Virginia Cases

a. McMillan v. McMillan, 219 Va. 1127 (1979)

VA couple gets in accident in Tennessee. Wife sues husband. Tennessee has spousal immunity law, whereas VA does not.

Modern jurisdictions would apply the law of the state of the marital domicile.

BUT Va SCt sticks to 1st Rest.

Tries to make modern approaches look worse than they are

Eg Second restatement - § 145. The General Principle

The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

the place where the injury occurred,

the place where the conduct causing the injury occurred,

the domicil, residence, nationality, place of incorporation and place of business of the parties, and

the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

This looks like a lot to take into account, but there is a more specific rule

Section 169 for the second restatement - intra-family immunity -

(1) The law selected by application of the rule of § 145 determines whether one member of a family is immune from tort liability to another member of the family.

The applicable law will usually be the local law of the state of the parties' domicil.

Also discusses NY cases to make interest analysis look bad

Babcock v. Jackson (NY 1963) -

1. NY plaintiff is a guest in a car with a NY driver. Crashed into a stone wall in Ontario

2. The issue was the application of the Ontario guest statute (says you can't sue the host for negligence) or NY law, which allows for host liability to guest for negligence

3. NY ct held that Ontario guest statute does not apply.

This is a false conflict. Ontario is not interested in its guest statute applying, and NY is interested in its normal tort law applying

Purpose of guest statute is avoiding fraudulent suits between guest and host

Ontario not interested bc fraud in this case would not be felt in Ont

NY is worried about deterring negligence and compensation.

NY is interested in its law applying bc it would want compensation to a NYer

But VA SCt then points to Kell v. Henerson (NY Sup. Ct. 1965) to show how arbitrary modern approaches are

Ontario guest and host

Trip begins and ends in Ontario

Accident in NY

Court applied NY law, not Ontario guest statute

Green: this is not arbitrary

Babcock was a false conflict

This is a true conflict. Ontario is interested in its law applying. Ontario statute concerns fraud and the effects of the fraud in this case would be felt in Ont.

NY is also interested. The purpose of NY law is compensation and deterrence

The compensatory interest is not there because there are no NYers to compensate

BUT the deterrence interest is there bc there is a NY accident to deter

Also, even if they were inconsistent, these are early cases in NY and Kell is just a lower NY ct decision

VA court sticks with the first restatement – chooses Tenn law – spousal immunity

Jones v. R.S. Jones, Inc. 246 Va. 3 (1993)

Plane crash in florida. It was serviced in VA. Wife of deceased pilot sued the service company. Issue is whether Florida 2 year SOL applies or VA's one year catch-all SOL applies.

Florida's wrongful death statute applies. It is the place of the harm. That much is clear.

Florida's wrongful death statute has its own SOL. Virginia has a procedural SOL applying to any COA before a VA court that does not have a SOL.

VA's wrongful death SOL (which is also two years) is substantive, so it does not apply to this case.

The VA supreme court could have said that the VA SOL is both substantive and procedural, rather than using the one year catch all or trying to apply Florida's SOL provision as substantive. But they did not do this.

The VA supreme court wanted to ensure that the one year catch-all provision did not apply to an action in which both states have a policy of two year SOL in wrongful death cases.

So - Virginia Supreme Court says that Florida's SOL is substantive.

The Florida COA is statutory, but the SOL is not close to the COA in the statute (although it may have been in the past)

But using the Davis v Mills test VASCt says they are bound together.

Says that the FL SOL is bound up with the FL right because the FL SOL clearly refers to FL wrongful death actions.

Green: jibberish

Here is the FL SOL

95.11. Limitations other than for the recovery of real property

Actions other than for recovery of real property shall be commenced as follows:

...

(3) Within four years.--

 (a) An action founded on negligence.

...

(4) Within two years.--

..

 (d) An action for wrongful death.

...

 (g) An action for libel or slander.

(5) Within one year.--

 (a) An action for specific performance of a contract.

...

The FL SOL refers to wrongful death actions generally, not FL wrongful death actions

The VA SCt says…

We think the limitation contained in Fla.Stat.Ann. § 95.11(4)(d) is directed so specifically to the right of action provided by the state's wrongful death act as to warrant saying that the limitation qualifies the right. Indeed, if the limitation is not so directed, one is constrained to ask, to what else could it possibly be pointed? The language, "[a]n action for wrongful death ... shall be commenced ... [w]ithin two years," is, to borrow from Davis v. Mills, "so specific that it hardly can mean anything else [than a qualification upon the newly created liability]."

NO – all procedural SOLs say the same thing, using the court’s reasoning, they would all be substantive

Buchanan case –

Buchanan’s forced off road by truck- Injured

Sued John Doe to get uninsured motorist benefits

- successful suit against Doe is prereq to getting from insurer

Buchanan is from Va, ins K signed in Va

BUT WVa uninsured motorist statute required proof of physical contact

Lex loci deliciti (tort) or contractual issue covered by place of contracting of insurance

This case is a “no brainer” under interest analysis – West Va. is not interested in its law applying.

* why have the proof of physical contact req?
* worried about fraud
	+ sacrifice compensation
	+ but fraud will not be felt in WVa
* VA law
	+ wants more compensation even if more fraud
* consequences of fraud
	+ VA
	+ compensation to Va'ian

But, because Va. is committed to the 1st Restatement, this case is difficult. Majority – the W. Va. statute simply sets forth a contractually-based condition of recovery from Ins Co. Dissent – no, the tort cause of action against John Doe is the condition for the contact action against insurer; thus the statute should be characterized as one of tort.

* "The forum state applies its own law to ascertain whether the issue is one of tort or contract."

Green: not clear what this means – esp. since the concurrence and dissent look to WVa cases to determine whether WVa law is contract or tort

 \* Perkins v. Doe (W. Virginia): characterized the W Va statute as one of tort.

 \* Lee v. Saliga (W. Virginia): characterized the W Va statute as one of contract (but this was a direct action against the insurance company).

 \* Buchanan case is more like Perkins than Lee, because it consists of a “John Doe” action.

Note the Lacy concurrence in Buchanan: it notes the public policy exception, but is this really the public policy exception in play? No, because, if so, Lacy would have advocated dismissing the case and have the plaintiff refile in West Virginia. Rather, this is veiled interest analysis (in effect, he is saying that because Virginia has an interest, we will keep the case and apply our substantive law of “no contact necessary”).

Note, that in Buchanan, the Court uses **recharacterization** to avoid an unwanted 1st Restatement conclusion.

Also concurrence:

Further, if the accident had occurred in Virginia, there would be no question of Buchanan's right to proceed to establish John Doe's liability for his injuries. Indeed, if Buchanan had filed suit in West Virginia, based on the facts before us here, the courts of that state would not have applied the physical contact rule to bar his action.

That’s renvoi… (also probably wrong about what WVa ct would do)

Dreher v. Budget: facts – accident in Virginia, plaintiffs are both Virginia residents, defendants who allegedly caused the accident rented their car in New York (i.e., that is where contract was made). NY law – derivative liability. Va – no such derivative liability. If issue is a matter of tort, Va. law applies (place of harm). If issue is a matter of contract, then NY law applies (place of contracting).

 \* Court first tries to characterize the action as one of contract. But there is a problem with this. The plaintiffs are, if anything, third-party beneficiaries of the contract. Under the 1st Restatement, this would really be a tort case, but the Va. S. Ct. doesn’t want to go with tort. It wants this to be a contract case.

**Note that Virginia appears, at first glance, to be an old-fashioned 1st Restatement state, but after reading these cases, we see that Virginia doesn’t apply the 1st Restatement straightforwardly in practice. It veers towards interest analysis, without admitting it.**

**10 states still follow 1st Restatement, and it tends to be messily applied – just as we have seen in Virginia.**

**PLEADING AND PROVING FOREIGN LAW**

In the past, a proponent of even sister state law had to prove such law as fact

* + 1. Had to be pleaded like any other fact
		2. Proved through rules of evid (w/ experts)
		3. Decided by jury
		4. Very limited appellate review

This was in large part because the cause of action was thought to be a remedial law of the forum and the content of foreign law was a factual basis in that cause of action for recovery

This is clearly not what we do now with respect to sister state law: Sister state law is subject to judicial notice, with all that that means (i.e., court makes the decision as a matter of law, sister state law not formally submitted as “evidence” requiring proof, de novo review upon appeal, etc.)

While courts are generally required to take judicial notice of sister state law, the situation is mixed with regard to foreign law. FRCP 44.1 provides that a federal judge takes judicial notice of foreign law.

**A separate question: What if party fails to plead foreign law?**

Consider what happens when a party fails to plead any law…?

The claim is generally considered sufficient until the D brings a motion to dismiss for failure to state a claim. So the same thing should arguably be true when the choice of law rules say that foreign law applies but the plaintiff says nothing about it.

What does the D have to say to get the ball in the P’s court – just mouth the words “failure to state a claim”?

* Usually thought that the D has to give an argument – offer a possible cause of action and show why the P’s facts don’t fit it

sometimes courts are said to be permitted to dismiss sua sponte for failure to state a claim when the defendant does not mention it

Green wonders whether a court might not be obligated to do so

1. 2 Californians enter into gambling contract in Cal, perf in Cal
	* + 1. P sues D under contract in Cal state ct
			2. D fails to bring motion to dismiss for failure to state a claim
			3. can the case proceed or must ct bring up CA law
			4. Green: Yes

This would apply when the Californians sue in NV state court too – obligation to protect Cal interests under Full faith and Credit

Maybe no comparable duty with the relevant law is foreign…?

A separate, but related, question: **What if foreign law is introduced by the D or the ct, but the parties do not offer evidence of foreign law**?

Many possible solutions:

- put burden on plaintiff and dismiss
- put burden on defendant and assume states a claim
- put burden on party best able to identify law
- put burden on court
- use presumption about what law is like to allow case to proceed

This used to be quite common because there were no good law libraries

If it was a general common law case, under Swift the ct would just come to its own conclusion (by forum lights) about what the general common law was

but there were also some presumptions that courts would use

EG what about question of whether the general common law in Pa was overridden by statute? What happens if no evidence was offered about the matter? Rather than dismissing the action, the court would presume that the common law still applies, unchanged by state, in Pa – this would be so even though the forum might have abrogated the common law by statute

 Would things be different if the action were under Ca. or Fl. Law (formerly civil law states)? Yes - in these cases, the court would generally NOT presume that the general common law applied

 What about Engl. Law? Presume the common law applies. French law? Proponent must offer evidence of what French law is, otherwise, action will be dismissed (unless another presumption was used).

Also note that courts may often presume that fundamental principles of law apply (regardless of whether they are actually a part of the common law). Examples: breach of contract, liability for negligence, battery

This shifts the burden to the party opposing the application of the fundamental principle of law to show that the jurisdiction’s law did not have this fundamental principle.

Courts also sometimes presumed that sister state law/foreign law was identical to forum state law. A dubious proposition, but there is an argument to made for this: that the parties have consented to the law of the forum state when they make no arguments for sister state law/foreign law.