Conflict of Laws-Choice of Law-Governmental Interest Test Applied to Hold Foreign Tavern Owner Liable Under Local Law-Bernhard v. Harrah's Club

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Conflict of Laws Commons

Recommended Citation
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1976/iss4/11

This Casenote is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Harrah’s Club, a well known Nevada gambling and drinking club, regularly advertises in California. In July 1971, Fern and Phillip Myers responded to the Club’s advertisements and drove from their California home to Harrah’s Club in Nevada. Although the Myers became obviously intoxicated while at the club, club employees continued to serve them alcoholic beverages. The Myers left the club and drove from Nevada into California, where their car, driven by a highly intoxicated Fern Myers, crossed the center line and collided head-on with motorcyclist Richard Bernhard.

Bernhard, also a California resident, brought an action against Harrah’s Club in California superior court. He alleged that Harrah’s Club had negligently furnished alcoholic beverages to the Myers and that under California law the club was civilly liable for injuries caused in his accident with the Myers. Harrah’s Club filed a general demurrer, claiming that Nevada law, which denies recovery against a tavernkeeper for damages caused by his intoxicated patrons, should govern. The trial court sustained the demurrer. The California Supreme Court, having previously rejected the traditional torts conflict rule of *lex loci delicti* in favor of the governmental interest approach, analyzed the California and Nevada state interests and concluded that since California’s interest would be more impaired by the nonapplication of California law, California law should apply.¹

I. Background

A. The Restatement and Lex Loci Delicti

Until recently, the rule universally applied to torts conflicts was that of *lex loci delicti*—the law of the place of the wrong governed. This simple rule was embodied in the first *Restatement of Conflicts*² and reflected the *Restatement*’s overall concern with certainty, predictability of result, and ease of administration.

---
² See *Restatement of Conflict of Laws* §§ 377-83 (1934).
Strict application of the rule, however, often resulted in inequitable and unjust results. In order to apply some law other than that indicated by strict operation of the rule, innovative courts resorted to various subterfuges: classifying the issue as procedural rather than substantive; characterizing the matter as contract rather than tort; resorting to renvoi; or arbitrarily relying on public policy.

The rule and the Restatement were generally denounced by commentators, who not only criticized the judicial gymnastics required to avoid literal application of the rule but also pointed out that a mechanical application of the rule generally ignored the special facts of the case, the contents and purposes of the conflicting laws, and the relevant state interests.

The courts, sensitive to the criticisms and aware of the inequitable results of lex loci delicti, began to abandon the rule in favor of less rigid approaches. This transition, however, has been

3. An oft-cited example is the case of Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956), which involved an accident in Arabia between a United States citizen and a truck owned by a United States corporation. The federal district court in New York applied New York's conflicts rule, or lex loci delicti, and directed a verdict for defendant, since plaintiff had failed to present evidence of the applicable Saudi Arabian law. The Court of Appeals for the Second Circuit affirmed.

4. The court was free to apply its own procedural law. Restatement of Conflict of Laws § 585 (1934); see, e.g., Grant v. McAuliffe, 41 Cal. 2d 859, 862, 264 P.2d 944, 946 (1953). But see Allen v. Nessler, 247 Minn. 230, 240-43, 76 N.W.2d 793, 799-800 (1956).

5. Since under the Restatement the court was to apply the law of the place of contracting, courts, by treating the issue as contractual rather than tortious, could sometimes change the substantive law that should apply. See, e.g., Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928).

6. Renvoi is a doctrine under which the court adopts the law of a foreign jurisdiction, including the laws of conflicts of law, which in turn refers the court back to the law of its own forum. See, e.g., University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936).


10. D. Cavers, THE CHOICE-OF-LAW PROCESS 9 (1965); see also Cavers, supra note 8, at 192.


12. In the following cases, the courts have either expressly rejected the lex loci delicti rule or have implicitly rejected it by rejecting the Restatement approach in another area: Armstrong v. Armstrong, 441 P.2d 699 (Alas. 1968); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Reich v. Purell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); First Nat'l Bank v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973); Runge v. Allied Van Lines, 92 Idaho 718, 449 P.2d 378 (1969); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); W.H. Barber Co. v. Hughes, 225 Ind. 570, 63 N.E.2d 417 (1945); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Jagers v.
difficult and has led to confusion. Although the commentators were united in their dislike for the rule and the Restatement, they invariably disagreed on a more satisfactory alternative. As a result, the courts have adopted a variety of approaches, drawing support from the various modern theories as needed.

In order to understand current torts conflicts law, one must have some understanding of the alternatives that are presented to a court when dealing with a conflicts question. The following section gives a brief description of the more prominent modern theories. Inasmuch as the suggestions of most commentators embrace a general approach to all areas of conflicts law, the following discussion will first describe the overall approach and then comment more specifically on its tort application.

B. Modern Alternatives to the Restatement

1. The Restatement (Second)

The most widely adopted alternative approach is that con-


14. Leflar’s analysis of the Wisconsin cases illustrates the pattern: Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931) (lex loci delicti); Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (characterization of the doctrine of intrafamily immunity as a family law problem governed by the law of the domicile); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965) (combination of “most significant relationship,” “center of gravity,” and “governmental interest” theories); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1965) (adoption of Leflar’s “choice-influencing considerations”).

tained in the *Restatement (Second) of Conflict of Laws*. The most significant aspect of this alternative is that it greatly increases the range of policies to be considered when dealing with a conflicts issue. Whereas the first *Restatement* was overly preoccupied with ease of administration, certainty, and uniformity, section 6 of the *Restatement (Second)* adds other broad considerations, such as the needs of the interstate and international systems, the relevant policies of the forum and other interested states, and the protection of the parties' justified expectations.16

Based upon these broad policies, more specific rules are formulated in each area of the law. The rule to be applied in torts conflicts issues is that the "rights and liabilities of the parties . . . are determined by the . . . law of the state which, with respect to that issue, has the most significant relationship to the occurrence."17 The *Restatement (Second)* also offers rules that apply to specific torts, e.g., tort actions based on injuries to person, land or other tangibles usually are to be governed by the law of the state where the injury occurred.18

The *Restatement (Second)* is the most versatile of the various methods of conflict resolution. For example, a court dealing with a torts conflicts issue is free to base its decision upon the broad policies outlined in section 6, the narrow "most significant relationship" test, or even narrower rules that deal with specific torts. This flexibility has been both applauded19 and criticized. The most common criticism of the broad approach is that it affords "no real basis for decision in the hard cases because it does not identify the considerations which control the flexibility that

---

16. Restatement (Second) § 6 suggests that, absent statutory authority, a court should consider the following factors as being relevant to the choice of applicable law:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests
of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

17. Id. § 145. In making this determination, the following contacts are to be taken into account: the place where the injury occurred; the place where the conduct occurred; the domicile of the parties; and the place where the relationship, if any, between the parties is centered. Id.

18. Id. §§ 146-49, 151-52, 154-55.

19. "[T]he Restatement (Second) is the most workable and useful single tool . . . currently available to the bench and the bar. It is comprehensive, flexible, and eclectic." Westbrook, supra note 14, at 463.
it allows . . . ."20 The more specific torts rules have been condemned as throwbacks to the original Restatement’s preoccupation with the place of the injury as the determining factor.21

2. Leflar and the choice-influencing considerations

The broad policies outlined in Restatement (Second) section 6 provide the basis for the “choice-influencing considerations” proposed by Professor Robert Leflar.22 Leflar’s thesis is that courts can use the actual policies as a “practical (though not a mechanical) test of the rightness of choice-of-law rules and decisions.”23 He maintains, however, that the many policies involved24 must be reduced to a manageable number, with a minimum of overlap. Accordingly, he has summarized the policies relevant to conflicts laws into five “choice-influencing considerations”:25 (1) predictability of results,26 (2) maintenance of interstate and international order,27 (3) simplification of the judicial task,28 (4) advancement of the forum’s governmental interests,29 and (5) appli-

20. R. Leflar, American Conflicts Law § 96 at 222 (1968).
23. Id. at 281.
24. The Restatement (Second) lists seven policies to be considered—see note 16 supra. Professor Yntema has identified 17 policies which he says are relevant in the choice-of-law process. Yntema, The Objective of Private International Law, 35 Can. B. Rev. 721, 734-55 (1957).
26. This consideration embraces the policy encouraging uniformity of result and the policy that the parties to a transaction should be able to predict beforehand the legal consequences of their actions. See Leflar, supra note 22, at 282-83.
27. The problems arising from the unique system of federalism within the United States, as well as the conflicts that arise between nations, are weighed in this factor. It includes a consideration of the limitations upon state action that are imposed by the federal constitution and also recognizes the possible interests of states other than the forum in having their law applied. See id. at 285-87.
28. Although this is classified as a minor consideration, Leflar maintains that complex rules that are difficult to administer delay decisions and lead to overcrowded dockets. Therefore, other considerations being equal, a court should give preference to the law that is simplest to apply. However, this does not justify an automatic preference for forum law, nor should mechanical rules such as lex loci delicti be applied, since both ignore other important policies. See id. at 288-90.
29. This consideration recognizes the interest of the forum state in advancing its own policies when proper. This is no justification for unreasoned preference of forum law, and the burden is placed on the court to identify the pertinent policies by “thoughtful and intelligent analysis of the legal materials in the light of current socio-economic, cultural, and political attitudes in the community.” Id. at 290-95.
cration of the better rule of law.30

Criticism of Leflar's approach has generally been directed toward the "better rule of law" consideration and has pointed out that if a court applies a foreign law as better than its own, it is either usurping the role of its own state legislature or avoiding its responsibility to overrule and update its own law. On the other hand, application of a forum's own law as "better" has been criticized as presumptuous and offensive to the other state.31

Despite these criticisms, several jurisdictions have adopted Leflar's approach32 and have relied expressly on the "better rule of law" consideration in their decisions. In torts cases, the decisions have been based primarily on the courts' analyses of the "better rule of law" and "governmental interest" considerations, while the other three factors have been dismissed as irrelevant or unimportant.33

3. Cavers and principled preferences

Professor David Cavers has voiced his concern that formulas such as Leflar's are too complex and of no precedential value. Accordingly, he has advocated the development of what he terms "principles of preference,"34 which are in essence rules that would apply to all cases having the same general fact pattern.

Generally, the principles of preference apply the law imposing the higher standard of conduct, providing it is not unjust to the defendant. For example, Principle 1 deals with the situation where the law of the state of injury provides a higher standard of conduct than the law of the state where the defendant acted or has his home, and mandates the application of the law of the state of injury. Similarly, if the law of the state where the defendant acted imposes a higher standard of conduct than the law of the state of injury, Principle 3 indicates that the higher standard should apply, as long as the injury was foreseeable to the defen-

30. Although his inclusion of this consideration has been highly criticized, Leflar defends it on the ground that courts do consider it. Its inclusion provides a means for courts to reject "anachronistic laws still hanging on" in their own or other states without having to "cover up" their choice with other superficial reasons. See id. at 295-304.
34. See D. Cavers, supra note 10, at 121-22 & n.8.
dant. However, in the instance where the law of the state of injury and defendant's conduct imposes a lower standard than that of the home state of the plaintiff, Principle 2 indicates that the defendant's expectations should be protected and the law of the state of action and injury, even though imposing a lower standard of conduct, should apply.\textsuperscript{35}

Although none of Cavers' principles have been expressly adopted by any jurisdiction, they have been used as forceful arguments when applicable.\textsuperscript{36}

4. \textit{Ehrenzweig and lex fori}

In contrast to Leflar and Cavers, both of whom criticize any overt preference for forum law,\textsuperscript{37} Professor Albert Ehrenzweig has attempted to show by logical argument and historical analysis that the forum should begin with the presumption that it will apply its own law (\textit{lex fori}), except in certain situations where rules have developed that dictate the application of foreign law.\textsuperscript{38} Examples of these rules include a "rule of validation" in reference to contracts, trusts, and wills, which generally seeks to uphold the validity of such agreements,\textsuperscript{39} and the situs rules that generally govern in property cases.\textsuperscript{40}

In torts, Ehrenzweig advocates the general application of \textit{lex fori}, except where either party would be dealt with unfairly. Ehrenzweig divides these latter cases into two categories: those in which the primary purpose of the law is the censure and admonition of the wrongdoer,\textsuperscript{41} and those in which the law seeks primarily to compensate for harm inflicted by unavoidable accidents (enterprise liability).\textsuperscript{42} As to the admonitory torts, Ehrenzweig

\textsuperscript{35} Id. at 139-66.
\textsuperscript{36} The appellate court in the instant case relied upon Principle 1 as a partial justification for its decision to apply California law. Bernhard v. Myers, 117 Cal. Rptr. 351, 356 (1974).
\textsuperscript{39} Id. See also A. Ehrenzweig, \textit{A Treatise on the Conflict of Laws} §§ 175-84 (1962).
\textsuperscript{40} Ehrenzweig, \textit{The Lex Fori—Basic Rule in the Conflict of Laws}, 58 \textit{Mich. L. Rev.} 637, 643 (1960); A. Ehrenzweig, \textit{ supra} note 39, §§ 232-34.
\textsuperscript{41} See Ehrenzweig, \textit{The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement}, 36 \textit{Minn. L. Rev.} 1, 5 (1951).
would apply the law of the state of conduct.\footnote{See Ehrenzweig, \textit{Products Liability in the Conflict of Laws–Toward a Theory of Enterprise Liability under “Foreseeable and Insurable Laws”: II}, 69 \textit{Yale L. J.} 794, 801 (1960); Ehrenzweig, \textit{Guest Statutes in the Conflict of Laws–Towards a Theory of Enterprise Liability Under “Foreseeable and Insurable Laws”: I}, 69 \textit{Yale L.J.} 595, 603 (1960).} In cases of enterprise liability, Ehrenzweig would apply any law that is reasonably “foreseeable and insurable” by the defendant.\footnote{E.g., Babcock v. Jackson, 12 \textit{N.Y.2d} 473, 484, 191 \textit{N.E.2d} 279, 285, 240 \textit{N.Y.S.2d} 743, 751 (1963); Milkovich v. Saari, 295 \textit{Minn.} 155, 166-68, 203 \textit{N.W.2d} 408, 414-15 (1973).} In instances in which a defendant finds himself in a state whose laws were not foreseeable, Ehrenzweig would recommend dismissal under the doctrine of \textit{forum non conveniens}.\footnote{Currie, \textit{Notes on Methods and Objectives in the Conflict of Laws}, 1959 \textit{Duke L.J.} 171, 177-78 (1959).} Thus, the plaintiff must choose a forum whose laws were foreseeable and calculable by the defendant.

Although his views are often cited,\footnote{Currie, \textit{Ehrenzweig and the Statute of Frauds: An Inquiry into the “Rule of Validation”}, 18 \textit{Okla. L. Rev.} 243 (1965).} Ehrenzweig’s \textit{lex fori} doctrine has not been explicitly adopted by any jurisdiction.\footnote{Leflar, \textit{Ehrenzweig and the Courts}, 18 \textit{Okla. L. Rev.} 366, 371 (1965) (containing a good summary of Ehrenzweig’s influence on the judiciary).} Ehrenzweig maintains, however, that courts have implicitly applied these principles,\footnote{Ehlnea, supra note 40, at 643-44. At least one other commentator, Professor Currie, does not agree with Ehrenzweig’s interpretation of the cases. See Currie, \textit{Ehrenzweig and the Statute of Frauds: An Inquiry into the “Rule of Validation”}, 18 \textit{Okla. L. Rev.} 243 (1965).} except where the judges were not imaginative enough to escape from black letter rules such as those of the \textit{Restatement}.

5. Currie and governmental interest analysis

The instant case applied the approach advocated by the late Professor Brainerd Currie. Like Ehrenzweig’s theory, Professor Currie’s “governmental interest” theory expresses a strong preference for the application of forum law,\footnote{Often Ehrenzweig would disagree with either the method used to resolve the case or with the result. One author has summarized the situation in the following manner: “One way to sum up the citation situation would be by saying that the courts have taken about the same liberties in citing Ehrenzweig’s writing that he sometimes takes in citing their cases.” Leflar, \textit{Ehrenzweig and the Courts}, 18 \textit{Okla. L. Rev.} 366, 371 (1965) (containing a good summary of Ehrenzweig’s influence on the judiciary).} a position based on Currie’s firmly held belief that the forum state with an interest in the case should (in most instances) apply its own law.\footnote{Leflar has examined eight recent conflicts cases and concluded that none of them have adopted Ehrenzweig’s approach, although he is sometimes cited. Leflar, supra note 46, at 369-71.}
The governmental interest method involves essentially a four-step process—policy analysis, false conflict analysis, conflict avoidance, and forum law application. The policy analysis step requires the court to determine and analyze the policies underlying the conflicting laws of the forum and the foreign state. The most common criticism of the policy analysis step emphasizes the difficulty of ascertaining the policies underlying the laws, particularly when the forum court examines foreign law. A related criticism is that the forum court may not be capable of determining the strength of the policy held by the other state.

Under the false conflict step, the court determines whether or not either state has an interest in applying its policy. If only one state has such an interest, the court simply applies the law of the interested state. This portion of the approach has been termed the "clearest contribution of governmental-interest analysis." The correct application of this principle disposes of many apparent conflicts, and it has found wide acceptance among courts and commentators. However, some commentators have expressed concern that a court, by failing to identify the state policies and interests involved, will erroneously conclude that there is no conflict.

The conflict avoidance step requires the court to take a closer look at an apparent conflict. If a moderate or restrained interpretation of the policy or interest of one of the states will avoid a conflict, the other state’s law should be applied. Currie cites as an example of this step the California case of Bernkrant v.

---

51. For a summary of Currie’s views, see W. REESE & M. ROSENBERG, supra note 38, at 523-24.
52. Id. at 523.
53. For these and other criticisms, see Reese, Recent Developments in Torts Choice-of-Law Thinking in the United States, 8 Colum. J. Transnat’l L. 181, 186-87 (1969); Hill, Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. Chi. L. Rev. 463 (1960).
56. See, e.g., Traynor, supra note 9, at 667-81; D. CAVERS, supra note 10, at 89; Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965) (per curiam) (uses false conflict concept even though applying most significant relationship test).
Fowler, in which the court declined to apply the California Statute of Frauds, which would have invalidated a claim against an estate based on an oral contract. Nevada, the place of contracting and domicile of the plaintiffs, had no such law. In that case, Justice Traynor correctly reasoned (according to Currie) that a broad application of California's statute was unnecessary to effectuate the legislative policy and, by a moderate and restrained interpretation of the California statute, avoided conflict with Nevada law and policy.

Under the fourth step, if the court is unable to avoid a conflict between the legitimate interests of the two states, it should apply its own forum's law. Currie's conclusion that in a true conflict the court should apply the law of the forum has drawn heavy criticism from most commentators. Even some who basically agree with the rest of his approach have offered their own suggestions on how to deal with this situation.

One such solution has been proposed by Professor William Baxter, who suggests that a court that faces a true conflict should examine each state's interest and determine to what extent the purpose underlying a rule will be furthered by the application or impaired by the nonapplication of the rule. The court should apply the law of the state whose policy would be most impaired by the nonapplication of the rule—a concept Baxter labels the "comparative impairment" principle. Baxter admits that in some cases the contending interests will appear to be in balance, whereupon he says that "[t]he judge decides on the basis of some marginal factor and justifies his decision as best he can in his opinion."

Professor Harold Horowitz, while accepting Baxter's comparative impairment analysis, has suggested additional factors the court should consider when faced with a difficult decision. He recommends that the court consider "applicable multistate policies" such as the "rule of validation" proposed by Ehrenzweig.

---

60. Currie, supra note 55, at 757-58.
61. W. REESE & M. ROSENBERG, supra note 38, at 524.
63. Baxter, supra note 62.
64. Id. at 9.
65. Horowitz, supra note 57.
66. Id. at 758-76.
67. Id. at 759. See text accompanying note 39 supra.
and other policies which facilitate and uphold interstate transactions. In addition, he suggests that the court examine the "relevant interests of the parties," thus bringing into consideration the parties' expectations and attempting to avoid unfair surprise.

In summary, the application of traditional interest analysis as outlined by Professor Currie would place a conflicts case into one of the following categories: (1) a false conflict case—only one state has an interest and its law will be applied; (2) an avoidable conflict case—both states have legitimate interests, but the conflict is resolved by a moderate definition of the policy or interest of one state or the other; and (3) an unavoidable conflict case—the legitimate interests of the states cannot be reconciled, and therefore forum law should be applied.

The comparative impairment refinement of Professor Currie's approach would eliminate the third category and expand the second category to include all cases except those in which the policies and interests are balanced, whereupon other factors would be considered in making the decision.

Several courts have issued opinions which refer to "governmental interest." As indicated earlier, both the Restatement (Second) and Leflar's choice-influencing considerations include analysis of governmental interests as a factor to be considered in resolving a conflicts issue. Therefore, a court that speaks of governmental interest may not necessarily belong to Currie's camp. California, however, has adopted the Currie approach. The following section briefly traces the development of California conflicts law up to the instant case.

68. Horowitz, supra note 57, at 776-79. It is possible that Professor Currie's "moderate and restrained interpretation" step would encompass the above theories—the court in the instant case apparently equated "comparative impairment" with "a moderate and restrained interpretation." See 16 Cal. 3d at 319-23, 546 P.2d at 722-26, 128 Cal. Rptr. at 218-22.

However, few would agree with Currie that forum law should be applied as a last resort. Thus Currie's approach is sometimes termed "traditional" governmental interest, when compared to the other solutions which have been suggested. See Sedler, Symposium—Conflict of Laws Round Table: The Value of Principled Preferences, 49 Tex. L. Rev. 224 (1971).

69. See Currie, supra note 55, at 763.

70. Other authors have identified additional false conflicts such as the instances in which the laws of both states are the same, or would produce the same result. See Comment, False Conflicts, 55 Calif. L. Rev. 74 (1967).

71. See, e.g., cases cited in note 32 supra.
C. Previous California Conflicts Cases

Prior to 1967, lex loci delicti was applied in California.72 California's break from the rule was foreshadowed in the 1963 case of Bernkrant v. Fowler,73 in which the California Supreme Court relied on an analysis of the state interests involved and the expectations of the parties. Even though the court did not employ the governmental interest approach, Currie applauded Bernkrant as a model case wherein conflict was avoided by a moderate and restrained interpretation of California Law.74

People v. One 1953 Ford Victoria,75 which could also be classified as a conflict avoidance case, involved the application of a California statute that required that the mortgagee of an automobile forfeit his interest if the car were later used to transport narcotics, unless he had made an investigation of the character of the purchaser at the time of sale. The sale in question was made in Texas, where there was no such requirement. The court in the instant case cited People v. One 1953 Ford Victoria as an example of a successful application of the comparative impairment principle.76 As interpreted by the Bernhard court, the decision not to apply the California statute was the result of a conclusion that California's interest in controlling the transportation of narcotics would be less impaired by the nonapplication of the California law than would Texas' interest in protecting valid security interests if Texas law were not applied. Currie described the case as a "fine illustration of how a court may, by defining local interests with moderation and restraint, avoid conflict with the interests of another state."77

Although foreshadowed by these cases, California did not expressly reject the lex loci delicti rule until the 1967 case of Reich v. Purcell.78 Reich involved an automobile accident in Missouri between the Reichs, Ohio residents en route to California, and Purcell, a California resident. The accident caused the death of Mrs. Reich and her son. The laws of Missouri limited damages

---

73. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); see text accompanying note 59 supra.
74. Currie, supra note 55, at 757.
75. 48 Cal. 2d 595, 311 P.2d 480 (1957).
76. 16 Cal. 3d at 321-22, 546 P.2d at 724, 128 Cal. Rptr. at 220.
78. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
to $25,000, while California and Ohio had no limitation. In the resultant action by Mr. Reich, the trial court entered a judgment for $25,000. The California Supreme Court reversed, first rejecting the place-of-the-wrong rule and then proceeding to analyze the case from the standpoint of governmental interest.

Following the formula espoused by Professor Currie, the court first identified the “involved states” as California (forum state and domicile of the defendant), Ohio (domicile of the plaintiffs and decedents at the time of the accident), and Missouri (place of the injury). Each state’s law was ascertained, and the court examined the interest of the three states in the case. As for its own law, the court concluded that since California had no limitations on damages, it had no interest in protecting the defendant. The fact that the plaintiffs had moved to California following the accident was considered irrelevant, and California was classified as a disinterested forum. Missouri was said to have the predominant interest as to the regulation of conduct within its borders, but the court classified the limitation on damages not as an issue of conduct, but as an issue of compensation. The court explained that Missouri would have no substantial interest in applying its laws governing compensation since none of the parties resided there. Having concluded that neither California nor Missouri had an interest in the case, the court noted that the defendant himself could not complain “when compensatory damages are assessed in accordance with the law of his domicile,” and applied Ohio law. Although the court did not so identify the case as such in the opinion, it was later classified as a false conflict.

_Hurtado v. Superior Court_, also a false conflict case, involved a wrongful death action brought by the survivors of a Mexican citizen killed in an accident in California. The defendant was a California resident. The court rejected the application of Mexico’s limitation on damages, finding that the underlying policy of protecting defendants from the imposition of excessive financial burdens was inapplicable since the defendant was a California resident. The court found an interest in applying its own law, reasoning that the purpose of the law, which imposed

79. Id. at 555, 432 P.2d at 730, 63 Cal. Rptr. at 34.
80. Id.
81. Id. at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35.
83. 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).
no limitations on recovery for wrongful death, was to strengthen the deterrent aspect of the law creating an action for wrongful death. California was found to have a definite interest in deterring harmful conduct within its borders.\footnote{Id. at 583-84, 522 P.2d at 672, 114 Cal. Rptr. at 112.}

Reich and Hurtado established a pattern for the resolution of conflicts of law problems utilizing the governmental interest approach: (1) identify the involved states, (2) ascertain their respective laws, (3) identify the policies and state interests underlying the laws, and (4) determine if each state has an interest in applying its own law. This analysis was carried no further, however, since in both cases the court found that only one state had an interest in applying its law. Thus, neither Reich nor Hurtado gave any concrete indication as to how the court would deal with a true conflict.

II. INSTANT CASE

In the instant case, the California Supreme Court followed the pattern established in Reich and Hurtado, first identifying the "involved states" as Nevada and California and then analyzing their respective laws and underlying policies. The court noted that, in the case of Hamm v. Carson City Nugget, Inc.,\footnote{85 Nev. 99, 450 P.2d 358 (1969).} the Nevada Supreme Court had refused to impose civil liability upon tavern owners, the stated policy being that to do so would "subject the tavern owner to ruinous exposure every time he poured a drink and would multiply litigation endlessly [needlessly] in a claims-conscious society."\footnote{16 Cal. 3d at 318, 546 P.2d at 722, 128 Cal. Rptr. at 218 (quoting Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 101, 450 P.2d 358, 359 (1969)).} California, however, seeking to enforce a policy that would "[protect] members of the general public from injuries . . . resulting from the excessive use of intoxicating liquor,"\footnote{16 Cal. 3d at 318, 546 P.2d at 722, 128 Cal. Rptr. at 218 (quoting Vesely v. Sager, 5 Cal. 3d 153, 165, 486 P.2d 151, 159, 95 Cal. Rptr. 623, 631 (1971)).} had judicially imposed civil liability on a tavern owner in the 1971 decision of Vesely v. Sager.\footnote{5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).} The court concluded that both states had an interest in the case and that it was confronted with a true conflict rather than a false conflict as in the previous cases of Reich and Hurtado.\footnote{16 Cal. 3d at 319, 546 P.2d at 722, 128 Cal. Rptr. at 218.}

Faced with a true conflict, the court, under traditional inter-
est analysis, could have simply applied the law of the forum. However, the court apparently chose to treat this as an avoidable conflict and attempted to resolve the issue through a moderate and restrained interpretation of the applicable laws. To implement this process the court adopted the "comparative impairment" concept advocated by Professor Baxter and attempted to determine "which state's interest would be more impaired if its policy were subordinated to the policy of the other state." The court had identified Nevada's policy as being designed to limit the liability of its tavern owners and the California policy as being to protect its citizens from injury resulting from the use of intoxicating liquor. Analyzing these policies in light of the facts presented by the case, the court reasoned that the defendant, by advertising and soliciting business in California, had "put itself at the heart of California's regulatory interest." Therefore, its activities fell within the scope of the California law and California's interest would be substantially impaired if California law were not applied.

The court minimized the impact of the decision on Nevada's interest, stating that since Nevada already subjects its tavern owners to criminal liability, the decision would not impose an entirely new duty upon the tavern owners to distinguish between California residents and other patrons but would simply increase their economic exposure to include a foreseeable and coverable business expense. Further, since liability would extend only to those tavern owners who advertise in California, Nevada's policy would not be significantly impaired. The court concluded that on balance the California policy would be more impaired if California law were not applied and, therefore, reversed the trial court's decision to sustain the demurrer.

III. Analysis

The validity of the court's use of the governmental interest approach depends largely upon the accuracy of its identification of the interests and policies underlying the conflicting state laws. The case note will analyze the court's identification of the various state interests and policies, discuss the application of the compar-

90. See text accompanying note 61 supra.
91. Avoidable conflicts are discussed in the text accompanying note 70 supra.
92. Comparative impairment is discussed in the text accompanying note 63 supra.
93. 16 Cal. 3d at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.
94. Id. at 322, 546 P.2d at 725, 128 Cal. Rptr. at 221.
95. Id. at 323, 546 P.2d at 725, 128 Cal. Rptr. at 221.
ative impairment test after fully identifying the state interests, and review the alternatives available to a court when no decision can be reached through state interest analysis.

A. Identifying the Underlying State Interests

The court identified the California policy as protecting the public from injuries resulting from the excessive use of liquor. This policy is furthered by imposing criminal and civil liability, both of which seek to deter tavern owners from selling alcoholic beverages to obviously intoxicated persons who are likely to cause injury in California. The court specifically identified this policy of prevention and labeled it a "regulatory interest."

Prevention of injury, however, is not the only interest underlying California's policy. Once an injury has occurred, the state has an interest in compensating the injured. Although the court did not mention this compensatory interest, the imposition of civil liability appears to have a compensatory as well as a regulatory function, since it allows third parties to look to the tavern owners for recovery for injuries sustained in accidents with intoxicated tavern patrons.

Although the court initially identified Nevada's policy as protection of Nevada's tavern owners from unrestricted civil liability, the court also referred several times to a supposed Nevada statute imposing criminal liability. The court apparently assumed that although Nevada had not imposed civil liability, it had a regulatory interest in preventing tavern owners from serving liquor to already intoxicated patrons.

The criminal statute, however, had been repealed in 1973.

96. Id. at 318, 546 P.2d at 722, 128 Cal. Rptr. at 218.
97. Id. at 322, 546 P.2d at 725, 128 Cal. Rptr. at 221.
98. Id. at 318, 546 P.2d at 722, 128 Cal. Rptr. at 218.
99. Id. at 322-23, 546 P.2d at 725, 128 Cal. Rptr. at 221:

Although the State of Nevada does not impose such civil liability on its tavern keepers, nevertheless they are subject to criminal penalties under a statute making it unlawful to sell or give intoxicating liquor to any person who is drunk or known to be an habitual drunkard. (See Nev. Rev. Stats. 202.100 . . . . )

Since the act of selling alcoholic beverages to obviously intoxicated persons is already proscribed in Nevada, the application of California's rule of civil liability would not impose an entirely new duty requiring the ability to distinguish between California residents and other patrons.

This legislative action,\textsuperscript{101} combined with the Nevada Supreme Court's decision in \textit{Hamm v. Carson City Nuggett, Inc.}\textsuperscript{102} not to impose civil liability on a tavern owner, indicates that, contrary to the court's supposition, Nevada has a strong policy \textit{against} regulating its tavern owners in this area.

Although a policy of nonregulation seems somewhat unusual at first glance, upon examination it is not irrational. Nevada's economy is based in large part upon its gambling and entertainment industries, both of which involve high-volume sales of alcoholic beverages. Thus it would seem that Nevada's policy is most likely designed to protect its economic interests in these industries.

In addition to the probable economic interest, it would seem that Nevada has a special interest in being free from regulation by other states. Since states are generally empowered to establish the rights and duties of their citizens in those areas that are free from federal regulation, it might be said that all states have an interest in being free from the regulation of other states. This interest would be particularly strong if, as in the instant case, it could be said that a state has determined that it will not regulate an activity that is normally regulated.\textsuperscript{103}

\textbf{B. Reapplication of the Comparative Impairment Test}

Having identified the policies and, to a limited extent, the underlying motivational interests, the court attempted to resolve the conflict by determining which state's interest would be most impaired if its law were not applied. The court's decision to apply California law is not unacceptable if one agrees that the court correctly identified the underlying policies and interests.\textsuperscript{104} How-

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{101} "A subsequent change in legislation can, although it does not necessarily do so, define the strength of a policy at the time a transaction took place." A. \textsc{von Mehren} \& D. \textsc{Trautman}, \textsc{The Law of Multistate Problems} 376 (1965).
\item\textsuperscript{102} 85 Nev. 99, 450 P.2d 358 (1969).
\item\textsuperscript{103} It might be said in light of the repeal of the criminal statute that Nevada has extended a privilege to protect the tavern owners from liability that would ordinarily be imposed. Comment \textit{a} to § 163 of \textit{Restatement (Second)} suggests that if the state of conduct has established a privilege protecting certain behavior that is normally tortious in the state of injury, a court should respect that privilege and apply the law of the state of conduct if the policy underlying the rule of nonliability is a strong one.
\item\textsuperscript{104} If Nevada's criminal statute were still in effect, it could be assumed that both Nevada and California would have an interest in preventing injuries and that the imposition of civil liability by California is simply strengthening a preexisting Nevada policy. Although Nevada would still have an interest in being free from out-of-state regulation, it seems less offensive to impose California law when Nevada's policy differs only in degree and not in substance from California's.
\end{itemize}
\end{footnotesize}
ever, as indicated in the previous section, the court made an incorrect assumption as to Nevada law and thus did not fully consider Nevada's interests in the case; also, the court did not discuss California's compensatory interest. This section will analyze the application of comparative impairment as if the court had fully and correctly identified the state interests involved.

1. The possible impairment of California's interests

The court correctly stated that California has an interest in preventing the service of liquor to intoxicated customers whenever it will produce harmful effects in California. It is less clear that California is justified in attempting to protect this interest by imposing regulations upon conduct occurring out of state.

The California Supreme Court previously stated in Reich v. Purcell that the foreign state within which injury occurred was "concerned with conduct within her borders and as to such conduct she has the predominant interest of the states involved."\(^{105}\) Likewise, in Hurtado v. Superior Court, the court justified the application of California law on the ground that California had an interest in deterring harmful conduct within its borders.\(^ {106} \) On the basis of the court's previous statements, it would appear that it would respect Nevada's predominate interest in regulating or refusing to regulate such conduct within its borders.\(^ {107} \) However, the fact that a defendant's conduct in another state will possibly cause harmful effects in California seems to place him within the ambit of California's interest in prevention of injury.\(^ {108} \) Thus,

---

105. 67 Cal. 2d at 556, 432 P.2d at 730, 63 Cal. Rptr. at 34.
106. 11 Cal. 3d at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112.

It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident. Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive concern.

108. The United States Supreme Court has stated that:

A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it.

Young v. Masci, 289 U.S. 253, 258-59 (1932). But see Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of
even though it is somewhat inconsistent with the court's prior statements, it seems that the court is justified in its conclusion in the instant case that this prevention interest would be impaired by the nonapplication of California law.

The extent to which California's compensatory interest would be impaired by the application of Nevada law is less clear. If California law is not applied, the plaintiff cannot recover from the tavern owner and will be forced to recover from the California driver. Since there is no policy allowing the plaintiff double recovery for his injuries, the compensatory interest will be impaired only to the extent that the plaintiff's injuries exceed his recovery from the driver. Thus the effect on California's compensatory interest is uncertain, and may vary greatly from case to case, a conclusion that may explain why the court did not discuss this aspect of California's law.

2. The possible impairment of Nevada's interests

The impairment to Nevada's economic interest is apparent, since part of the tavern owners' revenues will be used to pay for either California judgments or liability insurance, thus decreasing the funds available in Nevada for taxes, investment, and salaries. It is also conceivable that the imposition of liability would cause tavern owners to avoid further solicitation in California, thus actually decreasing revenues and economic growth. This reduction would probably occur, however, only if the cost of the judgments or liability insurance exceeded the profits derived from sales to California customers, a development that seems unlikely.

The impairment to Nevada's interest is limited somewhat by the fact that only those tavern owners who advertise in California will be subject to liability. The risk of economic impairment is increased, however, by the fact that plaintiffs in this particular tort can choose defendants. This presents the possibility that the tavern owner will often be the sole defendant, the plaintiff having elected to bypass the drunken driver. The application of California law will thus have the occasional effect of substituting a Nevada defendant for a California defendant, shifting the entire economic loss from California to Nevada.

A more serious impairment to Nevada's interest arises from another State merely because the welfare and health of its own citizens may be affected when they travel to that State."
the imposition of regulation by California in an area wherein Nevada has a strong policy against regulation. Nevada, exercising its sovereign right to determine the rights and duties of its citizens, has decided that its tavern owners have no duty to avoid selling liquor to already intoxicated patrons. The application of California law requires that the tavern owners assume a new duty of not only refusing to serve alcohol to already inebriated Californians, but also first identifying the California customers, a task that may be difficult and out of place in the setting in which the tort normally occurs. The imposition of a new standard of conduct is a more substantial imposition upon Nevada's sovereign rights than simply extending civil liability to enforce an already existing duty (which was what the Bernhard court thought it was doing) or removing the dollar limitations on recovery (as in Reich and Hurtado).

3. *Comparative impairment*

Having examined in detail the impact of the nonapplication of either state's law upon the respective state interests involved, it appears that the resolution of the issue in the instant case on the basis of comparative impairment is very difficult. The California policy of regulation is in direct conflict with Nevada's policy of nonregulation, the advancement of either resulting in a corresponding detriment to the other. Further, without additional information, it is difficult to compare the economic impairment to Nevada with the possible impairment to California's compensatory policy. In short, an analysis of the state interests using comparative impairment is inconclusive as to which law should be applied.

It appears that had the court identified all the relevant state policies and interests, it would have recognized that it faced an unavoidable rather than an avoidable conflict. Traditional governmental interest required that the court apply the law of the forum when faced with an unavoidable conflict; however, this is only one of the possible solutions. The following section presents a brief analysis of this and other alternatives that might be adopted to resolve an unavoidable conflict.

**C. Possible Solutions to an Unavoidable Conflict**

1. **Apply forum law**

Application of forum law is the traditional solution recom-
mended by Professor Currie. It has the advantage of being simple in application and also insures that the forum's interests will always be protected. In some cases, however, application of forum law will be grossly unfair to the defendant, since he will not have foreseen its application. Furthermore, most commentators believe that the courts should employ more sophisticated reasoning, rather than mechanically applying forum law.

2. Consider factors other than state interests

Another alternative, recommended by Professor Horowitz,\(^\text{110}\) is that the court enlarge the number of factors considered in making the decision to include an analysis of applicable multi-state policies and the relevant interests of the parties. The fact that the court in the instant case indirectly considered the expectations of the defendant would lend some credence to this suggestion.\(^\text{111}\) Professor Horowitz also points out that the opinions in *Reich, Bernkrant v. Fowler*, and *People v. One 1953 Ford Victoria* referred to one or both of these factors.\(^\text{112}\)

It seems, however, that if the court is going to consider factors other than the relevant state interests, it should do so expressly, rather than relying indirectly upon these factors as secondary support for a questionable decision supposedly based solely upon state interest analysis. Even though it may make no difference in the outcome whether the decision is expressly or impliedly based upon other factors, it would seem that if the court is going to base its decision upon something other than the rule it is ostensibly applying, it should do so openly rather than by attempting to distort the rule itself in order to reach the desired result.\(^\text{113}\)

3. Adopt another method

An alternative method would be to completely abandon the

---

\(^{110}\) Horowitz' suggestions are discussed in the text accompanying notes 65-68 *supra*.

\(^{111}\) The court referred to the imposition of civil liability as a "foreseeable and coverable business expense." 16 Cal. 3d at 323, 546 P.2d at 725, 128 Cal. Rptr. at 221. In light of the fact that the defendant advertised in California, it seems reasonable to assume that the club could foresee the occurrence of an accident similar to the one that occurred and the subsequent imposition of California law. This appears to be a more reasonable basis for the decision than the state interest analysis.

\(^{112}\) Horowitz, *supra* note 57, at 772-79. These cases are discussed in text accompanying notes 73-82 *supra*.

\(^{113}\) This was a common criticism of the first Restatement. See text accompanying notes 3-11 *supra*. 
emphasis upon an analysis of governmental interests and look to other approaches, such as those discussed above.114 Interestingly, to the extent the court adopts Professor Horowitz' suggestion and bases its decision upon factors other than state interests, the governmental interest approach loses its distinctive characteristics and begins to closely resemble other conflicts of laws theories. If the governmental interest approach includes, in addition to a state interest analysis, a consideration of the multistate policies and the relevant interests of the parties, it can scarcely be distinguished from Leflar's choice-influencing considerations discussed above.115 It might be said that the primary difference between expanded governmental interest and the choice-influencing considerations is that in the former the state interest analysis predominates while in the latter there is no particular emphasis upon any one factor and the court is free to base its decision upon the element that it considers most relevant in the particular case. The same resemblance can be drawn between expanded governmental interest and the broad approach permissible under section 6 of the Restatement (Second),116 which includes as relevant factors "the needs of the interstate and international systems," "the relevant policies of the forum," "the relevant policies of other interested states," and "the protection of justified expectations." The broadened governmental interest approach is also similar in some respects to Ehrenzweig's model.117 Horowitz expressly mentions Ehrenzweig's "rule of validation" as one of the applicable multistate policies to be considered,118 and the similarity between Ehrenzweig's "foreseeable and insurable law" theory and Horowitz' "relevant interests of the parties" seems evident.119

The governmental interest approach seems most foreign to Cavers' principles of preference120 and the rules of the Restatement (Second) is discussed in the text accompanying notes 15-21 supra.

114. The alternatives are discussed in the text accompanying notes 15-48 supra.
115. The choice-influencing considerations are discussed in the text accompanying notes 22-33 supra.
116. The Restatement (Second) is discussed in the text accompanying notes 15-21 supra.
117. Ehrenzweig's approach is discussed in the text accompanying notes 37-48 supra.
118. Horowitz, supra note 57, at 759.
119. One of the elements of the factor entitled "relevant interests of the parties" is called "prevention of unfair surprise." This element corresponds to Ehrenzweig's "foreseeable and insurable law" maxim. Both phrases refer to the basic idea that no party should be subjected to a law whose application he could not foresee. Compare Horowitz, supra note 57 at 776-79 with Ehrenzweig, Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability under "Foreseeable and Insurable Laws": II, 69 YALE L.J. 794, 801 (1960).
120. The principles of preference are discussed in the text accompanying notes 34-36 supra.
ment (Second). However, it may be that as more cases are decided utilizing governmental interest such rules and principles may emerge. Horowitz himself states that "Professor Cavers' . . . 'principles of preference' will surely be the form which the choice-of-law rules of the future will take." Of all the alternatives, the instant case indicates that California is most likely to follow Horowitz' suggestion—first attempting to resolve the conflict through an analysis of the state interests and, if no decision can be reached, going on to consider a limited number of additional factors. However, an important point to be derived from the instant case is that perhaps the court should be more willing to admit that the state interests are sometimes in balance. If at that point the court is going to broaden its analysis to include other relevant factors, it should do so expressly rather than by implication.

IV. Conclusion

It is clear from the instant case that there are certain prerequisites to the successful application of the governmental interest approach. First, it is imperative that the court be accurately informed as to the applicable laws. Second, the court must be thorough and honest in its attempt to ascertain the underlying state interests; simply accepting a policy stated in a reported court opinion is inadequate and leaves the court open to criticism. Finally, in the cases that present true conflicts, the court must be objective and realistic in its attempt to successfully accommodate the conflicting state interests.

If the court's analysis meets the above criteria, governmental interest will yield a satisfactory result in many cases. It seems particularly useful in the false conflict cases such as Reich, and can also be successfully employed in certain true conflict cases such as People v. One 1953 Ford Victoria, wherein the state

121. Horowitz, supra note 57, at 780 (footnote omitted).
122. Professor Leflar has commented upon this problem:

True governmental interests of a state are not discoverable by blind matching with any old law that may be on the state's books. They can be identified, and in turn implemented, only by thoughtful and intelligent analysis of the legal materials in the light of current socio-economic, cultural, and political attitudes in the community. Ascertainment of a state's governmental interests is no small task, not one to be solved by locating a statutory section or a paragraph in an old judicial opinion.

Leflar, supra note 22, at 291.
123. 48 Cal. 2d 595, 311 P.2d 480 (1957).
interests can be accommodated by application of the comparative impairment concept.

The instant case also brings into sharp focus the question of how the court should react when no decision can be reached through an analysis of the state interests. In these cases, the court should look beyond the confines of state interest analysis for the solution, preferably to include an analysis of additional factors such as those recommended by Horowitz. In so doing, however, the court should be willing to acknowledge that these factors are being considered and should expressly identify them in the decision.