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Interest Analysis - The Sands of Confusion

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Once more the Pennsylvania Supreme Court has, with great solemnity, decided that Tweedle Dum is indeed of greater significance than Tweedle Dee.[1] Not to be outdone by their elevated brethren, law professors have already begun stumbling over each other in efforts to reweigh our heroes on what each believes to be a better calibrated scale than that used by the Court.

The matter started innocently enough. John Shaposka, Jr. offered to ride his classmate, Michael Cipolla, home from school on the afternoon of January 24, 1966, and the offer was accepted. On the way to Michael's home, John's automobile was involved in a collision and Michael sued John in a Pennsylvania court to recover for the injuries he sustained in that collision. The problems arise from the facts that (a) Michael lived in Pennsylvania, which is where the parties were headed at the time of the occurrence; (b) John lived in Delaware, and the automobile he was driving was registered, garaged and insured in that state; (c) the accident happened on the Delaware side of the border separating the two adjacent states. To further complicate matters, a Delaware guest statute prohibits a guest from recovering damages from his driver-host in the absence of wilful or wanton misconduct; and Pennsylvania permits guests in motor vehicles to recover damages from their hosts upon a showing of simple negligence.

Faced with these facts, Justice Cohen and a majority of the Court concluded that there was indeed a true conflict of interests and that, weighing the contacts of each state "on a qualitative rather than quantitative scale" the substantive law of Delaware was properly applied. In reaching this decision, the Court thought that Pennsylvania's only relevant contact was that the injured party resided in Pennsylvania. Delaware, on the other hand, was the domicile of the defendant; the place where the vehicle in which the boys were riding was registered,

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* A.B., LL.B., University of Pittsburgh; LL.M. Yale University; Professor of Law, Duquesne University. The author, who has not taught conflicts for some five years, disclaims possessing any expertise in this area so thoroughly muddled by experts. He writes, instead, as a confused layman exuding sympathy for the judges, lawyers and litigants caught in the middle of the scholarly maze that conflict of laws has become.

1. See Cipolla v. Shaposka (1970) 439 Pa. 563, 267 A.2d 854.

housed and insured; and, the situs of the accident. Each of these contacts was considered relevant.

Justice Roberts dissented vigorously, believing the situs of the accident and the domicile of the automobile to be irrelevant contacts and, thus, that the score was dead-locked and not, as the majority believed, 3-1 in favor of Delaware. The remainder of Justice Robert's opinion is dedicated to the establishment of a procedure for breaking the tie without the necessity of replaying the accident. This, he concludes, can best be achieved by searching for the "better rule of law," magnanimously awarding the honors therefor to the Pennsylvania legislature.

While the majority opinion professes to weigh the contacts qualitatively, the opinion gives no indication that this was actually done. The opinion mentions that Pennsylvania's only relevant contact comes about as a result of the plaintiff-appellant's being a local resident. It does not discuss why, and to what extent, this contact is relevant and makes no effort to weigh this contact against the quantitatively greater Delaware relevant contacts. Clearly, it is the policy of Pennsylvania to protect its citizens from negligent hosts. Since an injured person can represent both a type of lost or diminished resource and, perhaps, an economic liability whose care may ultimately devolve upon other Pennsylvania citizens or upon the state if adequate redress is not obtained, Pennsylvania conceivably has a great deal at stake in seeing that Michael Cipolla receives adequate compensation. Delaware, too, may have much at stake in the outcome of this litigation. Obviously, its guest statute was motivated by *some* policy consideration that it deems beneficial to its citizenry. While the majority does not even hint at the underlying policy the Delaware statute is intended to serve, Justice Roberts in his dissent concludes that "[T]he sole purpose of the Delaware guest statute . . . 'is to protect one who generously, without accruing benefit, has transported another in his motor vehicle. . . .' "[2]

Further, if the majority is to be believed, permitting plaintiff to recover in this case might cause insurance premiums assessed to all Delaware motorists to increase, thus giving Delaware another basis for concern. Finally, according to the majority, the accident's occurrence in Delaware provides that state with an interest, since Delaware may legitimately strive to assure its residents that they "should not be put in jeopardy of liability exceeding that created by their state's laws just

2. Id. at 858.

because a visitor from a state offering higher protection decides to visit there."[3]

But, if we are to believe the majority's statement that choice of law should be premised on the quality, and not the quantity, of the relevant contacts, the Court's work should just have begun at the place it stopped. How significant is the insurance factor? Does the guest statute *really* affect insurance rates, and to what extent? Is it more important to assure reasonable insurance rates for Delaware citizens than to prevent recovery by a non-negligent guest from his negligent host, thus potentially increasing the tax burden of Pennsylvania citizens to compensate for the added economic burden precipitated by the uncompensated injury to its citizens?

What weight should we give to enforcing the reasonable expectations of Delaware citizens that, while driving in their home state, their liability will not exceed that created by local law? Shouldn't the Court have made some effort to determine to what extent this is a valid consideration? Do citizens of Delaware *actually rely* on the presence of a guest statute and, being assured that it is still in effect, breathe a sigh of relief? And, if they do, how do you weigh this reliance against Pennsylvania's interests?

These, and many more, questions must be asked and considered if one is truly to attempt a qualitative evaluation of the relevant contacts. And there is no indication in the opinion that *any* questions of this type were considered by the majority. Thus, clearly, if the Court in fact did choose the law of the jurisdiction it believed to have the greater interest qualitatively, it did so by some unexplained process.[4]

While the failure of the majority to specify exactly why it concluded that Delaware's relevant contacts were qualitatively greater than Pennsylvania's provides a basis for criticizing the opinion, it is believed an even more substantial objection remains. Assuming that a court *does* attempt a qualitative analysis, how can this be accomplished? Potatoes can be weighed against potatoes, or even against squash, and values rationally assigned. But, can we really weigh interests against interests

3. Id. at 856-857.

4. Even if it is ultimately concluded that a qualitative weighing of interests is the best means of achieving "conflicts justice," the Court in *Cipolla* gives no indication of what considerations it deemed most weighty. Thus, the decision is virtually useless as an aid in making future appraisals on an interest analysis basis. Lawyers and judges are left in the dark in attempting to rationally predict how a cause containing all or some of the same interests, but in a different context, might now be decided in Pennsylvania. The Court owed it to the bar and to the judges of the Pennsylvania Courts of Common Pleas to be more specific in discussing the "whys" and "hows" of its conclusions.

and come up with any worthwhile conclusions—with conclusions that do any more than spotlight the subjective prejudices, experiences and beliefs of a majority of a particular court? As Justice Traynor so poignantly stated: "Can you weigh a bushel of horse feathers against next Thursday?"[5] Unless the interests of one state are so minor as to be clearly inferior—which was not true in *Cipolla*—aren't we just kidding ourselves in attempting to assign relative values to valueless factors? Can we, by any known process, look to the facts and sensibly conclude that, in a host-guest case of this type, a plaintiff's residence in a non-guest statute state is worth 10 points; garaging the vehicle gives a state 3 points; the residence of the defendant in a guest statute state gives that state 8 points; etcetera? And, unless we can devise a method capable of rationally assigning measurable values to such interests, what can be gained from an in-depth comparison of the competing, more than minimal, relevant interests?

The last two decades have seen monumental advances in the solution of conflicts cases. Recognition of the false conflict and compelling application of the substantive law of an interested jurisdiction have eliminated most of the more blatant past errors. It is time to recognize, however, that further quests for purity and certainty—at least at this stage of our development—endanger destroying the good that has evolved. Far too many courts in far too many jurisdictions are today painfully aware that their choice of law opinions are anxiously awaited by law professors eager to criticize, but unable themselves to offer the long sought for panacea. Indeed, as the diverse views in this Symposium illustrate, even the most esteemed of the "experts" are not immune from attack, and may begin to tread cautiously where once they ran untrammeled! Continued, and usually justified, criticism without the creation of a *workable* solution, however, is not the answer. Indeed, by pointing out the importance of interests of which the courts were formerly unaware,[6] law professors have made the choice of law picture muddier today than it was five years ago. Much more of this, and even vested rights will look good to harried jurists and lawyers! To preclude regression we should cease, or at least deemphasize, the search for absolutism, and strive toward a *practical, workable* method of solving conflicts problems that offers a reasonable degree of predictability and can be utilized effectively by trial judges who must deal with hundreds

5. Justice Traynor acknowledges an indebtedness to Prosser *Res Ipsa in California*, 37 CALIF. L. REV. 183, 225 (1949) who in turn acknowledges his indebtedness to an unidentified English judge.

6. See A. Twerski, *supra* this Symposium.

of other problems during the year, and who should not have to be a combination of Cavers and Ehrenzweig to achieve acceptable results. The solution, in short, cannot be one that measures "conflicts justice"[7] solely in terms of eventually separating out the most interested jurisdiction. It must, to achieve real justice, also concern itself with the *unjustness* of placing litigants, attorneys and insurance companies in a fog of uncertainty that frequently doesn't lift until a decision is rendered by the highest appellate court.

The largely discarded vested rights approach, applying in all instances the law of the situs of the occurrence regardless of applicable interests, is clearly inconsistent with the goal of achieving conflicts justice.[8] But, it did offer certain undeniable advantages. Immediately following the occurrence of the accident all concerned parties and their insurers could *rationally* place some value on the case and enter into meaningful settlement negotiations. Or, if it became apparent that settlement was not imminent or likely, it could rationally be decided whether the case merited large out of pocket outlays in preparing for trial. While this predictability was certainly not worth the often heavy price it extracted, it was undeniably beneficial and attempts should be made to retain it in arriving at a workable solution for conflicts cases. As a result of the interest analysis approach taken by the Court in *Cipolla*, there is no semblance of predictability remaining in Pennsylvania conflicts law.[9] Suppose, for instance, that an identical case arises except for the fact that the automobile involved in the collision is owned by the youthful driver's father, and the father is a career military man only recently transferred to Delaware—a state where he never before lived—and who expects to be transferred elsewhere in two or three years?[10] Or, suppose that the insurance on the automobile is written by a company insuring only governmental employees and that its rates are based on the status and level of the government employment, and not on the geographic location where the vehicle is garaged?

7. See D. Cavers, *supra* this Symposium, for the origin of this most descriptive phrase.
8. See B. Currie, *Conflicts, Crisis and Confusion in New York*, in B. Currie, Selected Essays On The Conflicts Of Laws, 690 et seq., (1963).
9. While predictability is, at best, uncertain in an interest analysis jurisdiction, the problem is compounded in Pennsylvania by the failure of the Court to give some indication of the factors it deemed relevant in assessing the weight to place upon the various competing interests. See note 4, *supra*.
10. Or, suppose he was a corporate executive who, similarly, fully expected to be transferred; or, indeed, had already received his "traveling orders" to another state, effective some time in the future. Would, in all these instances, the weight given to residence or domicile be identical?

What value would you, representing either the plaintiff or defendant, place on this new case? Would you feel justified in spending thousands of dollars for photographs; statements from highway safety experts; depositions; X-ray and medical examinations; etcetera? Or would you attempt to prevail on as low a budget as possible? None of these "practical" problems can be ignored if we are truly to search for "conflicts justice." That term clearly transcends the goals of a system whose primary concern is to make sure that the law of the most interested jurisdiction is applied to the dispute, and must also encompass the achievement of some measure of predictability.

As a result of *Cipolla* there is certainty only in the unlikely event an identical case is once more brought before the Pennsylvania courts. In all other legitimate tort conflicts cases the parties—and the Commonwealth, which must foot the heavy costs of litigation where cases cannot be settled before trial—are deprived of a reasonable opportunity to effectuate a fair settlement; and one lawyer will have the difficult job of explaining to his client why the principles of "conflicts justice" prevented his recovery. We can, and must, do better! We must strive for a solution that accommodates *both* the goal of applying the law of an interested jurisdiction and the goal of providing all involved parties with a reasonable degree of certainty and predictability so that they might fairly and properly evaluate the claim. Additionally, this accommodation process should be one that can be easily and fairly applied by the harried and overworked trial judges of our Courts of Common Pleas.

It is my belief that, in tort conflicts cases, utilization of an interested *lex fori* test most nearly meets all these goals and achieves the best accommodation of the often competing interests of predictability and interest analysis. Such a test would compel the forum, whenever it has a legitimate, somewhat more than minimal, interest in the cause, to apply its own substantive law. The initial (and frequently the only) determination that the trial judge will have to make in applying the interested *lex fori* rule is simply whether the interests of the forum state are more than minimal or, perhaps more accurately, that the interests of some other state don't *clearly predominate or overwhelm* the local interests.[11]

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11. For an illustration of judicial willingness to subordinate the minimal interests of the forum and apply the law of a *clearly* more interested jurisdiction see Justice Traynor's opinion in *Bernkrant v. Fowler* 55 Cal.2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). See also Romero v. International Terminal Operating Co. 358 U.S. 354 (1959); and B.

It is believed that these types of broad threshold "interest analyses" are most easily made—and predicted by attorneys and insurance companies—and will not cause the confusion that of necessity results from the refined screening of interests compelled by the Pennsylvania Supreme Court in *Cipolla*. Once it is determined by the court that the forum state has a sufficient interest to pass through this coarse-meshed sieve, it proceeds by applying its own substantive law. If the interests of the forum are too slight to traverse even this sieve, and there is only one other interested jurisdiction, the forum would then apply the law of that interested forum. *Only* if the local interests are nil or minimal and there are two or more other jurisdictions with legitimate, more than minimal, interests in the matter would the court be confronted with the dilemma it itself created in *Cipolla* and have to either "weigh interests qualitatively" or, as Justice Roberts would have them do, select the law of that interested jurisdiction with the most enlightened legislators or jurists! The chances of this third contingency occurring, however, appear remote indeed since, if any other alternatives are available, only the most imprudent lawyer would commence suit in a jurisdiction where he is unable to predict the law that will be applied.

Utilization of the interested lex fori approach in *Cipolla* would clearly have compelled the Pennsylvania courts to apply Pennsylvania substantive law. Had the suit been commenced in Delaware, that state would most certainly have applied its substantive law had it utilized this test. And, most important, all counsel and insurance companies involved could easily, and with considerable assurance, have predicted such results immediately following the occurrence of the accident. The advantages of such an approach are clear. In *most* cases application of an interested lex fori approach will: (1) assure that the law of an interested forum is applied to the cause without the necessity of the forum court's having to undertake that most laudable task, but one all courts are clearly incapable of performing, of weighing the competing interests against one another in an attempt to discover which are the "weightiest," or most significant; (2) preclude the possibility of the forum reaching the conclusion that the "interest score" is tied and compel it, as Justice Roberts would, to attempt to choose the "better rule of law," a function totally beyond the competence or experience of most judges and one which the people of all political subdivisions of this nation

CURRIE, *The Silver Oar and all That: A Study of the Romero Case*, in B. CURRIE SELECTED ESSAYS ON THE CONFLICT OF LAWS at p. 361 (1963).

have wisely entrusted to members of another co-equal branch of government; (3) provide—very soon after the occurrence—considerably more certainty and predictability than has yet, or perhaps can ever, be achieved by an approach totally dependent upon the weighing of competing interests, thus enabling all interested parties to rationally place a value on the case and begin settlement and trial preparation; and (4) eliminate the need for interested state forums to make difficult, if not impossible, distinctions between substantive and procedural law.

This is not to say that utilization of an interested lex fori approach does not also have draw-backs. One often cited objection is that it permits, and indeed encourages, forum shopping. And, to far too many lawyers and judges for far too many years, forum shopping has remained just slightly less reprehensible than wife beating. However, the ability of any litigant to forum shop is severely limited by the requirements of due process, personal jurisdiction and venue. And, should additional protection be needed it may possibly be found in the ability to have many conflicts cases that are commenced in state courts removed to federal courts where, if cause can be shown, they can be transferred to other, or more convenient, forums. While *Van Dusen v. Barrack*[12] might compel the transferee state to apply the conflicts law of the transferor forum when that forum is an interested jurisdiction and the defendant sought the transfer, there is no indication that the result would be the same if, for example, the transferor forum had no interest in the cause.[13] When filtered through these protective screens forum shopping loses much of its imagined stigma. It can only be utilized by one who claims that, through little or no fault of his own, another's conduct has caused him injury.[14] And even this allegedly wronged individual can only browse in forums that have previously been deemed proper by legislative or judicial fiat. Furthermore, it is time opponents of forum shopping in conflicts cases realize that this practice already exists on a broad scale and has, indeed, even achieved a modicum of judicial acceptability. Cases within the concurrent jurisdiction of state

12. 376 U.S. 612 (1964).

13. Justice Goldberg, in *Van Dusen v. Barrack*, specifically stated that, in compelling the transferee court to apply the conflicts law binding upon the transferor forum, the Court did "not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*." (Emphasis supplied) 376 U.S. at 639, 640.

14. But see the discussion of "sham" plaintiffs, *infra* page 399.

and federal courts are clearly illustrative of this fact. Any lawyer who today has a case that can be commenced in either a state or federal forum (which is true of a disproportionately large percentage of conflicts cases) would be foolhardy to conclude that *Erie v. Tompkins*[15] and *Guaranty Trust Co. v. York*[16] make it irrelevant whether a federal or state forum is selected; that the result will be the same in either case. What remains of the *Erie-York* doctrine in the wake of *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*[17] and *Hanna v. Plummer*[18] is not altogether clear. What is clear, however, is that today there are limitations on the power of a federal district court to apply state substantive law on the basis of an "outcome determinative" test alone; and, even more clearly, that the procedural and evidentiary changes spawned by *Hanna* not only make a mockery of "outcome determination" but, additionally, make intelligent "forum shopping" between state and federal forums an absolute necessity for all prudent lawyers. An example utilizing the proposed Federal Rules of Evidence clearly illustrates the permissibility—indeed, the necessity—of a plaintiff's engaging in limited forum shopping. Suppose the defendant in the *Cipolla* case had died from the injuries sustained in the collision, and that plaintiff was the only surviving witness. Suppose, further, that Pennsylvania has a Dead Man's statute which prevents a plaintiff from testifying against the interests of a deceased defendant. If plaintiff brings such a suit in a Pennsylvania state court he will be unable to testify about the defendant's negligent conduct and, in all probability, suffer a non-suit. If, on the other hand, he begins his suit "up the street" in the federal district court and the proposed federal evidence rules have by then been adopted, the Dead Man's statute will be inapplicable, and the plaintiff can testify in detail and at length as to the decedent's negligence in driving his automobile.[19] Obviously, a lawyer able to choose between a state and federal forum in such a case would be grossly negligent if he failed to intelligently select his forum. This illustration using the proposed federal evidence rules is not an isolated example. It is simply illustrative of one of a plethora of situations where a litigant, aware

15. 304 U.S. 64 (1938).
16. 326 U.S. 99 (1945).
17. 356 U.S. 525 (1958).
18. 380 U.S. 460 (1965).
19. See Proposed Federal Rule of Evidence 601 and the Advisory Committee's Note thereto contained in the PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES (March 1969), which makes clear that State Dead Man's Acts are to have no applicability to causes within the scope of the proposed federal rules.

of the differences in federal and state procedure and evidence, can now or will in the future be able to greatly affect the *outcome* of his case by astute, and entirely permissible, selection of the appropriate forum—or, to phrase it in the legal vernacular, by forum shopping! These gross departures from *Erie* and *York* have not been condemned as depriving litigants of "procedural" or "evidentiary" justice. Nor, in my opinion, will application of an interested *lex fori* approach and the resultant limited forum shopping it may spawn deprive litigants of "conflicts justice."

A second possible draw-back to an interested *lex fori* approach, and one that is more valid than the objection to forum shopping, is that it places a premium on winning the race to the court-house door, with the "spoils" of controlling the applicable law going to the swiftest. It is one thing to give a limited opportunity to forum shop to a party who *reasonably* believes that he has been injured because of another's negligence. As long as one of two or more parties must have the opportunity of chosing the forum, and thus in large measure controlling the applicable law, the principles of risk allocation clearly dictate that the choice should be given to that party who claims wrongful injury caused by the others. And, where two or more parties *reasonably* claim wrongful injury and, as a result, one commences suit in a forum which will hear the merits of all the claims, the slower parties to the court-house should have no basis to complain since their rights to choose the forum are no greater than those of their more diligent adversary. It is another, and more dangerous thing, however, to give this opportunity to select a favorable forum to one who does not have a *reasonable basis* to seek a judgment in his favor and who is commencing suit solely to shut off or diminish the rights of a legitimate claimant.[20] Suppose, for in-

20. The argument can be made that the illegitimate or sham claimant should be permitted to commence the suit since all he is asking the forum to do is effectuate *its policy* by barring the true plaintiff from recovering damages. Thus, this argument would continue, it is unfair to ask the forum to stay or dismiss the proceedings so that a result the forum opposes can be obtained by the true plaintiff in another forum.

The best answer to this argument is that, policy notwithstanding, the judicial system has been developed to allow those who believe they have been wronged to seek redress in the courts and to allow those allegedly causing those wrongs to come forth and defend against the charges levied. See, generally, *Osborn v. Bank of the United States* 9 Wheat 738, 824 (1824), providing that the "right to sue is anterior to" the making of a defense. To utilize the courts neither to present nor defend alleged legitimate claims, but solely to prevent such claims from being presented, seems to pervert the entire system. And, "weighed qualitatively," the forum's interest in protecting its domiciliary should be subverted to its interest in protecting the integrity of its judicial system!

While this reasoning may be said to indicate a "plaintiff bias," it can be argued that if this be so the entire judicial system—especially in the area of concurrent state and federal jurisdiction with the degree of choice this may give a plaintiff—also is somewhat

stance, that both Delaware and Pennsylvania utilized an interested lex fori approach for solving tort conflicts cases and that, immediately following the occurrence of the accident precipitating this article, John Shaposka commenced suit *as the plaintiff* in a Delaware court. Suppose, further, that the applicable procedure makes it compulsory for Cipolla to file a counter-claim in that action in the Delaware forum and that judgments in that cause would be res judicata in any other forum. Since, obviously, Delaware's guest statute would preclude recovery by Michael Cipolla in such action, all that the latter could do would be to bring suit elsewhere if he could and attempt to push it to trial before the Delaware suit. And, if he fails to do so, application of the interested lex fori approach will have worked to deprive him of the opportunity of bringing his cause in a forum where he could be heard on the merits. Thus, by winning the race to trial Shaposka, with no reasonable or legitimate cause of action against Cipolla,[21] could prevent the latter from having his cause heard in a jurisdiction which would give him the opportunity to prove negligence and obtain a recovery.

There is no doubt that, as illustrated, the interested lex fori approach is subject to abuse by "sham" plaintiffs who have no reasonable expectation of recovering a judgment for damages, but seek only to compel the "true" plaintiff to litigate the merits of his cause in a jurisdiction where he cannot obtain recovery, or where recovery will be more difficult or damages limited. And, while it is in accord with the concepts of risk allocation to permit a legitimate or "true" plaintiff to select his forum and attempt to prove negligence, it contravenes those concepts to present this choice to a "sham" plaintiff who cannot reasonably hope for a verdict in his favor and who has commenced suit only to block, limit or make more difficult the "defendant's" more plausible claim.

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indicative of a "plaintiff bias." Before a defendant can be entitled to an opportunity to present a fair defense, the plaintiff must be provided with a fair opportunity to present his claim!

Closely related to the problem of the "sham" plaintiff is the ability of a litigant—whether or not he alleges to be wronged—to, in some instances, obtain a declaratory judgment that might bind the true plaintiff. It stands to reason that use of the declaratory judgment procedure should not be permitted to encourage court-house races any more than use of the "sham" plaintiff device should be sanctioned. See Baade, *Counter-Revolution or Alliance For Progress? Reflections on Reading Cavers, The Choice-of-Law Process* 46 Texas L. Rev. 141, at 175-178 (1967).

21. It is interesting to note that, while the Delaware Guest Statute would preclude Cipolla from effecting a recovery in Delaware, that statute would not deprive the host from recovering from a guest whose negligence—by distracting the driver, for instance—caused the injury. Thus, the mere filing of the suit by John Shaposka would not illustrate that he is a "sham" plaintiff in this case. This fact could only be determined upon the completion of some discovery procedures.

The fact that such abuses of the interested lex fori approach *can* occur, however, is not a sufficient reason to scrap a procedure that otherwise seems to effectuate a workable accommodation between "conflicts justice," predictability, and ease of application. First of all, it is somewhat cynical to suppose that *every* person in the position of a John Shaposka, or even a large percentage of such persons, will attempt to become "sham" plaintiffs. And, secondly, it is inconceivable that the courts cannot and will not separate out the obvious sham plaintiffs from those with reasonable claims and refuse to litigate the causes of the former. Suppose, for instance, that the "plaintiff" in a conflicts case brings his action in an interested jurisdiction where *neither* party could recover because of some exclusionary law or evidentiary rule and that suit could have been commenced in other forums where one or both of the parties could have recovered upon a showing of negligence on the part of the other. That, in and of itself, would be considerable, if not irrefutable, evidence of the fact that the "plaintiff" is a phony trying only to abuse the system by winning the race to trial.[22] Or, suppose further that in *Cipolla v. Shaposka,* John Shaposka commenced suit in the Delaware state courts where Cipolla could under no circumstances recover but where, conceivably, Shaposka could recover if he could show the accident occurred as a result of the guest's negligence. If, as the discovery proceeds, it appears that there is no plausible basis for awarding recovery to Shaposka, it would be clear that the action was only a sham and the court should, following a preliminary hearing, either dismiss the action or stay it pending outcome of an action in another state by the true plaintiff.[23]

In short, judges can, with a minimum of effort, detect the most blatant, if not all, sham plaintiffs. And, if they are willing to remain vigilant and do not blink their eyes at obvious attempts to mock the choice of law process,[24] the danger of sham plaintiffs should prove more imagined than real.

22. That the forum where a recovery could not be obtained also has an interest, and that denying recovery would coincide with that interest, should not alter the fact that that plaintiff is really a "sham" when he assumes that role. See note 20, *supra.*

23. See note 21, *supra.*

24. In rejecting strict interest analysis, I do not also reject the choice of law process. Clearly, in all true conflicts cases, some method for choosing the applicable law must be utilized. All I ask is that more emphasis be placed on the practical and jurisdictional facits of choice of law and less be placed upon an in depth analysis of competing interests.

On the need for flexible rules governing choice of law problems, rather than strict adherence to a weighing of interests approach, see the interesting article by Professor Rosenberg in *Conflict of Laws Round Table Symposium* 49 TEXAS L. REV. 229 (1971).

On balance, it seems that an interested lex fori approach comes nearer to achieving true "conflicts justice" than any approach premised entirely, or predominately, upon an analysis of competing interests. Properly applied, it assures that the law of *an* interested jurisdiction is applied to the cause; provides the high degree of predictability so vital to an intelligent appraisal and handling of the case; and is easily handled by lawyers and judges who cannot be expected to become conflicts scholars. While it does allow for selective forum shopping, this practice, as limited by the protective screens, has been widely accepted and approved in most areas of concurrent state and federal jurisdiction and cannot even be deemed detrimental, let alone bad "per se."

The solutions predicated primarily upon a weighing of interests have simply not worked. In searching for "conflicts justice" the academic and judicial community have too frequently overlooked the plight of litigants and counsel. It is time to put an end to the search for perfection; to stop jousting with windmills that leave the Don Quixotes unscathed and beat the Sancho Panzas—and Michael Cipollas—into the inconstant sands of confusion.