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Remember the lyrics to that television commercial touting the slim cigarette made especially for the dainty feminine hand: "You've come a long way, baby, to get where you've got to today"? Not a bad description of the Supreme Court of Pennsylvania. In the half-dozen years since its decision in Griffith v. United Air Lines, Inc.,[1] the court has generated a high degree of sophistication in utilizing interest analysis to resolve choice-of-law problems.[2] Not surprisingly, that enhanced refinement has dramatized the difficulties inherent in weighing the interests of "competing states" and the various techniques available to effect that process. The sophistication, the difficulties and the techniques uniquely coincide in *Cipolla v. Shaposka*.[3]

Although the case, as characterized by the majority opinion, presented a true conflict of competing state interests,[4] neither the operative facts nor the resolution of the specific issue presented was basically complex. Given a Pennsylvania guest-passenger, a Delaware host-driver, allegedly negligent driving in Delaware resulting in injury to the passenger in Delaware, and a Delaware guest statute, interest analysis would lead almost inexorably to the conclusion that the statute was applicable. And so the court concluded. More interesting than the conclusion, however, were the interests identified and the techniques employed in the majority and dissenting opinions.

The majority found that Pennsylvania had a legitimate interest in the issue presented because plaintiff was a Pennsylvania domiciliary. That interest apparently rested upon Pennsylvania's concern that "one of its own" should go uncompensated for injuries resulting from a host-driver's negligence. The essence of that interest, which made Pennsylvania "a concerned jurisdiction,"[5] presumably was a concern that one of

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1. 416 Pa. 1, 203 A.2d 796 (1964).

2. McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966). The court's decision in *McSwain* demonstrated that interest analysis was not a devious technique fashioned solely by plaintiffs' lawyers to avoid state law which prohibited or restricted recovery. It's just that plaintiffs' lawyers seem to have recognized its appropriate functional value before defendants' lawyers did. *McSwain* demonstrated, too, that interest analysis was not simply a judicial device which permitted each court to favor its own domiciliaries whenever possible.

3. 439 Pa. 563, 267 A.2d 854 (1970).

4. 439 Pa. at 565, 267 A.2d at 856.

5. *Id.*

its domiciliaries, injured and uncompensated, might become an indigent ward of the state. To the extent that that concern represents a legitimate interest on the part of Pennsylvania, it suggests just how broadly interest may be defined in interest analysis. After all, everyone has to be domiciled somewhere. Consequently, in every tort action in which plaintiff and defendant have different domiciles, at least two states will have competing legitimate interests in the economic integrity of their domiciliaries. Since nearly every issue in every tort case possesses the potential of affecting the economic integrity of the litigants, the legitimate interests of the two domicile states will have applicability to each such issue. To carry that thought to its logical conclusion, an indicative law[6] fashioned by the forum which leads to the dispositive law[7] of either of the domicile states would be bottomed on a legitimate interest of that state in the issue so resolved. To be specific: if the Pennsylvania court in *Cipolla* (contrary to its actual holding) had utilized an indicative law referring to the depositive law of Pennsylvania, and the consequent non-applicability of Delaware's guest statute, the result achieved would have been a resolution of the specific issue presented by the application of the law of a state having a legitimate interest in that issue.

Would such a result have violated either the full faith and credit[8] or due process clause[9] of the Constitution? The full faith and credit clause requires recognition and application of the applicable law of a sister state; in *Cipolla* that potentially applicable sister-state law was Delaware's guest statute.[10] But how does the forum determine whether or not such potentially applicable sister-state law is in fact applicable? The answer necessarily must come from the indicative law of the forum. In Pennsylvania, since *Griffith*, that indicative law is the product of interest analysis. If such analysis persuaded the Pennsylvania court that Pennsylvania's interest as the domicile of the plaintiff was superior to

6. The phrase "indicative law" is intended to refer to "those rules which indicate the system of dispositive rules which is to be applied." Taintor, *Foreign Judgments in Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 U. PITT. L. REV. 223, 233, n.58 (1942). It is the author's view that "indicate law" is simpler and no less descriptive than such phrases as "conflict-of-law" or "conflict-of-laws rule."

7. The phrase "dispositive law" is intended to refer to "those rules which are used to determine the nature of rights arising from a fact-group, i.e. those which dispose of a claim." Taintor, *supra* note 6. It is the author's view that "dispositive law" is more descriptive and useful than such phrases as "municipal law" or "internal law." The author is indebted to the late Charles W. Taintor II for creation of the phrases.

8. U.S. Const., art. IV, § 1. The "implementing" legislation is at 28 U.S.C. § 1738 (1958).

9. U.S. Const. amend. XIV § 1.

10. DEL. CODE ANN. tit. 21, § 6101 (a) (1949).

the interest of Delaware, the Pennsylvania court would fashion an indicative law referring to Pennsylvania's dispositive law, which contains no guest statute. While one (perhaps most) might say that such an indicative law was the product of painfully inept interest analysis, its utilization would result in resolution of the specific issue pursuant to the dispositive law of a state having a legitimate interest in that issue; perhaps, in the view of most, not the more significant interest, certainly not an overriding interest, but *a* legitimate interest. So long as that much can be said, it seems extraordinarily unlikely that the Supreme Court of the United States would find such a conclusion violative of the full faith and credit clause.[11]

How about due process? Defendant's argument theoretically could assert two bases for finding a violation of that constitutional provision: (1) the specific issue of whether or not Delaware's guest statute was applicable had been resolved by an indicative law referring to the dispositive law of a state having no legitimate interest in the issue, and (2) defendant could not reasonably have anticipated that his liability would be determined by the dispositive law of any state other than Delaware. The first basis is, by definition, unpersuasive to the extent that Pennsylvania, as plaintiff's domicile, has a legitimate interest in the specific issue. The second basis asserted is somewhat more complicated.

Given the facts of *Cipolla*, defendant could not assert successfully that he was unaware that the plaintiff was a non-domiciliary of Delaware or even a domiciliary of Pennsylvania. After all, defendant was driving plaintiff to his home in Pennsylvania.[12] Therefore, defendant's due process "surprise" argument necessarily would rest on the premise that, even though defendant knew that his passenger was a Pennsylvania domiciliary, defendant could never have anticipated that his liability to the plaintiff would be determined by Pennsylvania law, at least not unless and until defendant drove his car into Pennsylvania. Professor Cavers' "territorial approach,"[13] cited with approval by the majority in *Cipolla*,[14] states that such an imposition of Pennsylvania law upon the defendant "would be rejected as unfair."[15] If *unfair* means that it would

11. *Cf.* Richards v. United States, 369 U.S. 1, 12, 13 (1962).
12. 439 Pa. at 564, 267 A.2d at 854.
13. CAVERS, THE CHOICE-OF-LAW PROCESS, 146 (1965).
14. 439 Pa. at 567, 267 A.2d at 856. It should be noted that the language of Professor Cavers quoted by the court appears under a section heading which contains the following caveat: ". . . at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship." Cavers, *supra* note 13 at 146.
15. *Supra* note 13.

be the product of the less desirable of two potentially available indicative laws in a case such as *Cipolla*, conceded. However, if unfair is intended to be synonymous with violative of due process, no such concession can be made. Given the hypotheses that (1) Pennsylvania, as plaintiff's domicile, has a legitimate interest in the specific issue presented, and (2) defendant knew his passenger was domiciled in Pennsylvania, it follows that a determination of defendant's liability to plaintiff by the application of Pennsylvania's dispositive law could not constitute a due process surprise to defendant.

To any who may be shocked by the conclusion that defendant's knowledge of plaintiff's domicile should have alerted defendant to the possible imposition of Pennsylvania law, this suggestion is offered: look to the propriety of determining that Pennsylvania had a legitimate interest in the specific issue decided arising out of plaintiff's Pennsylvania domicile. If that interest in truly legitimate, defendant can have no constitutional right to ignore it, once knowing, actually or constructively, that his passenger was a Pennsylvania domiciliary. If that interest is not a legitimate one, Pennsylvania, as plaintiff's domicile and as a state having adopted interest analysis as a means of resolving choice-of-law problems—along with an impressive number of other states having adopted that approach[16]—has a legitimate complaint. The interest arising out of plaintiff's domicile is one looking toward hard economic reality: an uncompensated victim of personal injuries inflicted by another's negligence may become a ward of the state. Isn't that the sort of reality which interest analysis is intended to reflect in the indicative laws so fashioned? If it isn't, interest analysis is likely to produce the kind of unrealistic and even ludicrous results achieved by a rigid application of lex loci delicti.[17]

The reader is reminded that the court in *Cipolla* did not find Pennsylvania's interest as plaintiff's domicile superior to Delaware's interest. The preceding discussion was intended to indicate the possibilities flowing from the majority's conclusion that Pennsylvania, as plaintiff's

16. According to CRAMTON & CURRIE, CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS, 256-57 (1968), the following jurisdictions have utilized interest analysis in resolving various choice-of-law problems: California, District of Columbia, Kentucky, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Wisconsin. More recently, in a diversity case, both litigants agreed that the trial court correctly determined "that North Dakota would now abandon its older rule of 'lex loci delecti' [*sic*] and follow the more modern conflict of law principle of 'significant contacts.'" Trapp v. 4-10 Investment Corp., 424 F.2d 1261, 63 (8th Cir. 1970).

17. See, *e.g.*, Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Mike v. Lian, 322 Pa. 353, 185 A. 775 (1936).

domicile, had a legitimate interest in the issue presented. Those possibilities indicate the extreme latitude available to a court in resolving a choice-of-law problem through interest analysis. The outermost perimeters of that latitude are likely to be determined by the full faith and credit and due process clauses of the Constitution, and those constitutional boundaries are notably uninhibiting. More confining by far is the self-restraint exercised by such a court, a self-restraint presumably dictated by the court's legitimate effort to fashion the best indicative law available in order to achieve the most appropriate result, by a degree of professional pride, and, considerably less altruistic but perhaps equally persuasive, by its recognition that undue parochialism may evoke a similar response from other state courts resolving choice-of-law problems involving Pennsylvania domiciliaries. Finally, to one deeply concerned that a litigant's domicile may provide an interest sufficient to justify constitutionally the imposition of the law of his domicile, this last consolation is extended: the interest arising out of plaintiff's domicile and the interest arising out of defendant's domicile may tend to be mutually negating to a court engaged in interest analysis.

The dissenting opinion in *Cipolla* came to just that conclusion.[18] Refusing to accept the majority's suggestion that non-application of Delaware's guest statute would adversely affect insurance premium rates in Delaware,[19] and determining that the sole purpose of that guest statute was to protect the "generous host,"[20] the dissent found the interests of Pennsylvania and Delaware to be "evenly balanced":[21] each state had an interest in the economic integrity of its own domiciliary.

To a judge engaged in interest analysis, striking an even balance between the competing states presents an obvious problem: How should the choice-of-law issue be resolved? The dissent in *Cipolla* resolved it by determining which state's dispositive law was "the better rule of law."[22] Finding that guest statutes "represent a regressing policy"[23] and that allowing a guest to recover from his negligent host represents " 'emerging' policy,"[24] the dissenting opinion concluded "that Pennsylvania's rule is the better rule of law."[25]

18. 439 Pa. at 573, 267 A.2d at 859.
19. 439 Pa. at 570, 267 A.2d at 858.
20. *Id.*
21. 439 Pa. at 573, 267 A.2d at 859.
22. *Id.*
23. 439 Pa. at 576, 267 A.2d at 861.
24. 439 Pa. at 578, 267 A.2d at 862.
25. *Id.*

In an article published in the Spring of 1966,[26] Professor Leflar suggested that a determination of which two competing laws was "the better rule of law" was an appropriate "choice influencing" consideration in resolving a choice-of-law problem. Such an enticing invitation to courts confronted with difficult conflicts issues and committed to interest analysis, extended by so eminent and such a widely (and justifiably) respected authority, was not likely to remain long unaccepted. In an opinion dated August 31, 1966,[27] the Supreme Court of New Hampshire resolved a choice-of-law problem involving the applicability of a guest statute. Three years earlier, that court had discarded lex loci delicti as an inappropriate indicative law in resolving the potential applicability of an interspousal tort bar, and concluded that, because the state of the marital domicile had the more significant interest in that specific issue, a properly fashioned indicative law would refer to the dispositive law of that domicile state.[28] Yet, in the same opinion, the court imposed the guest statute of the locus delicti.[29] By 1966, the court recognized the propriety of utilizing interest analysis in determining the potential applicability of a guest statute. Its opinion constituted a perceptive review of the senselessness of a mechanical application of lex loci delicti to resolve choice-of-law problems in tort cases, and an insightful statement of the practical advantages of interest analysis. Using that analysis, the court determined that the state in which defendant's car was garaged and presumably insured (New Hampshire) had a greater interest in the issue than the state in which the injury occurred (Vermont). In addition, the court "conclude[d] that our rule is preferable to that of Vermont."[30]

In turn that New Hampshire opinion, Clark v. Clark,[31] was cited four times by the dissent in *Cipolla*, along with several citations to Professor Leflar's article.

The appeal of the suggestion that a court's determination of the better law is a legitimate factor to be considered in interest analysis is easy

26. Leflar, *Choice Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. Rev. 267 (1966); and see Leflar, *Conflicts Law: More on Choice Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).
27. Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).
28. Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963).
29. *Id.* For a discussion of how *Thompson* could have affected a determination made by another forum as to New Hampshire's interest in a guest statute case, before New Hampshire's decision in *Clark*, *supra* note 27, see Seidelson, *The Americanization of Renvoi*, 7 DUQ. L. REV. 201, 217-221 (1969).
30. Clark v. Clark, *supra* note 27, 107 N.H. at 355, 222 A.2d at 210.
31. *Supra* note 27.

to comprehend. First, every court presumably wishes to achieve a "good" result in deciding a case, *i.e.*, a result satisfying to the court.[32] Second, as interest analysis becomes ever more refined, its use demands ever more of courts utilizing it, consequently, any convenient "way out" becomes appealing. Third, assuming that interest analysis produces an even balance between the interests of the competing states, the forum demands a method of resolution; the one alternative totally unacceptable to any court is a failure to decide. Little wonder that some justices have found declination of Professor Leflar's invitation to consider "the better rule of law" impossible. Yet, no matter how appealing the suggestion may be, examination of its functional value and its general propriety seems appropriate.

Understandably, a judge utilizing "the better rule of law" to resolve a choice-of-law problem, and finding the better rule to be the law of his own state, may anticipate and be sensitive to the suggestion that his conclusion is the product of undue parochialism. The dissent in *Cipolla* concluded by emphasizing that

> I have in the end concluded that Pennsylvania's rule is the better rule of law, not out of "state chauvinism," (citation omitted) but because I am firmly convinced that it represents "emerging" policy and the "sounder view of law."[33]

In *Clark*, the court wrote,

> If the law of some other state is outmoded, an unrepealed remnant of a bygone age, . . . we will try to see our way clear to apply our own law instead. *If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law.*[34]

The italicized portion of the *Clark* apologia provides an interesting point at which to begin an examination of the propriety of resolving choice-of-law problems by determining which state's law is the better one.

If the highest appellate court of State A finds itself confronted with such a problem and concludes that (1) State A and State B are the competing states, and (2) State A's law is "obsolete or senseless," there will be no true conflict. Assuming that the absolute or senseless law of State

32. For a discussion of "judicial satisfaction" in resolving choice-of-law problems in the context of a federal court exercising pendent jurisdiction, see Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82, 92-94 (1968).

33. Cipolla v. Shaposka, *supra* note 3, 439 Pa. at 578, 267 A.2d at 862.

34. Clark v. Clark, *supra* note 27, 107 N.H. at 355, 222 A.2d at 209.

A is decisional law, the highest appellate court of that state, recognizing the law's infirmities, can and probably should overrule it. That done, the conflict disappears. State A's new law, presumably similar to the better law of State B, will permit the court to achieve the better result regardless of which state's law it utilizes.

If the obsolete or senseless law of State A is statutory, the highest appellate court of that state has available two closely related alternative techniques for avoiding its use in the case before it. First, the court may so strictly construe the statute that it becomes inapplicable to the operative facts before the court. Second, it may determine that the legislative intent underlying the statute did not anticipate application of the statute to an issue in which another state (State B) had a legitimate interest.[35] As the highest appellate court of State A, the court cannot commit legal error in determining the applicability of the statute, either as to the operative facts of the particular case or as to the specific issue in which State B has a legitimate interest. Consequently, the court can achieve the better result by finding its own statutory law inapplicable, and utilizing the better law of State B.

Those techniques, however, raise serious questions of propriety—even in terms of constitutional validity—when employed to avoid a sister state's law because the forum determines such law to be obsolete or senseless.

Both the vested rights and local law theorists insisted that a court can never apply any law but its own.[36] Under that view, when a court determined that another state's interests justified recognition, the forum simply applied as its own a law homologous to the law of the other state. If that theory has continued validity, arguably the forum might be as free to overrule or strictly construe another state's law in a choice-of-law context as it would be its own law, since the other state's law would become the forum's own when utilized. But the theory may never have been very sound, and certainly contemporary judges have felt no need to employ such fictitious terminology as a condition precedent to the application of sister-state law.[37] Two alternative conclusions

35. *Cf.* Milliken v. Pratt, 125 Mass. 374 (1878).

36. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 Harv. L. Rev. 361, 379, 386 (1945); Seidelson, *The Full Faith and Credit Clause: An Instrument for Resolution of Intranational Conflicts Problems*, 32 Geo. Wash. L. Rev. 554, 556 (1964).

37. *E.g.*, the majority opinion in *Cipolla*, *supra* note 3, 439 Pa. at 566, 267 A.2d at 856, after determining "that Delaware's contacts are qualitatively greater than Pennsylvania's," concluded "that [Delaware] has the greater interest *in having its law applied to the issue before us.*" [Italics added.] But see Pearson v. Northeast Airlines, Inc., 309

suggest themselves concerning the theory of absorption of sister-state law. If the absorption theory means no more than that every time a forum applies sister-state law that law becomes the law of the forum in resolving the choice-of-law problem in that case, the theory is no more than a shibboleth which does not justify forum tampering with sister-state law. If the theory means that the forum is free to mold sister-state law to fit the forum's notions of appropriate policy, the theory creates constitutional problems.

When the court in State A is confronted with a true conflict between the law of State A and the law of State B, its determination that B's interests are paramount leads to the application of B's law. To suggest that the highest appellate court of State A may "overrule" State B's decisional law because the court deems it obsolete or senseless, gives to that court a position of super appellate court vis-à-vis the highest appellate court of State B. To suggest that the highest appellate court of State A may give to a statute of State B a construction or applicability other than that given by the highest appellate court of State B, makes the State A court a super appellate court and a super legislative body for State B. That obvious impropriety is enhanced and dramatized by the full faith and credit clause. If as to a given conflicts issue, the court in State A finds that State B's interests dictate the applicability of State B's laws, and the court in State A then "amends" that law, it is submitted

F.2d 553, 560 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). The Second Circuit's adherence to the theory of absorption may be a product of Judge Learned Hand's continuing influence. See Siegmann v. Meyer, 100 F.2d 367 (2d Cir. 1938). It must be conceded that there remains uncertainty over whether a forum's determination to "apply" sister-state law is to be read literally or as an indication that the forum will fashion a local law homologous to that law existing in the sister state. In a recent article, Professor Sedler, in discussing a hypothetical choice-of-law proposition, used this language: "There is only a conflict of laws when the result, were the case to be heard in the courts *of the state whose law is sought to be used as a model*, would be different from the result that would be reached under the substantive law of the forum." [Italics added.] Sedler, *Characterization, Identification of the Problem Area and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L.J. 8, 14 (1970). The italicized language suggests an absorption approach. Yet, later in the same article, Professor Sedler, in laying before a New Hampshire court a hypothetical set of facts involving an interspousal tort action between Massachusetts spouses, with the principal operative facts occurring in New Hampshire and contituting a battery, and a Massachusetts interspousal tort bar, wrote, "The New Hampshire court would recognize that here the problem area is truly one of family law and that policy behind the Massachusetts rule of spousal immunity would be to maintain family harmony *(whether this is a sound or realistic policy is for Massachusetts to decide)*." [Italics added.] *Id.* at 67. Professor Sedler concluded that New Hampshire "would apply its own law." *Id.* at 68. The italicized and parenthetical language suggests that, if New Hampshire utilized Massachusetts law, it would be inappropriate for the forum to tamper with the "model" law of Massachusetts, for if a determination of the wisdom of a Massachusetts policy is for Massachusetts to decide it would be unduly instrusive for the forum to mold Massachusetts law to fit New Hampshire's concept of the proper policy.

that the court has violated the constitutional mandate of the full faith and credit clause.[38] And such amendment is exactly what happens any time a court avoids the application of sister-state law by finding that law obsolete or senseless. The determination that a statutory or decisional law of State B is anachronistic or foolish, and therefore ripe for overruling, repeal, or a construction so strict as to make it feckless, seems to be uniquely a function of State B.

By way of specific example, the *Cipolla* dissent's view of the economic motives underlying Delaware's guest statute serves nicely. The dissent did "not believe . . . that Delaware passed its guest statute for the purpose of lowering the insurance rates of those who house their automobiles in Delaware."[39] One reason for that disbelief was the dissenting justice's conclusion that the statute would not effectuate such a purpose. The efficacy of the statute in that regard may be open to reasonable doubt. But suppose the Delaware legislature had enacted the statute for that purpose, and the highest appellate court of Delaware had so found. Would it be appropriate for the Supreme Court of Pennsylvania to avoid the application of the Delaware guest statute because the court determined that the Delaware legislature had been mistaken? Or, that the highest appellate court of Delaware had "misconstrued" the legislative intent? It would seem not. Delaware's legislature has an inherent right to enact statutes for any constitutionally appropriate purpose. That the purpose may not be accomplished effectively by the legislation gives the Supreme Court of Pennsylvania no right to "repeal" the statute in a choice-of-law case. Similarly, the Delaware Supreme Court is the final arbiter of the legislative intent underlying constitutionally permissible Delaware legislation. Legally speaking, that court cannot err in determining such intent. Still legally speaking, the Pennsylvania Supreme Court cannot "reverse" such a determination.

For the highest appellate court of State A to resolve a choice-of-law problem in which A and B are the competing states, by determining that State B's law is obsolete or senseless, then applying State A's law to achieve a better result, the court in State A must assume the posture of a super legislature or a super appellate court, or both, for State B. Such a posture is awkward, inappropriate and constitutionally imper-

38. The kind of "amendment" of sister-state law referred to in the text should be distinguished from a determination by the forum that, while a portion of a sister-state's law is applicable, another portion of that law is not. Pearson v. Northeast Airlines, Inc., *supra* note 37, at 560; Seidelson, *supra* note 36, at 557.

39. 439 Pa. at 569, 267 A.2d at 858.

missible. So much so, that Professor Cavers viewed it as a threat to the subsistence of the choice-of-law process:

> If I am suspect [of favoring a result-selective approach], I suppose it is due to my insistence that the process of making a just choice between two laws requires that one take into account the respective results worked by the laws between which one chooses. However, in a choice-of-law case, the court is not engaged in an exercise in comparative jurisdiction, appraising the respective merits of two rules of law. Rather the court is passing upon the conflicting claims of two parties, each of whom insists that the facts of the case justly require that one of the rules, and not the other, be applied in its decision. It is therefore to the circumstances of the case that one must look for the problem. To neutralize these by asking the judge simply to express a preference between the two rules on the score of "justice and convenience" is to abolish our centuries-old subject.[40]

The appeal of treating the better law as an appropriate choice influencing factor is diminished by another consideration. It is not functionally necessary. As noted earlier in this article, the constitutional restraints on a court compelled to resolve a conflicts problem are notably uninhibiting. Given the Pennsylvania domicile of the plaintiff in *Cipolla*, the Supreme Court of Pennsylvania could have determined constitutionally that Pennsylvania had the superior interest in the specific issue—applicability of the guest statute—and fashioned an indicative law referring the court to the dispositive law of Pennsylvania. Result: non-application of the guest statute. While such an indicative law might be deemed to be the poorer of two alternatives, it would be constitutionally permissible. It would achieve, coincidentally, the better result sought by the dissent. That may appear to be a disingenuous method of securing the result, and nearly everyone (certainly this author) prefers judicial candor over deception; yet, nearly everyone (and certainly this author) prefers a constitutionally appropriate mode of resolving choice-of-law problems over a device bottomed on constitu-

40. CAVERS, THE CHOICE-OF-LAW PROCESS, 86 (1965). That language of Professor Cavers, in addition to possessing the usual grace of style of his writing, goes to the essence of the infirmity of the better rule of law approach. Professor Leflar objects to a choice of jurisdictions made without concern for the law of each jurisdiction. Leflar, *supra* note 26, N.Y.U.L. REV. at 295. His objection arises from a desire to secure "[j]ustice in the individual case." *Id.* at 296. In a choice-of-law setting, that desire is more likely to be realized by analysis of the parties, the facts, and legitimate interests in both on the part of the states concerned, than by "an exercise in comparative jurisdiction." Such analysis may demonstrate the propriety of applying the law of that state which will provide "justice in the individual case," no matter how "obsolete" the forum may consider that law to be.

tional impropriety. In addition, to the extent that the forum is compelled to justify its conclusion that its interest is superior to that of the other state, the forum is likely to demonstrate that enlightened self-restraint reflected in the majority opinion in *Cipolla*. That degree of self-restraint can be expected to exceed the restraint imposed on a court willing to resolve the issue by choosing "the better law."

One additional technique employed by the dissent in *Cipolla* requires comment. The dissenting justice engaged in an examination of the indicative law of Delaware for the purpose of determining the extent of Delaware's interest in the specific issue presented. And the technique is eminently sensible.[41] Given a choice-of-law problem in which A and B are the competing states, and in which their competing interests are rather neatly balanced, the forum can secure assistance by examining the indicative laws of both states. If the forum discovers that a court sitting in State A confronted with the identical problem would utilize an indicative law referring to the dispositive law of State A, and a court sitting in State B would utilize an indicative law referring to the dispositive law of State A, the forum would be justified in concluding that both of the competing states had recognized State A's superior interest in the issue. That conclusion could persuade the forum to apply the dispositive law of State A.

The dissent in *Cipolla* looked to Delaware's indicative law and discovered that Delaware had expressly eschewed interest analysis and determined to retain lex loci delicti to resolve conflicts in tort cases.[42] Thus, if the facts of *Cipolla* had been laid before the Delaware Supreme Court, that court would have applied Delaware dispositive law and imposed the guest statute. One would imagine that would have demonstrated an enhanced interest on the part of Delaware. Not to the dissent. It noted that, since Delaware retains lex loci delicti, a Delaware court would "not apply its guest statute in accidents *which occur in common law jurisdictions.*"[43] Quite so. But the accident in *Cipolla* did not occur in a common law jurisdiction; it occurred in Delaware, the state having the guest statute. It could be and has been asserted[44] that a state retaining lex loci delicti does not thereby evidence either an enhanced or a diminished interest in a particular issue, since retention of that mechanical indicative law is unrelated to interest analysis. Con-

41. See Seidelson, *supra* note 29, at 221-28.
42. Friday v. Smoot, 211 A.2d 594 (Del. 1965).
43. Cipolla v. Shaposka, *supra* note 3, 439 Pa. at 570, 267 A.2d at 858.
44. Kay, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. Rev. 584, 589, n.31 (1968).

trarily, it could be and has been asserted[45] that a state expressly disavowing interest analysis in favor of the retention of lex loci delicti necessarily evidences its interest in the particular issue presented. What seems extraordinary to assert is the dissent's conclusion that, because Delaware would abstain from imposing its guest statute on a passenger injured in Pennsylvania, Delaware has manifested a diminished interest in having its guest statute imposed on a passenger injured in Delaware. If Delaware's retention of lex loci delicti means anything in terms of Delaware's interest in having its guest statute applied, it must reflect an interest in having the statute applied to actions seeking recovery for injuries sustained by guest-passengers in Delaware. And that's where Michael Cippola sustained his injuries.

Considering the nature of and the purposes underlying interest analysis, it is a certainty that the level of sophistication in its use, the number of difficulties its use produces, and the refinement of techniques developed to resolve those difficulties will continue to increase. That is not intended as an indictment of interest analysis. Rather, it is a description generally applicable to improvements in the law. And such improvements constitute an on-going process. The more refined a judicial approach becomes, the more likely it is to become sensitive to an increasing number of factors, and the more factors considered, the better the result is likely to be. Consequently, one can say pleasurably to the Supreme Court of Pennsylvania (and other courts having adopted interest analysis): You've still got a way to go.

45. Seidelson, *supra* note 29, at 211.