immunities from suit existed[30] and held that the defendants were not immune from suit by the daughters although the mother's pleading was defective as against father and son. The law of Idaho, however, was applied to define the substantive elements of the tort.[31] Since *Emery*, other jurisdictions have chosen to follow the doctrine of most significant relationship in determining the existence of intrafamilial immunity from suit in cases involving foreign torts.[32]

Annot., 96 A.L.R. 2d 973, 977 (1964); RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

[28] In considering the most significant relationship doctrine as applied to intrafamilial disabilities and immunities, two lines of cases need to be recognized. Some courts in applying the doctrine seem to find that the law of the matrimonial domicile will, without exception, have the dominant interest. *E.g.*, Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). On the other hand, other courts recognize that in the usual case the spouse's domicile will have the controlling interest for choice of law purposes, but will not necessarily preclude a situation where the state of the injury might have the dominant interest. *E.g.*, Magid v. Decker, 251 F. Supp. 955 (W.D. Wis. 1966); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966). Nevertheless, both are applications of the same doctrine. To illustrate, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 390(g) (Tent. Draft No. 9, 1964) reads as follows:

> In accordance with the rule of § 379, whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicile.

Comment a. to this section reads as follows:

> The rule of this section is an application of the rule of § 379. In this situation, however, it is possible to make a more definite statement as to the governing law than in the case of other issues.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964) reads as follows:

> (1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.
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> (2) Important contacts that the forum will consider in determining the state of most significant relationship include:
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> (a) the place where the injury occurred,
>
> (b) the place where the conduct occurred,
>
> (c) the domicile, nationality, place of incorporation and place of business of the parties, and
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> (d) the place where the relationship, if any, between the parties is centered.
>
> (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the interested states.

[29] 45 Cal. 2d 421, 289 P.2d 218 (1955).

[30] *Id.* at 428, 289 P.2d at 223.

[31] *Id.* at 425, 289 P.2d at 221.

[32] *E.g.*, Goldberg v. Faull, 275 F. Supp. 96 (E.D. Tenn. 1967)(dictum indicated recent trend); Pittman v. Deiter, 10 Pa. D. & C.2d 360 (Phil. Cnty. 1957); Lederle v. United Serv. Auto. Ass'n, 394 S.W.2d 31 (Tex. Civ. App. 1965), *vacated per*

In the area of intrafamilial torts, logic would seem to dictate that disabilities to sue and immunities from suit be determined by reference to the law of the domicile.[33] The presence or lack of such intrafamilial disabilities and immunities reflects the policies of the domicile in regulating the incidents of the marital relationship of its residents.[34] Furthermore, only by participation in the legislative processes of the state of the domicile may the parties concerned reflect their views as to the rights and immunities which should arise out of their relationship.[35] By looking to the law of the family domicile to resolve such questions, the courts would be applying the law of the state which has the primary interest and responsibility for regulating the incidents of the marital relationship of its domiciliaries.[36] The mere occurrence of a fortuitous event, such as an automobile accident, does not in itself confer upon a state a legitimate interest in the marital relationship of parties domiciled outside of its jurisdiction.[37] Nor should rights and liabilities imposed by the relationship change simply because the family has crossed a state border temporarily.[38] In brief, mechanical application of the traditional lex loci delicti rule in the area of intrafamilial disabilities and immunities may bring about an unjust result bearing no relation to the purposes and policies underlying the law of the family domicile, while at the same time serving none of the policies of the state where the accident occurred.[39]

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curiam as moot, 400 S.W.2d 749 (Tex. 1966); Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

[33] *See* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W. 2d 814 (1959). *See generally* Cheatham & Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959, 974-75 (1952).

[34] *See* Magid v. Decker, 251 F. Supp. 955 (W.D. Wis. 1966); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). *See generally* Weintraub, *A Method for Solving Conflict Problems—Torts,* 48 CORN. L.Q. 215 (1963).

[35] *See* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). *See also* Ford, *supra* note 25. It may be questionable whether particular parties wield significant legislative influence and whether such influence could affect their own case. It is clear, however, that a legislature is more capable of changing a well-publicized fault in its own law, than to influence the law of a sister jurisdiction.

[36] *E.g.,* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Lederle v. United Serv. Auto. Ass'n, 394 S.W.2d 31 (Tex. Civ. App. 1965), *vacated per curium as moot,* 400 S.W.2d 749 (Tex. 1966); Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962). *See* Ford, *supra* note 25.

[37] *See* Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958) (dictum); Wilcox v. Wilcox, 26 Wis. 2d 167, 133 N.W.2d 408 (1965). *See generally* Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959).

[38] *See* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

[39] *See* Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). *See generally* Hancock, *The Rise and Fall of Buckeye v.*

Those states which have adopted the most significant relationship doctrine have done so regardless of whether the law of the domicile grants[40] or denies[41] immunity, and regardless of whether the place of the tort does[42] or does not[43] correspond to the state of the forum. However, in recognizing the policies underlying the law of the domicile and determining whether to apply that law to questions concerning intrafamilial disabilities and immunities, courts should be careful not to overlook legitimate interests of the state of the injury. In this connection it is appropriate to consider the question of whether a *true conflict* exists.[44] For example, suppose that a vacationing family travels to another state where they are injured in an automobile accident caused by the husband's negligence. Assume further that the state of domicile does not recognize interspousal immunity while the state where the accident occurred does, and that the wife sues her husband in tort in the accident state. The only interests the state of injury might have in the litigation would be to provide compensation to persons injured on its highways, which in turn would serve as a deterrent to negligent driving, and in compensating resident medical attendants for care rendered to the injured.[45] However, the state of injury does not allow a wife to recover from her husband. Therefore, if the state of injury recognizes the legitimate interests of the state of domicile in the marital relationship of its domiciliaries and applies the law of the state of domicile, it will not in any way be frustrating a policy of its own. Properly analyzed, a *true conflict* does not exist,[46] as was the situation in *Schwartz v. Schwartz*.[47]

Buckeye, 1931-1959 Marital Immunity for Torts in Conflict of Laws, 29 U CHI. L. REV. 237 (1962).

[40] *E.g.*, Magid v. Decker, 251 F. Supp. 955 (W.D. Wis. 1966); Pire v. Kortebein, 186 F. Supp. 621 (E.D. Wis. 1960); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Koplic v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958) (dictum); Lederle v. United Serv. Auto. Ass'n, 394 S.W.2d 31 (Tex. Civ. App. 1965), *vacated per curium as moot*, 400 S.W.2d 749 (Tex. 1966); Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

[41] *E.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Pittman v. Deiter, 10 Pa. D. & C.2d 360 (Phil. Cnty. 1957); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Bodenhagen v. Farmers Mut. Ins. Co., 5 Wis. 2d 306, 92 N.W.2d 759 (1958), *modified on rehearing* 95 N.W.2d 822 (1959).

[42] *E.g.*, Goldberg v. Faull, 275 F. Supp. 96 (E.D. Tenn. 1967); Magid v. Decker, 251 F. Supp. 955 (W.D. Wis. 1966); Pire v. Kortebein, 186 F. Supp. 621 (E.D. Wis. 1960); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962).

[43] *E.g.*, Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958) (dictum); Pittman v. Deiter, 10 Pa. D. & C.2d 360 (Phil. Cnty. 1957); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

[44] *See* Traynor, *supra* note 37; Weintraub, *supra* note 34.

[45] See note 22 *supra*.

[46] *See* Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966), which discusses Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963) and concludes that in the latter case no true conflict existed. *See generally* Traynor, *supra* note 37; Weintraub, *supra* note 34.

[47] 103 Ariz. 562, 447 P.2d 254 (1968).

In such a situation, by applying the law of the domicile, the state of injury would additionally be furthering legitimate interests of its own. This is because, in adopting a rule of tort immunity, the state of injury subordinated its interests in the deterrent effect of liability on potentially negligent drivers and the certainty of payment to resident medical personnel to its interests in maintaining the immunity. But when the immunity is not applied to nondomiciliary spouses, local interests are served by allowing the action.

Under this same hypothetical, let us now assume that in the state of domicile the immunity applies, while in the state of injury it does not. In this situation a *true conflict* exists. Since the state of injury would allow the wife to recover from her husband, in recognizing the interests and applying the law of the state of domicile, it would be frustrating a legitimate interest of its own. At this point the question narrows to which state's policy should prevail. Here it would seem that the law of the state of domicile should nevertheless prevail over the law of the state of the injury. The parties are nondomiciliaries and the husband's natural concern for the safety of his wife and himself should be as great a deterrent to his negligent driving on the highways of the state of injury as the thought of having to respond to his wife in damages.[48]

In making this analysis the effect of insurance should not be overlooked in determining which law to apply. If the state in which the injury occurs applies the immunity in order to protect insurance companies from collusive suits, and *if the contract of insurance was entered into in the state of the injury*, then that state would have a legitimate interest in having its law applied. In such a situation, to apply the law which allows such actions would frustrate the legitimate interests of the state in which the injury occurred in protecting its insurance companies from collusive suits; and it may well be that the state where the injury occurred would have the most significant relationship.[49] In the usual case, however, insurance would have been purchased in the state of the domicile, and that state would have the primary interest in regulating the conduct of parties concerning contracts entered into within its borders.[50]

As the above analysis indicates, the *Schwartz* court correctly per-

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[48] This was the situation presented in Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966), and the court applied the law of the family domicile to determine the question of interspousal tort immunity.

[49] If Arizona's policy behind interspousal immunity was the avoidence of collusive suits, then Arizona might be considered to have the dominant interest in *Schwartz* since the automobile involved was rented in Arizona, and possibly any insurance involved would have been purchased in Arizona. However, the case is silent as to the insurance factor and is also silent as to any policy reasons for retaining interspousal immunity.

[50] *See* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). *See generally* Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595, 603 (1960).

ceived the false conflict in the specific case and gave effect to the interests of both New York and Arizona by permitting the suit. The effect of the case is much more significant, however, because it embraces the methodology of the *Restatement (Second) of Conflict of Laws*[51] as an appropriate guide to choice of law in Arizona. This method, in the language of section 379(1),[52] may be called "the most significant relationship" method. Although the court does not speak highly of the "interest analysis theory" propounded by Professors Cavers and Currie,[53] this does not mean that the court in applying the most significant relationship rule does not weigh and analyze interests. Indeed, the court quotes with approval the language of section 379(3): "In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and *the relevant purposes of the tort rules of the interested states.*"[54] And the court further quotes with approval Professor Leflar:

> [I]t may be assumed that 'grouping of contacts' does not mean mere counting of contacts, that qualitative rather than quantative evaluation determine 'the most significant relationship'. Qualitative evaluation is inevitably in terms of policies and interests (of the states involved). . . .[55]

This clearly indicates that "interest analysis" is an important branch of the analytical approach which Arizona courts will be expected to make henceforth.[56]

II. DÉPEÇAGE IN ARIZONA CHOICE OF LAW: SOMETHING BORROWED

In qualitatively weighing the contacts related to each issue of a case, care must be exercised to avoid problems connected with *dépeçage*.[57] *Dépeçage* is a French word used to describe the selective adoption of law from various interested jurisdictions to apply to different aspects of the same case.[58] In order to avoid an inappropriate use of dépeçage in selecting the laws of different jurisdictions under the most significant relationship rule, not only must the policies underlying the law of any particular jurisdiction be considered, but also their relationship to the other laws of that jurisdiction.[59] For example, assume that a commercial plane crashes with passengers aboard and the law of the state of injury

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[51] § 379 (Tent. Draft No. 9, 1964).
[52] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).
[53] Schwartz v. Schwartz, 103 Ariz. 562, 564, 447 P.2d 254, 256 (1968).
[54] *Id.* at 565, 447 P.2d at 257.
[55] *Id.*
[56] Accordingly we adopt the contacts theory, as embodied in the Restatement (Second) of Conflict of Laws as the rule for Arizona. Schwartz v. Schwartz, 103 Ariz. 562, 565, 447 P.2d 254, 257 (1968).
[57] *See* note 10 *supra.*
[58] *See generally* Wilde, *Dépeçage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329 (1968).
[59] *Id.* at 359.

holds airlines strictly liable for such accidents, but imposes a limitation on the amount of recovery. The state of an injured passenger's domicile, however, applies a negligence standard to airline accidents, but permits unlimited recovery.[60] In this situation it would be absurd for a court sitting in either state to apply the strict liability standard of the state of injury, while at the same time applying the unlimited liability rule of the state of the passenger's domicile. And if the state of injury had a negligence standard with unlimited recovery while the state of domicile had strict liability with limited recovery, the same would be true as to applying the state-of-injury's negligence standard in conjunction with the state-of-domicile's limited recovery rule. While it could be argued that the standard of care imposed by the state of injury should govern suits involving accidents which occur within its borders, and the amount of recovery should be governed by the law of the passenger's domicile since the contract of carriage was entered into in that state, such an argument overlooks the inter-relationship of the respective laws of each jurisdiction. The standard of care and amount of allowable recovery in each state are complementary and meant to be used in conjunction with one another. If the law as to the amount of recovery or the standard of care of either state is divorced from the other, the respective policies of both states are distorted.[61] Obviously neither state would desire strict liability with unlimited recovery or a negligence standard with limited recovery. In order to avoid such an inappropriate use of dépeçage it is essential that conflicting domestic rules be considered in their entire legal context in order that rules related in purpose not be separated and illogically combined with rules of other jurisdictions.[62]

By the use of dépeçage results may be reached in a particular conflicts case which could not be sustained under the purely domestic law of any of the jurisdictions involved. This was the result in *Lillegraven v. Tengs*.[63] In an action between two Alaskan residents, the plaintiff, a passenger in an automobile owned by the defendant and operated with his consent, sued for injuries sustained in a British Columbia automobile accident. British Columbia had an owner's liability statute and a one-year statute of limitation which had run, while Alaska had no owner's liability statute and a two-year statute of limitation which had not run. Combining the British Columbia owner's liability statute and the two-year Alaskan statute of limitations, the Alaska court allowed the plaintiff to recover, a recovery not possible under the purely domestic law of either state.[64] Any doubt as to the wisdom of applying dépeçage in this situ-

[60] This example was taken from Wilde, *Dépeçage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 358 (1968).
[61] Wilde, *supra* note 58, at 358.
[62] Wilde, *supra* note 58, at 359.
[63] 375 P.2d 139 (Alas. 1962).
[64] *Id.*

ation is dispelled when one considers that the purpose of using dépeçage is to effectuate the policies underlying the laws of different interested jurisdictions as they apply to the respective *issues* of a case, and not necessarily to arrive at a result which would be obtained by applying the entire related law of any one jurisdiction to all the issues in a case.[65] However, the use of dépeçage in a situation such as *Lillegraven* without due regard to the underlying policy considerations of the respective jurisdictions, but solely to sustain a meritorious cause of action which would not otherwise exist, is clearly inappropriate.

Since the most significant relationship method involves qualitative analysis of competing interests as applied to the various issues of a case, it necessarily involves dépeçage. The problems connected with dépeçage may be avoided, however, if the forum is simply aware of the potential anomalous results and makes the avoidance of such results one of the considerations it weighs in reaching a conclusion.

As a practical matter the use of dépeçage is not avoided even under the lex loci delicti rule. The characterization of a substantive rule as procedural has been used as a device to allow the forum to apply its own law to a particular issue and avoid the consequences of the lex loci delicti rule when that rule would lead to an undesirable result.[66] In *Kilberg v. Northeast Airlines, Inc.*,[67] the New York court characterized the measure of damages in a wrongful death action arising out of a Massachusetts airplane crash as procedural instead of substantive in order to avoid a limitation on damages under Massachusetts law. The court in effectuating a strong policy of the forum, reached a desired result only by avoiding a principle of law, a result that could have been reached without such avoidance under the doctrine of most significant relationship by dépeçage.

The *Schwartz*[68] court, in adopting the most significant relationship rule aligned itself with the modern trend of legal thought on the subject of conflict of laws in tort. While the rule is not an easy one to apply, its consistent and discriminate application will result in furthering the policies of each jurisdiction interested in a case by giving paramount consideration to the law of the jurisdiction most intimately concerned with the outcome of a particular issue.

III. Interspousal Tort Immunity in Arizona: Something Old

While the *Schwartz* decision treats the issue of interspousal immunity as well settled in Arizona, it was, nevertheless, the first case in which an

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[65] Wilde, *supra* note 58, at 356.
[66] *E.g.*, Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). *See* Wilde, *supra* note 58 at 335.
[67] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).
[68] 103 Ariz. 562, 447 P.2d 254 (1968).

Arizona court affirmatively recognized the doctrine.[69] This common law rule is simply that neither spouse may sue the other for torts committed before or during coverture. The doctrine evolved from the fictional common law notion of unity; that is, that a husband and wife were legally one person.[70] During coverture, spouses were barred from suing each other; the wife on the theory that she and her husband were one and she had no legal existence; the husband because he was liable for her torts and would, therefore, be suing himself.[71] This ancient rule of immunity has been abolished in several states, yet a majority of jurisdictions still cling persistently to the outmoded doctrine. The controversy has centered around the interpretation of the Married Women's Acts which have been uniformly enacted in this country, purporting to give the wife her own legal identity.[72] The purpose of these acts has been frustrated by a majority of American jurisdictions which hold that such statutes do not create a new cause of action, and that to do so, requires additional and specific legislative action.[73] On the other hand, several courts have liberally construed these statutes reasoning that the legislative intent was to abolish the legal identity of spouses and to allow interspousal actions without exception.[74] It should be noted, however, that the preservation of this immunity in American law is due not to an adherence to the outmoded and long since discredited doctrine of unity of husband and wife, but rather is primarily a reflection of the seemingly advantageous social considerations[75] discussed below.

The principal argument advanced in support of retaining interspousal tort immunity is that the allowance of an action between

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[69] The court of appeals decision in *Schwartz* (7 Ariz. App. 445, 440 P.2d 326 (1968)) rested on this premise. It should be noted that Jaeger v. Jaeger, 262 Wis. 14, 53 N.W.2d 740 (1952), interpreted Arizona law as *not* recognizing interspousal tort immunity.

[70] *See* Thompson v. Thompson, 218 U.S. 611, 615 (1910). *See generally* Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423 (1966).

[71] *See* Abbot v. Abbot, 67 Me. 304, 24 Am. R. 27 (1877); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924). *See generally* Williams, *The Legal Unity of Husband and Wife*, 10 MOD. L. REV. 16 (1947).

[72] Arizona's Married Woman's Act, ARIZ. REV. STAT. ANN. § 25-214 (1956), reads in part:

> A. Married women of the age of twenty-one years and upwards have the same legal rights and are subject to the same legal liabilities as men of the age of twenty-one years and upwards except the right to make contracts binding the common property of the husband and wife.

See generally McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959).

[73] *E.g.*, Schwartz v. Schwartz, 7 Ariz. App. 445, 440 P.2d 326 (1968). Flogel v. Flogel, 257 Iowa 547, 133 N.W.2d 907 (1965); Fisher v. Toler, 194 Kan. 701, 401 P.2d 1012 (1965). *See also* cases collected in Annot., 43 A.L.R.2d 632 (1955). This argument is specious since a common law doctrine which is judicially created can be judicially abrogated.

[74] *E.g.*, Cramer v. Cramer, 379 P.2d 95 (Alas. 1963); Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Brown v. Gosser, 262 S.W.2d 480 (Ky. Ct. App. 1953).

[75] *See* 27 OHIO ST. L.J. 550, 553 (1966).

spouses would result in disruption of family harmony.[76] However, if the injury is serious enough to make one spouse willing to prosecute the action over the other's objection, one might question whether any domestic harmony remains to be disrupted.[77] As was said in *Crowell v. Crowell*:[78]

> Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish and protect' her. Civilization and justice have progressed thus far with us, and never again will 'the sun go back ten degrees on the dial of Ahaz.' Isaiah, 38:8.

Moreover, in negligence cases the disruption of family harmony argument overlooks the possible existence of liability insurance. Where there is liability insurance, the insurer is in substance, if not in form, the defendant, and any recovery would inure to the family's benefit, rather than upset its tranquility.[79]

Alternatively, it is argued that allowing interspousal suits will increase the possibility of fraud and collusion against insurance companies.[80] Due to the closeness of the family relationship, such a possibility exists. Nevertheless, to the extent insurance is involved in any litigation, the danger of collusion is present; however, such danger is generally not in itself considered sufficient justification for denying a remedy which would otherwise exist.[81] The threat of collusion can be minimized by the utilization of modern trial techniques such as deposition and discovery, which afford counsel the opportunity to scrutinize the evidence

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[76] *E.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Fisher v. Toler, 194 Kan. 701, 401 P.2d 1012 (1965); Latiolais v. Latiolais, 361 S.W.2d 252 (Tex. Civ. App. 1962). *See* Comment, *Interspousal Immunity Rule and the Effect of Liability Insurance in Automobile Accidents*, 11 S.D.L. REV. 144, 146 (1966). This is also one of the reasons offered in justification of the parental immunity doctrine. The trend since 1963 has been to abrogate parental immunity. *See* Purcell v. Frazer, 7 Ariz. App. 5, 435 P.2d 736 (1967). *See also* 9 ARIZ. L. REV. 490 (1968).

[77] *E.g.*, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, *aff'd on rehearing*, 191 Wis. 225, 210 N.W. 822 (1926). *See generally* McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1052 (1931).

[78] 180 N.C. 516, 524, 105 S.E. 206, 210 (1920) (the last sentence of this quotation, as found in West's Southeast Reporter, is incorrect).

[79] *E.g.*, Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Boisvert v. Boisvert, 94 N.H. 357, 53 A.2d 515 (1947); Clement v. Atlantic Cas. Ins. Co., 25 N.J. Super. 96, 95 A.2d 494 (1953). *See also* E. HARPER & F. JAMES, TORTS § 8.11 (1956). To the same effect in parental immunity, *see* 9 ARIZ. L. REV. 490-95 (1968).

[80] *E.g.*, Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963). *See* 27 OHIO ST. L.J. 550, 554 (1966).

[81] *See* Cramer v. Cramer, 379 P.2d 95 (Alas. 1963); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955). *See generally* Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423, 433 (1966).

before trial.[82] Moreover, insurance companies may protect themselves against the risk of collusion by increasing premium rates or by providing in an exclusionary clause that the policy does not protect one spouse against liability to the other for negligence.[83] It must also be recognized that there is a public responsibility to distinguish the meritorious claims from the fraudulent.[84]

Another reason given in support of the immunity is the fear that its abrogation would lead to an inundation of trivial and insignificant claims.[85] However, experience has proved to the contrary.[86] The recognition of any cause of action for tortious injury leads to a certain number of superfluous claims,[87] but this does not justify barring prosecution of legitimate claims where real injury has been sustained at the hands of one's spouse.[88] Moreover, many of the events giving rise to a cause of action in a stranger are not considered actionable as between husband and wife, who are deemed to have consented to certain conduct and contacts by the other party because of the very nature of the marriage relationship.[89] Other courts have alluded to the fact that an injured spouse has adequate remedies in divorce and criminal proceedings.[90] While these remedies may prevent future wrongs, neither compensates the victim for past injuries. Divorce destroys the marital relationship and criminal proceedings would seriously disrupt the domestic harmony sought to be preserved.[91] Moreover, neither remedy is available for negligent torts.

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[82] *See* Brown v. Gosser, 262 S.W.2d 480 (Ky. Ct. App. 1953); Moorissett v. Morrissett, 80 Nev. 566, 397 P.2d 184 (1964); Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961). *See generally* 27 OHIO ST. L.J. 550, 555 (1966).

[83] *See* 27 OHIO ST. L.J. 550, 555 (1966). However, in Arizona, attempted exclusionary clauses in automobile liability insurance policies may be invalid. *See* Kepner, *Arizona Automobile Liability Insurance Law—Beyond Mayflower*, 10 ARIZ. L. REV. 301 (1968).

[84] *See* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

[85] *See* Thompson v. Thompson, 218 U.S. 611 (1910); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Smith v. Smith, 205 Ore. 286, 287 P.2d 572 (1955. *See generally* Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423, 435 (1966).

[86] This conclusion was reached in Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) and Cramer v. Cramer, 379 P.2d 95 (Alas. 1963).

[87] *E.g.*, Drake v. Drake, 145 Minn. 388, 177 N.W. (1920) (man sued his wife to enjoin her from nagging).

[88] *See* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Spellens v. Spellens, 49 Cal. 2d 210, 241, 317 P.2d 613, 632 (1957) (concurring and dissenting opinion); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914). *See generally* Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423, 436 (1966).

[89] *See* McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1055 (1931).

[90] *E.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308 (1955); Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954).

[91] *See* Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938). *See generally* Comment, *Interspousal Immunity Rule and The Effect of Liability Insurance in Automobile Accidents*, 11 S.D.L. REV. 144, 148-49 (1966).

Courts should not overlook the effect of community property law in determining whether an injured spouse should be allowed to sue the other in tort. In a majority of community property states, a spouse's cause of action for personal injury is community property.[92] In these jurisdictions, the interspousal immunity rule is perhaps justifiable, since damages recovered by the wife for the tortious conduct of her husband would belong to the community, and to allow the action would be to compensate the husband for his own wrong.[93] This is analogous to the situation, in some community property states, in which one spouse's recovery against a third person is denied because of the other spouse's contributory negligence. The rationale is that any recovery is community property and would in effect compensate the negligent spouse for his own misfeasance.[94] However, rather than leaving the injured spouse without a remedy, the damages recovered in an interspousal suit may be treated as the separate, rather than community property of the injured spouse. In a majority jurisdiction electing to make this exception, or in a jurisdiction where a spouse's cause of action in tort is already treated as separate property,[95] community property law need not preclude an interspousal suit in tort.[96]

Nothing in the analysis above provides any policy justification for retention of the common law spousal immunity doctrine. Our research reveals *no prior Arizona case* which applies the doctrine, and neither the court of appeals nor the supreme court cites any such case. Under these circumstances it is extremely unfortunate that a moribund relic of a feudal English society was given new breath in *Schwartz*.[97] It is difficult to believe that the case and court which placed Arizona choice of law doctrine firmly in the twentieth century could in the same motion return Arizona law on interfamily immunity to the dusty archives of the fifteenth.

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[92] *E.g.*, Kenyon v. Kenyon, 5 Ariz. App. 267, 425 P.2d 578 (1967); Clark v. Foster, 87 Idaho 134, 391 P.2d 853 (1964); Texas & Pac. Ry. v. Leatherman, 351 S.W.2d 633 (Tex. Civ. App. 1961); Chase v. Beard, 55 Wash. 2d 58, 346 P.2d 315 (1959).

[93] For a discussion of the effect of community property law on interspousal tort actions see Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

[94] *E.g.*, Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Ferguson v. Rogers, 168 Cal. App. 2d 486, 336 P.2d 234 (1959); Choate v. Ransom, 74 Nev. 100, 323 P.2d 700 (1958); Bell v. Phillips Petroleum Co., 278 S.W.2d 407 (Tex. Civ. App. 1954).

[95] *E.g.*, Sanders v. P. & S. Ins. Co., 125 So. 2d 24 (La. App. 1960); Choate v. Ransom, 74 Nev. 100, 323 P.2d 700 (1958); Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952).

[96] *See* Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); *cf.* Ferguson v. Rogers, 186 Cal. App. 2d 486, 336 P.2d 234 (1959); Choate v. Ransom 74 Nev. 100, 323 P.2d 700 (1958); Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954).

[97] 103 Ariz. 562, 447 P.2d 254 (1968).