

1971

The Erosion of Lex Loci Delicti: Toward a More Rational Choice of Tort Law

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Conflict of Laws Commons](#), and the [Torts Commons](#)

Recommended Citation

The Erosion of Lex Loci Delicti: Toward a More Rational Choice of Tort Law, 5 U. Rich. L. Rev. 331 (1971).

Available at: <http://scholarship.richmond.edu/lawreview/vol5/iss2/9>

This Note is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

NOTES

THE EROSION OF LEX LOCI DELICTI: TOWARD A MORE RATIONAL CHOICE OF TORT LAW

Lawes were not made for their own sakes, but for the sake of those who were to be guided by them; and though it is true they are and ought to be sacred, yet, if they be or are become unusefull for their end, they must either be amended if it may be, or new lawes be substituted.

Sir Matthew Hale, *Considerations Touching the Amendments of Lawes*

Man is a gregarious animal. As such, he has historically sought the company of other men. He has organized his world into innumerable units—each with its own boundaries, each with its own laws. Once, when immobility and relative isolation characterized his existence, few legal complications arose from the policy differences that had been translated into the laws of his governments. His choice of law rules were relatively simple, predictable, and rigid. But as technology made Cairo as accessible as California—made international communication almost as practical as local conversation—the consequences of human interaction involved increasing interstate and international elements.

In the twentieth century United States, a maturing of the judicial system paralleled technological advance. As more cases posed choice of law questions, the courts recognized that the traditional rules did not properly resolve them. With increasing frequency, the several jurisdictions have abandoned the traditional choice of law concept and have sought new approaches to the problem of determining which law applies to tort cases involving interstate elements.

LEX LOCI DELICTI

In the nineteenth century, choice of law rules became a part of the Anglo-American common law.¹ In the twentieth century, *lex loci delicti*,

¹ H. GOODRICH, *CONFLICT OF LAWS* 3 (Skoles ed. 1964); Dicey reports finding no English decisions discussing conflict of laws issues prior to James I. *But see* Y.B. Anonymous, 2 Edw. II 110 (1308), wherein a writ of debt was brought upon a document drawn and executed at Berwick, Scotland. "[B]ecause it was made at Berwick, where this court has not cognizance, it was awarded that John took nothing by his writ." In England, as late as 1858, the choice of law rules were described as "incomplete and chaotic," the standard treatise being Story. *See* Dicey, *Private Interna-*

the rule requiring the application of the tort law of the place of the wrong, became well established.² It was written into the first restatement³ by the reporter, Professor Beale. *Lex loci delicti* gained widespread acceptance,⁴ and has even recently been characterized as the "majority view" in the United States.⁵

tional Law, 28 L.Q. REV. 341 (1912). In the United States, Wharton prefaced the second edition of his conflict of laws treatise with the statement that there had been as many decisions in the eleven years since 1870 as there had been prior to that time.

² See *Alabama Great So. R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892).

³ RESTATEMENT OF CONFLICT LAWS §§ 337 et seq. (1934). See, e.g., *Jordan v. State Marine Corp.*, 257 F.2d 232 (9th Cir. 1958).

⁴ *Richards v. United States*, 369 U.S. 1 (1962); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Young v. Masci*, 289 U.S. 253 (1933); *Texas & P. Ry. v. Humble*, 181 U.S. 57 (1901); *Alexander v. Inland Steel Co.*, 263 F.2d 314 (8th Cir. 1958); *Philp v. Macri*, 261 F.2d 945 (9th Cir. 1958); *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958); *E. L. Farmer & Co. v. Hooks*, 239 F.2d 547 (10th Cir. 1956), *cert. denied*, 353 U.S. 911 (1957); *Franklin v. Wills*, 217 F.2d 899 (6th Cir. 1954); *Ferroline Corp. v. General Aniline & Film Corp.*, 207 F.2d 912 (7th Cir. 1953), *cert. denied*, 347 U.S. 953 (1954), *rehearing denied*, 347 U.S. 979 (1954), *rehearing denied*, 348 U.S. 851 (1954); *Black & Yates, Inc. v. Mahogany Ass'n.*, *rehearing denied*, 129 F.2d 227 (3d Cir.), *cert. denied*, 317 U.S. 672 (1941); *Gray v. Blight*, 112 F.2d 696 (10th Cir.), *cert. denied*, 311 U.S. 704 (1940); *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940); *Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248 (1909); *Maloy v. Taylor*, 86 Ariz. 356, 346 P.2d 1086 (1959); *Yazoo & M.V.R.R. v. Littleton*, 177 Ark. 199, 5 S.W.2d 930 (1928); *Chasse v. Albert*, 147 Conn. 680, 166 A.2d 148 (Sup. Ct. Err. 1960); *Seaboard Air Line Ry. v. Andrews*, 140 Ga. 254, 78 S.E. 925 (1913); *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N.E. 97 (1906); *Holderman v. Pond*, 45 Kan. 410, 25 P. 872 (1891); *Matney v. Blue Ribbon, Inc.*, 202 La. 505, 12 So. 2d 253 (1942); *Watkins v. Cupit*, 130 So.2d 720 (La. App. 1961); *Pringle v. Gibson*, 135 Me. 297, 195 A. 695 (1937), *rehearing denied*, 135 Me. 512, 197 A. 553 (1938); *Walsh v. New York & N.E.R.R.*, 160 Mass. 571, 36 N.E. 584 (1894); *Eskovitz v. Berger*, 276 Mich. 536, 268 N.W. 883 (1936); *Hall Motor Freight v. Montgomery*, 357 Mo. 1188, 212 S.W.2d 748 (1948); *Neal v. Kropp*, 299 S.W.2d 888 (Mo. App. 1957); *Beacham v. Portsmouth Bridge*, 68 N.H. 382, 40 A. 1066 (1896); *Clement v. Atlantic Cas. Ins. Co.*, 13 N.J. 439, 100 A.2d 273 (1953); *Charnock v. Taylor*, 223 N.C. 360, 26 S.E.2d 911 (1943); *Collins v. McClure*, 143 Ohio St. 569, 56 N.E.2d 171 (1944); *Complete Auto Transit, Inc. v. Bass*, 229 S.C. 607, 93 S.E.2d 912 (1956); *Chicago, R.I. & P. Ry. v. Thompson*, 100 Tex. 185, 97 S.W. 459 (1906); *Grandstaff v. Mercer*, 214 S.W.2d 133 (Tex. Civ. App. 1948); *Goldman v. Beaudry*, 122 Vt. 299, 170 A.2d 636 (1961); *C.I.T. Corp. v. Guy*, 170 Va. 16, 195 S.E. 659 (1938); *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d 288, 118 P.2d 985 (1941); *Clise v. Prunty*, 108 W. Va. 635, 152 S.E. 201 (1930); *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954). See RESTATEMENT OF CONFLICT OF LAWS § 379 (1934). For cases specifying where the place of the tort is in different factual situations, see Annot., 77 A.L.R.2d 1266 (1961).

⁵ See *Richards v. United States*, 369 U.S. 1 (1962). Although numerous decisions since 1962 have doubtless decreased the size of the majority currently embracing *lex*

Lex loci delicti favors a body of easily administerable rules the results of which would be uniform, would conform to justifiable expectations, and would discourage forum shopping.⁶ However, the law of the place of the wrong, even if uniformly applied, serves these goals no more adequately than the law of any other state. Thus, it has been suggested that the objectives sought by the application of lex loci delicti could be better served by referring all disputes presenting choice of law problems to the law of Alaska.⁷ Furthermore, it is questionable whether the objectives lex loci delicti purports to serve are, in themselves, the paramount goals to be attained in the choice of law process.⁸

EROSION OF LEX LOCI DELICTI

Dissatisfaction with the harsh results of the application of lex loci delicti led to judicial constriction of the rule in three important ways: the lex fori—the internal law of the forum—was applied to matter characterized as procedural,⁹ and the lex loci delicti was not applied when it contravened

loci delicti, most courts have not had recent occasion to reexamine their prior decisions relying on lex loci delicti. Thus, it may still be said to be the general rule. Furthermore, the highest courts of some states have considered arguments based on the merits of the modern approaches to choice of law, but have refused to adopt these approaches, reaffirming lex loci delicti instead. See, e.g., *McGinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 408 S.W.2d 891 (1966); *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *Folk v. York-Shipley, Inc.*, 239 A.2d 236 (Del. 1968); *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967); *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965); *Cook v. Pryor*, 251 Md. 41, 246 A.2d 271 (1968); *Petrea v. Ryder Tank Lines, Inc.*, 264 N.C. 230, 141 S.E.2d 278 (1965); *Cobb v. Clark*, 265 N.C. 194, 143 S.E.2d 103 (1965); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968).

⁶ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); see *Cheatham and Reese, Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 976 (1952); *Goodrich, Public Policy in the Law of Conflicts*, 36 W. VA. L.Q. 156, 165-67 (1929); *Rheinstein, The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 22-23 (1944).

⁷ B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 699-700 (1963).

⁸ The modern approaches to the choice of tort law proceed on the premise that a preferable objective is to refer the decision of the case to the law of that state which is determined—by various means—to have the greatest interest in its resolution.

⁹ The process of characterization, whether it relates to the substantive—procedural distinction, or to the classification of the type of case, (tort—contract) is usually performed under the law of the forum. *Fahs v. Martin*, 224 F.2d 387 (5th Cir. 1955); *Hall v. Copco Pacific, Ltd.*, 224 F.2d 884 (9th Cir. 1955); *King Bros. Prod., Inc. v. RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271 (S.D.N.Y. 1962). An outrageous

a strong public policy of the forum state.¹⁰ The occasional application of the renvoi doctrine offered a third escape route to courts seeking uniformity otherwise unattainable under *lex loci delicti*.¹¹ The invocation of these three doctrines appears in retrospect to presage the adoption of the "approach" techniques which dominate present-day choice of law rationale.¹²

MODERN APPROACHES TO CHOICE OF LAW

Early judicial efforts to formulate a replacement for *lex loci delicti* viewed the rule as an inadequate index of the interests of the various states whose law could apply to a multi-contact tort situation. The courts emphasized that the fortuitous circumstance of the wrong occurring in a given state did not give that state a controlling interest in the resolution of the dispute.¹³ The question of what does amount to a controlling interest, however, and how it should be determined has not been answered uniformly by those courts adopting modern approaches to the choice of tort law.¹⁴

mischaracterization, however, may violate the full faith and credit and due process clauses of the federal constitution. *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952).

¹⁰ *Texas & P. Ry. v. Humble*, 181 U.S. 57 (1901); *Gray v. Blight*, 112 F.2d 696 (10th Cir.), cert. denied, 311 U.S. 704 (1940); *Gaines v. Poindexter*, 155 F. Supp. 638 (W.D. La. 1957); *Ingle v. Cassady*, 208 N.C. 497, 181 SE. 562 (1935); *Nelson v. Chesapeake & O.R.R.*, 88 Va. 971, 14 S.E. 838 (1892); *Dallas v. Whitney*, 118 W. Va. 106, 188 S.E. 766 (1936); RESTATEMENT OF CONFLICT OF LAWS § 612 (1934). The forum policy is expressed in its statutes. See *Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N.E. 619 (1912). Furthermore, where liability exists by peculiar statute in a foreign country, enforcement is against the policy of the forum state which has no such statute. *Victor v. Sperry*, 163 Cal. App. 2d 518, 329 P.2d 728 (1958). However, the mere fact that a lesser degree of negligence is actionable in the foreign state does not make the action against forum policy. *Kingery v. Donnell*, 222 Iowa 241, 268 N.W. 617 (1936).

¹¹ See *In re Schneider*, 198 Misc. 1017, 96 N.Y.S.2d 652, aff'd, 100 N.Y.S.2d 371 (Sup. Ct. 1950); Dean, *The Conflict of Conflict of Laws*, 3 STAN. L. REV. 388 (1951); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938).

¹² A search for a decision which is based primarily on "justice" has long been advocated by scholars in the field of choice of law. See, e.g., Harper, *Policy Bases of the Conflict of Laws*, 56 YALE L.J. 1155 (1947).

¹³ *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

¹⁴ In an increasing number of tort cases, the courts have discarded *lex loci delicti* in favor of an approach that requires an analysis of the factors involved in the case to determine what law should be applied to the particular issues of the case. *Tramontana*

The Second Restatement of the Conflict of Laws, in its proposed official draft, suggests that the law of the state having the "most significant relationship" with the occurrence or the parties should control the particular issues raised. But the Restatement provides inadequate standards by which the "relationships" are to be weighed or evaluated. The result is a highly subjective choice of tort law.¹⁵ The "grouping of contacts," or "center of gravity" approach to the choice of tort law represents a more refined approach. However, the role of the involved states' policy in the choice of law process is unclear, and there has been some difficulty in applying the test to various factual situations.¹⁶ The "Interest-analysis" approach to the

v. S.A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir.), *cert. denied*, 383 U.S. 943 (1965); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965); Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Howe v. Diversified Builders, Inc., 262 Cal. App. 2d 741, 69 Cal. Rptr 56 (1968); Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Schneider v. Schimmels, 256 Cal. App. 2d 366, 64 Cal. Rptr. 273 (1967); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Doiron v. Doiron, 241 A.2d 372 (N.H. 1968); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Dow v. Larrabee, 107 N.H. 70, 217 A.2d 506 (1966); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Van Dyke v. Bolues, 107 N.J. Super. 338, 258 A.2d 372 (1969); Maffatone v. Woodson, 99 N.J. Super. 559, 240 A.2d 693 (1968); Mullane v. Stavola, 101 N.J. Super. 184, 243 A.2d 842 (1968); Farber v. Smolack, 20 N.Y. 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Long v. Pan Am. World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); DeFoor v. Lematta, 437 P.2d 107 (Ore. 1968); Casey v. Manson Const. & Eng. Co., 247 Ore. 274, 428 P.2d 898 (1967); McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966); Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966); Woodward v. Stewart, 243 A.2d 917 (R.I.), *cert. denied*, 393 U.S. 957 (1968); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). The flexibility of modern approaches to choice of law has been praised. See, e.g., Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multi-State Tort Law, 53 VA. L. REV. 847 (1967). On the other hand, the same flexibility has raised the possibility that the courts will revert to *lex loci delicti* in despair at the present confusion. D. Cavers, THE CHOICE OF LAW PROCESS, 121-122 (1965). See generally *Conflict of Law Round Table*, 49 TEX. L. REV. 211 (1971).

¹⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Proposed Official Draft, Part II, 1968). See p. 336 *infra*.

¹⁶ Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); see p. 338 *infra*.

choice of law requires the application of the law of that state having the greatest interest in applying its policy to the resolution of the dispute. Yet, an effort to evaluate the various interests of the states presupposes some form of "superlaw" which assigns weights to the various interests. Such a "superlaw" does not exist.¹⁷ Leflar's list of "Choice-Influencing Considerations" delineates factors that should enter the choice of law process, but allows the deciding judge to weigh his decision in favor of whichever rule of law he considers to be the "better rule." This degree of subjectivity, assuming that the "better rule" has a place in the choice of law process at all, allows the forum court wide latitude to apply its own law.¹⁸ Furthermore, when the results of decisions reached under the modern approaches to choice of law are compared with the results reached by applying *lex loci delicti*, a surprising similarity appears.¹⁹

The forum state's practice of analyzing the interests of the involved states for choice of law purposes has received general constitutional approval.²⁰ However, it is as yet unclear which particular methods of determining the applicable law will satisfy due process and full faith and credit requirements.²¹ It is suggested that the test of "fair play and substantial justice" which a state must meet in order to exercise judicial jurisdiction over a case involving foreign elements²² will also apply to the presently evolving choice of law rules.

THE SECOND RESTATEMENT

The Second Restatement of the Conflict of Laws, in its Proposed Official Draft,²³ replaces the First Restatement's endorsement of *lex loci delicti*²⁴ with the proposition that "the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state

¹⁷ See p. 341 *infra*.

¹⁸ See p. 343 *infra*.

¹⁹ See p. 345 *infra*.

²⁰ See *Richards v. United States*, 369 U.S. 1 (1962).

²¹ See *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, *cert. denied*, 372 U.S. 912 (1962); Currie, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 595 (1968); Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROB. 706 (1963).

²² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The "minimal contacts" which will permit the acquisition of personal jurisdiction must afford a "substantial connection" with the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

²³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Proposed Official Draft, Part II, 1968).

²⁴ RESTATEMENT OF CONFLICT OF LAWS §§ 337 et seq. (1934).

which, as to that issue, has the most significant relationship to the occurrence and the parties. . . ."²⁵

The contacts²⁶ to be taken into account in determining the law applicable to an issue include the place where the injury occurred,²⁷ the place where the conduct causing the injury occurred,²⁸ the domicile, residence, nationality, place of incorporation and place of business of the parties,²⁹ as well as the place where the relationship, if any, between the parties is centered.³⁰

In evaluating the various contacts, the Second Restatement postulates that the court should consider their importance with respect to the particular issues of the case.

Furthermore, the Second Restatement recognizes a number of general factors that become relevant in any choice of law process—tort or otherwise. Clearly, a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law if one exists.³¹ In the event there is no statutory directive—the usual case—it sets forth its own factors relevant to the choice of the applicable rule of law. These factors include the needs of the interstate and international systems,³² the relevant policies of the forum³³ and other interested states,³⁴ the relative interests of other states in the determination of a particular issue,³⁵ the protection of justified expectations,³⁶ the basic policies underlying the particular field of law,³⁷ certainty, predictability, and uniformity of result,³⁸ and ease in the determination and application of the law to be applied.³⁹ The weight given

²⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (Proposed Official Draft, Part II, 1968).

²⁶ *Id.* § 145(2).

²⁷ *Id.* § 145(2)(a).

²⁸ *Id.* § 145(2)(b).

²⁹ *Id.* § 145(2)(c).

³⁰ *Id.* § 145(2)(d).

³¹ *Id.* § 6(1).

³² *Id.* § 6(2)(a). See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-383 (1959); *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

³³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (Proposed Official Draft, Part II, 1968).

³⁴ *Id.* § 6(2)(c).

³⁵ *Id.*

³⁶ *Id.* § 6(2)(d).

³⁷ *Id.* § 6(2)(e).

³⁸ *Id.* § 6(2)(f).

³⁹ *Id.* § 6(2)(g).

each of these enumerated considerations varies according to the type of case before the court.⁴⁰

A most outstanding characteristic of the Second Restatement's "most significant relationships" position on choice of law is its controversiality. Although approved by some authorities,⁴¹ it is more often—and more cogently—criticized because of its subjectivity.⁴² Nevertheless, the "most significant relationships" approach to the choice of law has gained a degree of recognition in the courts.⁴³

GROUPING OF CONTACTS

The leading case representing a modern approach to choice of tort law⁴⁴ espouses the "center of gravity" or "grouping of contacts" theory—that the law of the jurisdiction having the greatest "contacts" with the occurrence, or the jurisdiction where the "center of gravity" of the occurrence or the parties may be found, controls the disposition of the particular

⁴⁰ In *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966), the court looked to essentially similar factors in deciding a choice of law question. See generally Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); 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); Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963); Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959).

⁴¹ See, e.g., Moreland, *Conflicts of Law—Choice of Law in Torts—A Critique*, 56 KY. L.J. 5 (1967).

⁴² "The trouble with [the Second Restatement] theory is that the quest for 'most significant contacts' that it enjoined was not implemented by any standard according to which significance could be determined. 'One "contact" seems to be about as good as another for almost any purpose. The "contacts" are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is the more significant. The reasons for the conclusion are too elusive for objective evaluation.'" Currie, *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963). See Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965). Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. (1963).

⁴³ See *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); see generally, *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (2d Cir. 1967), cert. denied, 393 U.S. 979 (1968); *Gaither v. Myers*, 404 F.2d 216 (D.C. Cir. 1967); *Abendschein v. Farrell*, 11 Mich. App. 662, 162 N.W.2d 165 (1968), aff'd, 382 Mich. 510, 170 N.W.2d 137 (1969); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Tattis v. Karthans*, 215 So. 2d 685, 691 (Miss. 1968).

⁴⁴ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

issues in the case. In *Babcock v. Jackson*,⁴⁵ lex loci delicti was decisively abandoned in favor of a modern approach to the choice of law:

Justice, fairness, and "the best practical result . . ." may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.⁴⁶

The terms "center of gravity" and "grouping of contacts" are no more than catchwords or labels whose function is to designate an approach rather than to define a principle of law.⁴⁷ However, they are at least as adequate to define a principle of law as the terms "due process of law," "property," "reasonableness," and "unjust enrichment," which the courts constantly employ.⁴⁸

The essence of the "center of gravity" or "grouping of contacts" theory may be stated as an abstract rule of law with relative ease. However, the concept has little meaning apart from the criteria employed to determine when a contact exists, and what qualitative weight will be assigned to the several contacts which may be present in particular cases. It is in determining and weighing the contacts that the courts have evidenced some disagreement when applying the "grouping of contacts" test.⁴⁹

In *Babcock v. Jackson*,⁵⁰ the New York Court of Appeals concluded that New York's interest in determining the liability of a New York guest injured by the negligence of a New York host while driving in Ontario outweighed any interest Ontario might claim to have. However, beyond the facts of that particular case, the court developed no guidelines for determining when a contact exists, or how it is to be weighed. Further-

⁴⁵ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

⁴⁶ *Id.* at 481.

⁴⁷ *Id.* at 486 (dissenting opinion).

⁴⁸ Cheatham, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1229, 1230 (1963).

⁴⁹ The most apparent uncertainty to develop from the cases subsequent to *Babcock* centers around the role played by state policy in the grouping of contracts approach. See *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); *In re Chrichton*, 20 N.Y.2d 124, 135 n.8, 228 N.E.2d 799, 806 n.8, 281 N.Y.S.2d 811, 820 n.8 (1967); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734, *amend. remittitur denied*, 22 N.Y.2d 722, 239 N.E.2d 204, 292 N.Y.S.2d 107 (1968) (the facts or contacts which obtain significance in defining state interests are those which relate to the purpose of the particular law in conflict).

⁵⁰ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

more, subsequent cases have not agreed on the content of, or the qualitative weight to be assigned to such contacts.⁵¹

In *Babcock*, the court purported to rely on the "most significant relationship" view espoused by the Second Restatement. Yet, the Second Restatement, in its present form, does not require the excellent result reached in the case.⁵² The court concluded that New York had a controlling policy interest in the outcome of the case, and that Ontario had no such interest. A consideration of the governmental policies underlying the competing laws of two or more jurisdictions, and a determination of whether the policies conflict, are characteristic of the "governmental interest" approach to the choice of law pioneered by the late Professor Brainerd Currie,⁵³ rather than characteristic of a "most significant relationship" analysis. Although the court did not expressly rely on Currie's doctrine in deciding *Babcock*, other courts have regarded his theory as controlling when presented with similar factual situations.⁵⁴

The choice of law process adopted in *Babcock* requires a separation of the different issues presented by a given case. It is entirely possible that individual issues may ultimately be decided under the law of different states. In addition, it requires an identification of the various states whose law could apply, and a determination whether there is indeed a conflict on the isolated issue among them. An analysis of the contacts the respective jurisdictions have with the occurrence ultimately determines which state has a paramount interest in having its policy or law applied.

In *Dym v. Gordon*,⁵⁵ the New York Court of Appeals applied a similar test to an automobile accident between New York domiciliaries temporarily residing in Colorado. The court held the relevant factors to include: where the relationship between the parties was formed, the basis of its formation, and the domicile of the parties. The court cautioned against a quantitative "adding up" of the contracts,⁵⁶ clearly expressing a requirement that the evaluation must be qualitative.

⁵¹ See cases cited note 41 *supra*.

⁵² Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1235 (1963).

⁵³ See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

⁵⁴ See Reich v. Purcell, 67 Cal. 2d 551, 482 P.2d 727, 63 Cal. Rptr. 31 (1967); Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970); McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966).

⁵⁵ 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

⁵⁶ Courts in other jurisdictions, however, have occasionally engaged in a process

The role played by the policy interests of the various governments in the choice of law process is unclear as a result of the New York cases subsequent to *Babcock v. Jackson*. In *Babcock*, the policies of the concerned jurisdictions were highly relevant to the outcome of the case: "New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence cannot be doubted. . . ."⁵⁷ However, the court is believed to have retreated from that position in *Dym v. Gordon*.⁵⁸ Furthermore, in *Macey v. Rozbicki*,⁵⁹ it was indicated that New York had not adopted a policy-centered approach. Yet, the New York Court has more recently stated that "contacts obtain significance only to the extent that they relate to the policies sought to be vindicated by the conflicting laws."⁶⁰

INTEREST ANALYSIS

The late Professor Brainerd Currie was the leading exponent of a choice of law process that weighs the interests of the various governments which might claim the right to have a dispute adjudicated according to their law.⁶¹ Currie criticized the Second Restatement's position of "most significant relationships" because it establishes no standards by which the significance of a given contact could be determined. "One 'contact' seems to be about as good as another for almost any purpose. The 'contacts' are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is more significant."⁶² For the purpose of finding the rule of decision in a particular case, Currie would substitute his own principles for those found in the Second Restatement:

of quantitative addition of contracts to determine the applicable law. See, e.g., *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961).

⁵⁷ 12 N.Y.2d 473, 482, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 748 (1963).

⁵⁸ 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

⁵⁹ 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

⁶⁰ *In re Chrichton*, 20 N.Y.2d 124, 135 n.8, 228 N.E.2d 799, 806, 281 N.Y.S.2d 811, 820 (1967). See *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

⁶¹ See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963). Professor Ehrenzweig, however, considers this approach "unfortunate." Ehrenzweig, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 570 (1968). He further believes that the alterations made to Currie's approach by the courts have probably made it unacceptable to its principal advocate. A. EHRENZWEIG, *CONFLICTS IN A NUTSHELL* 31 (2d ed. 1970).

⁶² Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963).

When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

. . . If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

. . . If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

. . . If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

. . . If the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum—until someone comes along with a better idea.

. . . The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.⁶³

California adopted the language of the “governmental interests” approach to the choice of law in *Reich v. Purcell*.⁶⁴ The court concluded that when the application of the law of the place of the wrong would defeat the interests of the litigants and the states concerned, it would not apply that law, but would determine the law that most appropriately applied to the issue presented.⁶⁵

The reference to both state and individual interests in *Reich* may be viewed as unnecessary duplication. Once the court considers the state’s

⁶³ *Id.* at 1242.

⁶⁴ 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). See Ehrenzweig, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 570 (1968).

⁶⁵ *Id.*

interest in a choice of law case, that interest—meaning policy—will be to give appropriate recognition to the legitimate interests of the litigants.⁶⁶ On the other hand, *Reich* has been criticized for its very reliance on any sort of state interest. State interest, Professor Ehrenzweig postulates, presupposes the existence of some form of “superlaw” under which the priority of states’ interests could be determined. Such a “superlaw” does not exist. Once it is recognized that the state interest approach fails, becoming mere surplusage, it is not surprising that the court based its reasoning entirely on the more tangible interests of the litigants.⁶⁷

CHOICE-INFLUENCING CONSIDERATIONS

At the threshold of an analytical approach to the choice of law lies the recurring problem of which considerations should be relevant to the determination of the law applicable to the individual issues in a tort case. Professor Robert A. Leflar has identified five factors, called “choice-influencing considerations,” which serve as a practical vehicle for the decision of specific cases.⁶⁸ They include predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum’s governmental interests, and application of the “better rule of law.”⁶⁹ The “choice-influencing considerations” approach to the choice of law did not originate with Leflar. Professors Cheatham and Reese were among the first to analyze such considerations, narrowing them to nine factors⁷⁰ whose influence may be seen in the proposed position of the Second Restatement.⁷¹ Professor Yntema has also listed seventeen “policy considerations” which cover related factors.⁷²

The extent to which Leflar’s list represents a valuable addition to current choice of law doctrine is evidenced by the fact that the courts of

⁶⁶ Weintraub, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 556 (1968).

⁶⁷ Ehrenzweig, *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 570 (1968).

⁶⁸ R. LEFLAR, AMERICAN CONFLICTS LAW 233-265 (1968); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966); Leflar *More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

⁶⁹ Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

⁷⁰ Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

⁷¹ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (Proposed Official Draft, Part II, 1968).

⁷² Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721 (1957).

several jurisdictions have applied it to particular disputes,⁷³ lauding its combination of "workable brevity" and "reasoned analysis."⁷⁴

In tort cases, Leflar's consideration of the advance predictability of results has been viewed as largely irrelevant because negligence is not planned. However, the parties' expectations as to legal liability and insurance coverage, if in fact they had any such expectations, would be with reference to their own state. Which lends support to Leflar's consideration of advancement of the forum's governmental interests. The courts adopting this approach recognize their duty to advance their own governmental interests, and do so, where possible, by weighing that interest more heavily than the interests of other governments whose law could apply to the case.⁷⁵

Leflar's preference for the "better rule of law" represents an open and frank recognition of a factor tacitly underlying the entire common law process wherein the courts overrule old precedents, or adopt one rule rather than another in a case of first impression. The Wisconsin Supreme Court's decision in *Zelinger v. State Sand & Gravel Co.*⁷⁶ turned, in part, upon a determination that the *lex fori* was the better rule of law:

While in this case we consider our own law to be the better law, we must state it is applied for that reason and not because it is the law of the place of the wrong or the law of the forum. All other considerations being the same on this issue, we would apply the law of a nonforum state if it were the better law.⁷⁷

Although the "better rule" consideration should not become the sole factor on which the choice of tort law is based, it is wise to consider the better rule in the choice of law process. It is often easier for a courageous judge to prepare the way for a reform of inferior domestic law by his open preference for "better" foreign solutions. He thereby diminishes the adverse effect which a changing of the domestic rule would have on certainty and the expectations of the parties.⁷⁸ On the other hand, without

⁷³ *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Woodward v. Stewart*, 243 A.2d 917 (R.I.), *cert. denied*, 393 U.S. 957 (1968); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968).

⁷⁴ *Woodward v. Stewart*, 243 A.2d 917 (R.I.), *cert. denied*, 393 U.S. 957 (1968).

⁷⁵ See *Clark v. Clark*, 107 N.H. A leading advocate of invoking the "better rule" has been Professor Cavers. See D. CAVERS, *THE CHOICE OF LAW PROCESS* 9, 79 (1965). 351, 222 A.2d 205 (1966).

⁷⁶ 38 Wis. 2d 98, 156 N.W.2d 466 (1968).

⁷⁷ *Id.*

⁷⁸ Ehrenzweig, "False Conflicts" and the "Better Rule": *Threat and Promise in Multi-State Tort Law*, 53 VA. L. REV. 847 (1967).

guidelines, it may be abused as a justification for a court to reach a pre-determined result.⁷⁹

INDIVIDUAL ISSUES UNDER THE MODERN VIEWS

Under the modern approaches to the choice of law, the court must first ascertain that a true conflict exists as to the particular issue in question. This recognition of a true conflict presupposes the isolation of the various issues presented, and results in the application of the choice of law process to them individually. The courts consider the decisional factors of whatever approach they adopt in the context of their relevance to the issues of the case individually, rather than to the case as a whole. Since the advent of the modern approaches to the choice of law, trends have developed that may predict which law will apply to several individual issues which recur in the tort litigation process.

Where the issue in conflict is intrafamily immunity, and the wrong occurred in the forum state but the domicile of the parties was in another state, the law of the other state has been held to apply.⁸⁰ However, where the parties were domiciled in the forum state and the tort was committed in another state, the law of the forum applied.⁸¹ Thus, even under a modern approach to choice of law, the same result obtains as that which existed under the old concept of domicile.

Where wrongful death and survival statutes relate to the choice of law, the courts often apply the law of the domicile of the deceased or his representatives to determine the substantive rights of the parties. The law of the domicile has been held to apply when the domicile is in the forum state as well as when it is not.⁸² Furthermore, the law of the defendant's domi-

⁷⁹ See, e.g., *Conklin v. Horner*, 38 Wis.2d 468, 157 N.W.2d 579 (1968) (dissenting opinion), from which one might infer that the court is simply applying the law of the forum while it goes through the motions of careful selection in accordance with formal procedures.

⁸⁰ *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966). See *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968).

⁸¹ *Doiron v. Doiron*, 241 A.2d 372 (N.H. 1968); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966). But see *Roscoe v. Roscoe*, 379 F.2d 94 (D.C. App. 1967), where, on similar facts the other state's law was held to apply.

⁸² *Fabricius v. Horgen*, 257 Iowa 268, 132 N.W.2d 410 (1965); *DeFoor v. Lematta*, 437 P.2d 107 (Ore. 1968); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964). For a similar application based on residence rather than domicile, see *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1969); See generally *Bannowsky v. Krauser*, 294 F. Supp. 1204 (D. Colo. 1969).

cile, also the place of injury, applies in an international conflicts situation.⁸³

Cases presenting an issue of contribution among tortfeasors have, on different rationale, accomplished the same practical result as the old common law rule that the law of the place of the wrong applies.⁸⁴

Whether the forum court will impose vicarious liability on its resident as a result of a wrong committed in another jurisdiction, depends on the law of the state where the defendant resides.⁸⁵

It has been held that the state where the wrong occurred has the greatest interest in determining whether a spouse may recover for loss of consortium upon an analysis of the interests and factors involved.⁸⁶

When a resident of the forum state sues as a result of a tort committed outside the state, the courts have refused to apply the guest statute of the state where the tort was committed.⁸⁷ This type of decision terms the occurrence of the accident in the foreign state "fortuitous," and an insufficient relationship to make the foreign state's law controlling. When, on the other hand, the forum state has a guest statute, and its residents are injured in a state which does not, the court has held the forum state's law to apply.⁸⁸ However, the fact that the forum state does not have a guest statute has been held not to prevent the forum court from applying a foreign guest statute.⁸⁹

In addition, modern choice of law principles have been applied to cases involving issues of workmen's compensation,⁹⁰ comparative negli-

⁸³ *Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966).

⁸⁴ *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

⁸⁵ *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967); *See generally Williams v. Rawlings Truck Line, Inc.*, 357 F.2d 581 (D.C. Cir. 1965).

⁸⁶ *Schneider v. Schimmels*, 256 Cal. App. 2d 366, 64 Cal. Rptr. 273 (1967); *Casey v. Manson Const. & Eng. Co.*, 247 Ore. 274, 428 P.2d 898. *See Van Dyke v. Bolves*, 107 N.J. Super 338, 258 A.2d 372 (1969).

⁸⁷ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d (1963). *See Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966). *But see Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 463, 262 N.Y.S.2d 463 (1965); *Kuchinic v. McGrory*, 422 Pa. 620, 222 A.2d 897 (1966); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

⁸⁸ *Dow v. Larrabee*, 107 N.H. 70, 217 A.2d 506 (1966).

⁸⁹ *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). *But see Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970).

⁹⁰ *Howe v. Diversified Builders, Inc.*, 262 Cal. App. 2d 741, 69 Cal. Rptr. 56 (1968).

gence,⁹¹ and the civil consequences of statutory violation,⁹² with varying results.

CONCLUSION

In the area of torts, American choice of law doctrine is in a state of post-revolutionary evolution. Since declaring their departure from the established principles of *lex loci delicti*, many leading courts have set about the evolutionary task of developing a new body of cohesive choice of law principles to apply in the event that divergent laws of substance conflict. Modern approaches to the choice of law seek to adjudicate the particular issues raised in the litigation process according to the law of the state which, by the employment of various procedures, may fairly be said to have the greatest interest in the resolution of the controversy. The particular means employed to accomplish these ends, however, are as significant as the ends themselves because they control the extent to which essential fairness and justice will be successfully attained. Furthermore, the constitutional validity of a given state's approach to the choice of law will probably depend on whether its particular method satisfies a "minimum contacts" test similar to the test now applied to determine the constitutionality of jurisdiction.

The modern approaches to the choice of law are substantially more than disguised bases for the application of the forum court's own law, although forum law is often applied as a result of their exercise. When properly applied, they recognize that the forum state often has a legitimate interest in the resolution of the particular dispute, and is usually more than a mere convenient place to file suit.

Because of the lack of uniform, concrete principles leading to predictable results, some courts may be expected to remain reluctant to adopt a modern approach to the choice of tort law. Other courts, however, will weigh the necessity for substantial justice in individual cases more heavily than the need for certainty and predictability. They will adopt the modern approaches to choice of tort law in increasing numbers.

It should not be assumed that the ultimate approach to choice of law lies within the limits of the presently defined theories. As the courts refine the present approaches, new patterns will emerge. Even as the courts misapply present doctrines, a process of cross-fertilization may produce favorable hybrids. Furthermore, scholarly and judicial creativity may

⁹¹ *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Frummer v. Hilton Hotels Int'l, Inc.*, 60 Misc. 2d 840, 304 N.Y.S.2d 335 (Sup. Ct. 1969).

⁹² *Myers v. Gaither*, 232 A.2d 577 (D.C. App. 1967).

produce new theories that are totally foreign to modern choice of law thinking. It is to be hoped that an increasing number of courts will turn from the mechanical ease of *lex loci delicti*, and lend their efforts to the creation of a new and better approach to the choice of tort law, so that more favorable results might occur—sooner.

J. D. F. III