SMU | Dedman School of Law

SMU Law Review

Volume 33 | Issue 5 Article 4

January 1980

Abandonment of Lex Loci Delicti in Texas: The Adoption of the Most Significant Relationship Test

Peter J. Riley

COMMENTS

ABANDONMENT OF LEX LOCI DELICTI IN TEXAS: THE ADOPTION OF THE MOST SIGNIFICANT RELATIONSHIP TEST

by Peter J. Riley

Since 1888 Texas courts have applied lex loci delicti, the law of the place of the injury, as the choice of law rule in all multistate tort actions.[1] Recently, in *Gutierrez v. Collins*,[2] the Supreme Court of Texas rejected this rule in common law tort actions and instead adopted the "most significant relationship" test set forth in sections 6 and 145 of the *Restatement (Second) of Conflict of Laws*.[3] This decision follows the modern trend; most jurisdictions have abandoned the lex loci delicti rule in favor of more flexible rules.[4] This Comment seeks to review and analyze the development of both the lex loci delicti and the most significant relationship approaches.

---

1. *See* St. Louis, Iron Mountain & S. Ry. v. McCormick, 71 Tex. 660, 9 S.W. 540 (1888). *See generally* 12 TEX. JUR. 2D *Conflict of Laws* § 12 (1960); Stumberg, *Conflict of Laws—Torts—Texas Decisions*, 9 TEXAS L. REV. 21 (1930).

2. 583 S.W.2d 312 (Tex. 1979).

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971) [hereinafter referred to and cited as RESTATEMENT (SECOND)].

4. *See, e.g.*, Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453 (Ark. 1977); Reich v. Purcell, 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); Rungee v. Allied Van Lines, Inc., 92 Idaho 718, 449 P.2d 378 (1968); Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); Witherspoon v. Salm, 142 Ind. App. 655, 237 N.E.2d 116 (1968); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973); Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Pevoski v. Pevoski, 371 Mass. 358, 358 N.E.2d 416 (1976); Sweeney v. Sweeney, 402 Mich. 234, 262 N.W.2d 625 (1978); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Malk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Issendorf v. Olson, 194 N.W.2d 740 (N.D. 1972); Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971); Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968), *cert. dismissed*, 393 U.S. 957 (1969); Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wash. 2d 806, 459 P.2d 32 (1969); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). *See generally* Annot., 29 A.L.R. 3d 603 (1970); Ausubel, *Conflict of Laws Trends—Torts*, 19 DE PAUL L. REV. 684 (1970); Carpenter, *New Trends in Conflicts Rules Affecting Torts: A Chronological Review*, 1 LOY. CHI. L.J. 187 (1970); Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969); von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975); Yeager, *Recent Developments in the Conflict of Laws—Iowa Personal Injury Cases*, 23 DRAKE L. REV. 47 (1973); Comment, *Choice of Law: The Abandonment of Lex Loci Delicti—Should Virginia Follow the Trend?*, 13 U. RICH. L. REV. 133 (1978).

In addition, this Comment examines *Gutierrez* and the forces that led to the adoption of a new choice of law doctrine in Texas.

I. LEX LOCI DELICTI

The world in general, and the United States in particular, is composed of many governments, each with its separate legal system. Transcending governmental boundaries, however, is the pursuit of commercial and social activity. Consequently, events frequently occur that have a relationship with more than one governmental territory. Which government's law will be applied when such a situation arises is the central concern of the law of conflicts.

The first major theoretician of the American law of conflicts was Joseph Story.[5] He postulated three basic concepts: (1) every state possesses absolute sovereignty within its own territory and may bind all persons or property located there; (2) no sovereign can give laws effect beyond its boundaries; (3) consequently, whatever force the laws of one state have beyond its borders depends upon the deference given to those laws by other states.[6] These basic concepts introduced American courts to the territoriality-comity theories that prevailed in Europe.[7] Even today comity is often expressed as the basis for giving effect to foreign law.[8] Comity, however, has never totally satisfied territorial theorists as an adequate explanation for the operation of foreign law in the forum. Assuming that law is strictly territorial, it is inconsistent to believe that such law can have an operative effect beyond the territorial limits of the government from which it emanates.[9] Consequently, the view that foreign law is allowed to operate, by comity, in the forum was replaced by the concept that a foreign-created right or obligation is enforced by the forum.[10] This proposition was stated by Justice Holmes: "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found."[11]

---

5. *See, e.g.*, Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934); Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230 (1961). At the time America achieved independence there was no system of choice of law rules in this country. *See* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 4 (1962).

6. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 7 (5th ed. 1857); *cf.* Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 306 (1953) (three basic propositions of international territorial theory were summarized: (1) the laws of each state have no force beyond its borders; (2) all persons within the borders of a state, whether permanently or temporarily, are subject to those laws as long as they remain there; (3) rights acquired in one state will be recognized in another state only so long as the interests of the second state are not prejudiced).

7. G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 6 (1963).

8. *Id.*

9. *Id.* at 7; *see* G. STUMBERG, *supra* note 7, at 7-12; Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 365 (1945).

10. Cheatham, *supra* note 9, at 365.

11. Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1909).

Subsequently, Joseph Beale[12] expanded and popularized this theory of fixed legal obligations, also known as the vested rights theory, into all areas of conflict law.[13] In tort actions, the obligation is created by the law of the place of the injury. Thus the concept became known as the lex loci delicti doctrine.

In 1934 lex loci delicti was incorporated into the *Restatement of the Conflict of Laws*.[14] Within ten years, all states had adopted the *Restatement* codification.[15] Applying lex loci delicti, the *Restatement* sought to identify the one state that created the particular right in question. The law of that state governed all actions based on the right, wherever the action was brought. Predictability of outcome, uniformity of decision, support of the parties' reasonable expectations, and ease of application were the proclaimed advantages of this rule.[16]

Problems of Application. The promised advantages of lex loci delicti have not materialized because courts, tending to view the consequences of invariably applying foreign law as harsh, have developed a variety of devices in order to apply the law of their own jurisdiction.[17] One such device is the resort to arguments grounded in public policy. Many courts have refused to apply the law of the place of the injury when that law violated the court's conception of good morals, natural justice, or the general interests of the forum state's citizens.[18] In *Kilberg v. Northeast Airlines*,[19] for exam-

12. 2 J. BEALE, A TREATISE ON THE CONFLICTS OF LAWS (1935); *see* Cheatham, *supra* note 9, at 379-85.

13. *See* R. LEFLAR, AMERICAN CONFLICTS LAW 173-74 (3d ed. 1977).

14. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter referred to and cited as RESTATEMENT]. Joseph Beale was the reporter for the first *Restatement*. Although other theorists opposed him, Beale incorporated his ideas into the *Restatement*:

> § 378 LAW GOVERNING PLAINTIFF'S INJURY
> The law of the place of the wrong determines whether a person has sustained a legal injury.
>
> § 379 LAW GOVERNING LIABILITY-CREATING CONDUCT
> Except as stated in § 382, the law of the place of the wrong determines
> (a) whether a person is responsible for harm he has caused only if he intended it,
> (b) whether a person is responsible for unintended harm he has caused only if he was negligent. [*sic*]
> (c) whether a person is responsible for harm he has caused irrespective of his intention or the care which he has exercised.

15. *See* RESTATEMENT IN THE COURTS 223-329 (1945) for a complete summary of the states that adopted the first *Restatement*'s approach.

16. *See, e.g.*, 3 J. DOOLEY, MODERN TORT LAW: LIABILITY AND LITIGATION § 46.01 (1977); LaBrum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747, 748 (1968).

17. *See* 3 J. DOOLEY, *supra* note 16; O'Toole, *The Place of Wrong Rule: "An Unrepealed Remnant of a Bygone Age, A Drag on the Coattails of Civilization?,"* 13 N. ENG. L. REV. 613, 627 (1978); Comment, *supra* note 4, at 137; Note, *Conflict of Laws: The Adoption of the Most Significant Relationship Test in Missouri*, 38 U.M.K.C. L. REV. 457, 460 (1970).

18. *See* Hudson v. Von Hamm, 85 Cal. App. 323, 259 P. 374 (1927); Marchlik v. Coronet Ins. Co., 30 Ill. 2d 327, 239 N.E.2d 799 (1968); London Guar. & Accident Co. v. Balgowan S.S. Co., 161 Md. 145, 155 A. 334 (1931); Herrick v. Minneapolis & St. L. Ry., 31 Minn. 11, 16 N.W. 413 (1883), *aff'd*, 127 U.S. 210 (1888); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936). *See generally* Lorenzen, *Territoriality, Public Policy, and the Conflict of*

ple, the plaintiff's decedent boarded an airplane in New York and was killed when the plane crashed in Massachusetts. Massachusetts' wrongful death statute limited recovery to $15,000, while New York's constitution specifically forbade any limitation on damages in wrongful death actions. The New York court applied its own wrongful death statute, reasoning that the fortuity of the place of injury should not subject New York citizens to foreign laws that contravene basic New York public policy.[20]

While invocation of public policy produced a potential for an increased damage award in *Kilberg*, it resulted in dismissal of the suit in *Carter v. Tillery*.[21] In *Carter* the plaintiffs, Texas residents, were injured in a plane crash in Chihuahua, Mexico. The plaintiffs sued the pilot for negligence in a Texas district court. The trial court refused to apply Mexican law and dismissed the action. The court of civil appeals affirmed, basing its decision on the dissimilarity doctrine.[22] This doctrine, well-established in Texas,[23] requires courts to dismiss suits when conflicts of law rules demand application of Mexican law. The doctrine was predicated on the perception that the laws of Mexico differed substantially from those of Texas. Consequently, application of this dissimilar law was deemed contrary to public policy, and any action requiring such application could not be entertained in Texas courts.

A second device developed by courts to avoid applying the law dictated by lex loci delicti is the characterization of the issue in controversy as procedural.[24] The general rule recognized in the *Restatement* was that the law of the forum governed procedural matters.[25] Thus, in *Kilberg* the New York court buttressed its public policy reasoning by labeling the determination of the amount of recovery a procedural matter.[26] Likewise, in *Wells v. American Employers' Insurance Co.*[27] the court determined, over a vig-

Laws, 33 YALE L.J. 736, 746-47 (1924); Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 974-75, 992-94 (1956).

19. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

20. "New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old." *Id.* at 39, 172 N.E.2d at 528, 211 N.Y.S.2d at 135. Note that New York probably would have applied its own law even if the laws of New York and Massachusetts had been switched. In that situation unlimited liability probably would be contrary to public policy.

21. 257 S.W.2d 465 (Tex. Civ. App.—Amarillo 1953, writ ref'd n.r.e.).

22. *Id.* "Except for Texas, virtually all American jurisdictions have discredited and abandoned the once-favored doctrine . . . ." Note, *The Texas Dissimiliarity Doctrine as Applied to the Tort Law of Mexico—A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1281 (1977).

23. This policy has existed in Texas since 1887. *See* Texas & Pac. Ry. v. Richards, 68 Tex. 375, 4 S.W. 627 (1887). In Texas the rule developed in response to difficulties in interpreting Mexican law and also because Mexican laws have historically been more penal in nature. Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896). *See generally* Paulsen, *Foreign Law in Texas Courts*, 33 TEXAS L. REV. 437, 439-58 (1955); Note, *supra* note 22.

24. *See generally* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); R. LEFLAR, *supra* note 13, at 174; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 226 (1971).

25. *See* RESTATEMENT, *supra* note 14, § 585, which states: "All matters of procedure are governed by the law of the forum."

26. 9 N.Y.2d at 41, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

27. 132 F.2d 316 (5th Cir. 1943).

orous dissent,[28] that direct insurer liability was a procedural matter. Consequently, when a plaintiff residing in Texas brought suit in Texas for automobile accident injuries against a Louisiana resident's insurer, the court applied Texas law.[29]

A third device used by courts to escape lex loci delicti's mandate was the characterization of an injury as a breach of contract rather than a tort.[30] The choice of law for contract cases often differed from the choice of law in tort cases.[31] Thus, in *Hudson v. Continental Bus System, Inc.*[32] the plaintiff purchased a round-trip bus ticket to Acapulco, Mexico, from the defendant in Dallas. While in Mexico the bus was involved in an accident that injured Mrs. Hudson. She filed suit in Dallas, arguing that Texas law should apply because the ticket formed the basis for a contract between the parties. The trial court dismissed the suit, holding that the cause of action arose from a tort occurring in Mexico and thus was not justiciable in Texas because of the dissimilarity doctrine. The court of civil appeals disagreed, holding that the bus ticket created a contract.[33] Accordingly, the court reversed and remanded with directions that the case be adjudicated under Texas law.[34]

These examples of judicial reliance on public policy and characterization of issues as either procedural or contractual illustrate the means by which courts have been able to avoid the harsh results that would otherwise flow from strict adherence to the lex loci delicti rule.[35] At the same time, however, use of such escape devices undermined uniformity and predictability in court decisions, the reasonable expectations of liti-

28. *Id.* at 317-18.

29. *Id.* at 317.

30. *See* Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928), in which a third party rented an automobile in Connecticut from the defendant, driving the car to Massachusetts where it was involved in an accident that injured a passenger. The passenger brought an action in Connecticut based on a Connecticut statute that imposed liability on automobile rental agencies for injuries caused by the lessee. The laws of Massachusetts, the place of the injury, imposed no such vicarious liability. The Connecticut court applied its own statute by characterizing Levy as a third-party beneficiary under the Connecticut leasing contract. As such, he was entitled to the benefit of the law of the place where the contract was formed. *See generally* R. LEFLAR, *supra* note 13, at 271-75; R. WEINTRAUB, *supra* note 24, at 224-26; North, *Contract as a Tort Defense in the Conflict of Laws*, 26 INT'L & COMP. L.Q. 914 (1977).

31. *See* RESTATEMENT, *supra* note 14, § 332. By operation of § 332, the law of the place of contracting is applied.

32. 317 S.W.2d 584 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.).

33. *Id.* at 588.

34. *Id.* at 589. Such a characterization argument was dismissed in Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *see* note 19 *supra* and accompanying text. Kilberg's administrator had urged that a contract between Kilberg and defendant airline had been formed when Kilberg purchased his ticket. Plaintiff contended that the crash was a breach of this contract (promise to provide safe transportation) and that New York contractual law (with no limit on amount of recovery) should apply. The New York court, however, summarily disposed of this characterization. *Id.* at 35, 172 N.E.2d at 527, 211 N.Y.S.2d at 135.

35. *See* Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), in which the court states, "[t]he place of injury . . . [is] . . . entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment . . . ." *Id.* at 39, 172 N.E.2d at 527, 211 N.Y.S.2d at 135.

gants, and ease of application, which have been the primary advantages of the lex loci delicti doctrine. The erosion of the primacy of these considerations portended the demise of the lex loci delicti rule.

Before the courts had demonstrated their dissatisfaction with the lex loci delicti rule, scholars were criticizing the rule because it was not founded upon the same methods of legal analysis that had been successfully developed in other areas of the law, such as domestic torts, contracts, and property.[36] In these legal areas, principles developed from a blend of precedent, analogy, legal reasoning, and consideration of social needs, not from the creation of a simple mechanical rule. Accordingly, scholars started to develop a variety of alternative theories.[37] The first major alternative was introduced by Professor David Cavers in 1933.[38] Cavers posited that the emphasis of the law of conflicts should be on the reaching of a proper result, and not on the search for an analytically correct rule.[39] To help courts achieve such an emphasis, Cavers suggested a three-step analysis. A court should first scrutinize the event or transaction, then compare the proffered foreign rule with the forum rule to determine whether they produce different results, and finally, choose the rule that produces justice between the litigants in light of the policies behind the conflicting laws.[40] Cavers believed that this analytical process would force courts to develop conflicts rules in the same way they developed principles in most areas of substantive law.[41]

Cavers' article stimulated the interests of other scholars in developing additional analytical alternatives to the rule in the *Restatement*.[42] These alternatives avoided the search for one proper rule and instead attempted to balance the interests of the parties, the various state policies, and the need for certainty and uniformity of result. On occasion, courts also experimented in applying a choice of law based on an analysis of various factors instead of mechanically applying lex loci delicti. An example is *Gordon v. Parker*.[43] In *Gordon* an action for alienation of affections was initiated in Massachusetts by a husband who, with his wife, was domiciled in Pennsylvania. Plaintiff's wife had engaged in sexual relations with the

36. The three most vocal critics were Walter Wheeler Cook, David Cavers, and Ernest G. Lorenzen. *See* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933); Lorenzen, *supra* note 18.

37. Leading works in this endeavor are: B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); A. EHRENZWEIG, *supra* note 5; R. LEFLAR, *supra* note 13; A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965); R. WEINTRAUB, *supra* note 24.

38. Cavers, *supra* note 36, at 187-97.

39. *Id.* at 191.

40. *Id.* at 193-94. This means that the court should evaluate the two laws as a legislature would. Normally legislatures consider the policies behind laws and determine what is best for the community. This idea that the court should choose the "better law" has received support by one modern theorist. *See* R. LEFLAR, *supra* note 13, at 212-15.

41. *See* Cavers, *supra* note 36, at 188.

42. Von Mehren, *supra* note 4, at 935; *see* note 85 *infra* for a short discussion of the range of alternatives that have developed.

43. 83 F. Supp. 40 (D. Mass. 1949).

defendant in Massachusetts. The plaintiff sought application of Massachusetts law because Pennsylvania did not recognize alienation of affections as a cause of action.[44] The defendant moved for summary judgment on grounds that the matrimonial domicile was the place where the ultimate wrong was done to the husband and that the law of the domicile, Pennsylvania, did not recognize plaintiff's claim. The court, while recognizing that lex loci delicti should not be set aside lightly, rejected defendant's contention and applied Massachusetts law.[45] It held that Massachusetts' interests in the suit outweighed those of Pennsylvania.[46] As the place of the husband's domicile, and thus the place of marital injury, Pennsylvania concededly had an interest.[47] Massachusetts, however, was the locus of the misconduct and the domicile of the alleged wrongdoer.

Other courts departed from the lex loci delicti doctrine by analysis similar to that used in *Gordon v. Parker*.[48] In 1962 the United States Supreme Court noted this trend with approval in *Richards v. United States*.[49] Although in *Richards* the Court applied lex loci delicti,[50] it observed that some states had rejected the traditional rule in situations in which application would appear "inappropriate or inequitable."[51] The Court endorsed the emerging approach:

> Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.[52]

---

44. *Id.* Pennsylvania did have criminal sanctions, however, against such activities.

45. *Id.* at 42. The court drew a distinction between injuries to body and mind, where precedent existed for applying the rule of the law of the state in which the injury occurred, and injury to consortium, where there was no conflict of law precedent applicable in Massachusetts. *Id.* at 41.

46. *Id.* at 42. The court stated that Massachusetts has an interest in conduct within its borders that lowers the standards of the community within which the conduct occurs. The court further noted that Massachusetts is concerned when its citizens interfere with other people's marriages.

47. *Id.*

48. *See* Vrooman v. Beech Aircraft Corp., 183 F.2d 479 (10th Cir. 1950); Seigmann v. Meyer, 100 F.2d 367 (2d Cir. 1938); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957).

49. 369 U.S. 1 (1962). Chief Justice Warren, writing for the Court, saw "no compelling reason" to prevent federal courts from applying more flexible choice of law rules. *Id.* at 12-13.

50. Plaintiffs, the personal representatives of passengers killed in an airplane crash that occurred in Missouri, brought suit against the United States for negligence allegedly committed by the Federal Aviation Agency. Under the Federal Tort Claims Act, federal courts must look in the first instance to the law of the state in which the negligent acts occurred. 28 U.S.C. § 1346(b) (1976). The Supreme Court stated that this also required application of that state's choice of law rules. 369 U.S. at 11. Since Oklahoma decisions had declared that an action for wrongful death is based on the statute of the state in which the injury occurred, the Missouri statute limiting the amount of recovery was applied instead of the Oklahoma statute, which provided no such limitation.

51. 369 U.S. at 13.

52. *Id.* at 15 (footnote omitted).

The *Restatement (Second)*, drawing support from the dictum in *Richards*, adopted the most significant relationship test one year after the *Richards* decision was handed down.[53] The new choice of law rule replaced the lex loci delicti principle with a balancing of factors approach.[54] The *Restatement (Second)* was influential in accelerating the trend among the states to abandon lex loci delicti.

II. THE ADOPTION OF THE MOST SIGNIFICANT RELATIONSHIP TEST IN TEXAS

In 1967 the Texas appellate courts for the first time were presented with an opportunity to abandon the lex loci delicti principle and to adopt the *Restatement (Second)*'s most significant relationship test in tort controversies.[55] In *Marmon v. Mustang Aviation, Inc.*[56] an airplane crashed in Colorado, causing the death of the Texas residents who had chartered the plane

53. *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 379 (Tent. Draft No. 8, 1963). Another case that strongly influenced the development of *Restatement (Second)* is Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (N.Y. 1954). *Auten* involved a contractual choice of law question. Its importance derives from the court's emphasis on contact analysis rather than applying the traditional mechanical rule. The *Restatement (Second)* relies heavily upon contact analysis.

54. RESTATEMENT (SECOND) *supra* note 3, § 145 provides:

> § 145. The General Principle
> (1) 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.
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) 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.

Section 6 provides:

> § 6 Choice-of-Law Principles
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (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.

55. *See generally* Larsen, *Conflict of Laws, Annual Survey of Texas Law*, 22 SW. L.J. 190, 191-92 (1968); Comment, *Texas Public Policy in Conflicts: The Cuckold of Lady Fate*, 22 BAYLOR L. REV. 205 (1970).

56. 416 S.W.2d 58 (Tex. Civ. App.—Austin 1967), *aff'd*, 430 S.W.2d 182 (Tex. 1968). *See generally* Note, *The Doctrine of Most Significant Contacts in Texas: Marmon v. Mustang Aviation, Inc.*, 22 SW. L.J. 863 (1968).

from a Dallas-based company.[57] The choice of law problem arose because the Colorado wrongful death statute imposed a $25,000 limit on damages recoverable for each death, while the Texas wrongful death statute[58] placed no limit on recoverable damages. The plaintiff's contention that Texas law should apply because of the most significant relationship doctrine was rejected by the trial court.[59] The Austin court of civil appeals discussed the recent trends in choice of law at length, citing *Richards v. United States*[60] and the *Restatement (Second)*.[61] The appellate court nevertheless refused to adopt the new methodology and affirmed the trial court's application of Colorado law, reasoning that such a well-established rule should be reversed only by the Texas Supreme Court.[62] On appeal by writ of error the supreme court declined the opportunity to abandon lex loci delicti as the governing tort choice of law rule in Texas.[63] The supreme court was concerned that adoption of the new methodology would give the Texas wrongful death statute effect outside Texas's borders. The court emphasized that historically the statutory construction of the Texas wrongful death statute had limited the statute's scope to domestic deaths.[64] Consequently, alteration of such settled judicial construction

57. Three of the four passengers killed were executives of Dr. Pepper Co., a corporation that was headquartered in Texas. The trip west had been made on behalf of the Dr. Pepper Co. under a contract made by the company with defendant, whose principal place of business was in Texas. The pilot had been hired in Texas, and the aircraft was garaged, maintained, licensed, and contracted for in Texas. Compare these facts and the resulting decision to the decision in Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 124 N.E.2d 99, 211 N.Y.S.2d 133 (1961); *see* notes 19-20 *supra* and accompanying text.

58. *See* TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (Vernon 1940 & Supp. 1980). Prior to its amendment in 1975, art. 4678 read in part:

> Whenever the death or personal injury of a citizen of this State or of the United States . . . has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign state or country, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. The law of the forum shall control in the prosecution and maintenance of such action in the courts of this State in all matters pertaining to procedure.

Tex. Rev. Civ. Stat. art. 4678 (1940). In 1975 this article was amended to include the following language: "[T]he court shall apply such rules of substantive law as are appropriate under the facts of the case." TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980).

59. Nevertheless, the trial court asked the jury to assess damages applying Texas law in the event that lex loci delicti was found inapplicable.

60. 369 U.S. 1 (1962); *see* notes 49-52 *supra* and accompanying text.

61. *See* 416 S.W.2d at 64.

62. *Id.* at 63. The court stated: "We have been urged to adopt the new doctrine of most significant contacts. We find much merit in the doctrine, and, if free to act in a cause of first impression, we would be inclined to explore the doctrine more fully with a view to consideration of adoption." *Id.*

63. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 194 (Tex. 1968). *See generally* Thomas, *Conflict of Laws, Annual Survey of Texas Law*, 23 SW. L.J. 159, 159-62 (1969).

64. 430 S.W.2d at 185. The court referred to Willis v. Missouri Pac. Ry., 61 Tex. 432 (1884). *Willis* involved the death of plaintiff's husband in a railroad accident in Indian territory. The supreme court upheld a demurrer because the Indian territory did not allow recovery under wrongful death (under common law there was no wrongful death action), and because the Texas Wrongful Death Statute, Tex. Civ. Stat. ch. 52 (1879), could not be applied extraterritorially.

would need to come from the legislature,[65] despite the language in *Richards*[66] that arguably allows for extraterritorial extension of statutes.

In a lengthy dissent Justice Steakley asserted that the court had never reached the question of whether the wrongful death statute applied extraterritorially. Consequently, prior statutory construction was not binding, and the court was free to follow *Richards*.[67] Justice Steakley further asserted that the Texas wrongful death statute did not mandate application of the law of the place of the injury; rather, it merely authorized such application.[68]

The *Marmon* court's reliance on statutory construction left open the question of whether Texas courts must apply lex loci delicti in actions derived from the common law. Justice Norvell, who wrote the majority opinion, suggested a possible answer in his subsequent opinion denying a motion for rehearing: He stated:

> The doctrine of lex loci delicti is a court-made rule . . . . and the abandonment of this rule in favor of some different one, such as a "significant contacts" rule, while it may involve the overruling of common law precedents on policy grounds, does not necessarily involve saying that a statute had one meaning fifty years ago and a different one today.[69]

This statement led observers to conclude that the Texas Supreme Court would adopt the most significant relationship test when a case arose involving a common law choice of law rule.[70] Despite these predictions, the courts of civil appeals since *Marmon* continued to apply automatically lex loci delicti, even in common law tort actions.[71] The federal courts apply-

---

> [W]here the right of action does not exist except by reason of statute, it can be enforced only in the state where the statute is in existence and where the injury occurred. . . .
>
> The principle upon which the doctrine rests is the want of power in a state to give her laws an extraterritorial effect.

61 Tex. at 434. The court, in addition to reviewing case law, noted that nothing in the statute could be construed as giving it extraterritorial effect. *Id.* at 186.

65. 430 S.W.2d at 185. The court followed Moss v. Gibbs, 370 S.W.2d 452, 458 (Tex. 1963), in which it had adopted the general precept that statutes, as creatures of the legislature, could only be changed by the legislature, and that once courts have given the statute a meaning they cannot alter that meaning until the legislature acts.

66. The Texas Supreme Court referred to the dictum in Richards v. United States, 369 U.S. 1 (1962). 430 S.W.2d at 185; *see* note 52 *supra* and accompanying text for the relevant dictum.

67. 430 S.W.2d at 187-89. Justice Steakley's dissent was joined by Justices Smith and Greenhill.

68. *Id.* at 192. *See generally* Thomas, *supra* note 63, at 160.

69. 430 S.W.2d at 194 (citation omitted).

70. Professor A.J. Thomas was the first observer to reach this conclusion, *see* Thomas, *supra* note 63, at 161, and was followed by others. *See generally* Lipschutz v. Gordon Jewelry Corp., 373 F. Supp. 375, 385 (S.D. Tex. 1974); Comment, *supra* note 55, at 213 n.42. The supreme court nevertheless has adhered to *Marmon* in wrongful death actions. *See* Click v. Thuron Indus., Inc., 475 S.W.2d 715 (Tex. 1972); Francis v. Herrin Transp. Co., 432 S.W.2d 710 (Tex. 1968). *See generally* Thomas, *Conflict of Laws, Annual Survey of Texas Laws*, 26 Sw. L.J. 191, 193 (1972); Thomas, *supra* note 63, at 162-64.

71. *See* Lee v. Howard, 483 S.W.2d 922 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.); McEntire v. Forte, 463 S.W.2d 491 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.); Brown v. Seltzer, 424 S.W.2d 671 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.).

ing Texas law under the *Erie* doctrine,[72] however, recognized the distinction made in *Marmon* and applied the *Restatement (Second)* approach to choice of law problems involving common law torts.[73]

Adoption of the New Test by the Texas Supreme Court. Not until 1979, in *Gutierrez v. Collins*,[74] did the supreme court choose to consider which law should apply in a common law tort action. In *Gutierrez* the plaintiff sought to recover damages for personal injuries suffered in an automobile accident that occurred in Chihuahua, Mexico. Both parties were residents of El Paso, Texas. The trial court's dismissal of the action was affirmed by the court of civil appeals,[75] based on the dissimilarity doctrine[76] and on a narrow interpretation of *Marmon*. The Texas Supreme Court reversed on both grounds,[77] holding that the law of the place with the most significant relationship to the occurrence will control in common law conflicts actions.[78] In addition, the court held that the dissimilarity doctrine will no longer be recognized as a defense in Texas.[79]

The court began its analysis by examining the wrongful death statute, concluding that the statute mandates the choice of law only in statutory actions. The court stated that the statute does not govern a choice of law rule for common law actions.[80] Although lower courts had applied the statute to common law actions, the supreme court had never done so, and therefore it was not bound by stare decisis.[81] Thus, *Gutierrez* became a

72. The doctrine, which emanates from Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), requires the federal courts, when deciding questions of conflict of laws in diversity of citizenship cases, to follow the rules prevailing in the states in which they sit. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 264-66 (3d ed. 1976).

73. *See* Continental Oil Co. v. General American Transp. Corp., 409 F. Supp. 288, 295-96 (S.D. Tex. 1976), in which the most significant relationship test was held applicable in an action involving negligent manufacture of railroad tank cars. The district court reasoned that since all Texas decisions mandating lex loci delicti involved wrongful death actions, Texas courts might apply the new approach in actions not involving the statutory rule. The immediate case was such an action. *See also* Couch v. Mobil Oil Corp., 327 F. Supp. 897, 900 (S.D. Tex. 1971), in which the district court applied Texas law instead of the law of the place of the personal injury, Libya. The court based this choice of law on a limitation of *Marmon* to wrongful death situations. *But see* Smith v. General Motors Corp., 382 F. Supp. 766 (N.D. Tex. 1974), *aff'd*, 526 F.2d 804 (5th Cir. 1976), in which the district court in a personal injury action refused to apply the most significant relationship test as the choice-of-law rule. "The courts of the State of Texas have been unbending in applying the *lex loci delictus* rule in negligence cases." 382 F. Supp. at 768 (citing to Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968)).

74. 583 S.W.2d 312 (Tex. 1979).

75. Gutierrez v. Collins, 570 S.W.2d 101 (Tex. Civ. App.—El Paso 1978), *rev'd*, 583 S.W.2d 312 (Tex. 1979).

76. *See* text accompanying notes 22 & 23 *supra*.

77. The decision was unanimous.

78. 583 S.W.2d at 318.

79. *Id.* at 322.

80. *Id.* at 314.

81. *Id.* at 319. Even if it were bound, however, the court stated that "*[s]tare decisis* prevents change for the sake of change; it does not prevent any change at all. It creates a strong presumption in favor of the established law; it does not render that law immutable." *Id.* at 317. Does this statement indicate that the Texas Supreme Court is weakening in its firm reverence for stare decisis?

case of first impression.

To answer the question of which conflict of law methodology should be adopted for personal injury actions, the supreme court first examined the rule of lex loci delicti. This rule had evolved in days of little interstate travel. In a highly mobile society, however, the rule's reliance on a fortuitous incident produced harsh and unjust results.[82] Consequently, the court noted that the operation of the rule had been repeatedly circumvented by judicially created exceptions and strained characterizations of the facts.[83] Based on this reasoning, the court concluded that lex loci delicti was an outdated concept.[84]

To replace this outdated concept, the court reviewed the numerous theoretical alternatives[85] and concluded that the *Restatement (Second)*'s most significant relationship test captured the substance of these modern theories.[86] The court therefore adopted sections 6[87] and 145[88] of the *Restatement (Second)*, and remanded for a trial court determination of which law had the most significant relationship with the occurrence.[89]

Because Mexican law was one of the choices the trial court could consider, the Texas Supreme Court analyzed the continuing efficacy of the dissimilarity doctrine.[90] The doctrine developed in Texas almost ninety years ago to avoid application of Mexican law, which was difficult to translate, differed substantially from Texas law, and was more penal in nature.[91] In modern times, however, access to translations is no longer a problem, as proved by the ease with which other states were applying Mexican law. Furthermore, Mexico has adopted a new constitution and revised its civil and penal codes, as a result of which Mexican laws more closely approximate the laws of Texas. The court therefore rejected the dissimilarity doctrine and stated that this doctrine will no longer be recognized as a defense in Texas.[92] Thus, any determination of whether a particular Mexican law violated Texas public policy should be conducted on a

82. *Id.* at 317.

83. *Id. See also* notes 17-35 *supra* and accompanying text.

84. *Id.* The supreme court added: "It is in recognition of this fact that courts and commentators are seeking to fashion a new rule more attuned to the demands of modern society." *Id.*

85. The major theories in modern conflict of law include Cavers' "principles of preference," D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); Currie's "governmental interests analysis," B. CURRIE, *supra* note 37; Ehrenzweig's "lex fori" approach, A. EHRENZWEIG, *supra* note 5; Leflar's "choice influencing considerations," R. LEFLAR, *supra* note 13; von Mehren and Trautman's "functional approach," A. VON MEHREN & D. TRAUTMAN, *supra* note 37; Sedler's "judicial method," Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Tort Cases*, 44 TENN. L. REV. 975 (1977).

86. 583 S.W.2d at 318. The supreme court agreed with Robert Leflar's analysis, "the *Restatement (Second)* . . . includes most of the substance of all the modern thinking on choice of law" (quoting R. LEFLAR, *supra* note 13, at 284).

87. Section 6 contains general choice of law principles; *see* note 54 *supra*.

88. Section 145 contains the general tort principle; *see* note 54 *supra*.

89. 583 S.W.2d at 322.

90. *See* notes 22-23 *supra* and accompanying text.

91. 583 S.W.2d at 319-21; *see* Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896).

92. 583 S.W.2d at 322.

case-by-case basis.[93]

Although the Texas Supreme Court's holding in *Gutierrez* was limited to common law tort actions, the court also set the stage for a sweeping elimination of lex loci delicti by recognizing the significance of the 1975 amendments to the Texas wrongful death statute.[94] The court stated that these amendments reflect "an obvious change from the lex loci delicti rule."[95] This observation should produce a willingness by Texas courts to disregard previous judicial construction of statutory tort actions. Freed from the burden of stare decisis, the courts are likely to replace the traditional rule, which has been severely criticized by the supreme court as outdated. Consequently, lex loci delicti might well be dead as a choice of law rule in Texas statutory tort actions, and probably will be replaced by the most significant relationship test.

The Texas Supreme Court's willingness to break from tradition and adopt the *Restatement (Second)* approach in tort cases could also portend the demise of the mechanical choice of law rule governing contract actions in Texas.[96] Lex loci contractus, the law of the place of contracting, was adopted by the first *Restatement*, but today is being abandoned by a majority of jurisdictions in favor of section 188 of the *Restatement (Second)*.[97] Section 188 requires that the choice of law in contract actions be the law of the state with the most significant relationship to the transaction. This new rule is similar to the *Restatement (Second)*'s choice of law rule for torts in that it requires the identification of relevant contacts and an analysis of those contacts in light of the principles enunciated in section 6.[98] As the Texas Supreme Court has followed the trend of replacing the first *Restatement*'s mechanical rule in tort actions with the more flexible rule of *Restatement (Second)*, so could it follow the trend of replacing the rule governing choice of law in contract actions. The impact of *Gutierrez*, therefore, could reach well beyond its limited holding.

III. CRITICISMS OF THE RESTATEMENT (SECOND) APPROACH

While the lex loci delicti rule has been severely criticized, the most sig-

93. *Id.* at 321-22.

94. TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980); *see* 583 S.W.2d at 317 n.3.

95. 583 S.W.2d at 317 n.3.

96. It has long been the settled law of Texas that contract actions are governed by the law of the place in which the contract was made. Austin Bldg. Co. v. National Union Fire Ins. Co., 432 S.W.2d 697, 701 (Tex. 1968); Cantu v. Bennett, 39 Tex. 304, 310 (1873).

97. *See* R. LEFLAR, *supra* note 13, at 308 n.13.

98. RESTATEMENT (SECOND), *supra* note 3, § 188(2) states:

> The contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

nificant relationship test also has its detractors. Scholars criticize the test on four grounds. First, the concept fosters forum shopping. Secondly, the flexibility of the concept produces uncertain results and is used by courts to apply the law most favorable to plaintiffs. Thirdly, some courts have resorted to a quantitative analysis, mechanically applying the law of the state with the largest number of contacts. Finally, courts and scholars have perceived the *Restatement (Second)* as affording an unduly limited qualitative analysis.

Forum Shopping. Commentators have asserted that adoption of the most significant relationship test will encourage forum shopping.[99] This contention is based on the dual proposition that some jurisdictions will still utilize lex loci delicti while others will differ as to which relationships they deem significant. This charge may have merit, but it can be asserted against any alternative approach and will exist as long as the American jurisdictional system allows actions to be brought in more than one state.[100]

Flexibility and Plaintiff Orientation. The criticism that the *Restatement (Second)* is too flexible is perplexing, because one of the major reasons for change is the inflexibility of the lex loci delicti rule.[101] One specific criticism concerning the *Restatement (Second)*'s degree of flexibility has been rebutted.[102] A 1972 empirical study statistically demonstrated that courts employing the most significant relationship test do not overwhelmingly choose the law most favorable to plaintiffs.[103]

Contact Counting. The third criticism directed against the *Restatement (Second)* test is the tendency of some courts to count contacts as the sole method of choosing the applicable law.[104] In so doing, courts have violated the directive of section 145(2) that the contacts be evaluated according to their relative importance.[105] Clearly this directive contemplates a

99. LaBrum, *supra* note 16; Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections Upon the Opinion and Its Implications*, 31 INS. COUNSEL J. 428 (1964); *see* Wessling v. Paris, 417 S.W.2d 259, 261 (Ky. 1967).

100. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945). In this decision the United States Supreme Court determined that suits can be brought within any jurisdiction, so long as the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316. *See generally* C. WRIGHT, *supra* note 72, at 300-06.

101. For example, this was one of the reasons cited by the Texas Supreme Court. *See* Gutierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979).

102. *See* Leflar, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1247, 1248-49 (1963); Reese, *Recent Development in Torts Choice of Law Thinking in the United States*, 8 COLUM. J. TRANSNAT'L L. 181, 189-90 (1969).

103. Note, *Most Significant Contacts Method: An Empirical Analysis*, 25 VAND. L. REV. 575, 611 (1972).

104. *See* R. LEFLAR, *supra* note 13, at 136; Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1233 (1963); Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 244 (1963).

105. RESTATEMENT (SECOND), *supra* note 3, § 145; *see* note 54 *supra*. *See also* Wilcox v. Wilcox, 133 N.W.2d 408, 416 (Wis. 1965), in which the court asserted: "[T]he mere counting of contacts should not be determinative of the law to be applied. It is rather the relevancy of the contact in the terms of policy considerations important to the forum, vis-à-vis other contact states."

weighing of contacts, not merely a counting.

Qualitative Analysis. Some scholars have complained that the analysis contemplated by the *Restatement (Second)* mandates that the significance of contacts be determined without a consideration of social and governmental policies.[106] Approving of this criticism, some courts began to use the factors enumerated in the *Restatement (Second)* only for the initial identification of contacts, and then used a different method to evaluate the relevancy of those contacts.[107] This criticism and this practice are not reconcilable with the *Restatement (Second)* or the comments of the reporter Willis Reese. Section 145(2), which sets forth the four contacts to be considered in determining the proper choice of law, explicitly refers to section 6, which contemplates an inquiry into social and governmental policy.[108] In addition, Professor Reese expressly stated that choice of law rules are the product of policies and will be successful only as long as they reflect and further those policies.[109] Policy analysis, therefore, is an integral part of the most significant relationship test.

IV. PRACTICAL APPLICATION OF THE NEW RULE

Most courts, including the Texas Supreme Court in *Gutierrez*, have interpreted the *Restatement (Second)* accurately. They have read section 6 in conjunction with section 145 and thus have analyzed contacts in light of the governmental and social policies of the forum and the foreign state.[110]

106. *See* Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965), wherein it was asserted that the new approach simply contemplates a "massing of contacts" and that this was unsatisfactory. "[T]he consideration of . . . policies is the very essence of choice of law and cannot be simply contrasted with 'contacts'." *Id.* at 1236. Professor Currie also discussed this problem by noting that the *Restatement (Second)* conspicuously neglects to supply a standard for evaluation of contacts. Currie has complained, saying, "surely we cannot go on indefinitely speaking of 'significant contacts' without asking and answering the question: 'Significant for what?'" Currie, *Full Faith and Credit Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 95. *See generally* Carpenter, *supra* note 4; Weintraub, *The Future of Choice of Law for Torts: What Principles Should be Preferred?*, 41 LAW & CONTEMP. PROB. 146 (1977); Note, *Conflict of Laws: Minnesota Rejects the "Significant Contacts" Doctrine in Favor of the "Better Law" Test*, 58 MINN. L. REV. 199 (1973).

107. *See* notes 118-31 *infra* and accompanying text.

108. These contacts include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

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

RESTATEMENT (SECOND), *supra* note 3, § 145(2).

109. *See* Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 681 (1963). Reese went on to explain: "If the purposes sought to be achieved by a local statute or common-law rule would be furthered by its application . . . this is a weighty reason why such application should be made." *Id.* at 683. Fourteen drafts were needed to produce the 1971 final draft.

110. *See* Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970); Suchomajcz v. Hummel Chem. Co., 524 F.2d 19 (3d Cir. 1975); Grant v. Bill Walker Pontiac-GMC, Inc., 523 F.2d 1301 (6th Cir. 1975); Pancotto v. Sociedade de Safaris de Mozambique, 422 F. Supp. 405 (M.D. Ill. 1976); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); First Nat'l Bank

One example of the actual process of analysis under the *Restatement (Second)* is *Griggs v. Riley*.[111] In that case, a car driven by an Illinois resident and containing another Illinois resident was involved in a collision in Missouri with a car driven by a Missouri resident. The passenger sued the Illinois driver in Missouri for injuries resulting from the driver's negligence. The Missouri court noted that Illinois law precludes passengers from recovering from their negligent hosts for injuries sustained in automobile accidents. In contrast, Missouri law allows compensation in such situations.[112] The court chose between the laws of the two jurisdictions by applying the most significant relationship test, which recently had been adopted in Missouri.[113]

The court conducted its choice of law analysis by comparing the facts of the case to the list of contacts set forth in section 145(2) of the *Restatement (Second)*. The only two contacts of significance were the residence of the parties and the place in which the relationship was centered.[114] The court then turned to the principles of section 6. It determined that only two of these principles were applicable: the relevant policies of the forum and the relevant policies of the other interested state.[115] The court first examined the relevant policies of Missouri, the forum. One policy favored compensating automobile passengers for injuries resulting from the negligence of others. Another policy sought to protect the interests of Missouri residents in proper application of Missouri's contribution statute. This policy was discussed because the driver of the other vehicle, a Missouri resident, had been joined as a defendant.[116]

The court next examined the relevant policies of the other interested state, Illinois. Illinois denied recovery to passenger-guests because such suits were considered to be an ungrateful response to the gratuity of driver-hosts. On the other hand, Illinois followed the rule of lex loci delicti, thereby acknowledging that it had no interest in applying Illinois law to accidents outside its borders. Following comparison of the policies of

v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973); Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1970); Feurste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Beaulieu v. Beaulieu, 265 A.2d 610 (Me. 1970); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969) (en banc); Brickner v. Gooden, 525 P.2d 632 (Okla. 1974); Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967); Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 555 P.2d 997 (1976).

111. 489 S.W.2d 469 (Mo. Ct. App. 1972).

112. *Id.* at 472.

113. *See* Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969) (en banc).

114. 489 S.W.2d at 473.

115. *Id.*; *see* note 54 *supra*. Principle (a) was held inapplicable because, the court determined, the application of a guest statute would have little foreseeable effect on interstate relations in automobile accidents. The court found that principles (d), (e), and (f) had little application in negligence actions where the conduct resulting in damage is not planned in advance. The court observed that principles (f) and (g), while beneficial, are always subservient to the achievement of desirable results.

116. 489 S.W.2d at 473. The appellate court pointed out that although no judgment was granted against the Missouri defendant, a consideration of policies concerning such a party must be made because the choice of law to be used in a trial necessarily must be determined prior to the verdict. *Id.* at 473-74.

these two states, the court held Missouri law applicable because Missouri was the only state with a significant interest in the controversy.[117]

The analysis of the *Griggs* decision illustrates the analysis that will likely be used by Texas courts following the adoption of the most significant relationship test in *Gutierrez*. Of note, however, is the fact that many states that originally adopted the *Restatement (Second)* approach have supplemented section 145 contact analysis with either Professor Leflar's choice-influencing considerations[118] or Professor Currie's governmental interests analysis.[119] Because Texas courts may follow this trend, practitioners should be acquainted with these alternative approaches.

Professor Leflar's analysis is similar to that contemplated by section 6 of the *Restatement (Second)*, adding, however, an evaluation of which rule is the better rule of law.[120] This approach is illustrated in *Conklin v. Horner*,[121] in which an Illinois guest-passenger sued an Illinois host-driver for injuries sustained in an automobile accident in Wisconsin. Illinois law permits passenger recovery only if the driver's negligence is willful and wanton, while Wisconsin law allows recovery if the driver fails to exercise ordinary care. In choosing between the laws of Wisconsin and Illinois, the court used the *Restatement (Second)* methodology only to identify the states with substantial interests.[122] To evaluate these interests, however, the court turned to Leflar's choice-influencing considerations. These con-

117. *Id.* at 474. Missouri had an interest in passenger compensation and in the proper application of its contribution statute. Note that if the appellate court had engaged in pure contact counting, a deadlock would have existed. Illinois had two contacts; it was the home of two parties. Missouri also had two contacts; it was the forum and the home of one of the parties.

118. *See* Meyer v. Chicago, Rock Island & Pac. Ry., 508 F.2d 1395 (8th Cir. 1975); Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Decker v. Fox River Tractor Co., 324 F. Supp. 1089 (E.D. Wis. 1971); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977); Myers v. Government Employees Ins. Co., 225 N.W.2d 238 (Minn. 1974); McGuire v. Exeter & Hampton Elec. Co., 114 N.H. 589, 325 A.2d 778 (1974); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968), *cert. denied*, 393 U.S. 957 (1969). *See generally* R. LEFLAR, *supra* note 13, at 197-222, 281-85; Juenger, *supra* note 4; Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Leflar, *Conflicts Law, More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

119. *See* Hanley v. Tribune Publishing Co., 527 F.2d 68 (9th Cir. 1975); Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928 (5th Cir. 1974); Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); White v. Smith, 398 F. Supp. 130 (D.N.J. 1975); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973); Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). *See generally* B. CURRIE, *supra* note 37; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963); Seidelson, *Interest Analysis and an Enhanced Degree of Specificity: The Wrongful Death Action*, 10 DUQ. L. REV. 525 (1972). *But see* Comment, *Governmental Interest Analysis and the Resolution of Tort Choice of Law Problems: Some Suggested Limitations*, 40 U. COLO. L. REV. 577 (1968).

120. *See also* R. WEINTRAUB, *supra* note 24, at 244-53, for a criticism of the better law consideration.

121. 157 N.W.2d 579 (Wis. 1968).

122. *Id.* at 582-83. The court noted that the first Wisconsin decision adopting *Restatement (Second)*, Wilcox v. Wilcox, 133 N.W.2d 408 (Wis. 1965), was a simple one, and application of the most significant relationship test was sufficient. In more complicated cases, however, the Wisconsin Supreme Court found the *Restatement (Second)* inadequate. 157 N.W.2d at 583.

siderations are predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interest, and application of the better rule of law.[123] After discussing these considerations at length, the court found the forum's governmental interest and the better rule of law[124] determinative in the case. Utilizing these two factors, the court applied Wisconsin law because courts should further the legitimate governmental interests of the forum[125] and because guest statutes limiting recovery are anachronistic and are therefore inferior law.[126]

Professor Currie's approach is grounded in the view that the weighing of the significance of contacts is not a proper judicial function.[127] Consequently, if the forum state has any interest that will be affected by the outcome of the case, the forum's law should be applied. If however the forum has no such interest, it should apply the law of the state that has an interest. In situations in which two nonforum states have an interest, the law most similar to that of the forum should be applied.[128]

The Currie approach is illustrated in *Tooker v. Lopez*.[129] In *Tooker* two New York residents were attending college in Michigan where an automobile accident occurred, killing the plaintiff's daughter who was a guest-passenger in defendant's car. Plaintiff brought an action against the host-driver for wrongful death in New York. The defendant pleaded Michigan's guest statute as a defense. In Michigan guests could recover only upon a showing of willful misconduct or gross negligence by the driver. By contrast, in New York such an action could be maintained upon a showing of simple negligence.[130] The court chose to apply New York law because both parties were New Yorkers and the car was insured in New York. Thus, New York contacts provided the forum with an interest and, therefore, the forum's law was applied.[131]

---

123. 157 N.W.2d at 583.

124. The consideration of the better rule of law requires the court to determine which law it regards as intrinsically more just. Leflar provides some guidelines; a court should make the determination in terms of socio-economic jurisprudential standards, or on the basis of providing justice in the individual case, or the court should avoid laws that are anachronistic. *See* R. LEFLAR, *supra* note 13, at 212-15.

125. 157 N.W.2d at 585.

126. *Id.* at 586.

127. *See* Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). Currie had expressed this criticism of the most significant relationship test in an earlier article, Currie, *Conflicts, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 40.

128. *See generally* B. CURRIE, *supra* note 37, for a discussion of the "governmental interests analysis" approach.

129. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

130. *Id.* at 570-72, 249 N.E.2d at 395-97, 301 N.Y.S.2d at 521-26.

131. *Id.* at 572, 249 N.E.2d at 397, 301 N.Y.S.2d at 526. The fact that the car was insured in New York was sufficient for the court as a controlling forum interest. The practice of supplementing *Restatement (Second)* with Currie's "governmental interest analysis" has experienced problems. The major problem is that a number of courts have to some extent dropped the forum preference aspect of it and have engaged solely in the governmental interests analysis. This practice has been criticized in that it eliminates the predictability of results that forum preference provides. Conversely, forum preference eliminates uniformity of results (uniformity regardless of forum). Thus, this methodology has created a conun-

V. CONCLUSION

For ninety-one years Texas applied the law of the place of the injury as its choice of law rule in multistate tort actions. Dissatisfaction with this rule led courts to create exceptions to the rule and scholars to propose alternatives. By 1963 most states chose to reject the rule in favor of alternative approaches. In 1979 the Texas Supreme Court in *Gutierrez v. Collins* followed the trend and adopted the most significant relationship test of *Restatement (Second)* as Texas's choice of law rule in all common law multistate tort actions. Although the holding of *Gutierrez* is limited to common law tort actions, the decision's eventual impact could be far-ranging. Citing recent amendments to the Texas wrongful death statute, the court acknowledged that the *Restatement (Second)*'s approach may be appropriate in statutory tort actions. In addition, analogies between lex loci delicti and lex loci contractus, when considered in light of *Gutierrez*, foreshadow the adoption of the *Restatement (Second)* as the choice of law rule in contract actions.

---

drum in that, properly applied, it eliminates the uniformity that is deemed desirable in choice of law rules, but it also eliminates a desirable factor, certainty, when applied improperly. *See, e.g.*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). *See generally*, Traynor, *War and Peace in the Conflict of Laws*, 25 INT. & COMP. L.Q. 121 (1976); Twerski, *To Where Does One Attach the Horses?*, 61 KY. L.J. 393 (1973).