Spring 1972

Changes in Tort Conflict of Laws in Missouri

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Recommended Citation
Sanborn N. Ball, Changes in Tort Conflict of Laws in Missouri, 37 Mo. L. Rev. (1972)
Available at: http://scholarship.law.missouri.edu/mlr/vol37/iss2/4

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I. INTRODUCTION

Problems of conflict of laws inhere in a federal system of government. At an early date such issues were recognized as "the most embarrassing and difficult of decision, that can occupy the attention of those who preside in courts of justice."1 Although about one case in one hundred involves a conflicts question, the area attracts the attention of many capable legal scholars.2 As a consequence, dynamic change has occurred in this field during the last decade. Such a change recently manifested itself in Missouri's tort choice of law.

When suit is brought in one state for a tort that occurred in another, the court must determine which state's law to apply. Until recently, the Missouri3 and majority position4 allowed one to predict that the law of the place of wrong (lex loci delicti) would control the parties' substantive rights. Legal scholars5 and progressive courts6 criticized the rule. In 1969 the Missouri Supreme Court in *Kennedy v. Dixon*7 overturned a long

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4. In Richards v. United States, 369 U.S. 1, 11-12 (1962), the Court stated: The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties.
7. 499 S.W.2d 173 (Mo. En Banc 1969).
line of precedent by abandoning the lex loci delicti doctrine. Missouri adopted the "most significant relationship test" of the Restatement (Second) of Conflict of Laws, thus abandoning an "isle of stability" and embarking on a voyage in an "uncharted sea."

This comment seeks to elucidate the changes caused by the Kennedy decision in tort choice of law in Missouri. The three part analysis consists of an overview of Missouri's tort choice of law prior to Kennedy, an appraisal of the Restatement (Second) test as applied by the Missouri court, and a projection of the impact of the decision on selected issues arising within the context of a multi-state tort.

II. THE TRADITIONAL APPROACH

A. Lex Fori

The doctrine of lex fori (law of the forum) preceded lex loci delicti as a tort choice of law formula. Throughout the United States the law of the forum controlled all issues in a multi-state tort. The outstanding characteristic of this local law theory was ease of application. Criticism of this isolationist methodology centered around its refusal to recognize the interests of other states. Today such an approach might violate the full faith and credit or due process clauses of the United States Constitution.

B. Lex Loci Delicti

The trend towards lex loci delicti began in dicta in the 1880 case of Dennick v. Central R.R. The eighth edition of Story's treatise on conflicts adopted the doctrine, giving the movement added impetus. In the mid-1880's the Missouri courts abandoned lex fori and adopted lex loci delicti.

8. Cases cited note 74 infra.
9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) [hereinafter cited as RESTATEMENT (SECOND)].
12. In Anderson v. Milwaukee & St. P. Ry., 37 Wis. 321, 322 (1875), the court stated:

The action here is a personal action, for personal injury, governed by the lex fori. This is almost too familiar a principle for discussion or authority.

16. 103 U.S. 11 (1880).
The original Restatement of Conflict of Laws\textsuperscript{19} and Missouri courts\textsuperscript{20} adopted the views of Joseph Beale, the leading advocate of lex loci delicti. Lex loci grew out of the vested rights doctrine, which called for universal enforcement of rights created under a state's local law. Beale rationalized that the cause of action originated in the state of the tort, hence vesting rights in the injured party.\textsuperscript{21} Under the original Restatement\textsuperscript{22} and in Missouri\textsuperscript{23} the law of the "place of wrong" governed all substantive issues relating to the existence of the claim.\textsuperscript{24} The "place of wrong" was the "state where the last act necessary to make an actor liable for an alleged tort [took] place."\textsuperscript{25} In a multi-state tort this was the state where the injury occurred.\textsuperscript{26}

The logic of lex loci delicti possessed certain virtues. In a theoretical sense the doctrine provided for certainty, predictability and uniformity of result. No matter where a party sought to enforce a vested right the outcome should be the same. Little danger of forum shopping existed in the universal system.\textsuperscript{27} The principle protected the reasonable expectations

\begin{enumerate}
\item See Restatement of Conflict of Laws §§ 377-97 (1934) [hereinafter cited as Restatement].
\item See Restatement of Conflict of Laws, Missouri Annotations §§ 377-97 (1937).
\item See J. Beale, Conflict of Laws (1955).
\item Restatement §§ 377-97.
\item See Goodman v. McCulley, 367 S.W.2d 580 (Mo. 1965); Robinson v. Gaines, 331 S.W.2d 653 (Mo. En Banc 1960); Habery v. Reardon Co., 319 S.W.2d 859 (Mo. En Banc 1958); Hall Motor Freight v. Montgomery, 357 Mo. 1188, 212 S.W.2d 748 (1948); Root v. Kansas City S. Ry., 195 Mo. 348, 92 S.W. 621 (1906); Fogarty v. Saint Louis Transfer Co., 180 Mo. 490, 79 S.W. 664 (1904); Neihardt v. Knipmeyer, 420 S.W.2d 27 (K.C. Mo. App. 1967); Chapman v. Terminal Ry. Ass'n, 137 S.W.2d 612 (St. L. Mo. App. 1940); Chandler v. St. Louis & S.F. Ry., 127 Mo. App. 34, 106 S.W. 553 (K.C. Ct. App. 1907).
\item Thus, the lex loci delicti controlled state of mind, capacity to sue, motive, surrounding circumstances, immunity from suit, contributory negligence, available defenses, privilege, causation, existence of a cause of action and all other matters inherent in act and injury which go to determine their legal characteristics.
\item Oblatore v. Brauner, 283 F. Supp. 761, 762 (W.D. Mo. 1968); Gaston v. Wabash R.R., 322 S.W.2d 865, 867 (Mo. En Banc 1959); Restatement § 377. See Hughes Provision Co. v. La Mear Poultry & Egg Co., 242 S.W.2d 285 (St. L. Mo. App. 1951).
\item In Darks v. Scudders-Gale Grocer Co., 146 Mo. App. 246, 130 S.W. 430 (Spr. Ct. App. 1910), a merchant in Oklahoma ordered several bottles of ginger extract from a wholesale grocer in Missouri. The order was shipped from Missouri to the Oklahoma merchant, who sampled the extract. As a consequence, the merchant died. Held: The cause of action, if any, against the wholesaler for the death of the merchant accrued in Oklahoma.
\end{enumerate}
of the parties. Since the forum usually deferred to the law of the place of wrong, little danger of interstate judicial jealousy existed. Under lex loci delicti it was easy to determine which law to apply, and the doctrine did provide an arguably adequate choice of law formula.

These assertions may be challenged. While certainty, predictability and uniformity of result are valid policies in a choice of law system, the just resolution of individual cases should be paramount. Predictability aids attorneys in facilitating settlement, but fails to help courts in properly disposing of the issues. Adoption of the law of the locus delicti made application (as opposed to selection) of the law difficult in that the court was forced at times to grapple with an unfamiliar rule.

Scholars criticized the mechanical and arbitrary nature of the rule. Under such a jurisdiction-selecting rule the content of the law only came into play after the applicable law had been determined. Thus, lex loci selected the applicable law without considering the content of the contending rules, their suitability with regard to the relevant issues, or the result of the controversy.

The traditional doctrine utilized a package approach to choice of law. In the tort context, choice of law issues usually arise with respect to substantive issues other than the negligence of the parties. Lex loci dictated the same applicable law for all torts and all substantive issues. It is inconceivable that a single choice of law doctrine could adequately serve the wide range of tort issues.

Although the original Restatement incorporated lex loci delicti, this approach was inconsistent with the Restatement's basic statement of method:

Each court . . . derives [its choice of law rules] from the same source for determining all its law: from precedent, from analogy, from legal reason and from consideration of ethical and social need.

Experience demonstrated that the last event rule did not work well in situations where the place of injury bore only a slight relationship to the

29. Northrip, supra note 10, at 83.
30. See RESTATEMENT (SECOND) § 6 (2) (f).
33. Northrip, supra note 10, at 83.
36. See note 24 supra.
39. RESTATEMENT § 5, comment b.

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occurrence and the parties regarding a certain issue. Its basic weakness lay in the assumption that only one state had an interest in applying its law. In many cases no one clearly demonstrable place of injury existed, or in others, injury occurred in more than one state. Further, the place of wrong of an unintentional tort is fortuitous; only by chance was the locus delicti concerned at all, and only by chance did a court apply the most appropriate rule of law.

C. Escape Devices

Courts sought to mitigate the potentially harsh results of lex loci delicti by resort to a number of escape devices. The frequently employed device of characterization occurred at two levels. First, a court could utilize the substance-procedure distinction. Although the law of the place of wrong controlled all substantive tort issues, the original Restatement and Missouri courts applied the law of the forum to matters of procedure. In cases where the lex loci delicti would yield harsh or unjust results, a court could characterize a seemingly substantive issue as procedural. This freed the forum to apply its own law. Second, a court might resort to a non-tort characterization, so that the choice of law rules of the characterized area would apply. Certain courts displayed a marked tendency to resort to characterization in difficult cases.

Another main principle of escape stated that the lex fori controlled if the lex loci delicti violated the strong public policy of the forum. As a corollary, some courts refused to enforce the penal laws of other jurisdictions. This escape device lended itself as a substitute for well reasoned analysis, and served as a guise to justify the application of local law. Argu-

40. Restatement (Second) 413.
41. Note, supra note 13, at 469-70.
42. Restatement (Second) 413.
43. See R. Leflar, American Conflicts Law § 93 (1968); Cook, "Characterization" in the Conflict of Laws, 51 Yale L.J. 191 (1941); Lorenzen, The Qualification, Classification, and Characterization Problem in Conflict of Laws, 50 Yale L.J. 743 (1941); Morse, Characterization: Shadow or Substance, 49 Colum. L. Rev. 1027 (1949).
44. Restatement § 585.
45. See Alexander v. Inland Steel Co., 263 F.2d 314 (8th Cir. 1959); Russell v. Kotsch, 336 S.W.2d 405 (Mo. 1960); Robinson v. Gaines, 331 S.W.2d 653 (Mo. En Banc 1960); Hall Motor Freight v. Montgomery, 357 Mo. 1188, 212 S.W.2d 745 (1948); Neihardt v. Knipmeyer, 420 S.W.2d 47 (K.C. Mo. App. 1967); Scott v. Jones, 394 S.W.2d 742 (K.C. Mo. App. 1960); Boneau v. Swift & Co., 66 S.W.2d 172 (St. L. Mo. App. 1934).
46. See, e.g., Noe v. United States Fidelity & Guar. Co., 406 S.W.2d 666 (Mo. 1965) (Louisiana direct action statute held procedural); Hopkins v. Kurn, 351 Mo. 41, 171 S.W.2d 625 (1943) (provision in Oklahoma Constitution that defense of contributory negligence was a question of fact held procedural).
47. See, e.g., Garrison v. Ryno, 328 S.W.2d 557 (Mo. 1959) (tort/contract); Williams v. Illinois Cent. R.R., 360 Mo. 501, 229 S.W.2d 1 (1950) (tort/contract).
49. Restatement § 612. The foreign law had to clearly conflict with the law of the forum and violate fundamental principles of justice.
ments of public policy appear when the law fails to keep pace with social needs.\textsuperscript{51}

The \textit{renvoi} doctrine entailed looking to the whole law of the place of wrong, including its choice of law rules.\textsuperscript{52} In the choice of law rules of the locus delicti, the forum might find a reference back to its own law. The \textit{renvoi} concept encouraged uniformity, but carried to its logical conclusion, there was no stopping point.\textsuperscript{53} American courts and scholars have not favored \textit{renvoi} in the tort area.\textsuperscript{54}

The application of lex loci in so many contexts led to irrational and unjust decisions. Beneath the guise of escape devices, courts sporadically departed from the doctrine in order to do justice.\textsuperscript{55} Resort to escape devices undermined the strongest arguments in favor of lex loci: certainty, predictability and uniformity of result. In combination, lex loci and the escape devices enabled forum preference.\textsuperscript{56} The reasons articulated by the courts to justify departure from the traditional rule were often so patently irrational and arbitrary as to invite widespread criticism of an admittedly proper result, and thus “make the choice between the disease and the cure a difficult one.”\textsuperscript{57}

\textbf{D. Departure from the Traditional Approach}

Choice of law issues involving automobile guest statutes constituted one area which exposed the deficiencies of the traditional rule.\textsuperscript{58} \textit{Neihardt v. Knipmeyer}\textsuperscript{60} is a good example of a Missouri court’s application of traditional principles to the choice of law issue prior to \textit{Kennedy}. Plaintiff sued for injuries resulting from the defendant’s negligent operation of the motor vehicle in which plaintiff was a guest. The trip had been planned in Missouri, but the accident occurred in South Dakota, a state with a guest statute. Missouri had no such statute. In spite of the fact that both parties were Missouri residents, the court held that South Dakota’s guest statute controlled the disposition of the case. The court stated:

\begin{quote}
We have been cited to no Missouri decision indicating that tort actions tried in Missouri are not governed by the law of the state where the tort occurred.\textsuperscript{60}
\end{quote}

\textsuperscript{52} R. Weintraub, \textit{Commentary on the Conflict of Laws} 53-58 (1971).
\textsuperscript{53} Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).
\textsuperscript{54} \textit{See} Griswold, \textit{Renvoi Revisted}, 51 Harv. L. Rev. 1165, 1167, 1170-76 (1938).
\textsuperscript{56} \textit{See} R. Leflar, \textit{American Conflicts Law} § 95 (1968).
\textsuperscript{57} Weintraub, \textit{supra} note 55, at 216.
\textsuperscript{59} 420 S.W.2d 27 (K.C. Mo. App. 1967).
\textsuperscript{60} \textit{Id.} at 29.

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Four years previously, New York had abandoned the vested rights doctrine in the famous case of Babcock v. Jackson. The Neihardt opinion did not cite Babcock or mention any new approaches to tort choice of law. The Babcock court declined to follow lex loci but went on to adopt what the opinion called the "center of gravity" or "grouping of contracts" doctrine. The court stated that

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.

In spite of the Babcock decision, other courts also rejected a change in the traditional approach to tort choice of law. Some emphasized the confusion generated by the modern approach, while others emphasized the absence of a suitable alternative to lex loci. Other jurisdictions have not yet reconsidered their prior decisions.

III. THE MODERN APPROACH

A. Interest Analysis

Before examining the most significant relationship test adopted by Missouri in Kennedy v. Dixon, it is important to understand a related choice of law theory.

The strongest proponent of governmental interest analysis, Brainard Currie, distinguished between "true conflicts" and "false conflicts." A true conflict resulted when the law of one state could not be applied without subverting the policy of the law of another state. A false conflict occurred when only one state had a legitimate interest in applying its law to a certain issue. Currie's methodology consisted of interest analysis with a forum preference corollary. First, the court examined the policies behind the conflicting laws to determine which state had a legitimate interest in having its law applied. If a false conflict resulted, the law of the single interested state should be applied. A superficial true conflict might be reduced to a false conflict by interpretation. If a true conflict was unavoidable, the law of the forum should control. Currie believed that weigh-

64. 439 S.W.2d 173 (Mo. En Banc 1969).
ing legitimate multi-state interests should be a political and not a judicial function. Currie's methodology tended to favor lex fori.

By its very nature governmental interest analysis cannot include all policy considerations that should be included in a choice of law theory. It fails to consider the traditional demands for certainty, predictability and uniformity of result, encourages blatant forum shopping, and disregards the parties' reasonable expectations. By failing to give due deference to foreign law, it threatens interstate judicial order.

Currie argued that his version of interest analysis eliminated the weighing of the significance of the contacts that several states might have with an issue. Yet, the forum still must determine the legitimacy of a state's interests; thus, to this extent, the court would seem to be involved in a weighing process. Therefore, in a practical sense the judicial task is not simplified and the court becomes involved in the political process Currie sought to avoid.

Interest analysis fails to aid a court in the satisfactory resolution of true conflicts. Choice of law rules should appropriately dispose of difficult as well as easy cases. The forum preference corollary seems just as arbitrary as the traditional approach, and likewise fails to select the appropriate law. Although interest analysis is probably a better choice of law formula than lex loci delicti, the courts have seldom used the Currie version as an unassisted basis of decision. The Babcock opinion mentions interests, but the case was not resolved on this basis. Although interest analysis can represent a distinct methodology in itself, it is probably most valuable as an implicit component of the most significant relationship test.

B. The Most Significant Relationship Test

In Kennedy v. Dixon Missouri abandoned lex loci delicti and adopted the most significant relationship test. Missouri residents Kennedy and Towey, while in Saint Louis, planned a vacation trip that was to originate and terminate in Missouri. The parties traveled to New York in the Towey


69. See Note, supra note 31, at 471-72.


72. RESTATEMENT (SECOND) § 145. Of the available alternatives, one writer concluded that the most significant relationship test constituted the most logical approach for Missouri. Northrip, Choice of Law Rules in Tort Cases—A Coming Conflict in Missouri, 33 Mo. L. REV. 81, 92 (1958).

73. 439 S.W.2d 173 (Mo. En Banc 1969).
automobile, which was licensed and garaged in Missouri. On the return trip a head-on collision occurred, killing the driver, Mary Towey, and injuring plaintiff, a guest in the Towey automobile. Although the accident occurred in Indiana, Kennedy brought suit in Missouri against the estate of Mary Towey for decedent's negligence. Indiana had a guest statute, but Missouri did not. Plaintiff submitted her case on alternative theories, one of which argued that Missouri law should control the guest-host relationship. The court agreed, holding that while Indiana law controlled the central negligence issue, Missouri law governed the guest-host question.

Under the traditional Missouri approach, Indiana law would have been applied on the guest-host issue, thus foreclosing plaintiff from recovery. The court specifically rejected lex loci delicti and adopted the most significant relationship test of the Restatement (Second):

§ 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.

74. In the following suits brought by an automobile guest against his host, the Missouri courts applied the guest statute of the place of wrong to determine the substantive rights of the parties: Allen v. Keck, 212 F.2d 425 (8th Cir. 1954); Goodman v. McCulley, 367 S.W.2d 580 (Mo. 1963); Bartlett v. Green, 352 S.W.2d 17 (Mo. 1961); Hisle v. Balkom, 328 S.W.2d 20 (Mo. 1959); Wilcox v. Swenson, 324 S.W.2d 664 (Mo. 1959); Barnes v. Lackey, 319 S.W.2d 638 (Mo. 1959); Ausmus v. Swearingen, 296 S.W.2d 8 (Mo. 1956); Lines v. Teachenor, 278 S.W.2d 300 (Mo. 1954); Tillman v. Zumwalt, 363 Mo. 820, 250 S.W.2d 142 (1952); Wendel v. Shaw, 361 Mo. 416, 235 S.W.2d 266 (1950); Wise v. Coleman, 360 Mo. 829, 230 S.W.2d 870 (1950); Bochner v. Thompson, 359 Mo. 465, 222 S.W.2d 97 (1949); Dennis v. Wood, 357 Mo. 886, 211 S.W.2d 470 (1948); Taylor v. Laderman, 349 Mo. 415, 161 S.W.2d 253 (1942); Neihardt v. Knipmeyer, 420 S.W.2d 27 (K.C. Mo. App. 1967); Fullington v. Southeastern Motor Truck Lines, Inc., 254 S.W.2d 246 (St. L. Mo. App. 1953); Woolf v. Holton, 240 Mo. App. 1123, 224 S.W.2d 801 (K.C. Ct. App. 1949); Yarnall v. Gass, 240 Mo. App. 451, 217 S.W.2d 283 (K.C. Ct. App. 1948); Stevers v. Walker, 233 Mo. App. 636, 125 S.W.2d 920 (K.C. Ct. App. 1939); Hargis v. Denny, 117 S.W.2d 368 (K.C. Mo. App. 1938); McCarty v. Bishop, 231 Mo. App. 604, 102 S.W.2d 126 (K.C. Ct. App. 1937); Hall v. Wilkerson, 84 S.W.2d 1063 (K.C. Mo. App. 1935).

An often overlooked part of the test lies in the reference in section 145 to section six which provides:

§ 6 Choice of Law Principles

[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.]

In applying these provisions to the facts before it, the Missouri Supreme Court held that Missouri had the most significant relationship to the occurrence and the parties with regard to the guest-host relationship.

A number of points should be made about the Restatement (Second) test. The most significant relationship test as applied in Missouri is a qualitative and not a quantitative test. The greatest danger in the approach is that "the Restatement (Second) will be interpreted to direct the counting of physical contacts with the parties and with the transaction and the awarding of the palm to the state with the 'most' contacts." The test could be regarded as a two-tier theory. First, several important factual contacts are enumerated. This listing is not intended to be all inclusive, but does serve as a convenient starting point, and guides the court as to what contacts should be considered. The state of the most significant relationship with respect to a certain issue probably has one or more of these contacts with the occurrence and the parties. After the court has grouped certain contacts with the appropriate states, it utilizes the choice of law policies set out in section six to give these con-
The state possessing the contacts with the most qualitative significance will be the state of the most significant relationship on a given issue. The weighing of the contacts could be viewed as a weighing of the policies discoverable from these contacts. Thus, the Restatement (Second) methodology constitutes a subjective analysis of objective factors.

In determining the qualitative significance of these factual contacts, the forum gives consideration to the relevant policies of all potentially interested states and the relative interests of those states in the application of their law to a given issue. To this extent, the Restatement (Second) has absorbed a degree of interest analysis. This incorporation helps insure emphasis on the qualitative aspects of the test. However, this is not the interest analysis envisioned by Currie; there is no forum preference. A more comprehensive test, the Restatement (Second) has taken certain positive aspects of interest analysis, and combined them with other policy considerations within a definite framework.

In *Kennedy* both of the interested states had two contacts with the occurrence and the parties. Indiana was the place of injury and injury-producing conduct. Missouri was the parties' common residence and the center of their relationship. The Missouri court went beyond this quantitative inquiry to qualitatively adduce the significance of each contact. The court pointed out that Indiana had no interest in applying its guest statute to two Missouri residents. In contrast, Missouri had a greater interest than any other state in the relationship between its citizens. The Missouri legislature's refusal to enact a guest statute indicated the state's public policy: Missouri guests should be compensated for injuries negligently inflicted by Missouri hosts. The court concluded that the host should compensate the guest no matter where the wrong occurred.

The opinion emphasized the policy aspects of the most significant relationship test. This reinforces the argument that in Missouri the considerations outlined in section six are an important part of the test.

The state with the most quantitative contacts will also usually be that of the most significant relationship. However, since the Restatement (Second) puts forth a qualitative test, a mere numerical superiority of contacts will not always insure that the favored state will be that of the most significant relationship. A court could validly conclude that one important

82. R. LEFLAR, supra note 67, § 96.
84. *Restatement (Second)* § 6, § 145, comment e.
85. R. LEFLAR, supra note 67, § 135.
86. Id. § 96.
88. "The contacts serve . . . as a [convenient] starting point upon which the catalyst of governmental policy, as viewed through the aims of the state's statutory scheme, acts to achieve a just and equitable result." Note, supra note 81, at 476.
89. See *Restatement (Second)* § 145, comments e-f.
contact is more significant than a combination of lesser ones. A hypothetical case will serve to illustrate. Plaintiff and defendant are Missouri residents who attend the University of Indiana for nine months of the year. Plaintiff is injured in Indiana while a guest in defendant's car, as a consequence of the latter's negligent driving. Defendant's car is licensed and garaged in Missouri. Indiana has a typical guest statute. Plaintiff sues defendant in a Missouri court.

**Query:** Which state has the most significant relationship to the occurrence and the parties on the guest-host issue? Indiana has three contacts: the place of injury, the place of injury-producing conduct, and the place where the relationship of the parties is centered. Missouri has only one contact: the place of the parties' common residence. However, Indiana has no important policy interests that would be furthered by applying its guest statute to two Missouri residents, while the decided public policy of Missouri would be furthered if forum law is applied. The licensing, garaging and registration of the automobile in Missouri should also be considered. Remembering that "Missouri has a greater concern than any other state in the relationships between its citizens . . . ", Missouri's single contact could well qualitatively outweigh Indiana's three lesser contacts.

The Missouri court also abandoned the traditional rule's package approach. The new analysis focuses on each issue, and then a determination is made as to which law should be applied to this particular issue. The *Restatement (Second)* recognizes that tort choice of law issues are divisible; thus a court need not apply the law of only one state to the collective issues in a case:

\[\text{[T]here is no good reason why all issues arising out of a tort claim} \]
\[\text{must be resolved by reference to the law of the same jurisdiction.}\]

The court must weigh the significance of each contact in light of each issue. Separate rules are stated in the *Restatement (Second)* for certain recurring issues in tort cases. Certain contacts will be more or less important with respect to certain issues. Thus, the identity of the state with the most significant relationship will depend on the nature of the particular issue.

In *Kennedy* the court split the issues in accordance with the dominant policy interests of the states concerned with the disposition of those issues:

The question of negligence . . . should be determined by the law

91. This hypothetical is contained in Note, *supra* note 81, at 473. The facts of this hypothetical are close to those of Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965). See text accompanying note 121 *infra*.
94. See id. at 184-85.
95. *Restatement (Second)* § 145, comment d.
97. *Restatement (Second)* § 145, comment d.
98. *Id.* §§ 156-80.
99. *Id.* § 145, comment d.
of the state where the tort occurs because that is the state with the
dominant interest concerning that issue, but such right of recovery
should not be limited or barred, depending on whether that state
does or does not have a guest statute.\textsuperscript{100}

No Indiana policy would be advanced by applying its law to the guest-host
issue, but Indiana did have a strong policy interest in requiring Missouri
residents to comply with the standard of care for the operation of motor
vehicles on Indiana highways.

The Missouri court noted that at times factual situations might arise
where a court will be unable to determine the state with the most sig-
nificant relationship to a particular issue. In such situations it instructed
the trial courts to apply the substantive law of the place of wrong.\textsuperscript{101} Some
writers have argued that this language suggests that the Missouri adoption
of the \textit{Restatement (Second)} test was less than complete. Such an interpre-
tation rests on the premise that to some extent the \textit{Kennedy} opinion en-
dorsed the Currie version of interest analysis. Since \textit{Kennedy} was a false
conflict, one of these writers contends that the holding directs trial courts
to use the most significant relationship test for false conflicts, but to fall
back on lex loci delicti for true conflicts.\textsuperscript{102} Such a reading of the case is
unwarranted. The opinion does not mention interest analysis. Further,
the court stated that in establishing this procedure it did "not intend that
it should provide a means of abdicating the obligation of determining the
state which has the most significant relationship."\textsuperscript{103} In most, if not all cases,
"it should be possible for the trial court to determine the state with the
most significant contacts and relationship to the issues involved. . . ."\textsuperscript{104}
This language, leaving open the possibility of resort to the traditional
approach, was probably included to aid the trial courts in the difficult
transition period. The most significant relationship test should be employed
in the true conflict situation. Although the competing state policies will
have to be weighed, balancing tests have become rather prominent in the
law. Further, a choice of law theory should be applicable to both easy and
difficult cases.

Nevertheless, this language does serve as a possible limitation on the
opinion. It might be viewed as an escape device to avoid employment of the
\textit{Restatement (Second)} methodology. However, given the inherent flexibility
of the most significant relationship test, resort to escape devices should be
unnecessary. In \textit{Kennedy} the plaintiff pleaded his case in alternative counts:
one under Indiana law; the other under Missouri law.\textsuperscript{105} This is a wise
practice. Further, given the present uncertainty of Missouri choice of law,
it would be wise to plead in the alternative on the choice of law issue:
one count under the most significant relationship test; the other under
lex loci delicti or the appropriate escape devices.

\textsuperscript{100}$439$ S.W.2d at 185.
\textsuperscript{101}$\textit{Id.}$
\textsuperscript{102}$\text{Note, Conflict of Laws—Choice of Law Problems in Tort Cases—Auto-
mobile Guest Statutes, 13 St. L. L.J. 467, 474, 479 (1969); see R. Weintraub, Com-
mentary on the Conflict of Laws 234-35 (1971).}$
\textsuperscript{103}$439$ S.W.2d at 185.
\textsuperscript{104}$\textit{Id.}$
\textsuperscript{105}$\textit{Id.}$ at 175-76.
The court's vote, one abstaining, one concurring, two dissenting and a three man majority, could point to another limitation. Three justices voted to abandon lex loci delicti, while three justices voted to retain the doctrine.\textsuperscript{106} However, the court will probably extend rather than retreat from the decision. The case has been further applied,\textsuperscript{107} and has received the support of most of the writers.\textsuperscript{108}

Kennedy v. Dixon\textsuperscript{109} should not be regarded as a result-oriented opinion. Under the traditional system of lex loci delicti and the escape devices the court could have allowed the plaintiff to recover without adopting a new choice of law methodology. For example, the concurring opinion questioned the wisdom of abandoning the traditional rule, but would have reached the same result as the majority by holding the Indiana guest statute unenforceable in Missouri as against public policy.\textsuperscript{110}

The dissent criticized the most significant relationship test as lacking certainty, predictability and uniformity of result.\textsuperscript{111} Proponents of the new approach acknowledge this, but argue that justice in the individual case should be paramount.\textsuperscript{112} The majority in Kennedy contended that additional cases will establish further guidance.\textsuperscript{113} However, even though the legal principles are the same, it will be seldom, if ever, that the facts of any two cases will be sufficiently alike for one to be dispositive of the other.\textsuperscript{114} Forum shopping would seem to be a very real danger.\textsuperscript{115} Although the reasonable expectations of the parties might not be protected, this consideration is not as important in the tort as in the contract area.\textsuperscript{116}

The new doctrine's inherent flexibility produces this lack of certainty. This flexibility constitutes the method's greatest advantage, and at the same time, its greatest disadvantage. Since determining the significance of a contact is a subjective process, reasonable courts may differ as to the significance of a contact in a given situation.\textsuperscript{117} Further, the courts still have an opportunity to be result-oriented. Yet, judicial discretion is exercised in many areas of the law, and, after examining the history of lex loci and its resulting escape devices, the need for flexibility in a choice

\textsuperscript{106.} See Kennedy v. Dixon, 489 S.W.2d 173 (Mo. En Banc 1969).
\textsuperscript{107.} See Roy v. Landers, 467 S.W.2d 924 (Mo. 1971).
\textsuperscript{109.} 489 S.W.2d 173 (Mo. En Banc 1969).
\textsuperscript{110.} \textit{Id.} at 186 (concurring opinion).
\textsuperscript{111.} \textit{Id.} at 186-87 (dissenting opinion).
\textsuperscript{113.} 439 S.W.2d at 173.
\textsuperscript{116.} \textit{Restatement (Second)} § 145, comment \textit{b}.
\textsuperscript{117.} R. EEFLAR, \textit{supra} note 67, § 155.

http://scholarship.law.missouri.edu/mlr/vol37/iss2/4
of law system becomes readily apparent. The most significant relationship test contains the requisite flexibility to accommodate competing policies in a multi-state tort situation.

Critics of the Restatement (Second) point to the New York experience with the "center of gravity" or "grouping of contacts" test. In Babcock v. Jackson two New York domiciliaries were on a trip in Ontario when the plaintiff-guest received injuries as a result of defendant-host's negligence. The trip began and was to end in New York, where the car was licensed and garaged. Ontario had a guest statute, but New York did not. The court held that New York law should control the guest-host relationship. In a more difficult case, Dym v. Gordon, two New York domiciliaries were independently attending a six week summer session at the University of Colorado. While a guest in defendant's automobile, registered in New York, plaintiff was injured by defendant's negligent driving. The court held that the guest statute of the place of injury, Colorado, should be applied. Justice Fuld, who wrote the majority opinion in Babcock, dissented in Dym. But in Tooker v. Lopez the New York Court of Appeals held that the Michigan guest statute should not be applied to bar a wrongful death action between two New York residents. Decedent-guest was killed in Michigan while riding in defendant-host's automobile, which was registered in New York. The accident occurred while decedent and defendant were both attending the University of Michigan. These cases illustrate that in difficult cases, courts and judges may disagree as to where the most significant relationship lies. Manipulative possibilities result from the new approach's flexibility.

Ehrenzweig has criticized the new formula as circular. Since the significance of the relationship is the very question which the choice of law rule must answer, what should be a conclusion has become a premise for the choice. This noted scholar feared that the most significant relationship test is a purely black letter approach that will be beset by many of the same difficulties that discredited the original Restatement, and will inevitably add to the confusion in tort choice of law. For example, at times the Restatement (Second) may take a jurisdiction-selecting approach similar to the traditional system.

The Kennedy majority acknowledged that the new rule will make the judicial task more difficult. Especially in a true conflict situation,
the forum court must undertake a difficult balancing process. Yet, courts have often successfully undertaken difficult processes in order to meet the needs of justice.

While the Restatement (Second) test does not outwardly consider which law may be better, it replaces the mechanics of lex loci with an analytical approach to choice of law. Importance attaches to the policies of the forum and interested foreign states. In some situations the interests of the forum will be advanced, but in others these interests will be subordinated. Although the new doctrine fails to defer to other interested states in all situations, maintenance of interstate judicial order should not be jeopardized. The Restatement (Second) test provides an appropriate balance between furthering the forum's interests and maintaining interstate judicial order.

IV. Projection

To illustrate the potential impact of *Kennedy v. Dixon* on Missouri law certain selected issues in tort will now be considered.

A. *The Standard of Care*

In setting the standard of care in a multi-state tort situation, Missouri has followed a straightforward lex loci delicti approach. In *Hall Motor Freight v. Montgomery* the plaintiff sued in Missouri for property damage resulting from an automobile accident in Kansas. A Missouri statute required the operator of a motor vehicle to exercise the highest degree of care. Kansas had no such statute. The trial court instructed the jury under the common law of Kansas, which required only ordinary care on the part of the defendants. On appeal the court approved this instruction, holding that when an action is brought in Missouri for a tort committed in another state, matters relating to the right of action should be governed by the lex loci delicti. In this case the state of conduct and the state of injury were the same. Thus, the conflict presented was between the law of the state of conduct-injury and the law of the forum.

In *Hughes Provision Co. v. La Mear Poultry & Egg Co.*, on the other hand, the injury-producing conduct and the injury occurred in different states. Defendant sold certain dressed rabbits to the plaintiff in Missouri. These rabbits were shipped to Ohio where the plaintiff sold them to a third party who contracted tularemia. The victim successfully sued the

128. Herein of the standard of care, tort defenses, immunity from suit, survival of tort claims, and wrongful death.
129. 439 S.W.2d 173 (Mo. En Banc 1969).
130. Restatement (Second) § 157.
131. See Bollinger v. St. Louis-S.F. Ry., 334 Mo. 720, 67 S.W.2d 985 (En Banc 1934); Caylor v. St. Louis-S.F. Ry., 332 Mo. 851, 59 S.W.2d 661 (1933); Larsen v. Webb, 392 Mo. 370, 88 S.W.2d 967 (1933); Tietsort v. Illinois Cent. R.R., 332 Mo. 640, 15 S.W.2d 779 (1919); Hiatt v. St. Louis-S.F. Ry., 308 Mo. 77, 271 S.W. 806 (1925); Sisk v. Chicago, B. & Q. R.R., 67 S.W.2d 80 (St. L. Mo. App. 1934); Boneau v. Swift & Co., 66 S.W.2d 172 (St. L. Mo. App. 1934).
132. 357 Mo. 1188, 212 S.W.2d 748 (1949).
133. 242 S.W.2d 285 (St. L. Mo. App. 1951).
plaintiff in Ohio. Plaintiff then sued defendant in Missouri. An Ohio statute made the selling of diseased provisions criminal, and the Ohio courts had held the violation of this statute to be negligence per se. The Missouri court held that the Ohio standard of care, as defined in the criminal statute, should control disposition of the case.

Under the methodology of the Restatement (Second), the forum will apply a general standard of care prescribed by the applicable law in determining whether the actor was negligent. General standards are usually found in the common law. The forum will also apply a precise standard specified by the controlling law. Precise standards may be established by criminal statute, or may be found in the common law. If the actor's conduct involved the violation of a criminal statute, the controlling law should determine whether a precise standard of care can be derived from the statute, and whether the necessary conditions of the statute have been satisfied. The controlling law will also determine whether violation of the statute constitutes negligence per se, some evidence of negligence, or no evidence of negligence.

If the most significant relationship test is applied to the standard of care issue, the choice of law will probably be the same, although the rationale will be different. The applicable law will usually be the local law of the state where the injury occurred. The place of injury will be the contact with the most qualitative significance on the standard of care issue. The state where the injury occurs usually will have the greatest interest in assuring that persons within its jurisdiction comply with the standard of care established for the particular activity by this state. Since the state of injury and the place of injury-producing conduct are often the same, the place of conduct would seem to be the second most important contact on the standard of care issue. Thus, if the state of wrongful conduct and injury are the same, this state's local law will usually determine the standard of care. Problems may arise when the conduct and injury occur in different states and the application of a precise standard of care is in question. However, Missouri will probably look to the law of the state of injury.

B. Tort Defenses

Contributory negligence is a frequently encountered defense in a negligence action. When a choice of law issue arose concerning this defense, the Missouri courts traditionally applied the prevailing rule in the

134. Restatement (Second) § 157, comment b.
135. Id. § 157, comment c.
136. Id. § 157 (2).
137. Id. § 157, comment d.
138. Id. § 161 (the general principle). See §§ 162-70 (specific applications of the general principle).
139. Id. §164.
state where the injury occurred. In Bryan v. Sweeney the existence of contributory negligence was determined in this manner. While doing electrical work on defendant's Illinois farm, plaintiff, a Missouri resident, suffered injuries from electric shock. When plaintiff sued in Missouri, defendant pleaded that under the law of Illinois plaintiff was contributorily negligent. In barring plaintiff's recovery, the court held that Illinois law controlled the contributory negligence issue.

The Missouri courts have also applied the local law of the state of injury to determine what degree of contributory fault is necessary to preclude recovery by the plaintiff in whole or in part. In Donahoo v. Illinois Terminal R.R. plaintiff sued for personal injuries suffered when defendant's negligently operated freight train struck the motor vehicle in which plaintiff was riding. Although the accident occurred at an Illinois crossing, plaintiff sued in Missouri. Under Illinois law contributory negligence served as a complete defense (unless defendant's actions could be characterized as willful and wanton). The court applied Illinois law to determine the degree of contributory fault necessary to preclude plaintiff's recovery.

Contributory negligence by the plaintiff is an absolute bar to recovery in Missouri and in most jurisdictions. In other states this defense has been replaced by a statutory scheme of comparative negligence. Missouri courts have applied foreign comparative negligence statutes when such was the law of the place of wrong. In Tepel v. Thompson defendant's locomotive struck plaintiff's automobile at a grade crossing in Arkansas. Plaintiff sued for personal injuries in Missouri, alleging that the railroad was negligent. Applying the Arkansas comparative negligence statute, the court held for defendant because the plaintiff's contributory negligence exceeded or equalled the negligence of the defendant.

To determine the elements of last clear chance or the humanitarian doctrine applicable in a multi-state tort, the Missouri courts have again looked to the law of the locus delicti. Plaintiff sued defendant railroad for personal injuries and property damage in Marshall v. Saint Louis-S.F.

141. See Bollinger v. St. Louis-S.F. Ry., 334 Mo. 720, 67 S.W.2d 985 (En Banc 1934); Scott v. Missouri Pac. R.R., 333 Mo. 374, 62 S.W.2d 834 (1933); Caylor v. St. Louis-S.F. Ry., 322 Mo. 851, 59 S.W.2d 661 (1933); Oxford v. St. Louis-S.F. Ry., 331 Mo. 53, 52 S.W.2d 989 (1932). In Missouri the burden of proving contributory negligence is regarded as a substantive issue. O'Leary v. Illinois Terminal R.R., 299 S.W.2d 873 (Mo. En Banc 1957).

142. 363 Mo. 1024, 256 S.W.2d 769 (1955).
143. 275 S.W.2d 244 (Mo. 1955).
144. Shephard v. Harris, 329 S.W.2d 1 (Mo. En Banc 1959).
148. 359 Mo. 1, 220 S.W.2d 23 (1949).
149. See, e.g., Vail v. Thompson, 360 Mo. 1009, 232 S.W.2d 491 (1950).
The suit was brought in Missouri, although the collision producing the injuries occurred in Kansas. As a defense to his own negligence, the defendant pleaded plaintiff's contributory negligence. Seeking to avoid this defense, the plaintiff invoked the doctrine of last clear chance. In determining the elements of last clear chance applicable to the case, the court consulted the law of Kansas.

Under the Restatement (Second) the law selected by application of the most significant relationship test determines the constituent elements, and hence, the existence of contributory fault. The selected law also governs the degree of contributory fault necessary to deny or reduce plaintiff's recovery, and determines whether plaintiff can recover, in spite of his negligence, when the defendant's conduct is of an aggravated nature.\(^1^{151}\)

A choice of law issue may also arise with respect to the effect of plaintiff's contributory fault. Plaintiff may be totally precluded from recovery,\(^1^{152}\) or, by virtue of a comparative negligence doctrine, be able to recover only reduced damages.\(^1^{153}\) Plaintiff's recovery may neither be barred nor reduced, because of the doctrine of last clear chance,\(^1^{154}\) or in Missouri, the humanitarian doctrine.\(^1^{155}\) The law selected by application of Restatement (Second) section 145 will be applied to determine which of these results will occur.\(^1^{156}\)

The place of injury will be the contact with the most qualitative significance with regard to a defense issue. The state where the injury occurs usually will have the greatest interest in determining which actors may avoid liability for their wrongful acts. In a majority of cases, the plaintiff's conduct allegedly constituting contributory fault will have occurred in the state of injury. If so, the local law of this state controls whether the plaintiff's conduct amounted to contributory fault, and the extent to which any contributory fault precludes recovery. Where the place of injury-producing conduct and the place of injury are not the same, the local law of the state of injury should usually be applied.\(^1^{157}\) Thus, in the defense area, it would seem that under the new rationale the choice of law will also be the same.\(^1^{158}\)

**C. Immunity From Suit\(^1^{159}\)**

Traditionally, the existence of an immunity was similarly determined by the law of the place of injury, although it was recognized that any state with a substantial connection to the facts had the judicial power to apply its own law.\(^1^{160}\) The interspousal immunity between husband and wife is

150. 361 Mo. 234, 234 S.W.2d 524 (En Banc 1950).
151. Restatement (Second) § 164, comment a.
152. Id. § 164.
153. Id. § 164, comment d.
154. Id. § 164, comment e.
156. Restatement (Second) § 164(1).
157. Id. § 164, comment b.
158. See Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968) (citing and adopting Restatement (Second) § 164).
159. Restatement (Second) § 145, comment d, § 156, comment f, § 161, comments d-e, §§ 168-69.
160. R. Leflar, American Conflicts Law § 141 (1968).
one of the most common examples.\textsuperscript{161} On this question the Missouri courts followed the traditional approach. In \textit{Robinson v. Gaines}\textsuperscript{162} the court forsook the law of the parties' domicile to apply the local law of the place of wrong. The wife sued the estate of her deceased husband for her injuries caused by the decedent's negligent operation of an automobile. Suit was brought in Missouri, the residence of the husband and wife, although the accident occurred in New Mexico. Under Missouri law a widow could maintain suit against the administrator of her deceased husband's estate. But the forum applied lex loci delicti, holding that under New Mexico law the widow had no cause of action.

By their very nature, immunity questions raise separate issues in a tort case. The willingness of the Missouri court to solve separate issues by different states' laws has cleared the way for a different choice of law on the immunity issue.\textsuperscript{163} Under the most significant relationship test, the choice of law will not only be decided under a new rationale, but a different result may be rendered.\textsuperscript{164}

The new approach is applied to determine whether one family member is immune from tort liability to another family member.\textsuperscript{165} The selected law determines what family relationships give rise to the immunity, and the circumstances under which the immunity is in effect. This law will control whether the estate of a deceased spouse is immune from suit by a surviving spouse, and whether the relationship must have existed at the time of tort.\textsuperscript{166}

Under the new Missouri approach the applicable law will usually be the local law of the state of the parties' domicile.\textsuperscript{167} Several reasons are advanced to explain the immunity from tort liability between spouses: the common law doctrine of spousal identity, the desire to preserve marital harmony and the desire to protect insurance companies from collusive suits.\textsuperscript{168} Under any of these rationales the state of the parties' common domicile will usually be the state with the most significant relationship to this issue. However, if the parties' relationship to the state of their domicile is considerably less close than their relationship to some other state, the law of the other state should be applied.\textsuperscript{169}

\begin{footnotes}
\item[162] 351 S.W.2d 653 (Mo. 1960).
\item[163] See R. Leflar, \textit{supra} note 160, § 141.
\item[165] \textit{Restatement (Second)} § 169 (1).
\item[166] Id. § 169, comment a. Note that the application of the most significant relationship test would have yielded a different result in the \textit{Robinson} case.
\item[167] See id. § 169 (2).
\item[169] \textit{Restatement (Second)} § 169, comment b. While most writers agree that the abolition of lex loci delicti as to interspousal immunity was justified, some have attacked a \textit{lex domicilii} approach on this issue as overly broad and not apt.
\end{footnotes}
D. Survival of Tort Claims

At common law tort claims did not survive the death of the tortfeasor or the injured person. This has been changed by statute in all jurisdictions. Yet, in many states certain torts do not survive. Under a vested rights rationale, it would seem that a state which created a cause of action could also destroy it. Thus, if by the law of the place of wrong there was no survival, the death of the tortfeasor or injured person would terminate the claim everywhere. If the claim did survive under the controlling law, the death of the tortfeasor or injured person should nowhere be a ground to refuse to entertain suit.

In Burg v. Knox plaintiff, a resident of Kansas, was injured while an automobile guest of James Knox, a resident of Missouri. Knox later died from injuries suffered in the accident, which occurred in Kansas. Plaintiff sued defendant-administratrix in Missouri. Under the Kansas statute the plaintiff could not maintain his action. The Missouri court followed the rule of the original Restatement:

Whether a claim for damages for tort survives the death of the tortfeasor or of the injured person is determined by the law of the place of wrong.


No case under the lex loci, then no case under the lex fori; and the supplement, viz., a case under the lex loci, then one under the lex fori. . . .

The Restatement (Second) determines whether a tort claim survives by applying section 145 to select the applicable law. It also provides that if the claim survives the death of the tortfeasor or injured party, there may be recovery by or against the decedent's representative, provided the lex fori permits the particular representative to sue and be sued. If the forum prohibits suit by or against this particular representative, no recovery is allowed.

for all law-fact patterns. While many of these writers do not subscribe to the most significant relationship test, they would probably agree that there are situations in which the common domicile of the parties should not be regarded as the contact with the most qualitative significance with respect to the interspousal immunity issue. See, e.g., Jayme, Interspousal Immunity: Revolution and Counter-revolution in American Tort Conflicts, 40 S. Cal. L. Rev. 307, 330-32 (1967).
While most cases have held that the survival issue is controlled by the law of the state of conduct and injury, it is questionable whether such decisions will be followed in the future, in view of the Missouri court’s pronouncement that the issues in a tort case are divisible for choice of law purposes. The state of conduct and injury will not by reason of these contacts alone have the most significant relationship to the survival issue. However, the local law of this state will be applied unless some other state possesses a greater interest in the determination of the issue. If the parties are domiciled in a single state, this state will usually be that of the most significant relationship.\(^{182}\)

Revival of a tort claim presents a different situation with respect to choice of law. Here the action is brought during the lifetime of both the tortfeasor and the injured party, but one of the parties dies before rendition of the judgment.\(^{183}\) In *Ausmus v. Swearingen*\(^{184}\) the Missouri court applied forum law to determine whether the suit could be revived, regardless of whether the claim survived under the law of the place of wrong. The court justified the rule on the ground that once the court acquired jurisdiction, such jurisdiction should only be removed by the local law of the forum state. This seems to have been the majority position. The *Restatement (Second)* suggests that a rule of the forum making revival of the suit contingent upon the survival of the cause of action could be interpreted by the forum to require as a condition for revival that the claim survive under the law with the most significant relationship on the question of survival.\(^{185}\)

E. *Wrongful Death*\(^{186}\)

Since tort principles traditionally have governed actions for wrongful death,\(^{187}\) the most significant relationship test should be applied in death actions.\(^{188}\) However, because wrongful death is a statutory cause of action, many courts have been less willing to abandon the vested rights approach in this area. Most courts have held that no cause of action for wrongful death exists unless it was created by the law of the place of wrong. Courts fear that to depart from lex loci would mean giving extra-territorial effect to a state statute.\(^{189}\) In *Husted v. Missouri Pacific Ry.*\(^{190}\) the Missouri court applied the local law of the state of conduct and injury to determine the rights and liabilities of the parties in an action for wrongful death. Decedent Missouri resident was unloading coal cars in defendant’s Kansas yards. The car in which decedent was working was negligently pushed over an incline causing it to collide with several other cars. The resulting impact threw decedent from the car to his death. Decedent’s brothers and sisters sued

\(^{182}\) See id. § 167, comment c.

\(^{183}\) Id. § 167, comment d.

\(^{184}\) 296 S.W.2d 8 (Mo. 1956).

\(^{185}\) See *Restatement (Second)* § 167, comment d.

\(^{186}\) Id. §§ 175-80.


\(^{188}\) See *Restatement (Second)* § 175, comment a.

\(^{189}\) R. Leflar, *supra* note 160, § 139.

the railroad in Missouri. Under the law of Kansas, decedent was under no obligation to support plaintiffs, although they lived on his farm. The court applied the law of Kansas in holding the verdict excessive, in that plaintiffs only had the right to recover their pecuniary loss.

The Restatement (Second) states that the law of the state of injury determines the rights and liabilities of the parties in a wrongful death action unless, with respect to a particular issue, some other state has a more significant relationship to the occurrence and the parties.\(^{191}\) In the Restatement (Second) the same principles control choice of law for both personal injuries and wrongful death.\(^{192}\) The place of injury is defined as the place where the force set in motion by the actor first takes effect. This is not necessarily the state of death or the state of pecuniary loss.\(^{193}\) Whether another state has a more significant relationship to the occurrence and the parties with respect to a particular wrongful death issue will depend on whether another state has an interest in the determination of this particular question. The extent of the interest of each concerned state should be determined in light of the policies of the local law rules. The probability that a state other than the state of injury will be the state of the most significant relationship is greater where the state of injury bears little relation to the occurrence and the parties.\(^{194}\)

In most cases the state of conduct and the state of injury will be the same. This state's law will usually control most wrongful death issues.\(^{195}\) If conduct and injury occur in different states, the local law of the state of injury will usually control. The likelihood is greater that the law of the state of injury will be applied if the decedent had a settled relationship with that state. If the decedent was domiciled, or resided or did business in the state of conduct, this state will probably have the most significant relationship. The same could be said if the injury occurred during an activity or relationship centered in the state of conduct, and the decedent had no settled relationship with the state of injury. When these two elements are found in the same case, the state of conduct will almost certainly be the state of the most significant relationship. When conduct and injury occur in different states it is quite possible that a third state may be that of the most significant relationship.\(^{196}\)

The Missouri courts have applied the law of the place of tort to determine both the amount recoverable\(^{197}\) and who is entitled to receive this

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191. Restatement (Second) § 175.
192. Id. § 175, comment a.
193. Id. § 175, comment b.
194. Id. § 175, comment d.
195. Id. § 175, comment e.
196. Id. § 175, comment f.
amount beneficially. If the cause of action for wrongful death owes its existence to a particular state's law, both ownership and size would seem to be aspects of this same cause of action. Still, the policy considerations that bear on one issue may be different from those that bear on another issue in the same case. If these issues can be logically separated it may be desirable to hold the validity of the cause of action controlled by one law, and such issues as damages and ownership controlled by another law.

In Chapman v. Terminal R.R. the administrator of the estate of William Foy sued in Missouri for Foy's wrongful death. Foy's death occurred in Illinois where defendant's locomotive struck the automobile in which Foy was a guest. The defendant argued that Foy's minority should limit the recovery allowed. Under an Illinois statute, the jury was not confined in its assessment of damages to the value of the services of decedent until he would have reached majority. The jury could consider the continuance of his life, and the benefits to be derived by his next of kin after majority had been reached. The court held that the measure of damages was controlled by the law of the place where the cause of action accrued—Illinois.

Under the Restatement (Second) the most significant relationship test is applied to determine both the measure of damages for wrongful death and the beneficial ownership of the cause of action. The state of conduct and injury will not by virtue of these contacts alone be the state of the most significant relationship with respect to either of these issues. However, the law of this state will usually control. If one state is the domicile of the defendant, decedent, and beneficiaries it would seem that the wrongful death statute of this state should be applied. The applicable law will


199. R. LEFLAR, supra note 160, § 139.

200. 156 Mo. App. 608, 137 S.W.2d 612 (St. L. Ct. App. 1940).

201. RESTATEMENT (SECOND) § 178.

202. Id. § 177.

203. Id. § 177, comment b; § 178, comment b. A predecessor to the Babcock decision, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), suggests that some courts will regard the relationship contacts (the parties' domicile and the center of the parties' relationship) as having the most qualitative significance with respect to an issue involving a statutory limit on damages for wrongful death. In the Kilberg case the decedent met his death when defendant's commercial airplane, on which he was a passenger, crashed. The decedent had been a resident of New York, where his relationship with the defendant airline had originated. The plane had taken off from a New York airport but crashed in Massachusetts. The application of the Massachusetts wrongful death statute would have limited the plaintiff's possible recovery to $15,000. In the ensuing wrongful death action brought in New York, the court applied the law of the forum, which imposed no such limitation. Although Kilberg purportedly was decided under the traditional approach (the court employed an escape device to enable the application of New York law), a portion of the dicta contained in the opinion is relevant at this juncture:

Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. . . . An air traveler from New York may in a flight of a few hours' duration pass through several . . . commonwealths [that limit
control: whether there are any limitations on the amount of recovery; whether punitive damages should be awarded; and whether there can be recovery for particular elements of damage. Likewise, the selected law will determine who the beneficiaries are and the measure of their recovery.

The problem of determining the proper party to maintain a multi-state wrongful death action has caused confusion. Courts have held that ownership of the right is an aspect of the cause of action, controlled by the law creating the right. Arguably, this included only beneficial and not the technical ownership vested in the nominal plaintiff. The designation of a person to bring suit in the controlling wrongful death act does not refer solely to the administrator or executor appointed at the place of wrong. Any person who satisfied the controlling act's description of the proper person to bring suit could maintain the action. Thus, an administrator appointed at the forum could maintain the action, although he held the proceeds solely for the beneficiaries designated in the controlling statute.

If the statute of the place of wrong designated a particular person as the one to sue upon the claim, that person could sue in Missouri. If the statute provided that suit for death should be brought by the personal representative of deceased, recovery was only allowed by a person qualified to sue at the forum. In Stipetich v. Security Stove & Mfg. Co. the parents of a minor decedent sought to sue for the child's wrongful death resulting from the negligence of defendant's servant in driving a delivery truck. Although Kansas was the situs of the tort and the plaintiff's residence, suit was brought in Missouri. The Kansas statute gave a cause of action for wrongful death to the next of kin of deceased, subject to certain limitations. Under the common law of Kansas the phrase "next of kin" meant the persons who inherit decedent's personal property. The Kansas statute

9 N.Y.2d at 39, 172 N.E.2d at 527-28, 211 N.Y.S.2d at 135. Although contained in a case purportedly decided under the traditional system, this language seems to indicate that the New York court would regard the relationship contacts as having the most qualitative significance on the damage limitation issue.

204. Restatement (Second) § 178, comment a.
205. Id. § 177, comment a.
206. R. Leflar, supra note 160, § 139.
on intestate succession provided that the intestate's personal property, if there was no wife nor surviving issue, went to his parents. Applying the law of Kansas, the Missouri court held that if there was a cause of action it was in the parents.

If the wrongful death statute chosen by use of the most significant relationship test designates a particular person to sue upon the claim, other than the personal representative, such other person may sue thereon in any state. Only the person designated in this statute will be permitted to sue on the claim. The state of conduct and injury will usually have the most significant relationship to the occurrence and the parties. However, this state's law will not be chosen by virtue of these contacts alone. If a single state is the domicile of the decedent and beneficiaries, or of the defendant and beneficiaries, its wrongful death statute should usually be applied to determine who may bring the action.

When the controlling death statute provides without further qualification that the wrongful death action shall be brought by decedent's personal representative, there will be a question as to which representative may maintain the action. In some situations representatives may have been appointed in two or more states. If recovery under the controlling statute is for the benefit of individual beneficiaries and no personal representative has been appointed in the forum state, a personal representative appointed in any interested state may sue upon the claim. However, if recovery under the statute is for the benefit of decedent's estate, only a personal representative qualified to sue under the law of the forum may maintain the action.

Under the common law a personal representative could only sue in the state of his appointment. This rule protected local creditors. However, local creditors have no interest in a recovery which goes directly to individual beneficiaries and not into the decedent's estate. In such a situation, there should be no objection to permitting a foreign representative to sue. If the recovery is for the benefit of the estate, local creditors have an interest in the recovery. The interests of local creditors would be prejudiced if a foreign representative sued successfully and then returned with the proceeds to the state of appointment. This explains the distinction drawn in the Restatement (Second) between personal representatives suing for wrongful death to benefit named beneficiaries and personal representatives suing for wrongful death to benefit decedent's estate.

V. CONCLUSION

When lex loci delicti was the tort choice of law rule in Missouri, attorneys naturally first sought the law which supported their client. If

210. Restatement (Second) § 179.
211. Id. § 179, comment b.
212. Id. § 179, comment c.
213. Id. § 180, comment a.
214. Id. § 180 (a).
215. Id. § 180 (b).
216. Id. § 180, comment b.
217. Id. § 180, comment c.
application of that law was unavailable under the mechanical jurisdiction-selecting rule, they sought an escape device that would allow the court to apply this law. In court, the attorney first presented the lex loci doctrine or selected escape device calling for the application of the law of a certain state. Then he would point out that this law supported the position of his client.218

A similar process is followed under the most significant relationship test. Instead of resorting to lex loci or an appropriate escape device, attorneys must emphasize contacts, policies and other factors that will lead a court to apply the desired law. Argument may embrace a wide range of matters showing interests beyond those of mere physical contacts, especially when these contacts favor the opponent. Argument of the superiority of a law should not be overlooked. If the law of another state favors his client, the attorney must demonstrate that justice will best be served by applying the foreign law in this instance. At the same time, courts like to maintain some consistency of result reached on similar facts. An argument based on stare decisis should not be avoided simply because Missouri follows the Restatement (Second). Forum shopping is a frequent criticism of the most significant relationship test, and, while such an argument might not be formalized in a court's opinion, it touches a sensitive area and could turn a court against even a meritorious case.219

The adoption of the most significant relationship test in Missouri seems to have given counsel more flexibility in selecting forums, remedies and available rules of law. As a practical matter, an attorney has a much better chance of getting a certain rule accepted as applicable if it is also the rule of the forum. Thus, an attorney has an advantage if he can sue in a jurisdiction that normally applies the rule for which he is arguing.220

These changes in tort choice of law partly reflect changes in national life. State boundaries have less significance today because of the increased mobility of our population. Men have an increasing tendency to conduct their affairs across state lines. These changes also reflect a changed attitude on the part of the courts; judges are more willing than before to consider the basic values and policies underlying choice of law. Courts today give greater weight to choice of law policies than to the demands of arbitrary legal theory.221 Certain problems persist in the eclectic approach of the Restatement (Second); however, the theory should provide a foundation upon which a tort choice of law system can be constructed that reflects the needs of contemporary society.

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219. Id. at 612-13.
220. See id. at 613.
221. Restatement (Second) 418.