

## LEX LOCI DELICTI A DYING CHOICE OF LAW APPROACH IN OHIO TORT CASES

FREDERICK R. SCHNEIDER\*

Perhaps no area of the choice of law process is in greater ferment and disarray than the area of tort law. Dissatisfaction with traditional rules is long-standing.<sup>1</sup> Since the now famous case of *Babcock v. Jackson*,<sup>2</sup> at least 15 other states and the District of Columbia have joined New York in discarding traditional rules and applying modern approaches.<sup>3</sup> In Ohio, the traditional *lex loci delicti* rule<sup>4</sup> has been found to be inadequate in three cases. The Court of Appeals for Franklin County has twice been faced squarely with the adequacy of the rule and has applied a more modern approach in its place.<sup>5</sup> During the past year the Supreme Court of Ohio adopted an alternative approach in one case, but the court's limitation of the traditional rule was extremely narrow.<sup>6</sup>

This article traces the development of the *lex loci delicti* rule in Ohio and points up some of the inadequacies of that rule as currently applied by Ohio courts. Following analyses of Ohio cases by applying the place of most significant relationship approach set forth in the *Restatement (Second) of Conflicts of Law*<sup>7</sup> it is submitted that the approach of that restatement should be adopted as the new choice of law rule in tort cases brought in Ohio courts.

It is accepted generally that the *lex loci delicti* rule was adopted by the Supreme Court of Ohio in *Alexander v. Pennsylvania Co.*<sup>8</sup> In *Alexander* the 16 year old plaintiff was employed by the defendant to work on a track gang and was injured in the course of his employment.<sup>9</sup> All these

---

\* Assistant Professor of Law, Salmon P. Chase College of Law.

<sup>1</sup> See, e.g., Yutema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L. J. 468 (1928); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

<sup>2</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>3</sup> Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969).

<sup>4</sup> The *lex loci* rule is the place of wrong rule; that is, the law of the jurisdiction where the wrong occurred is used to determine the respective rights and liabilities of the parties involved. This rule is adopted by RESTATEMENT OF THE CONFLICT OF LAWS, §§ 370-390 (1934). § 378 provides: "The law of the place of wrong determines whether a person has sustained a legal injury." See also R. LEFLAR, AMERICAN CONFLICTS LAW § 132 (1968).

<sup>5</sup> Conway v. Ogier, 115 Ohio App. 251, 184 N.E.2d 681 (1961); Thigpen v. Greyhound Lines, Inc., 11 Ohio App. 2d 179, 229 N.E.2d 107 (1967).

<sup>6</sup> Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971).

<sup>7</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1971) [hereinafter cited as RESTATEMENT (SECOND)].

<sup>8</sup> 48 Ohio St. 623, 30 N.E. 69 (1891).

<sup>9</sup> The plaintiff had been employed as a water boy. However, from time to time his foreman directed him to do other work. Plaintiff was injured when the foreman directed him to assist in the unloading of cinders; plaintiff climbed onto a train car and the foreman directed that the train begin to move before the plaintiff was able to establish his footing. The plaintiff was thrown from the train car and part of the train passed over him, causing his injuries.

events occurred in Pennsylvania. Under Pennsylvania's fellow-servant law the plaintiff could not have recovered from the employer railroad. Ohio, however, did not follow this rule, and if the accident had occurred in Ohio, the plaintiff could have recovered. The plaintiff brought suit in an Ohio court; undoubtedly, he hoped to avoid the Pennsylvania law by so doing. The defendant raised the Pennsylvania fellow-servant rule as a defense, and the court had to choose between Ohio law or Pennsylvania law to decide the case. It might be assumed that the court was faced with a choice of law question in a torts case. However, the existing Ohio law treated *Alexander* as an action on a contract.<sup>10</sup> The court then applied the contracts rule—the law of the place where the contract was made will govern—to the facts and held that Pennsylvania law would apply.<sup>11</sup> But the court was not satisfied to treat the case solely as an action on a contract and went on to say that Pennsylvania law would also be applied if the case were viewed as a tort case alone.<sup>12</sup> The court saw no reason to change the result solely because the action was brought in Ohio.

---

<sup>10</sup> In *Railway Co. v. Ranney*, 37 Ohio St. 665 (1882), the court determined that cases such as this one, arising out of an employer-employee relationship, were to be treated as contract cases. The process of labeling a case is called characterization. Courts always use the law of the forum in this phase of the case. See H. GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* § 9 (4th ed., by E. Scoles, 1964); A. EHRENZWEIG, *CONFLICTS IN A NUTSHELL* § 16-1 (2d ed., 1970).

<sup>11</sup> This rule was adopted as Ohio law in *Knowlton v. Erie Ry. Co.*, 19 Ohio St. 260 (1869), an important case for any discussion of Ohio choice of law in tort cases. In *Knowlton*, the plaintiff had purchased a ticket to ride on the defendant's railroad from Dunkirk, New York, to New York City. He was injured while on defendant's train when a boiler, allegedly defective, burst in the coach in which he was riding. The court assumed this was a contract case because it involved a contract of carriage (the line between tort and breach of contract is sometimes very fine indeed). The defendant raised as a defense a provision printed on plaintiff's ticket whereby the plaintiff assumed all risks of accident and agreed that the defendant should not be liable for any damages to the plaintiff's person or property caused by the negligence of any of the defendant's agents or employees. Such a provision was valid and enforceable in New York, but not in Ohio. Even though the action was brought in Ohio, the court had no difficulty in applying New York law to decide the case:

As the contract was made within the jurisdiction of New York, and contemplated no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract, and in respect to the manner of its execution [performance?], cannot be affected by the laws or policy of other states. If no cause of action arose to the plaintiff under his contract, where the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio.

*Id.* at 263-64.

<sup>12</sup> [W]hether the action of the plaintiff . . . sounds in contract or tort, in either case we think it is to be governed by the law of Pennsylvania. If the acts of the parties impose no obligation on the one hand and confer no rights upon the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights.

*Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 636, 30 N.E. 69, 71 (1891).

Except for the three exceptions already mentioned,<sup>13</sup> the *lex loci* rule has been universally followed by Ohio courts since *Alexander*.<sup>14</sup> Two other railroad employee<sup>15</sup> cases provide good examples of how the rule operates. In *Yeazel v. Louisville and Nashville Railway Co.*,<sup>16</sup> the plaintiff, employed by the Big Four Railroad, was struck in Kentucky by an L & N train while returning to his train. The question was whether the plaintiff's rights and the defendant's liability, if any, should be determined under Ohio or Kentucky law. The court held that the question of negligence should be determined under Kentucky law, the law of the jurisdiction in which the accident occurred. In *Louisville and Nashville Railroad Co. v. Greene*,<sup>17</sup> plaintiff's decedent had died as a result of a train accident at Latonia Depot, Kentucky. The primary issue was the defendant's contention that the damages awarded were excessive. The court held that the *lex loci* rule covered not only the question of negligence, but also the measure of damages, and used Kentucky law to determine whether or not the damages were excessive.

With the advent of the automobile a new area of choice of law cases was opened. Under the *lex loci delicti* rule, the law of the state in which an accident occurred should be applied to determine the respective rights and liabilities of the parties to a lawsuit growing out of such an accident. Indeed, this was the approach adopted in the courts of appeal<sup>18</sup> and then confirmed by the Supreme Court of Ohio in *Freas v. Sullivan*,<sup>19</sup> where the court traced the rule back to *Alexander*.<sup>20</sup> The most commonly litigated

---

<sup>13</sup> See discussion accompanying notes 5 and 6 *supra* and the cases cited thereunder.

<sup>14</sup> In the discussion that follows, no effort is made to provide an exhaustive review of Ohio cases. Rather, representative cases are chosen; others appear in the footnotes.

<sup>15</sup> Working for a railroad was a dangerous occupation. There were a large number of railroad employees' survivors suing the employer railroads. Most of these suits involved a question of applicability of the wrongful death statute. See, e.g., *Woodard v. Michigan Southern and Northern Indiana R.R. Co.*, 10 Ohio St. 121 (1859); *Hover v. Pennsylvania Co.*, 25 Ohio St. 667 (1874); *Wabash R.R. Co. v. Fox*, 64 Ohio St. 133, 59 N.E. 888 (1901). The question was seemingly settled by *Baltimore & Ohio R.R. Co. v. Chambers*, 73 Ohio St. 16, 76 N.E. 91 (1905), *aff'd*, 207 U.S. 142 (1907), but Congress passed the EMPLOYERS' LIABILITY ACT, 45 U.S.C. §§ 51-60 (1964), which was held constitutional by the United States Supreme Court in *Second Employers' Liability Cases*, 223 U.S. 1 (1911). The primacy of the federal act was recognized in *Waring v. Baltimore & Ohio R.R. Co.*, 15 Ohio C.C.R. (n.s.) 33, (1912). *Chambers* remained the law in suits not covered by the FELA until overruled in *Hughes v. Fetter*, 341 U.S. 609 (1951). Under *Hughes*, a state must allow an action for wrongful death in another state under the other state's statute unless the forum state has a strong policy against such actions. If the forum state has a wrongful death statute, as does Ohio, there can be no such strong public policy which would prevent an action for a wrongful death in another state.

<sup>16</sup> 13 Ohio App. 499 (1921).

<sup>17</sup> 26 Ohio App. 392, 160 N.E. 495 (1927).

<sup>18</sup> See, e.g., *Herrrell v. Hickock*, 49 Ohio App. 347, 197 N.E. 241 (1934); *Hickock v. Herrrell*, 56 Ohio App. 378, 10 N.E.2d 1012 (1935), and cases noted *infra*. The most recently reported court of appeals case, *Puls v. I & S Trailways, Inc.*, 21 Ohio App. 2d 218, 256 N.E.2d 246 (1969), also follows the *lex loci* rule.

<sup>19</sup> 130 Ohio St. 486, 200 N.E. 639 (1936).

<sup>20</sup> In confirming the use of the *lex loci* rule in motor vehicle cases, the court said: "The alleged injury herein was received in the state of Pennsylvania, and the alleged acts and omis-

defense in the motor vehicle cases appears to have been contributory negligence on the part of the plaintiff. In *Mostov v. Unkefer*,<sup>21</sup> the earliest motor vehicle case, the plaintiff was a passenger in an automobile driven by her husband which ran into defendant's parked, unlighted truck in Michigan. The defendant raised the defense of the contributory negligence of the husband, which it claimed was imputed to the plaintiff under Michigan law. The court interpreted the *lex loci* rule as requiring it to apply Michigan law to this question, and other Ohio courts have followed *Mostov* in applying the rule.<sup>22</sup> In each of these cases, it was necessary to determine whether or not the plaintiff had established a *prima facie* case. An interesting split arose in the courts of appeal on whether the Ohio law or the law of the jurisdiction where the accident occurred should be applied to decide this question.<sup>23</sup> In *Collins v. McClure*,<sup>24</sup> the Ohio Supreme Court held that the *lex loci* rule dictated that the law of the jurisdiction in which the

sions of Freas must be judged by the law of that state in force at the time . . . Whether recovery can be had depends upon the *lex loci delicti*." *Id.* at 491, 200 N.E. at 641.

<sup>21</sup> 24 Ohio App. 420, 157 N.E. 714 (1927).

<sup>22</sup> See, e.g., *Interstate Motor Freight Co. v. Johnson*, 32 Ohio App. 363, 168 N.E. 143 (1929); *Shaffer v. New York Central R.R. Co.*, 66 Ohio App. 417, 34 N.E.2d 792 (1940).

<sup>23</sup> This split is suggestive of the kinds of problems the courts encounter or create in choice of law cases. One can envision a similar problem creating much difficulty on the contributory negligence question.

In *De Shelter v. Kordt*, 43 Ohio App. 236, 183 N.E. 85 (1931), the question was whether or not the plaintiff's evidence was sufficient to allow a recovery—whether or not the plaintiff had proven a *prima facie* case. The accident had occurred in Michigan, where the plaintiff was a passenger in an automobile driven by the defendant. Michigan had a guest statute which prevented recovery against the driver unless the plaintiff passenger could prove gross negligence or wilful and wanton misconduct. The court analyzed the evidence under the Michigan cases, deciding that only ordinary negligence had been proven.

A similar problem occurred in *Davis Cabs, Inc. v. Evans*, 42 Ohio App. 493, 182 N.E. 327 (1932). The plaintiff had been a passenger in one of the defendant's cabs, and the accident occurred in Kentucky. The trial court had read part of the Kentucky statutes to the jury, and had used Kentucky law in framing its instructions on what constituted a *prima facie* case. The Court of Appeals for Hamilton County ruled, however, that these matters were questions of evidence and were therefore governed by the law of the forum (Ohio):

The statute of Kentucky in question admitted in proof, and submitted by the court in its general charge, provides a rule of *prima facie* evidence, and pertains to the remedy. There is no basis upon which the provision could be considered as substantive law; it is procedural. The statute prescribes a measure of proof to present *prima facie* unreasonable and improper driving. It was, therefore, the duty of the trial court as a part of the procedure of the forum to submit the Ohio rule on the question.

*Id.* at 497-98, 182 N.E. at 328. The court was bogged down in a problem area known as the substance-procedure distinction. Under this distinction, the court must determine which matters are substantive, and therefore controlled by the law of the place where the act or omission occurred, under the *lex loci* rule, and those matters which are procedural, and therefore controlled by the law of the forum. Matters typically labelled procedural are forms of pleading, necessary parties, counterclaims and set-offs, and rules of evidence. It is difficult to comprehend, however, how the question of whether or not a *prima facie* case has been proven can be a matter to be determined by the law of the forum if the *lex loci* rule is observed. For a complete discussion of the substance-procedure distinction, see H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS §§ 80-91 (4th ed., by E. Scoles, 1964). The Court of Appeals for Hamilton County reached the same result in *Collins v. McClure*, 63 Ohio App. 312, 26 N.E.2d 780 (1939).

<sup>24</sup> 143 Ohio St. 569, 56 N.E.2d 171 (1944).

act or omission occurred was to be applied to define the elements of a prima facie case.<sup>25</sup>

In most of the cases discussed thus far, nearly all the events giving rise to the causes of action occurred in one jurisdiction. *Alexander* is typical of these simple cases. There, everything relevant to the case—the residence of the parties, the place of hiring, the place of work, and the place where the alleged negligence and accident occurred—took place in Pennsylvania. Interjecting multi-state elements into a case gives rise to possible complications. One of these more complex cases is *Casper v. Higgins*.<sup>26</sup> Casper, the plaintiff, was a student and Higgins was an instructor at Miami University at Oxford, Ohio. Casper was enrolled in a course in public speaking, and as an incident of that course, he was encouraged to participate in various debates arranged by the school. He received credit for attending these debates. Two debates were arranged in Illinois, and Casper attended these. Higgins drove his automobile to these debates; his expenses were paid by the school. Casper was injured in Illinois when the automobile struck another vehicle while Higgins was driving.

The first question before the court was the nature of the relationship of the parties. The plaintiff contended that the trip was a joint enterprise tending toward the mutual advantage of both parties. The defendant argued that Casper was a guest passenger and that under the Illinois guest statute there was no liability. The court referred to Ohio law<sup>27</sup> to decide the initial question, and determined that there was no joint enterprise because at least one essential element was missing. The court therefore found Casper to have been a guest passenger.<sup>28</sup> There was no compelling reason for the court to use Ohio law to decide the party relationship, which is one of those issues that courts usually resolve by applying the law of the forum without question. But use of Ohio law to determine this issue was correct—and for a substantial reason. The relationship between the two parties was created in Ohio;<sup>29</sup> it was therefore natural and proper for their respective rights, duties, and possible liabilities to have been determined under Ohio law.

But the *Casper* court applied the Illinois guest statute to determine what duty the defendant owed the plaintiff and found that the defendant had a duty not to injure or contribute to the injury of the plaintiff by wilful and wanton misconduct. It would have been more reasonable to continue to

---

<sup>25</sup> The court said: "It follows, therefore, upon this phase of the case that the trial court was correct in applying the law of the state of Kentucky in the determination of the rights and liabilities of the parties . . ." *Id.* at 572, 56 N.E.2d at 173. The court returned to the *De Shetter* result.

<sup>26</sup> 54 Ohio App. 21, 6 N.E.2d 3 (1935).

<sup>27</sup> The court relied on *Bloom v. Leech*, 120 Ohio St. 239, 166 N.E.2d 137 (1929).

<sup>28</sup> The court recognized that Casper was not a passenger for hire.

<sup>29</sup> There was neither an allegation nor proof of a change in the relationship prior to the accident.

apply the law of Ohio in determining the defendant's duty to the plaintiff. Here, since both Ohio and Illinois had guest statutes, the outcome was not affected by the choice of law decision. But if the accident had occurred in a state which did not have a guest statute—Kentucky, for example—the choice of law would have affected the outcome of the case. In fairness to the court, this result was called for by the *lex loci* rule, which provides that respective rights and liabilities of the parties are to be governed by the law of the jurisdiction in which the alleged wrong occurred.

The choice of law becomes much more interesting and difficult when the elements of the other jurisdiction are increased and the elements present in Ohio are greatly decreased, as occurred in *Ellis v. Garwood*.<sup>30</sup> The plaintiff in *Ellis*, a resident of New York, was the administratrix of the estate of her husband, who had died in Ohio as a result of injuries received in an Ohio automobile accident. Both the decedent and the defendant were employed by the same company in New York; they were on a business trip for that employer at the time of the accident. The defendant was the driver on this trip which began, and was to have ultimately ended, in New York.<sup>31</sup> Because of the decedent's New York employment, the plaintiff had recovered an award under the New York Workmen's Compensation Law. She was seeking additional compensation (damages) directly from the defendant.<sup>32</sup> The New York Workmen's Compensation Law provided that an award made under that law was the exclusive remedy available against both the employer *and* the employee. Thus, in New York, the plaintiff's suit against the defendant would have been unsuccessful. Under an Ohio statute, however, a workmen's compensation award was the exclusive remedy against only the employer. Therefore, additional compensation could be obtained from the employee—if negligence were proven. The defendant raised the New York statute as a defense. The court applied Ohio law under the *lex loci* rule, because the accident occurred in Ohio, and held that the New York statute did not provide a defense which could be raised effectively in an Ohio court.

It is submitted that the *Ellis* court reached an unfortunate result. The relationship between the decedent and the defendant was almost totally New York oriented. The accident in Ohio was an unforeseen event which grew out of the New York relationship. New York retained sufficient nexus with the accident to require a workmen's compensation award to be

---

<sup>30</sup> 168 Ohio St. 241, 152 N.E.2d 100 (1958).

<sup>31</sup> This case is the approximate converse of *Casper*. That is, the *Casper* facts could be easily reversed (approximately) to give rise to the same case: the school would be located in Illinois, where the relationship between the parties would be created; the accident would occur in Ohio. The exact converse would call for the suit to be brought in Illinois, while here the suit was brought in Ohio.

<sup>32</sup> In order to confer jurisdiction on the Ohio court, the plaintiff had to voluntarily submit herself to the court's jurisdiction. The defendant was also a non-resident and could not be found for personal service in Ohio. He was served under the Ohio non-resident motorist statute, which is often thought of as being a protection for the residents of the state.

made to the decedent's widow. The occurrence of the accident in Ohio was essentially irrelevant to the issues of this case and should have been given little weight in the choice of the law to be applied.<sup>33</sup>

The *lex loci* rule has not been applied in three recent cases. The usefulness of these cases is hampered by the courts' failures to set forth the specific inadequacies of the traditional rule, to consistently apply a different choice of law approach and to clarify the approach used to guide the bench and bar in future cases.

In *Conway v. Ogier*,<sup>34</sup> the Court of Appeals for Franklin County decided a case which retained a multi-jurisdictional flavor with a bare minimum of Ohio contacts. In *Conway*, a New York doctor had operated on the wife in New York City and brought an action against both husband and wife to recover for medical services rendered. The wife counterclaimed for malpractice, and the husband counterclaimed for loss of consortium. The plaintiff's motions to dismiss both counterclaims on the ground that the statute of limitations had run were granted by the trial court. The court of appeals analyzed the wife's counterclaim as a cause of action arising in New York,<sup>35</sup> became engrossed in the application of Ohio's borrowing statute,<sup>36</sup> and finally ruled that the borrowing statute did not apply because the Ohio statute of limitations provided for a shorter time in which to assert a claim for malpractice than did the New York statute. The choice of law question in the wife's counterclaim is not particularly interesting but would have been more so if the court had given it the same treatment as the husband's claim.

The husband, who counterclaimed for loss of consortium, had never left Ohio. Where did his cause of action arise? The doctor acted in New York, but any effect on the husband was felt only in Ohio. The doctor argued that this counterclaim was a New York cause of action which would be barred by the application of the New York limitation period under the Ohio borrowing statute. The defendant husband, on the other hand, argued that since the matrimonial domicile was Ohio, and because he never left Ohio, his cause of action arose in Ohio and the New York statutes therefore were inapplicable. The court found the *lex loci* rule to be of no

---

<sup>33</sup> A more recent case, *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965), also posed some multi-state elements. There, however, the multi-state elements were caused by the parties moving to Arizona after the accident, which had occurred in Ohio while both parties were Ohio residents. The court answered the choice of law question by applying the *lex loci* rule. The result is correct—Ohio law should have been applied. But the choice of law question should never have been reached. The court should have applied Ohio law because it was the only law relevant at the time of the accident, and the later move to Arizona could not affect the case.

<sup>34</sup> 115 Ohio App. 251, 184 N.E.2d 681 (1961).

<sup>35</sup> "The place of injury for the malpractice claim is clearly New York, and the cause of action arose there." *Id.* at 252, 184 N.E.2d at 683.

<sup>36</sup> OHIO REV. CODE § 2305.20 (repealed, 131 Ohio Session Laws 1831 (1965)).

assistance.<sup>37</sup> The 1934 *Restatement* likewise is not helpful in determining the place of the wrong.

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.<sup>38</sup>

If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof.<sup>39</sup>

But the question is not the exercise of legislative jurisdiction. Neither the Comment following § 377, nor the note following that Comment and providing a summary of rules, is helpful.<sup>40</sup> The court could have said that the place of the wrong was New York because the harm the husband alleged to have suffered was a result of the doctor's conduct in New York. Or the court could have said that the place of wrong was in Ohio because the husband suffered in Ohio. Of these two alternatives, the former is perhaps the more reasonable, although neither is particularly satisfying. But the *lex loci* rule could have been applied—if the court had wanted to apply it.

Having determined that the *lex loci* rule was inadequate, the court needed another rule to take its place. The court discussed comparative governmental interests,<sup>41</sup> citing no authority and not discussing how an

---

<sup>37</sup> It is apparent that the "touchstone" of place of the wrong, in which the *Restatement* places its confidence, is of little assistance here. *Restatement of Conflict of Law* (1934) Section 377. Cf. *Schmidt, a Minor v. Driscoll Hotel, Inc.*, (1957), 249 Minn. 376, 82 N.W.(2d), 365, where the court refused to apply the *Restatement* rule in a case under a Dram Shop Act. Considerable difficulty has been experienced in choice of law for wrongs to intangible relationships, such as interference with contract, multi-state defamation, and alienation of affection cases.

115 Ohio App. at 254, 184 N.E.2d at 684.

<sup>38</sup> RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

<sup>39</sup> *Id.* § 65.

<sup>40</sup> E.g., "1. *Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.*" *Id.* Explanatory Note § 377, comment 1 at 455. This tells us that the court was correct, under this *Restatement* rule, in holding that the wife's counterclaim was a New York cause of action, because the "harmful force" took effect on her body there. But no "harmful force" took effect on the husband's body.

<sup>41</sup> It is apparent that a choice of law here involves competing state interests. In a society with fluidity of travel, it may be doubted that the "situs" of consortium can be said to firmly rest in the matrimonial domicile. New York's interest in negligent conduct occurring there is, in our opinion, a stronger claim than Ohio's tangential interest which rests only on the domicile of the defendants. The loss of consortium, here, must be considered as accruing in New York.

115 Ohio App. at 254, 184 N.E.2d at 685. The court's emphasis and concern was with the doctor's conduct, perhaps re-enforcing the theory that New York could reasonably be found to be the place of the wrong using the *lex loci* rule. But why did Ohio's interest rest on the matrimonial domicile theory? Ohio's interest rested on the loss of consortium, whatever that may have involved, which occurred in Ohio because the husband and wife were in Ohio at the relevant times. This seems to be a stronger interest than that recognized by the court. It relies on the harm and the place where the harm occurred, neither necessarily related to the matrimonial domicile. The harm would have occurred wherever the couple had happened to be. As will



examination of comparative governmental interests might be applied in other cases. The court's solution was a stopgap measure which was later to manifest itself in a different form.

Further complications of a choice of law question involving several jurisdictions were presented in *Thigpen v. Greyhound Lines, Inc.*<sup>42</sup> The plaintiffs had purchased tickets to ride on the defendant's bus from Selma, Alabama, to Cincinnati, Ohio; they were injured when the bus collided with another vehicle in Kentucky. This case, like *Conway*, was decided by the Court of Appeals for Franklin County. Because the case arose out of a contract for carriage, it was approached initially as an action on a contract.<sup>43</sup> As in *Conway*,<sup>44</sup> the question before the court centered on statutes of limitations and the Ohio borrowing statute; only the choice of law question is relevant to this discussion. The court found that Kentucky was neither the place of the making of the contract nor the place of its ultimate performance,<sup>45</sup> stating: "The fact that the collision here occurred in Kentucky was purely fortuitous. . . ."<sup>46</sup> The court went on to compare Kentucky's "degree of nexus"<sup>47</sup> to that of Ohio and Alabama as if it were deciding an action in tort and not one on a contract. Significantly, the court then cited *Babcock v. Jackson*<sup>48</sup> and a Tentative Draft of the *Second Restatement of Conflict of Laws*,<sup>49</sup> both of which reject the *lex loci* rule in

be seen, this was a step in the apparent shift from the *lex loci* rule to the place of the most significant relationship approach.

<sup>42</sup> 11 Ohio App. 2d 179, 229 N.E.2d 107 (1967).

<sup>43</sup> Because this article deals with the choice of law in tort cases, the author's decision to include a discussion of *Thigpen* should be explained. The *lex loci* rule has already been explained and traced back through *Alexander* to *Knowlton*. *Knowlton* also involved an alleged breach of a contract for carriage resulting in personal injury. The court treated it as a contracts case. Yet, in *Alexander*, the court relied heavily on the choice of law rule and decision made in *Knowlton*, *Alexander* itself was also technically a contracts case because it arose out of an employer-employee relationship. See note 10 *supra*. But *Alexander* is seen as the source of the Ohio adoption of the *lex loci* rule in tort cases. The characterization of these cases as contract cases is based on precedent; but they look like tort cases, as the court acknowledged in *Alexander*. See note 12 *supra*. As will be seen, the court in *Thigpen* also hedged: "Even as a tort action . . ." 11 Ohio App. 2d at 181, 229 N.E.2d at 109.

<sup>44</sup> *Conway v. Ogier*, 115 Ohio App. 251, 184 N.E.2d 681 (1961).

<sup>45</sup> Since the tickets were purchased in Alabama, it is obvious that the contracts were made there. It is not so obvious that Kentucky was not a place of performance.

Carrying appellants through the state of Kentucky does not make Kentucky a "place of performance" within the [Ohio] conflicts doctrines. It was "merely a means of enabling the company to perform by delivery" of the appellants at their destination. *Pittsburgh, Cincinnati, Chicago & St. L. Ry. Co. v. Sheppard* (1897), 56 Ohio St. 68, at 78. In *Sheppard*, horses were being transported from Illinois to Columbus, Ohio.

In applying Ohio law, the court considered the passage through Indiana as irrelevant. 11 Ohio App. 2d at 181, 229 N.E.2d at 109.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>49</sup> RESTATEMENT (SECOND) CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964). This subject is treated in RESTATEMENT (SECOND) § 145.

tort cases. But the court did not resolve the choice of law question because of the posture of the case presented.<sup>50</sup>

In terms of defining the extent of either the lex loci rule's inadequacy or the application of an alternative, the Supreme Court of Ohio's most recent choice of law opinion is only slightly more satisfying than *Conway* and *Thigpen*. *Fox v. Morrison Motor Freight, Inc.*<sup>51</sup> was decided on an issue of damages for wrongful death and presented the court with an opportunity to examine the adequacy of the lex loci rule. The plaintiff was an Ohio resident, as the decedent had been. The defendant was a corporation authorized to conduct business in Ohio and operated four truck terminals in that state. The decedent was killed in an Illinois collision involving a truck driven by the decedent and a truck driven by one of the defendant's employees. Both trucks were on trips that began in Ohio and were to have ended in Ohio. The facts of the case are reminiscent of *Ellis*. The narrow question presented to the court was whether the Illinois statutory limit on damages should have been applied by the Ohio courts. The suit was brought in Ohio under Ohio Revised Code § 2125.01,<sup>52</sup> which allows Ohio courts to enforce wrongful death actions provided by statutes of other jurisdictions. Under the lex loci rule, the damages question would have been answered by Illinois law,<sup>53</sup> and the trial court followed this rule.

In reversing, the Supreme Court of Ohio recognized the precedent be-

<sup>50</sup> Absent *Sheppard*, the court might have found Kentucky to be a "place of performance," thus enabling the court to apply Kentucky law—if it had wanted to. Obviously, to get the plaintiffs from Alabama to Ohio in a bus, the bus would have to travel through several other states. These other states could be viewed as "places of performance."

<sup>51</sup> 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971).

<sup>52</sup> When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter . . . . When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. . . .

OHIO REV. CODE ANN. § 2125.01 (Page 1968). Of course, absent the last sentence quoted, the Ohio courts would now be required to entertain this suit under the doctrine of *Hughes v. Fetter*, 341 U.S. 609 (1951). Such has not always been the law. Compare the cases cited at note 14 *supra*.

<sup>53</sup> *Louisville & Nashville R.R. Co. v. Greene*, 26 Ohio App. 392, 160 N.E.2d 495 (1927). This is the position adopted by RESTATEMENT OF THE CONFLICT OF LAWS (1934). Comment *d* to § 391 provides:

The law of the place of the wrong governs the amount of recovery for wrongful death as well as the right to recover. Thus, any limitation upon the amount imposed by the law of the place of wrong will be applicable to determine the maximum amount recoverable elsewhere (see § 412).

Section 412 is the general rule for damages in tort cases: "The measure of damages for a tort is determined by the law of the place of wrong."

hind the *lex loci* rule but said that it would not apply that rule blindly to the *Fox* facts.<sup>54</sup> The court took note of the provision of the Ohio Constitution which prohibits a limitation on damages awarded in wrongful death actions,<sup>55</sup> and thus could have applied an often-employed "public policy" escape device. That is, the court could have recognized the constitutional provision as the expression of a strong public policy of the forum and could have refused to apply another jurisdiction's law repugnant to that public policy.

Instead, the court sought to find a stronger footing for its decision. It found this footing in a comparison of "governmental interests:"

All governmental interest in this case is Ohio's. Both the interest in fair and adequate compensation for the next of kin of an Ohio resident killed by a wrongdoer and the lawful administration of the decedent's estate are solely Ohio governmental interests. We fail to find any Illinois concern involved or disturbed.<sup>56</sup>

The court cited no authority for this approach,<sup>57</sup> which is reminiscent of the Court of Appeals for Franklin County's *Conway* decision. *Fox* laid down no new rules to guide the bench or the bar in the future. The court seemed to be ruling only on the narrow question presented; indeed, a concurring opinion stresses that the court was here carving out an exception to the still accepted *lex loci* rule.

*Fox* is not without problems. It is submitted that the Supreme Court of Ohio has recognized the general inadequacy of the *lex loci* rule but is probably experiencing the same agonizing development pains the Court of Appeals for Franklin County experienced in *Conway* and *Thigpen*. The court now appears to be in search of a new doctrine and a new approach to the choice of law in tort cases. The procedure followed in *Fox* is perhaps adequate for that case, but it will not be particularly helpful in the future. What rules and standards will the court follow in the next case? What rules and what standards should trial court judges follow now? Moreover, just what does Ohio's obvious interest in the lawful administration of the decedent's estate have to do with whether or not the Illinois limit on damages in wrongful death actions should be applied in this case? The estate can be lawfully administered whether the recovery is \$30,000

---

<sup>54</sup> In the court's words:

But would rote application of *lex loci delicti*, with its blindness to other operable facts, consistently produce a just result in a wrongful death action where the injuries causing the death of an Ohio resident occur in another state? We think not. Therefore, in such a case the automatic application of the rule of *lex loci delicti* must be abandoned.

*Fox v. Morrison Motor Freight, Inc.*, 25 Ohio St. 2d 193, 195, 267 N.E.2d 405, 406 (1971).

<sup>55</sup> "The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another shall not be limited by law." OHIO CONST. art. I, § 19a.

<sup>56</sup> 25 Ohio St. 2d at 198, 267 N.E.2d at 408.

<sup>57</sup> It did, at other places in the opinion, cite some of the cases which have adopted new choice of law approaches.

or \$100,000. Indeed, except for funeral expenses, recovery is not even a part of the estate.<sup>58</sup> *Fox* will be examined below, under discussion of the place of the most significant relationship approach, to determine whether the Ohio interest in that case is sufficient to warrant the application of Ohio's law of damages.

Of perhaps greatest significance in *Conway*, *Thigpen* and *Fox*, is that the lex loci delicti rule was found to be inadequate. It is unfortunate that neither court saw fit to set down in more definite form the approaches applied in place of the traditional rule. It is suggested that both courts would accept the place of the most significant relationship approach<sup>59</sup> as satisfying the deficiencies of the lex loci rule. Support for this suggestion requires an examination of the development of the more modern approach and a discussion of it as applied to the facts of the Ohio cases previously discussed.

Judicial acceptance of the place of the most significant relationship approach, and indeed the judicial break from the lex loci rule itself, are traced to the New York Court of Appeals decision in *Babcock v. Jackson*.<sup>60</sup> Because a rather typical choice of law question was presented there, albeit in a more shocking form, *Babcock* is a good case with which to begin examination of this modern approach. Miss Babcock accompanied her friends, Mr. and Mrs. Jackson, on a week-end trip into Canada. All three were New York residents who made the arrangements for and began the trip in New York. While in the Province of Ontario, Mr. Jackson negligently lost control of his car and drove into a stone wall. Miss Babcock was injured as a direct result of this occurrence. Later, she sued Mr. Jackson in New York.

Prior to *Babcock*, New York had subscribed to the lex loci rule, under which the respective rights and liabilities of the parties would be governed by the law of Ontario. Ontario had an unusually strict guest statute which imposed no liability whatsoever on a driver for injuries or death sustained by his guest passengers which might result from the operation of any motor vehicle.<sup>61</sup> Since the Ontario statute was a complete bar to Miss

<sup>58</sup> While the action is brought in the name of the personal representative, the recovery is for the exclusive benefit of the surviving spouse, children and other next of kin of the decedent. OHIO REV. CODE ANN. § 2125.02 (Page Supp. 1970). Illinois law is virtually identical. See ILL. ANN. STAT. ch. 70 § 2 (Smith-Hurd Supp. 1971).

<sup>59</sup> This approach has been called, variously, the "center of gravity" rule, the "grouping of contacts" rule, the "dominant interest" rule, and even the "interest oriented" or "interest analysis" rule. See, e.g., *Conklin v. Horner*, 38 Wis.2d 468, 157 N.W.2d 579 (1968).

<sup>60</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) *Babcock* was cited in *Thigpen* and *Fox*.

<sup>61</sup> REV. STAT. ONT. 1960, ch. 172, § 105(2). This is contrasted with the typical "guest statute" in the United States which relieves the driver from liability for injuries caused by "ordinary" negligence, but does not relieve a driver from liability for injuries caused by "gross" negligence, or by willful or wanton misconduct. See, e.g., OHIO REV. CODE ANN. § 4515.02 (Page 1965). The Ontario statute has since been amended to impose liability in the case of "gross" negligence. REV. STAT. ONT. 1970, ch. 202, § 132(3).

Babcock's cause of action, application of the *lex loci* rule by the New York courts would have resulted in no recovery of damages. New York had no guest statute and would have allowed recovery under its law if the accident had occurred in New York, even if there had been only "ordinary" negligence, as apparently was the case. The trial court, applying the *lex loci* rule, dismissed the action. The dismissal was sustained by the Appellate Division over a strong dissent.<sup>62</sup>

The Court of Appeals reversed,<sup>63</sup> taking a long, critical look at the *lex loci* rule<sup>64</sup> and at its own refusal to apply that rule in *Kilberg v. Northeast Airlines, Inc.*,<sup>65</sup> a case in which the applicability of the Massachusetts limitation on wrongful death damages was at issue. The court looked also to its earlier rejection of the *lex loci* rule and adoption of the place of the most significant relationship approach for contracts cases in *Auten v. Auten*.<sup>66</sup> The result of these reflections was the court's adoption of the place of the most significant relationship approach for tort cases.

The court proceeded to work out this approach by comparing both the relative contacts and the relative interests of both jurisdictions, Ontario and New York, in light of the issue presented; the court stated that issue as being whether Miss Babcock was to be denied recovery for her damages caused by a conceded wrong. Ontario's only contact was that the accident occurred there, a fact deemed by the court to be a fortuitous event. By contrast, the New York contacts were many and significant: the parties were New York residents; the relationship was created in New York; the trip began in New York and was to have ended there. Ontario's statu-

---

<sup>62</sup> 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (Sup. Ct., 4th Dep't. 1962).

<sup>63</sup> *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>64</sup> In the court's words:

The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws (§ 384), and until recently unquestioningly followed in this court . . . has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort . . . . It had its conceptual foundation in the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law . . . . Although espoused by such great figures as Justice HOLMES . . . and Professor Beale . . . the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act. "The vice of the vested rights theory" it has been aptly stated, "is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved . . . ." More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. It is for this very reason that, despite the advantages of certainty, ease of application and predictability which it affords . . . there has in recent years been increasing criticism of the traditional rule by commentators and a judicial trend towards its abandonment or modification.

*Id.* at 477-78, 191 N.E.2d at 281, 240 N.Y.S.2d at 746-47, (citations and footnotes omitted).

<sup>65</sup> 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

<sup>66</sup> 308 N.Y. 155, 124 N.E.2d 99 (1954). Judges Van Voorhis and Scileppi disagreed that *Auten v. Auten* rejected the prior contract case rules. See the dissenting opinion in *Babcock*.

tory policy of denying recovery to a guest passenger was traced to a policy to prevent fraudulent claims against insurance companies; but in this case, any insurance would have been purchased in New York, which did not have a similar statutory bar, and thus presumably was purchased with the possibility of guest passenger claims being included in the insured risks. The court found no Ontario policy or interest which would be furthered by applying Ontario law. On the contrary, New York's policy of requiring a negligent driver to compensate his guest for injuries caused by such negligence would be furthered by application of New York law.<sup>67</sup> New York law was therefore applied.<sup>68</sup> New York courts have continued to

<sup>67</sup> In the *Babcock* court's words:

Comparison of the relative 'contacts' and 'interests' of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.

New York's policy of requiring a tortfeasor to compensate his guest for injuries caused by his negligence cannot be doubted—as attested by the fact that the Legislature of this State has repeatedly refused to enact a statute denying or limiting recovery in such cases [citation omitted], and our courts have neither reason nor warrant for departing from that policy simply because the accident, solely affecting New York residents and arising out of the operation of a New York based automobile, happened beyond its borders. Per contra, Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law. The object of Ontario's guest statute, it has been said, is 'to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies' (Survey of Canadian Legislation, 1 U. Toronto L.J. 358, 366) and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers. Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction. It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident. Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.

The issue here, however, is not whether the defendant offended against the rule of the road prescribed by Ontario for motorists generally or whether he violated some standard of conduct imposed by that jurisdiction, but rather whether the plaintiff, because she was a guest in the defendant's automobile, is barred from recovering damages for a wrong concededly committed. As to that issue, it is New York, the place where the parties resided, where their guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and the superior claim for application of its law . . . .

12 N.Y.2d at 482-83, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 750-51.

<sup>68</sup> The court's statement, quoted at note 67, that if the defendant's conduct had been in is-

apply this approach,<sup>69</sup> and it has been adopted in the *Restatement (Second)*<sup>70</sup> which also provides some special rules for particular situations.<sup>71</sup> This approach has also been adopted in a significant number of other jurisdictions.<sup>72</sup>

sue—that is, was he or was he not negligent—Ontario's law would presumably be most important, deserves special emphasis.

<sup>69</sup> See, e.g., *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). A useful, enlightening review of New York cases, pointing out some of the problems, is found in *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

<sup>70</sup> (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 domicile, 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.

RESTATEMENT (SECOND) § 145 (1971). Section 6 reads:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) § 6. This general statement of choice of law principles pervades the entire RESTATEMENT (SECOND) and must certainly be kept in mind in the application or consideration of any one particular section.

<sup>71</sup> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) § 146.

In an action for an injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence, the thing and the parties, in which event the local law of the other state will be applied.

*Id.* § 147. It is important to note that each of these sections contains identical "unless . . ." language. Thus, in applying either, the whole analysis of § 145 is required to determine whether or not, as to the particular issue, the state of the occurrence has the most significant relationship. In *Babcock*, for instance, the jurisdiction in which the accident occurred did not have the most significant relationship. Section 159 (1) provides: "The law selected by application of the rule of § 145 determines whether the actor owed a duty to the injured person and whether the duty was violated." Because of this reference to § 145, this section will not be cited in the following discussion.

<sup>72</sup> E.g., *Griffith v. United Air Lines, Inc.* 416 Pa. 1, 203 A.2d 796 (1964); *Wilcox v. Wil-*

It is appropriate to examine the effect which the adoption of this rule by the Supreme Court of Ohio would have on the outcome of Ohio cases. *Alexander v. Pennsylvania Co.*,<sup>73</sup> the Ohio pattern setting case which adopted the lex loci rule for tort actions and which was discussed above,<sup>74</sup> provides an initial point for such an examination. There, the plaintiff was employed by the defendant in Pennsylvania, performed his work in Pennsylvania, and was injured in Pennsylvania as a result of allegedly negligent conduct which occurred there. Ohio was the site of the lawsuit only. Section 146 of the *Restatement (Second)*<sup>75</sup> provides that "the local law of the state where the injury occurred" usually determines the respec-

---

cox, 26 Wis.2d 617, 133 N.W.2d 408 (1965); *but see* Conklin v. Horner, 38 Wis.2d 468, 157 N.W.2d 579 (1968), where the court arguably adopted a "better law" rule; Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). A brief review of these cases will further illustrate the operation and application of the place of the most significant relationship approach.

In *Griffith*, plaintiff's decedent had purchased a ticket to fly on one of defendant's airplanes from Philadelphia to Phoenix, and return. While on the flight to Phoenix, the airplane crashed in Colorado while making a scheduled stop at Denver. The crash caused the decedent's instant death. In a well written opinion, the court traced its prior application of the lex loci rule, reviewed criticisms of the rule, examined the various new approaches which have been suggested, and then adopted the place of the most significant relationship approach. The only question before the court at that stage of the proceeding was whether or not the Colorado limits on wrongful death damages should be applied. It was clear that under Colorado law, a very small amount of damages could have been recovered; under Pennsylvania law, substantial damages could be recovered. Colorado's contact with the accident, while certainly concrete and recognized, was clearly fortuitous; the plane crashed while attempting to land at the Denver airport, not to take advantage of the Colorado damages limitation. Colorado had no interest in compensating those who may have rendered medical aid, for death was instantaneous. The court did not recognize a corollary, however, as no doubt some Colorado funeral director was involved. The court further found that the Colorado statute was most likely intended to discourage speculation in damages, purely a matter of local concern. Pennsylvania's interests were significant. The relationship was entered into there; the well-being of the decedent's family was its concern; but also, Pennsylvania's constitution prohibited limitation of damages for wrongful death. The court held that Pennsylvania was the place having the most significant relationship, and therefore, its damages rules were to be applied.

In *Wilcox*, the plaintiff sued her husband for damages sustained in an automobile accident in Nebraska. The trial court sustained a demurrer to her complaint on the ground that only ordinary negligence was alleged, and that gross negligence was needed for liability under the Nebraska guest statute. Wisconsin, state of the domicile of both parties, as well as the forum state, had no guest statute, so that ordinary negligence would be a sufficient basis for recovery. (Wisconsin also permits interspousal suits for negligence.) After an interesting review of old and new choice of law theories similar to that in *Griffith*, the court discarded the lex loci rule and adopted the place of the most significant relationship approach. Emphasizing correctly that contact counting was not sufficient, the court proceeded to analyze the significance of each contact. Here, the court found Wisconsin to be the concerned jurisdiction because of the domicile of the parties, the fact that the relationship (host-guest) arose in Wisconsin, and the automobile insurance (the carrier was a party defendant under the Wisconsin direct action statute) was issued in Wisconsin. Wisconsin's policy was to compensate injured guest passengers for injuries sustained because of the driver's negligence. The court found that the Nebraska policy of protecting drivers from ungrateful guest passengers would not be furthered by applying Nebraska law in this case. Wisconsin was the most concerned jurisdiction, so its law was applied on this issue. The court recognized that Nebraska's laws and rules would be very relevant if any question of rules of the road developed at the trial.

<sup>73</sup> 48 Ohio St. 623, 30 N.E. 69 (1891).

<sup>74</sup> See discussion accompanying footnotes 8 through 12 *supra*.

<sup>75</sup> RESTATEMENT (SECOND) § 146, set out in full at note 71 *supra*.



tive rights and liabilities of the parties. Consequently, another state's law will be applied only if it has a more significant relationship to the occurrence and to the parties with respect to the particular issue of the case. This section refers to § 145<sup>76</sup> which lists the contacts to be considered relevant. Applying these to *Alexander*, the injury occurred in Pennsylvania, the conduct allegedly causing the injury occurred there, the domicile and residence of the plaintiff, the place of incorporation and place of business of the defendant were there and the employer-employee relationship centered there—all of the significant contacts were in Pennsylvania.

Because all the relevant contacts were with Pennsylvania it is unnecessary to go further into the analysis; indeed, it would be frivolous to do so. If the forum state's only contact with the occurrence is that it is the site of the trial, it would be unconstitutional for the court to apply the law of the forum.<sup>77</sup> This conclusion avoids the necessity of comparing and weighing the competing state interests; but since neither party was ever a resident or domiciled in Ohio, and there were no other Ohio contacts, what possible interest could Ohio have in the outcome of this case? Therefore, an Ohio court would apply Pennsylvania law to determine the respective rights and liabilities of the parties. In this case, the same result is obtained under the place of the most significant relationship approach as would be obtained by applying the *lex loci* rule—but for different reasons. The result seems correct and just.

If *Alexander* is distinctively and completely other-jurisdictional in favor, and thus one of the easiest cases to handle, *Casper v. Higgins*<sup>78</sup> must be close to the other end of the spectrum. To review the *Casper* facts, the plaintiff attended Miami University in Oxford, Ohio; he was enrolled in a public speaking course, and was encouraged to participate in various debates arranged by the school. The defendant was an instructor at the school, and drove the plaintiff to two debates in Illinois; his expenses were paid by the school. The accident causing the plaintiff's injuries occurred in Illinois when the defendant allowed his automobile to cross the center line on the highway and strike an on-coming automobile.

Two questions were presented by this case: What duty did the defendant owe to the plaintiff, and was that duty breached? Subsidiary to the first question was the question of the relationship between the parties. To define the duty, this must be known; the duty springs from the relationship. Should Ohio or Illinois law be used to determine the answer to the first

---

<sup>76</sup> *Id.* § 145, set out in full at note 70 *supra*.

<sup>77</sup> *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). The constitutional limitations on choice of law are infrequently alluded to by courts. In fact, this should be a threshold consideration in every choice of law case.

<sup>78</sup> 54 Ohio App. 21, 6 N.E.2d 3 (1935). For the prior discussion of this case, see the text accompanying notes 26 through 29 *supra*.

question? Following the approach suggested by the *Restatement (Second)* § 146<sup>79</sup> directs the forum to the law of the state where the injury occurred

. . . unless, *with respect to the particular issue*, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.<sup>80</sup>

Because the relationship was formed in Ohio, it is somewhat illogical to apply Illinois law to determine what duty the defendant owed the plaintiff, especially since the answer to this question depends on defining the relationship that did exist between the parties. Reference to § 145<sup>81</sup> reveals that the first two relevant contacts are the place where the injury and the place where the conduct causing the injury occurred. Both occurred in Illinois, but these contacts are here irrelevant. It is submitted that the objective is definition of the relationship between the parties in order to define the duty which the defendant owed the plaintiff. The last two relevant contacts listed in § 145—the domicile, residence and place of business of the parties, and the place where the relationship between the parties is centered—are much more germane to this issue. These contacts were all centered in Ohio. The foregoing analysis is in keeping with the § 145(2)<sup>82</sup> directive that the respective contacts should be evaluated according to their relative importance in light of the particular issue being decided.

Further analysis of *Casper* is necessary to be consistent with the full approach used by the courts in *Babcock*,<sup>83</sup> *Griffith v. United Airlines, Inc.*<sup>84</sup> and *Wilcox v. Wilcox*.<sup>85</sup> The respective states' policies and interests in the matter at issue must be examined. Ohio has a policy of requiring parties in relationship with one another to act in such a manner that their respective duties are met. Ohio certainly has an interest in encouraging good education at its state universities; this trip was in furtherance of that policy. Ohio also has a policy of having its educators conduct themselves in a non-negligent manner in their relationships with their students. The only Illinois interest that could be relevant to this issue is that of promoting safe driving on its roads, but that interest is of no relevance to the question of what duty the defendant owed the plaintiff in this case. Thus, no policy or interest of Illinois would be furthered by applying its law to determine the issue. Clearly, Ohio is the place of the most significant relationship.

The courts which have adopted this approach would apply the law of

---

<sup>79</sup> Set out at note 71 *supra*.

<sup>80</sup> RESTATEMENT (SECOND) § 146 (emphasis added).

<sup>81</sup> *Id.* § 145, set out in full at note 70 *supra*.

<sup>82</sup> RESTATEMENT (SECOND) § 145(2).

<sup>83</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>84</sup> 416 Pa. 1, 203 A.2d 796 (1964).

<sup>85</sup> 26 Wis.2d 617, 133 N.W.2d 408 (1965).

the place of occurrence to determine whether or not the conduct complained of was negligent.<sup>86</sup> This was not one of the questions in *Casper*, however. The negligence of the defendant appears to have been conceded; the plaintiff was attempting to find a theory to substantiate a relationship between the parties where ordinary negligence would be sufficient to permit a recovery, instead of having to prove gross negligence or wilful and wanton misconduct, which would be requisite to recovery under either the Illinois or Ohio guest statute. The real question to be answered is whether the defendant's duty to the plaintiff should be defined by Ohio or Illinois law. The foregoing analysis is completely relevant to answering this question. The only decidedly relevant contact was in Ohio, where the relationship was centered, and Ohio clearly had the only interest in spelling out the duty the defendant owed the plaintiff. Since *Casper* was a guest passenger case, the Ohio guest statute spells out the duty owed, and because there was only ordinary negligence shown by the evidence, there could be no recovery.

It is by now evident that the significant contacts approach is jurisdiction-seeking, not result-seeking. This is as it should be. A jurisdiction-seeking rule meets the objectives set out in § 6 of *Restatement (Second)*.<sup>87</sup> It is further evident that ordinarily, where a substantial relationship between the parties is formed in one jurisdiction and where the harm occurs in another jurisdiction, the jurisdiction where the relationship was created is likely to have the most significant relationship to the issue of the legal consequences of that relationship, particularly in terms of the duty of care owed by one party to the other. This conclusion is consistent with both the language and the result in *Babcock* and in *Wilcox*.<sup>88</sup>

It is now appropriate to examine and analyze *Ellis v. Garwood*<sup>89</sup> using this new approach. In *Ellis* the plaintiff's decedent was killed in an automobile accident in Ohio; the defendant was the driver; and decedent was

---

<sup>86</sup> In the words of the *Babcock* court:

Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.

12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750-51. See also the similar statement in *Wilcox v. Wilcox*. The Ohio Supreme Court recognized this concept in *Fox*.

<sup>87</sup> See note 70 *supra*.

<sup>88</sup> But see *Conklin v. Horner*, 38 Wis.2d 468, 157 N.W.2d 579 (1968), where the Supreme Court of Wisconsin rejected this thinking in favor of a "better law" idea and applied Wisconsin law, the law of the place where the accident occurred, on the idea that the Illinois guest statute did not reflect the better law, and that Wisconsin law, which permitted a guest to recover for ordinary negligence of the host driver, was the better law. It is suggested that this provincialism is out of tune with the basic tenets of choice of law, see *RESTATEMENT (SECOND) § 6*, and that such a solution will create many more problems than it will solve.

<sup>89</sup> 168 Ohio St. 241, 152 N.E.2d 100 (1958). For the prior discussion of this case, see the text accompanying notes 30 through 33 *supra*.

a passenger in the defendant's automobile. Both decedent and defendant were employed by the same employer in New York; both were New York residents and domiciliaries. The accident occurred while both were on a common business trip for their employer, a trip which began and was to have ultimately ended in New York. The plaintiff was the decedent's wife and was also a New York resident and domiciliary. She had recovered a workmen's compensation award in New York, which under New York law was to have been her full compensation for damages sustained as a result of the accident and death of her husband. Under New York law, the workmen's compensation award was the exclusive remedy against both the employer *and* the fellow employee, while under Ohio law it would be exclusive only against the employer. Suit was brought against the defendant in Ohio, where the accident occurred. The non-resident plaintiff had to come into the state and had submitted herself to the jurisdiction of the court. Personal service of the defendant could not be made, and he was served under the provisions of the Ohio non-resident motorist statute. The question in *Ellis* was whether the provision of the New York Workmen's Compensation Act making the workman's compensation award the exclusive remedy against both the employer and the employee should bar an Ohio action against the fellow employee.

The *Restatement (Second)* § 183 provides:

A State of the United States is not precluded by the Constitution from providing a right of action in tort or wrongful death by the fact that the defendant is declared immune from such liability to the plaintiff by the workmen's compensation statute of a sister State under which the plaintiff

- (a) could obtain an award against the defendant, or
- (b) has obtained, or could obtain, an award against another person.<sup>90</sup>

Thus, there is no United States Constitutional barrier to the application of Ohio law in this case.<sup>91</sup> But there is another reason to apply the New York Act. Actions for wrongful death are specially dealt with in the *Restatement (Second)*.<sup>92</sup> Again, one is directed to the law of the place where the injury occurred, here Ohio, unless with respect to the particular issue another state has a more significant relationship.

It is submitted that here New York had a more significant interest than Ohio. In *Ellis* it was the relationship between the decedent, the defendant, his fellow employer, and their common employer which was crucial. Both

<sup>90</sup> RESTATEMENT (SECOND) § 183.

<sup>91</sup> See *Carroll v. Lanza*, 349 U.S. 408 (1955).

<sup>92</sup> Included are:

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) § 175. "The law selected by application of the rule of § 175 determines what defenses may be raised on the merits to a suit for wrongful death." *Id.* § 176.

the decedent and the defendant were on a business trip in furtherance of their New York jobs; they were doing the work of their New York employer. The fact that the accident occurred in Ohio was relatively fortuitous.

If the interests and respective policies of each state are examined, this conclusion is reinforced. Both Ohio and New York have workmen's compensation acts; both states have policies of providing compensation for injuries sustained by an employee while working for his employer. Ohio has interests in promoting safety on its highways and in compensating those injured thereon (except, of course, where there is a statutory bar, such as the guest statute). But Ohio's interests would not be frustrated by this application of New York law; the injured party had already received compensation under a statutory plan not unlike Ohio's. The fact that Ohio law would permit additional compensation is not likely to promote safer driving by non-residents. Admittedly, *Ellis* is a close case; the interests and policies of the two states are similar. The relative significance and importance of the contacts, however, tips the balance toward the application of New York law.

It is suggested that both *Casper v. Higgins* and *Ellis v. Garwood* are similar in nature to *Babcock v. Jackson*, and to the interspousal suits, such as *Wilcox v. Wilcox*. In these cases, the place where the relationship was created and centered was held to be the place of the most significant relationship. It is submitted further that the nature of the employment relationship demands the same result. It should be noted that in all these cases the relationship is stable and long-lasting.

*Conway v. Ogier*<sup>93</sup> is a simple case, but neither the wife's nor the husband's claim is as easy to treat as was the plaintiff's in *Alexander*. There are probably enough Ohio contacts to take the application of either state's law out of the constitutional strictures.<sup>94</sup> As to the wife's counterclaim, the first reference is to the law of the place of injury.<sup>95</sup> Here, as to this particular issue, no other state had a relationship more significant than New York under the § 145 considerations.<sup>96</sup> The conduct causing the injury occurred there; the physician-patient relationship also was centered in New York. The Ohio residence or domicile of the parties seems of little importance. Moreover, New York's interest in having physicians within its border render competent services, and of compensating one who suffers from a doctor's negligence, is more significant than any Ohio interest in the matter. Indeed, it would seem that Ohio's only interest would be to compensate one

---

<sup>93</sup> 115 Ohio App. 251, 184 N.E.2d 681 (1961). For the prior discussion of this case, see the text accompanying notes 32 through 41 *supra*.

<sup>94</sup> See R. Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROB. 706 (1963).

<sup>95</sup> RESTATEMENT (SECOND) § 146.

<sup>96</sup> *Id.* § 145.

who has been harmed, an interest identical to part of New York's. Clearly, the wife's claim should have been based on New York law. Analysis of the husband's claim leads to the same result. The only difference is that he was injured in Ohio by the doctor's conduct in New York. But there was no contract or relationship between these two parties. The husband's cause of action is in a sense derivative from the wife's injury and harm. The state interests remain the same. Obviously, the court chose correctly when it applied New York law.<sup>97</sup>

The foregoing cases are relatively simple under the place of the most significant contacts analysis. *Thigpen v. Greyhound Lines, Inc.*,<sup>98</sup> however, is not. In *Thigpen* the plaintiffs purchased tickets to ride the defendant's bus from Selma, Alabama, to Cincinnati, Ohio, and were injured when the bus collided with another vehicle in Kentucky. Again, the real question in the case is whether the Kentucky statute of limitations should apply; if so, the action would have been barred. Where the cause of action arose ought to determine whether the Kentucky statute of limitations is applicable. Clearly the place of injury was Kentucky, and direction to that state's law is by § 146 of the *Restatement (Second)*.<sup>99</sup> Does any other state have a more significant interest? Applying the § 145 contacts test,<sup>100</sup> the conduct causing the injury occurred in Kentucky. The opinion does not tell whether the plaintiffs were Ohio residents or domiciliaries; it will be assumed that they were. The defendant operates its bus system extensively through many states, including Alabama, Kentucky, Ohio, and presumably Tennessee; the state of incorporation seems irrelevant. The relationship between the parties was created in Alabama, when the plaintiffs bought tickets and where they boarded the bus.<sup>101</sup> It would seem that since the parties specifically contemplated the multi-state bus trip, the fact that their relationship was created in Alabama is significantly less important than it might otherwise be. The relationship was of comparatively short duration, as opposed to the longer, continuing relationship of marriage or employment. Therefore, qualitatively, and based on contacts alone, it would not seem that any other jurisdiction had contacts more significant than Kentucky's.

What interests and policies are involved in *Thigpen*? All the states

<sup>97</sup> Because the court was concerned with the statutes of limitation and the borrowing statute, the analysis tends to get lost in the outcome of the case—a determination of which state's statute of limitation applies to each counterclaim. If instead the case is treated as involving questions of which state's law should be used to define the respective rights and liabilities on the negligence question, the choice of law problem is highlighted.

<sup>98</sup> 11 Ohio App. 2d 179, 229 N.E.2d 107 (1967). For the prior discussion of this case, see the text accompanying notes 42 through 50 *supra*. The following discussion assumes a tort case treatment. *But see* the discussion at note 45 *supra* and the cases cited therein.

<sup>99</sup> RESTATEMENT (SECOND) § 146.

<sup>100</sup> *Id.* § 145.

<sup>101</sup> Boarding the bus must be considered important here, as mere purchase of the tickets without use would be meaningless.

whose interests were considered by the court<sup>102</sup> have interests and policies which are relevant. If the fact that the collision had occurred in Kentucky was completely fortuitous, as the court said it was, Kentucky's interests and policies could be discounted. But it cannot be maintained that the place of the accident was fortuitous. The relationship between parties contemplated this travel in Kentucky, as well as in other states. The occurrence of the accident at that particular time and place was no more fortuitous than the occurrence of an accident at any other time or place of anticipated travel. Therefore, Kentucky's interests and policies are necessarily considered. It would seem that all states involved have similar interests and policies; each seeks to further safe driving on its streets and highways. But since the accident occurred in Kentucky, that state has the greatest concern for safety. Each state seeks to compensate victims of negligent conduct,<sup>103</sup> each has statutes of limitations.<sup>104</sup> Ohio, in addition, had in existence at the time of the accident (but not at the time of trial) a legislatively stated policy of imposing and following the shorter time limits of applicable statutes of limitations of other states under its borrowing statute.<sup>105</sup> Ohio was the forum, and the determination of the applicable statute of limitations was for its courts. If Kentucky was the place of the most significant relationship and if Kentucky was where the cause of action arose, its statute of limitations should have been applied. Therefore, an analysis of the respective state interests and policies, including Ohio's repealed borrowing statute, points to Kentucky as the place of the most significant relationship. Therefore, Kentucky's shorter statute of limitations should have been applied.

The facts of *Fox v. Morrison Motor Freight, Inc.*,<sup>106</sup> provide one more opportunity to compare the approach of the *Restatement (Second)* with that of the rule applied by Ohio's highest court. In this wrongful death action, the decedent and the plaintiff were Ohio residents. The defendant was a corporation authorized to conduct and conducting business in Ohio. At the time of the collision which caused decedent's death, the decedent and defendant's employee were on truck trips that began in Ohio and were to have ended in Ohio.

The *Restatement (Second)* specifically deals with damages in wrongful death actions in a section<sup>107</sup> which refers to the general wrongful death

---

<sup>102</sup> Ohio, Kentucky, and Alabama.

<sup>103</sup> Again, within certain limits, such as guest statutes. The guest statutes would not apply here as these were passengers for hire who paid their way.

<sup>104</sup> Although they may not prescribe equal time limits, presumably these statutes represent the respective legislative determinations of staleness of claims, court congestion and failing memories.

<sup>105</sup> OHIO REV. CODE § 2305.20 (repealed 1965). Examination of the opinion reveals that the repeal of the statute was not before the court.

<sup>106</sup> 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971).

<sup>107</sup> "The law selected by application of the rule of § 175 determines the measure of damages in an action for wrongful death." RESTATEMENT (SECOND) § 178.

section,<sup>108</sup> which in turn makes a general reference to the law of the place of the injury, unless another state has a more significant relationship under § 6. This is the typical provision, as has been seen. The question is whether Ohio's relationship was more significant than Illinois'. Section 6 provides that certain state restrictions may be determinative.<sup>109</sup> Although a subsection refers to statutory restrictions, those restrictions contained in state constitutions cannot be ignored if the restrictions set by statute are to be observed. In *Fox* the Ohio Constitution provides the answer — the amount of damages in a wrongful death case cannot be limited.<sup>110</sup>

It is suggested that in this case the same result would be obtained absent the constitutional restriction; the Illinois damages limitations would not be applied. The general rule points to the law of the place where the death was caused, but the *Restatement (Second)* also recognizes that there may be a state with a more significant interest. In *Fox*, Ohio's interest is more significant; the decedent, the plaintiff and the survivors were all Ohio residents. The defendant was authorized to do business in Ohio; more significantly, its employee was on a trip that originated and was to have ended in Ohio. The considerations of § 6 require this result. The relevant policies and interests of the respective states seem to be the most important consideration, and no policy or interest of Illinois was injured by the application of Ohio law. If the defendant were an Illinois resident, however, the Illinois damages limitation might be an important concern of that state in protecting its residents (and its insurers) from oppressive judgments. In such a situation, it is submitted that the Illinois law should be applied. This result would be in accord with the Comments to § 178 of the *Restatement (Second)*.<sup>111</sup> More important, recognition of the most significant contacts approach would provide workable rules and much needed guidance for application to an unsettled area of Ohio law.

In a recent unreported court of appeals opinion, *Schiltz v. Meyer*,<sup>112</sup> a plea for the adoption of the place of the most significant relationship approach was rejected. In many respects, the case is similar to *Casper v. Higgins*, *Ellis v. Garwood*, and even *Babcock v. Jackson*. Much of the discussion of those cases is relevant here.<sup>113</sup> The plaintiff, a Kentucky resident

<sup>108</sup> *Id.* § 175.

<sup>109</sup> *Id.* § 6(1).

<sup>110</sup> OHIO CONST. art. I, § 19a. Moreover, under the place of most significant contacts approach discussed above, Ohio's entire wrongful death law should apply, and not just the constitutional prohibition of limitations on damages.

<sup>111</sup> "In a situation where one state is the state of domicile of the defendant, the decedent and the beneficiaries, it would seem that, ordinarily at least, the wrongful death statute of this state should be applied to determine the measure of damages." RESTATEMENT (SECOND) § 178, comment *b* at 531.

<sup>112</sup> *Schiltz v. Meyer*, Nos. 248, 249 (Clinton County Ct. App., Jan. 25, 1971), *motion to certify record allowed*, No. 71-207, 44 OHIO BAR 1105 (Ohio, Sept. 15, 1971).

<sup>113</sup> See discussion in the text accompanying notes 78 through 86, 89 through 92 and 60 through 68 *supra*.



and domiciliary, was a guest passenger in an automobile registered and insured in Kentucky, and driven by one of the defendants, also a Kentucky resident and domiciliary. The accident occurred in Ohio, when this vehicle collided with another vehicle owned and operated by the other defendant, a resident and domiciliary of Ohio. This defendant filed an answer, and there was no choice of law question raised in this part of the case.

The plaintiff sued the first defendant (the driver) alleging, in part, that her negligence was a cause of the injuries suffered; only ordinary negligence was alleged, but the plaintiff also alleged that the rights and liabilities of these parties were governed by Kentucky law, which contains no guest statute. The host driver demurred to the petition, asserting that no wilful and wanton misconduct was alleged, and that therefore there could be no recovery. The host driver also asserted that the Ohio guest statute<sup>114</sup> applied. The trial court sustained the demurrer, applying the *lex loci* rule. The Court of Appeals for Clinton County affirmed.<sup>115</sup>

An examination of this case using the place of the most significant relationship approach leads to the opposite result. Here, as between these parties and on this particular issue,<sup>116</sup> the place of the conduct leading to the accident and the place of the accident are of little, if any, relevance. It cannot be argued that this defendant planned to have the accident in Ohio for, by definition, no accident can be intended. The real question is the duty of care the host owed her guest. As has been argued in the discussion of *Casper*,<sup>117</sup> this duty is established by the law of the place where the relationship was created. Here the relationship was created in Kentucky, the place where the parties lived, planned the trip, and in which state the trip began and was to have ended. Thus, the law of Kentucky should be applied to define this duty. It could be argued that the parties planned and were undertaking a trip to Ohio. However, there is no reason to believe that the parties contemplated that the duty owed by the host would somehow magically change after they crossed the Ohio River.

Kentucky has significant interests in the outcome of this case. It has an interest in setting the standard of care which a host owes to a guest passenger in a Kentucky-centered automobile trip, especially when they are using an automobile registered and insured in Kentucky. Further, if the plaintiff were impoverished by the accident and the injuries, she might

---

<sup>114</sup> OHIO REV. CODE ANN. § 4515.02 (Page 1965).

<sup>115</sup> As in *Conway v. Ogier*, the husband of the injured passenger also filed a suit, alleging medical expenses and loss of consortium as his damages. The trial court dismissed his action because of improper venue; the court of appeals affirmed, but on the ground that his cause of action derived from his wife's, and was barred on the same ground—there was no allegation of wilful and wanton misconduct.

<sup>116</sup> As seen above, this is the approach indicated by RESTATEMENT (SECOND).

<sup>117</sup> See discussion accompanying footnotes 78 through 86 *supra*.

become eligible for welfare in Kentucky, forcing the state to bear a financial burden.<sup>118</sup>

What interests does Ohio have in this case? Ohio has an interest in safety on its streets and highways. This interest is not promoted by allowing guest passengers injured by their hosts' negligence to go without compensation.<sup>119</sup> No Ohio insurance policy is involved, so no fraudulent claims against Ohio insurers were prevented by the court's decision. There is no ungrateful Ohio guest passenger suing an Ohio host driver. More importantly, the application of the Ohio law to this case frustrates the Kentucky interests without advancing any Ohio interest.<sup>120</sup>

Therefore, based upon a qualitative analysis of the contacts and of the respective interests of the two states, it is submitted that Kentucky is the place of the most significant relationship as to this issue. Its law should be used to define and establish the duty the host owed to her guest passenger. Kentucky has no guest statute; a host's ordinary negligence is sufficient to allow the injured guest to recover. The application of the *lex loci* rule is inappropriate in this case.<sup>121</sup>

The foregoing discussion has served to demonstrate the inadequacy of the *lex loci* rule presently applied to choice of law questions in Ohio tort cases. The discussion has demonstrated further that the place of the most significant relationship approach provides much more adequate and just solutions to the choice of law questions. The most significant relationship approach admittedly is more involved and somewhat more difficult to use than the *lex loci* rule. But this approach is more just because it meets the needs of each particular case; the *lex loci* rule does not. Indeed, the place of the most significant relationship approach deals with the particular issue within the particular case, so that determinations are based only on relevant matters.

The conclusion therefore is that the place of the most significant relationship approach as set forth in the *Restatement (Second)* should be adopted as the choice of law rule in Ohio tort cases. The use of this rule will enable the courts and bar of this state to make sound, just choice of law determinations in accordance with established rules. Guidance for

---

<sup>118</sup> An additional Kentucky interest might be argued. The husband suffered his damages only in Kentucky. However, it should be recognized that his claim depends upon, and is derived from, the injuries to his wife. He will not recover if she does not. Thus, it is difficult to find any additional Kentucky interest.

<sup>119</sup> The policy determination represented by the guest statute applies to Ohio residents injured in Ohio accidents. It also applies in some cases when Ohioans are injured in other states. See, e.g., *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

<sup>120</sup> A possible exception to this point generally is an Ohio interest in preserving the driver's assets in order not to limit the recovery of an Ohio domiciliary injured in the same accident. See *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965). Recognition of this interest could be applied also to the discussion of *Casper* accompanying notes 78-86 *supra*.

<sup>121</sup> If this particular suit had been brought in Kentucky, the Ohio guest statute would not have been applied. See *Arnett v. Thompson*, 433 S.W.2d 109 (Ct. App. Ky. 1968).

many of the problems can be found from the growing case law in other jurisdictions which have already adopted this approach. The concerns for justice and reason voiced in the *Conway*, *Thigpen* and *Fox* opinions will be met.