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Lex Loci Delicti and Dissimilarity Doctrine Abandoned and Most Significant Relationship Test Adopted.

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As a result of the decision in *Professional,* the availability of contribution was expanded beyond the scope of the general trend. Although contribution can be sustained in theory as a deterrent to potential violators, that conclusion is not capable of withstanding strict scrutiny. By allowing antitrust defendants to seek contribution from their coconspirators, the court may also endanger the viability of private suits when plaintiffs perceive the scope of their lawsuit spiralling out of control. Subsequent cases must decide, in the interest of fairness, under what circumstances contribution may be allowed.

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CONFLICT OF LAWS—Tort Choice of Law—*Lex Loci Delicti* and Dissimilarity Doctrine Abandoned and Most Significant Relationship Test Adopted

Gutierrez v. Collins,
583 S.W.2d 312 (Tex. 1979).

Esperanza Gutierrez was riding as a passenger in an automobile involved in a collision in Mexico with a vehicle driven by Edward Collins. Both Gutierrez and Collins were residents of El Paso, Texas. Alleging negligence on the part of Collins, Gutierrez brought suit in the district court of El Paso County seeking damages for personal injuries. The doctrine of *lex loci delicti* required Mexican law to control the action. Upon Collins' plea to the court's jurisdiction, the trial court held the dissimilarity doctrine compelled dismissal of the suit because Mexican law could not be enforced in Texas.[1] The El Paso Court of Civil Appeals affirmed,[2] and Gutierrez appealed to the Texas Supreme Court. Held—*Reversed.* In conflict of law questions in tort the doctrine of *lex loci delicti* is abandoned in favor of the most significant relationship test,[3] and the dissimilarity doctrine is no longer recognized as a defense.[4]

(1977) (90% of private antitrust cases terminated prior to trial); Posner, *A Statistical Study of Antitrust Enforcement,* 13 J. L. & ECON. 365, 382-83 (1970) (chart suggests two-thirds of private plaintiffs settle).

1. *See* Gutierrez v. Collins, 583 S.W.2d 312, 313 (Tex. 1979).
2. Gutierrez v. Collins, 570 S.W.2d 101, 102 (Tex. Civ. App. — El Paso, 1978), *rev'd,* 583 S.W.2d 312 (Tex. 1979).
3. Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979).
4. *Id.* at 322.

Lex loci delicti, or law of the place of the wrong,[5] dictated the substantive rights of the parties in tort cases for many years[6] and was followed in Texas beginning in the late 1800's.[7] Under *lex loci delicti* when an action is brought in one jurisdiction for a tort committed in another, all substantive rights and incidents relevant to the cause of action are governed by the law of the place of the wrong.[8] The place of the wrong is the state wherein the last event necessary to create a cause of action occurs.[9] A substantial reason for sustaining *lex loci delicti* was that the doctrine was precise, uniform, relatively easy to apply, and discouraged forum shopping.[10] The traditional doctrine, however, was not without its faults. Legal fictions, including procedural labeling,[11] renvoi,[12] and characterization,[13]

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5. *See* Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 294 (S.D. Tex. 1976); Garza v. Greyhound Lines, Inc., 418 S.W.2d 595, 598 (Tex. Civ. App. — San Antonio 1967, no writ).

6. *See, e.g.*, Texas & P. Ry. v. Humble, 181 U.S. 57, 61 (1901); Western Union Tel. Co. v. Hill, 50 So. 248, 253 (Ala. 1909); Kansas City So. Ry. v. Phillips, 298 S.W. 325, 326 (Ark. 1927).

7. *See, e.g.*, De Ham v. Mexican Nat'l Ry., 86 Tex. 68, 69, 23 S.W. 381, 382 (1893); Texas & P. Ry. v. Richards, 68 Tex. 375, 376, 4 S.W. 627, 628 (1887); Jones v. Louisiana W. Ry., 243 S.W. 976, 978 (Tex. Comm'n App. 1922, judgmt adopted).

8. *See* Richards v. United States, 369 U.S. 1, 3 (1962); Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 107, 33 S.W. 857, 857 (1896); Jones v. Louisiana W. Ry., 243 S.W. 976, 978 (Tex. Comm'n App. 1922, judgmt adopted).

9. Doody v. John Sexton & Co., 411 F.2d 1119, 1121 (1st Cir. 1969); RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

10. *See* Ingersoll v. Klein, 262 N.E.2d 593, 595 (Ill. 1970); Kennedy v. Dixon, 439 S.W.2d 173, 181 (Mo. 1969); Babcock v. Jackson, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746-47 (1963); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 977 (1952).

11. *See, e.g.*, Klingebiel v. Lockheed Aircraft Corp., 372 F. Supp. 1086, 1089 (N.D. Cal. 1971), *aff'd*, 494 F.2d 345 (9th Cir. 1974) (statute of limitations procedural matter governed by law of forum regardless of place of injury); Grant v. McAuliffe, 264 P.2d 944, 948 (Cal. 1953) (survival of actions matter of procedure to be determined by law of forum); Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 137 (1961) (Georgia's limitation on wrongful death recovery went to the matter of "remedy" making it procedural in nature). *But see* Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 193 (Tex. 1968) (on motion for rehearing) (Colorado limitation on recovery for wrongful death not procedural in nature).

12. Renvoi is a technique employed by courts in which the forum state's choice of law rule is interpreted to refer to the "whole law" of the other state including its conflicts law. *See, e.g.*, Richards v. United States, 369 U.S. 1, 10-11 (1962) (Federal Tort Claims Act refers to whole law of state, including choice of law rules); Alaska Airlines, Inc., v. Stephenson, 217 F.2d 295, 299 (9th Cir. 1954) (place of contract law avoided by declaring New York statute procedural and Alaska statute substantive); Guernsey v. Imperial Bank of Canada, 188 F. 300, 301 (8th Cir. 1911) (by interpreting Illinois law to refer to whole law including its conflict rules, law of place where note was payable governed rather than place of endorsement). *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW § 7 (3d ed. 1977); Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study*

were developed to circumvent the rigid results required under the rule. Commentators and courts alike criticized the doctrine as being too mechanical and inflexible.[14] Furthermore, the increasing mobility of modern society created many situations in which the place of the wrong was merely fortuitous and bore only a slight relationship to the cause of action.[15]

The shift away from the *lex loci delicti* approach was initiated by the landmark decision of *Babcock v. Jackson*,[16] in which the most significant relationship test was established as an alternative to the traditional rule.[17] Using prescribed standards of the test, the forum court is required to examine the event and determine which state has the most significant relationships to the controversy.[18] This doctrine, incorporated into the Restatement (Second) of Conflict of Laws,[19] requires the court to consider

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of Problems Involved In Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle, 14 S. CAL. L. REV. 221 (1941); Lorenzen, *The Renvoi Doctrine in the Conflicts of Laws — Meaning of "Law of a Country"*, 27 YALE L.J. 509 (1918).

13. Characterization is a process by which courts classify concepts, terms, or fact situations in order to predetermine the outcome of the choice of law question. *See, e.g.*, Garza v. Greyhound Lines, Inc., 418 S.W.2d 595, 598 (Tex. Civ. App. — San Antonio 1967, no writ) (action for personal injury sustained in Mexico characterized as breach of contract rather than tort); Hudson v. Continental Bus Sys., Inc., 317 S.W.2d 584, 588 (Tex. Civ. App. — Texarkana 1958, writ ref'd n.r.e.) (by allowing action for injuries sustained in Mexico based upon contracts, forum law applied under place of execution of contract rule); Haumschild v. Continental Cas. Co., 95 N.W.2d 814, 819 (Wis. 1959) (action by wife against husband for personal injury was question of family law, not tort, thereby avoiding application of doctrine of interspousal immunity in torts); *cf.* Ramirez v. Autobuses Blancos Flecha Roja, S.A. DE C.V., 486 F.2d 493, 496-97 (5th Cir. 1973) (breach of contractual duty of safe carriage is type of tortious conduct subject to articles 4671 and 4678 when result is death rather than personal injury). The *Ramirez* court noted decedent's ticket was one way, so place of performance of the contract would govern in any event. *See* Ramirez v. Autobuses Blancos Flecha Roja, S.A. DE C.V., 486 F.2d 493, 496-97 (5th Cir. 1973).

14. *See* First Nat'l Bank v. Rostek, 514 P.2d 314, 317 (Colo. 1973); Griffith v. United Airlines, Inc., 203 A.2d 796, 801 (Pa. 1964); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 200 (1971); Note, *The Erosion of Lex Loci Delicti: Toward A More Rational Choice of Tort Law*, 5 U. RICH L. REV. 331, 333-34 (1971).

15. *See* B. J. McAdams, Inc. v. Boggs, 426 F. Supp. 1091, 1098 (E.D. Pa. 1977); First Nat'l Bank v. Rostek, 514 P.2d 314, 318 (Colo. 1973); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145-74, Introductory Note, at 412 (1971); 41 J. AIR. L. & COM. 133, 136 (1975).

16. 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

17. *Id.* at 283, 240 N.Y.S.2d at 747.

18. *See id.* at 283, 240 N.Y.S.2d at 749. New York was held to have the dominant contacts in a suit for injuries sustained in an automobile accident in Canada since the accident involved New York residents on a trip beginning and ending in New York, in a car registered in New York, covered by New York insurance. The Ontario contacts were dismissed as insignificant and purely fortuitous. *Id.* at 284, 240 N.Y.S.2d at 750.

19. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971). Section six of

certain factors: the place of the injury; the place where the conduct causing the injury occurred; the domicile, residence, and nationality of the parties; and the place where the relationship, if any, between the parties occurred.[20] Ultimately and ideally, the examination of these elements will point to one state as having the most significant relationship to the issue.[21]

Following the *Babcock* reasoning over half the states have now rejected *lex loci delicti*[22] representing a clear trend toward more flexible alternatives.[23] In fact, few American courts thoroughly reexamining the *lex loci delicti* doctrine in the last two decades have chosen to retain the old rule.[24] Failure to abandon the doctrine has resulted more from unwillingness to forsake established precedent than belief that the old rule was a good one.[25]

The doctrine of *lex loci delicti* was formally stated in Texas in 1893,[26] and subsequently codified in 1913 for certain causes of action.[27] Texas repeatedly rejected efforts to replace the *lex loci delicti* rule, preferring instead to adhere to the traditional standard.[28] In order to avoid the harsh application of *lex loci delicti*, Texas courts began to erode the old

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the Restatement (Second) enumerates the general principles by which the more specific rules are to be applied. Section 145 lists factual matters to be considered when applying the principles of section six to a tort case. *Id.* §§ 6, 145.

20. *See id.* § 145(2).

21. Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928, 933 (5th Cir. 1974).

22. *See, e.g.*, Reich v. Purcell, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967); Ingersoll v. Klein, 262 N.E.2d 593, 595 (Ill. 1970); Pevoski v. Pevoski, 358 N.E.2d 416, 417-18 (Mass. 1976).

23. *See* Schwartz v. Schwartz, 447 P.2d 254, 257 (Ariz. 1968); Babcock v. Jackson, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963). *See generally* D. CAVERS, THE CHOICE OF LAW PROCESS (1965); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 24 (1965).

24. *See* Clark v. Clark, 222 A.2d 205, 207 (N.H. 1966); Heidemann v. Rohl, 194 N.W.2d 164, 169 (S.D. 1972); Winters v. Maxey, 481 S.W.2d 755, 758 (Tenn. 1972).

25. *See* Clark v. Clark, 222 A.2d 205, 207 (N.H. 1966); Heidemann v. Rohl, 194 N.W.2d 164, 169 (S.D. 1972); Winters v. Maxey, 481 S.W.2d 755, 758 (Tenn. 1972). *But see* Friday v. Smoot, 211 A.2d 594, 597 (Del. 1965) (referring to *lex loci delicti* as preferable because of its certainty).

26. *See* De Ham v. Mexican Nat'l Ry., 86 Tex. 68, 69, 23 S.W. 381, 382 (1893).

27. *See, e.g.*, Francis v. Herrin Transp. Co., 432 S.W.2d 710, 712-13 (Tex. 1968) (wrongful death); El Paso & Juarez Traction Co. v. Carruth, 255 S.W. 159, 159 (Tex. Comm'n App. 1923, judgmt adopted) (personal injury under workman's compensation act); Southern Pac. Co. v. Henderson, 208 S.W. 561, 562 (Tex. Civ. App. — El Paso 1919, writ ref'd) (violation of Federal Safety Appliance Act). *See generally* 1913 Tex. Gen. Laws, ch. 161, at 338 (current version at TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980)).

28. *See, e.g.*, Click v. Thuron Indus., Inc., 475 S.W.2d 715, 716 (Tex. 1972); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 187 (Tex. 1968); Pratt v. Royder, 517 S.W.2d 922, 924 (Tex. Civ. App. — Waco 1974, writ ref'd n.r.e.).

rule.[29] The law of the place of the wrong has been held to dictate the substantive, not procedural, rights involved in an action.[30] In addition, a distinction arose between common law causes of action in which application of *lex loci delicti* was viewed as merely permissive[31] and statutory causes of action in which application of the doctrine was compulsory.[32] In *Marmon v. Mustang Aviation, Inc.*[33] the Supreme Court of Texas expressly left open the possibility that the traditional rule might be abandoned in situations not involving the court's long standing interpretation of a statute that required application of *lex loci delicti*.[34] The court subsequently indicated the law of a foreign state would not be applied under Texas choice of law rules if its connection with the transaction was merely fortuitous.[35] It therefore became apparent that in nonstatutory, or common law, tort actions Texas would not apply the law of the forum if it did not have a significant relationship to the parties.[36] Finally, in 1975 the

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29. *See, e.g.*, Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 296 (S.D. Tex. 1976) ("[A] Texas court might apply a 'significant contacts' rule . . . in a nonstatutory context . . . . "). Continental Oil Co. v. Lane Wood & Co., 443 S.W.2d 698, 701-02 (Tex. 1969) (refusing to apply the law of a state whose connection with the event was minimal and fortuitous); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 194 (Tex. 1968) (on motion for rehearing) (*lex loci delicti* is a court made rule which could be abandoned in favor of the significant contacts rule).

30. *See* De Ham v. Mexican Nat'l Ry., 86 Tex. 68, 71, 23 S.W. 381, 382 (1893); El Paso & Juarez Traction Co. v. Carruth, 255 S.W. 159, 159 (Tex. Comm'n App. 1923, judgmt adopted). Substantive law includes rules and principles that fix rights and establish duties and responsibilities, while procedural law is the "legal machinery" that prescribes how these rights and duties are made effective in court. *See* Brooks v. Texas Employers Ins. Ass'n, 358 S.W.2d 412, 414 (Tex. Civ. App. — Houston 1962, writ ref'd n.r.e.); BLACK'S LAW DICTIONARY 1083 (5th ed. 1979).

31. *See* Couch v. Mobil Oil Corp., 327 F. Supp. 897, 900 (S.D. Tex. 1971) (personal injury diversity action); Flaiz v. Moore, 359 S.W.2d 872, 876 (Tex. 1962) (personal injuries and property damage to automobile); Willis v. Missouri Pac. Ry., 61 Tex. 432, 434 (1884) (transitory cause of action for personal injuries); Weintraub, *Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis*, 44 TEXAS L. REV. 1429, 1441 n.46 (1966) (application of law of place of injury not mandatory in Texas if death occurred in foreign state).

32. *See, e.g.*, Ramirez v. Autobuses Blancos Flecha Roja, S.A., DE C.V., 486 F.2d 493, 497 (5th Cir. 1973) (breach of contractual duty for safe carriage); Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 193-94 (Tex. 1968) (on motion for rehearing) (statutory wrongful death); Willis v. Missouri Pac. Ry., 61 Tex. 432, 434 (1884) (statutory cause of action for personal injuries).

33. 430 S.W.2d 182 (Tex. 1968).

34. *Id.* at 186; *see* Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 295-96 (S.D. Tex. 1976); Couch v. Mobil Oil Corp., 327 F. Supp. 897, 900 (S.D. Tex. 1971).

35. *See* Continental Oil Co. v. Lane Wood & Co., 443 S.W.2d 698, 701 (Tex. 1969).

36. *See* Continental Oil Co. v. General Am. Transp. Corp., 409 F. Supp. 288, 295-96 (S.D. Tex. 1976); Continental Oil Co. v. Lane Wood & Co., 443 S.W.2d 698, 701 (Tex. 1969). *Continental Oil Co. v. Lane Wood & Co.* was originally an action in conversion, a tort for

Texas Legislature amended article 4678[37] allowing application of Texas substantive law to personal injury actions arising in foreign states or countries whenever "appropriate under the facts of the case."[38] The amendment was intended both to free Texas courts from restraints of the territoriality doctrine underlying the judicial interpretation of article 4678 and to adopt the most significant relationship test.[39]

Concommitant with the *lex loci delicti* rule in conflict of law questions is the dissimilarity doctrine, requiring the forum to dismiss suits when the application of the law of the place of the wrong is unenforceable in the forum.[40] Generally, the law of the place of the wrong is deemed unenforceable when it is incomprehensible, substantially different, or against the public policy of the forum state.[41] The dissimilarity doctrine was based upon the belief that it would be unjust to enforce laws substantially different from and opposed to the laws of the forum state.[42]

The dissimilarity doctrine was first applied in Texas in 1887[43] and later enunciated in *Mexican National Railway v. Jackson*[44] when the Texas

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Texas conflict of laws purposes. *See* Lane Wood & Co. v. Continental Oil Co., 431 S.W.2d 625, 627 (Tex. Civ. App. — Tyler 1968), *modified*, 443 S.W.2d 698 (Tex. 1969).

37. *See* 1975 Tex. Gen. Laws, ch. 530, § 2, at 1382.

38. TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980)). The amendment expanded the right of recovery for a wrongful act in a foreign state to damages recoverable under the statutes of Texas as well as the statutes of the pertinent foreign state. In addition, the amendment allowed courts the discretion to apply such rules of substantive law as appropriate under each case. *See id.*

39. *See Proposed Amendments to Article 4678: Hearings on H.B. No. 964 Before the House Judiciary Comm.*, 64th Tex. Leg. (1975) (remarks by Rep. Powers) (unpublished tapes in the Legislative Reference Library, Austin, Texas); *Proposed Amendments to Article 4678: Debate on H.B. No. 974 Before the House of Representatives*, 64th Tex. Leg. (1975) (remarks by Rep. Powers prior to unanimous adoption of amendments to article 4678 wherein he explained purpose of bill was to allow application of most significant contacts rule rather than law of the place of accident) (unpublished tapes in Legislative Reference Library, Austin, Texas).

40. *See* Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 108, 33 S.W. 857, 857 (1896); Texas & P. Ry. v. Richards, 68 Tex. 375, 377, 4 S.W. 627, 629 (1887); Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1281 (1977).

41. *See, e.g.*, El Paso & Juarez Traction Co. v. Carruth, 255 S.W. 159, 160 (Tex. Comm'n App. 1923, judgmt adopted); Cass v. Estate of McFarland, 564 S.W.2d 107, 110 (Tex. Civ. App. — El Paso 1978, no writ); Carter v. Tillery, 257 S.W.2d 465, 467 (Tex. Civ. App. — Amarillo 1953, writ ref'd n.r.e.).

42. *See* Flaiz v. Moore, 359 S.W.2d 872, 875 (Tex. 1962); Paulsen, *Foreign Law in Texas Courts*, 33 TEXAS L. REV. 437, 454 (1955); Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1281 (1977).

43. *See* Texas & Pac. Ry. v. Richards, 68 Tex. 375, 376-77, 4 S.W. 627, 628 (1887) (refusing to apply Louisiana statute conferring right of action not given in Texas).

44. 89 Tex. 107, 33 S.W. 857 (1896).

Supreme Court followed the doctrine by refusing to enforce Mexican law in Texas.[45] Since *Mexican National Railway*, Texas courts consistently refused to entertain a suit for damages for death or personal injuries based on Mexican law because it was found to be materially different from Texas law.[46] By the end of the 1950's virtually every state, except Texas, had abandoned the dissimilarity doctrine.[47] The combined effect of the *lex loci delicti* rule and Texas' refusal to abandon the dissimilarity doctrine resulted in an almost *per se* dismissal of any cause of action involving a tort committed in Mexico or in any other foreign state whose laws were substantially dissimilar to Texas'.[48]

In *Gutierrez v. Collins*[49] the Supreme Court of Texas joined the growing majority of states in abandoning the *lex loci delicti* doctrine in tort cases.[50] Discounting arguments in favor of *lex loci delicti*, the court noted that in actual application of the doctrine the results were often unjust and arbitrary.[51] To replace *lex loci delicti* the court adopted the most significant relationship test as prescribed in sections six and 145 of the Restatement (Second) of Conflict of Laws.[52] The court further held article 4678[53] was part of a statutory scheme applicable to wrongful death

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45. *Id.* at 113, 33 S.W. at 861.

46. *See, e.g.*, El Paso & Juarez Traction Co. v. Carruth, 255 S.W. 159, 160 (Tex. Comm'n App. 1923, judgmt adopted) (personal injury); Cass v. Estate of McFarland, 564 S.W.2d 107, 111 (Tex. Civ. App. — El Paso 1978, no writ) (wrongful death); Carter v. Tillery, 257 S.W.2d 465, 467 (Tex. Civ. App. — Amarillo 1953, writ ref'd n.r.e.) (personal injury). *But cf.* Ochoa v. Evans, 498 S.W.2d 380, 387 (Tex. Civ. App. — El Paso 1973, no writ) (applying Mexican law of title to animals in conversion case); Apodaca v. Banco Longoria, S.A., 451 S.W.2d 945, 946 (Tex. Civ. App. — El Paso 1970, writ ref'd n.r.e.) (applying Mexican law of negotiable instruments).

47. *See* Shuman & Prevezer, *Torts in English and American Conflicts of Law: The Role of the Forum*, 56 MICH. L. REV. 1067, 1076-77 (1958); Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1281-82 (1977).

48. Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1305 (1977).

49. 583 S.W.2d 312 (Tex. 1979).

50. *Id.* at 316 n.2.

51. *See id.* at 317. The court noted that exceptions to the *lex loci delicti* rule had become so predominant as to repudiate its supposed virtue of uniformity. Further, while recognizing the alternative theories sometimes had inconsistent results, the court found neither the threat of inconsistent results nor the doctrine of stare decisis was reason to retain an unjust rule. *See id.* at 317.

52. *Id.* at 318-19; *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).

53. 1917 Tex. Gen. Laws, ch. 679, § 1, at 365 (current version at TEX. REV. CIV. STAT. ANN. art. 4678 (Vernon Supp. 1980)). This article was amended in 1975 yet the court in *Gutierrez* refused to make the amended version of the article retroactive, instead choosing to apply the article as written at the time of the accident. Gutierrez v. Collins, 583 S.W.2d 312, 317 n.3 (Tex. 1979). Generally, in the absence of clear legislative intent, statutes affect-

actions and was mandatory in statutory actions.[54] Gutierrez's suit, however, was for personal injuries, a common law action making application of article 4678 merely permissive.[55] The court, in rejecting traditional reasons for upholding the dissimilarity doctrine,[56] found Mexican law capable of being correctly interpreted and that public policy will not necessarily prohibit its application.[57] Taking these factors into consideration, the court disallowed the dissimilarity doctrine as a defense.[58]

The dissimilarity doctrine had often created hardship for Texas plaintiffs,[59] and its abolition as a defense naturally followed the abandonment of *lex loci delicti*.[60] The decision to abandon *lex loci delicti* would not be complete if an aggrieved party were allowed to suffer summary dismissal of his action once it had been determined Mexico had the most significant relationship to the issue.[61] Texas courts will not enforce a foreign law that violates the natural rights and interests of its citizens,[62] but the mere fact

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ing vested rights operate prospectively only, while procedural and remedial statutes apply to pending cases as well as to causes of action arising prior to their enactment. *See* Deacon v. City of Euless, 405 S.W.2d 59, 61 (Tex. 1966); Regal Properties v. Donovitz, 479 S.W.2d 748, 751 (Tex. Civ. App. — Dallas 1972, writ ref'd n.r.e.).

54. *See* Gutierrez v. Collins, 583 S.W.2d 312, 315 (Tex. 1979).

55. *See* Couch v. Mobil Oil Corp., 327 F. Supp. 897, 900 (S.D. Tex. 1971); Gutierrez v. Collins, 583 S.W.2d 312, 315-16 (Tex. 1979); Flaiz v. Moore, 359 S.W.2d 872, 876 (Tex. 1962).

56. *See* Gutierrez v. Collins, 583 S.W.2d 312, 320-21 (Tex. 1979). Texas courts refused to make a serious analysis of Mexican law because access to translations was a real problem, and even if interpreted Mexico's tort law was so intertwined with its penal sanctions that enforcement of it would violate public policy. *See* Gutierrez v. Collins, 583 S.W.2d 312, 319-20 (Tex. 1979); Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 113-14, 33 S.W. 857, 860 (1896). These problems, however, generally no longer exist. *See* Gutierrez v. Collins, 583 S.W.2d 312, 321-22 (Tex. 1979); Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1287 (1977).

57. *See* Gutierrez v. Collins, 583 S.W.2d 312, 321 (Tex. 1979).

58. *See id.* at 322.

59. *See, e.g.*, El Paso & Juarez Traction Co. v. Carruth, 255 S.W. 159, 160 (Tex. Comm'n App. 1923, judgmt adopted) (dismissing suit by Texas plaintiff injured in Mexico); Carter v. Tillery, 257 S.W.2d 465, 467 (Tex. Civ. App. — Amarillo 1953, writ ref'd n.r.e.) (dismissing suit by Texas plaintiff injured in crash of private plane in Mexico); Johnson v. Employers Liab. Assurance Corp., 99 S.W.2d 979, 983 (Tex. Civ. App. — Beaumont 1936, writ ref'd) (dismissing action under Louisiana Workmen's Compensation Act).

60. Should Mexican law be found the most significant, trial courts would have the old problem of deciding if it could be applied fairly. *See* Gutierrez v. Collins, 583 S.W.2d 312, 319 (Tex. 1979).

61. The hardships of the dissimilarity doctrine would again be imposed upon the injured party. *See* El Paso & Juarez Traction Co. v. Carruth, 255 S.W. 159, 160 (Tex. Comm'n App. 1923, judgmt adopted); Carter v. Tillery, 257 S.W.2d 465, 467 (Tex. Civ. App. — Amarillo 1953, writ ref'd n.r.e.); Johnson v. Employers Liab. Assurance Corp., 99 S.W.2d 979, 983 (Tex. Civ. App. — Beaumont 1936, writ ref'd).

62. *See id.* at 321; Castilleja v. Camero, 414 S.W.2d 424, 427 (Tex. 1967).

a foreign law is dissimilar does not necessarily indicate it is incapable of being enforced.[63] Most civilized nations have judicial remedies similar to those in the United States.[64] Consequently, enforcement of these laws does not unavoidably violate public policy.[65] Abandonment of the dissimilarity doctrine in favor of the more reasoned public policy approach will enable the courts to analyze the applicable foreign law on a case-by-case basis and to determine, in the interest of practicality and fairness, whether the foreign law should be enforced.

The supreme court's rejection of the *lex loci delicti* rule in favor of the flexible most significant contacts test will afford the citizens of Texas a fair and rational choice of law rule on which to rely. There are many possible alternatives to *lex loci delicti*,[66] yet the most significant relationship test combines most of these modern alternatives.[67]

The Texas Supreme Court gave little indication of the interpretation of the corresponding principles stated in the Restatement (Second). This leaves the trial courts and attorneys of Texas with little direction in applying the Restatement (Second) principles which by their nature are susceptible to many interpretations.[68] It has been argued that perhaps the most significant relationship test allows too much judicial discretion and

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63. *See* Ochoa v. Evans, 498 S.W.2d 380, 387 (Tex. Civ. App. — El Paso 1973, no writ); Apodaca v. Banco Longoria, S.A., 451 S.W.2d 945, 946 (Tex. Civ. App. — El Paso 1970, writ ref'd n.r.e.).

64. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 50 (3d ed. 1977). For example, some provisions of the Mexican Civil Code closely resemble Texas law. Note, *The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1287 (1977); *see, e.g.*, CODIGO CIVIL PARA EL DISTRITO Y TERRITORIOS FEDERALES art. 1915 (Mex. 1975) (referring to compensation for damage to personal property); *id.* art. 1917 (providing for joint liability in the case of joint tortfeasors); *id.* art. 1925 (providing for liability under concept of *respondeat superior*).

65. *See* Note, *The Texas Dissimilarity Doctrine As Applied to the Tort Law of Mexico — A Modern Evaluation*, 55 TEXAS L. REV. 1281, 1288 (1977).

66. *See, e.g.*, A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, ch. 3 (1972) (advancing the "*lex fori*," or law of the forum, approach); R. LEFLAR, AMERICAN CONFLICTS LAW § 107 (3d ed. 1977) (advancing "better law" theory which chooses one rule of law over another because it is superior in terms of justice in the individual case); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (advancing "governmental interest theory" requiring forum state to apply its law if it has any legitimate policy interest).

67. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (encompassing most of the modern choice-influencing considerations); R. LEFLAR, AMERICAN CONFLICTS LAW § 139 (3d ed. 1977). *But cf.* Milkovich v. Saari, 203 N.W.2d 408, 416 (Minn. 1973) (court described most significant contacts test as a non-rule).

68. *See* Milkovich v. Saari, 203 N.W.2d 408, 415 (Minn. 1973). *Compare* Babcock v. Jackson, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 748 (1963) (jurisdiction in which wrongful act occurred will usually have predominant concern) *with* Wilcox v. Wilcox, 133 N.W.2d 408, 416 (Wis. 1965) ("law of the forum should presumptively apply").

that the elements of predictability and uniformity have suffered.[69] Consequently, some jurisdictions have adopted a narrower and much more limited rule than the broad significant relationship doctrine, or have established fixed principles by which to interpret the test.[70] In addition, many courts recognizing the futility of strict compliance with the most significant relationship test have established certain general policies to aid in application of the test.[71] The most significant relationship test is based on noting contacts that are to be evaluated according to their relative importance with respect to the particular issue.[72] This concept is a methodology, not a rule,[73] and the mere counting of contacts is not what is involved.[74] The weight of a particular state's contacts must be measured on a qualitative rather than a quantitative scale.[75] The court in *Gutierrez* specifically emphasized that applications of section 145 of the Restatement (Second) should not turn on the number of contacts but on their qualitative nature.[76] Thus the court has indicated, along with most other jurisdictions, it believes the mere fact that a mathematically greater number of contacts occur in one state over another is not determinitive of

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69. *See* Friday v. Smoot, 211 A.2d 594, 597 (Del. 1965); Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966); Neumeier v. Kuehner, 286 N.E.2d 454, 457, 335 N.Y.S.2d 64, 69 (1972); Comment, *Choice of Law Rules in Tort Cases — A Coming Conflict in Missouri*, 33 Mo. L. REV. 81, 85 (1968).

70. *See* First Nat'l Bank v. Rostek, 514 P.2d 314, 319 (Colo. 1973) (attempt to combine features of *lex loci delicti* and most significant contacts test in guest statutes); Tooker v. Lopez, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532-33 (1969) (Fuld, C.J., concurring) (three specific principles to be followed in situations involving guest statutes in conflict situations). *See generally* 41 J. AIR L. & COM. 133, 141 (1975).

71. *See* Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 611 (9th Cir. 1975); Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.I., 422 F. Supp. 405, 407 (N.D. Ill. 1976); Erwin v. Thomas, 506 P.2d 494, 495 (Ore. 1973). The initial step in the choice of law analysis is to isolate the substantive legal issues and determine whether the various states' tort rules are in conflict. If no true conflict exists then the law of the forum applies, but if a potential conflict is discovered the next step is to examine the contacts with the states, evaluating the importance of each in relation to the legal issue. *See* Suchomajcz v. Hummel Chem. Co., 524 F.2d 19, 23 (3d Cir. 1975); Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 612-13 (9th Cir. 1975); Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.I., 422 F. Supp. 405, 407 (N.D. Ill. 1976).

72. *See* Babcock v. Jackson, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 748 (1963); Wilcox v. Wilcox, 133 N.W.2d 408, 416-17 (Wis. 1965).

73. *See* Milkovich v. Saari, 203 N.W.2d 408, 416 (Minn. 1973); Conklin v. Horner, 157 N.W.2d 579, 581 (Wis. 1968).

74. *See* Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928, 933 (5th Cir. 1974); Baffin Land Corp. v. Monticello Motor Inn, Inc., 425 P.2d 623, 628 (Wash. 1967).

75. *See* Schwartz v. Schwartz, 447 P.2d 254, 257 (Ariz. 1968); Wilcox v. Wilcox, 133 N.W.2d 408, 417 (Wis. 1965). *But see* Cavers, *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1235-36, 1240 (1963) (criticizing most significant contacts test as creating quantitative contact counting approach).

76. *See* Gutierrez v. Collins, 583 S.W.2d 312, 319 (Tex. 1979).

which state's law should apply.[77] In most significant relationship analysis,[78] strong emphasis is placed upon the place of the tort, especially when the occurrence of the tort in that state was not merely fortuitous.[79] When the issue involves standards of conduct, the place of the injury and conduct causing injury are the contacts most important in determining which state law should control.[80] Some courts feel it is only fair to permit a defendant to rely on his home state law when acting within that state,[81] while other jurisdictions applying the most significant contacts test begin with a rebuttable presumption in favor of the forum state and utilize the contacts in order of their importance to remove this presumption.[82]

Texas courts applying the significant relationship test will find it often difficult to determine the underlying purposes of the relevant state laws and harder yet to determine which are more significant.[83] Often the outcome of one case is in conflict with an earlier decision even though the facts are similar.[84] Until interpretation of the Restatement (Second) principles evolve through judicial processes, however, the trial courts of Texas will be forced to look to other jurisdictions for guidance.

States committed to the Restatement approach were initially careful in their assessment of the policies and interests involved in determining the applicable choice of law.[85] Yet, once a decision was rendered by the high court in a state, the lower courts and federal courts[86] tended to apply the

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77. *See, e.g.*, Schwartz v. Schwartz, 447 P.2d 254, 257 (Ariz. 1968); Baffin Land Corp v. Monticello Motor Inn, Inc., 425 P.2d 623, 628 (Wash. 1967); Wilcox v. Wilcox, 133 N.W.2d 408, 417 (Wis. 1965).

78. *See* Suchomajcz v. Hummel Chem. Co., 524 F.2d 19, 23 (3d Cir. 1975); Quadrini v. Sikorsky Aircraft Div., 425 F. Supp. 81, 88 (D. Conn. 1977); Jackson v. Miller-Davis Co., 358 N.E.2d 328, 331 (Ill. 1976); 77 HARV. L. REV. 355, 357 (1963).

79. *See* Dwork v. Olson Constr. Co., 551 P.2d 198, 200 (Colo. 1976); Dym v. Gordon, 209 N.E.2d 792, 795, 262 N.Y.S.2d 463, 467 (1965).

80. *See* Jackson v. Miller-Davis Co., 358 N.E.2d 328, 331 (Ill. 1976); Babcock v. Jackson, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, Comment d (1971).

81. *See* Suchomajcz v. Hummel Chem. Co., 524 F.2d 19, 23 (3d Cir. 1975); Cipolla v. Shaposka, 267 A.2d 854, 856 (Pa. 1970).

82. *See, e.g.*, Trapp v. 4-10 Inv. Corp., 424 F.2d 1261, 1264 (8th Cir. 1970); Castonzo v. General Cas. Co., 251 F. Supp. 948, 951 (W.D. Wis. 1966); Winters v. Maxey, 481 S.W.2d 755, 758 (Tenn. 1972).

83. *Accord*, Neumeier v. Kuehner, 286 N.E.2d 454, 457, 355 N.Y.S.2d 64, 69 (1972).

84. *See id.* at 457, 335 N.Y.S.2d at 67; Heidemann v. Rohl, 194 N.W.2d 164, 169 (S.D. 1972); Winters v. Maxey, 481 S.W.2d 755, 758 (Tenn. 1972).

85. *See, e.g.*, Schwartz v. Schwartz, 447 P.2d 254, 257-58 (Ariz. 1968); Fuerste v. Bemis, 156 N.W.2d 831, 833-34 (Iowa 1968); Mitchell v. Craft, 211 So. 2d 509, 512-13 (Miss. 1968).

86. In a diversity action, a federal court must apply the substantive law, including the conflicts law of the forum state. *See* Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3, 4-5 (1975); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

analysis as a rule rather than merely as an approach.[87] For example, some courts have held as a matter of law that "when two residents of the forum state are involved in an accident in another state, the law of the forum applies."[88] Under another rule when parties from different recovery states are involved in an accident, the forum will allow recovery regardless of the law of the place of the accident.[89] Finally, a number of jurisdictions in choosing to apply the laws of a particular state have held the determinative contact was the state in which compensation was paid pursuant to a workmen's compensation act.[90]

The most apparent pattern emerging from the application of modern alternatives to *lex loci delicti* is the tendency of courts to apply forum law to the case.[91] Courts, while referring to the policies and interests of the involved states, in practice apply forum law whenever they have an interest in doing so.[92] Several fact patterns have developed in which

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87. *Compare* Wartell v. Formusa, 213 N.E.2d 544, 545-46 (Ill. 1966) (analysis of Illinois law of interspousal immunity) *and* First Nat'l Bank v. Rostek, 514 P.2d 314, 319 (Colo. 1973) (analysis of South Dakota guest statute) *with* Milton v. Britton, 312 N.E.2d 303, 309-10 (Ill. Ct. App. 1974) (Illinois law of willful and wanton misconduct governed accident in Iowa involving Illinois residents) *and* Sabell v. Pacific Intermountain Express Co., 536 P.2d 1160, 1166 (Colo. Ct. App. 1975) (Colorado law of comparative negligence governed accident in Iowa involving Colorado residents).

88. Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 831-32 (1978); *see, e.g.*, First Nat'l Bank v. Rostek, 514 P.2d 314, 319 (Colo. 1973); Ingersoll v. Klein, 262 N.E.2d 593, 596 (Ill. 1970); Beaulieu v. Beaulieu, 265 A.2d 610, 616 (Me. 1970). *But see* Gutierrez v. Collins, 583 S.W.2d 312, 319 (Tex. 1979). The court refused to rule as a matter of law that forum law should apply in cases involving two Texas residents in a foreign state, leaving it instead for the trial court to decide on remand. The court did indicate, however, in all probability Texas law would control. Gutierrez v. Collins, 583 S.W.2d 312, 319 (Tex. 1979).

89. *See* Schwartz v. Schwartz, 447 P.2d 254, 258 (Ariz. 1968) (suit by wife for negligence of husband allowed despite interspousal immunity in state where accident occurred); Myers v. Cessna Aircraft Corp., 553 P.2d 335, 366-67 (Or. 1976) (suit not barred by statute of limitation in place of injury when limitations had not run in plaintiff's or defendant's state); *cf.* Pfau v. Trent Aluminum Co., 263 A.2d 129, 132-33 (N.J. 1970) (governmental interests analysis).

90. *See, e.g.*, Goodemote v. Mushroom Transp. Co., 427 F.2d 285, 287 (3d Cir. 1970); Madrin v. Wareham, 344 F. Supp. 166, 169 (W.D. Pa. 1972); Elston v. Industrial Lift Truck Co., 216 A.2d 318, 322 (Pa. 1966).

91. *Cf.* Loebig v. Larucci, 572 F.2d 81, 86 (2d Cir. 1978) (by failure to prove German law, Pennsylvania plaintiffs assented to application of New York law on issue of negligence); Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948, 952 (9th Cir. 1977) (when no written notice of intent to raise issue of foreign law is given, court is under no obligation to apply it); Brickner v. Gooden, 525 P.2d 632, 638 (Okla. 1974) (without identifying the laws in conflict, court concluded Oklahoma law had most significant relationship to tort and parties).

92. *See, e.g.*, Pancotta v. Sociedade de Safaris de Mocambique, S.A.R.I., 422 F. Supp. 405, 411-12 (N.D. Ill. 1976) (restatement test); Bernhard v. Harrah's Club, 546 P.2d 719,

courts will consistently apply forum law. When a plaintiff from a state permitting recovery is involved in an accident with a defendant from a state limiting recovery, damages, if any, will be restricted if suit is in the defendant's state.[93] Recovery will not be limited, however, if the suit is brought in the plaintiff's state, even if the injury occurred in a state restricting recovery.[94] In addition, compensation will be permitted when a plaintiff from a state disallowing recovery is injured by a defendant from a state permitting damages, and suit is brought in the defendant's state.[95] Furthermore, when two parties from states not permitting recovery are involved in an accident in a state allowing compensation and suit is brought in the state of the accident, recovery usually will be allowed.[96]

Adoption of the most significant relationship test by the Texas Supreme Court requires determination of the time frame within which contacts will be analyzed.[97] More specifically, the issue is whether a post-accident event should be considered in assessing which state has the most significant relationship to the cause of action. These post-accident events generally fall into one of two categories. The event may be under the personal control of the parties, such as a change in residence or marriage.[98]

724-25, 128 Cal. Rptr. 220, 221-22 (1976) (governmental interest analysis); Schneider v. Nicols, 158 N.W.2d 254, 258 (Minn. 1968) (choice-influencing considerations).

93. *See, e.g.*, Colley v. Harvey Cedars Marina, 422 F. Supp. 953, 957 (D. N.J. 1976) (forum law of defendant's state applied although benefits to plaintiff severely limited); Snow v. Continental Prod. Corp., 353 F. Supp. 59, 61 (E.D. Wis. 1972) (using choice-influencing considerations, Wisconsin law applied although accident occurred in plaintiff's state which allowed recovery); Maguire v. Exeter & Hampton Elec. Co., 325 A.2d 778, 780 (N.H. 1974) (defendant's state law of limited wrongful death damages applied although plaintiff's state had no limits).

94. *See* Turcotte v. Ford Motor Co., 494 F.2d 173, 177-78 (1st Cir. 1974); Schneider v. Nichols, 158 N.W.2d 254, 258 (Minn. 1968). *But see* Casey v. Manson Constr. & Eng'r Co., 428 P.2d 898, 907-08 (Or. 1967) (restatement test); Cippolla v. Shaposka, 267 A.2d 854, 860 (Pa. 1970) (restatement test).

95. *See* Hurtado v. Superior Court, 522 P.2d 666, 670, 114 Cal. Rptr. 106, 112 (1974); (government interests analysis); Broglin v. Nangle, 510 S.W.2d 699, 702 (Mo. 1974) (restatement test); Erwin v. Thomas, 506 P.2d 494, 500 (Or. 1973) (restatement test); Labree v. Major, 306 A.2d 808, 813 (R.I. 1973) (choice-influencing considerations); Johnson v. Spider Staging Corp., 555 P.2d 997, 1001 (Wash. 1976) (restatement test).

96. *See* Arnett v. Thompson, 433 S.W.2d 109, 112 (Ky. 1968) (sufficient contacts test); Milkovich v. Saari, 203 N.W.2d 408, 413 (Minn. 1973) (choice-influencing considerations); Griggs v. Riley, 489 S.W.2d 469, 472 (Mo. Ct. App. 1972) (restatement test). *But see* Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975) (restatement test); Mager v. Mager, 197 N.W.2d 626, 629 (N.D. 1972) (restatement test).

97. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 109 (3d ed. 1977).

98. 69 COLUM. L. REV. 843, 850 (1969); *see, e.g.*, Gore v. Northeast Airlines, Inc., 373 F.2d 717, 723 (2d Cir. 1967) (change in domicile); Reich v. Purcell, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967) (change in residence and domicile); Schneider v. Schneider, 260 A.2d 97, 99 (N.H. 1969) (subsequent marriage).

On the other hand, the event may be one over which the parties have no control, such as the repeal or amendment of a statute pertinent to the transaction.[99] A formalistic approach, followed by a number of courts and the Restatement (Second), would not allow the consideration of any contacts arising subsequent to the creation of the cause of action but would require analysis of the state interests at the time of the accident.[100] Other courts, however, will take these later events into account if they have a bearing upon the state's interest in the case.[101]

It is elementary that any one cause of action for a wrong may have many different issues.[102] Consequently, Texas trial courts might very well apply an old technique known as dépacage, a process whereby separate issues in a single case arising from the same facts are decided by the laws of different jurisdictions.[103] This technique is implicit in the nature of the most significant relationship test,[104] and has received significant acceptance in tort cases.[105] Issues to which dépacage has often been applied include intrafamily immunities,[106] guest statutes,[107] damages,[108] and stat-

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99. 69 COLUM. L. REV. 843, 850 (1969); *see* Gutierrez v. Collins, 583 S.W.2d 312, 313 (Tex. 1979) (article 4678 applying to death or personal injury in a foreign country was amended after accident in question).

100. *See* Gore v. Northeast Airlines, Inc., 373 F.2d 717, 723 (2d Cir. 1967); Tiernan v. Westext Transp. Inc., 295 F. Supp. 1256, 1264 n.6 (D. R.I. 1969); Reich v. Purcell, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967); Doiron v. Doiron, 241 A.2d 372, 374-75 (N.H. 1968); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145-74, Introductory Note, at 412 (1971).

101. *See* 69 COLUM. L. REV. 843, 843 (1969); *cf.* Schneider v. Schneider, 260 A.2d 97, 99 (1969) (involving subsequent marriage of plaintiff and defendant); Buckeye v. Buckeye, 234 N.W. 342, 343 (Wis. 1931) (involving subsequent marriage of plaintiff and defendant).

102. *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963); Griffith v. United Air Lines, 203 A.2d 796, 798 (Pa. 1964); Wilcox v. Wilcox, 133 N.W.2d 408, 415 (Wis. 1965).

103. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 109, at 221 (3d ed. 1977); Wilde, *Depacage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 329 (1968).

104. *See* Barrett v. Foster Grant Co., 450 F.2d 1146, 1152 (1st Cir. 1971); Babcock v. Jackson, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, Comment d (1971).

105. *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963); Griffith v. United Air Lines, 203 A.2d 796, 798 (Pa. 1964); Wilcox v. Wilcox, 133 N.W.2d 408, 415 (Wis. 1965).

106. *See* Emery v. Emery, 289 P.2d 218, 222-23 (Cal. 1955); Johnson v. Johnson, 216 A.2d 781, 783 (N.H. 1966); McSwain v. McSwain, 215 A.2d 677, 680-81 (Pa. 1966); Haumschild v. Continental Cas. Co., 95 N.W.2d 814, 818-19 (Wis. 1959).

107. *See* Babcock v. Jackson, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963); Wilcox v. Wilcox, 133 N.W.2d 408, 415-16 (Wis. 1965). *But see* Dow v. Larrabee, 217 A.2d 506, 508 (N.H. 1966); Dym v. Gordon, 209 N.E.2d 792, 794, 262 N.Y.S.2d 463, 466-67 (1965).

108. *See* Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 137 (1961); Griffith v. United Air Lines, 203 A.2d 796, 798 (Pa. 1964). *But see* Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468, 475-76 (D.C. Cir. 1965).