

# THE "MOST SIGNIFICANT RELATIONSHIP" IN THE CONFLICTS LAW OF TORTS

## LAW AND REASON VERSUS THE RESTATEMENT SECOND

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"The object of the [American Law] Institute in preparing the *Restatement* is to present an orderly statement of the general common law of the United States..."<sup>1</sup> That the *Restatement of the Law of Conflict of Laws* failed to reach this aim and indeed misled the courts by its "dogmatic and over-simplified character"<sup>2</sup> as well as by its adherence to the discredited doctrine of vested rights, was recognized by the leading scholars at the time of publication and is now generally admitted.

One might have hoped that this experience would preclude further attempts at "restating" a body of "rules" whose coherence as an independent branch of the law accessible to "orderly statement" remains subject to doubt. Unhappily, however, the American Law Institute has for more than a decade been engaged in "revising" its original product. Professor Reese, the able Reporter for this *Restatement Second*, has offered a description of his effort in the present symposium.<sup>3</sup> It is with considerable misgivings that I have accepted the editor's invitation to comment on this paper. I have stated elsewhere, perhaps all too often and all too vigorously, my opposition to both the substance and the procedure of the American Law Institute's undertaking in this field.<sup>4</sup> Moreover, it is always a hateful task to attack the work of a man for whom you feel the highest personal regard. Only the remaining hope to induce the Restaters to withdraw their latest draft on the conflicts law of torts<sup>5</sup> has prompted me to offer these comments despite my misgivings.

Professor Reese expects to be able to improve upon the work of his predecessor because he and his Advisers "can seek guidance from the large number of cases that have been decided, from the legislation that has been enacted, and from the books and articles that have been written since the appearance of the original *Restatement*."<sup>6</sup> However, for reasons no doubt inherent in his task rather than chargeable to his

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<sup>1</sup> RESTATEMENT, CONFLICT OF LAWS viii (1934).

<sup>2</sup> Reese, *Conflict of Laws and the Restatement Second*, *supra* p. 679, at 680.

<sup>3</sup> Reese, *supra* note 2.

<sup>4</sup> ALBERT A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* (1962) [hereinafter cited as TREATISE]. See *id.* at 12-13 and *passim*; also Ehrenzweig, *American Conflicts Law in Its Historical Perspective: Should the Restatement be "Continued"?*, 103 U. PA. L. REV. 133 (1954); and *infra* notes 5 and 19.

<sup>5</sup> Concerning earlier drafts on other subjects, see Ehrenzweig, *Restitution in the Conflict of Laws: Law and Reason versus the Restatement Second*, 36 N.Y.U.L. REV. 1298 (1961); *Miscegenation in the Conflict of Laws: Law and Reason versus the Restatement Second*, 45 CORNELL L.Q. 659 (1960); TREATISE 351, 463-464.

<sup>6</sup> Reese, *supra* note 2, at 680.

skill, he has not in fact been able to avail himself of these opportunities. In my treatise I have attempted to show throughout that the analysis, which according to the Reporter's Notes underlies the tentative drafts of the *Restatement Second*, includes a vast number of cases that fail to decide conflicts between differing laws and can therefore not properly be adduced as authorities.<sup>7</sup> I have further attempted to show that the language of most of the remaining cases is fatally burdened by the theories advanced by the *Restatement* which have now been recognized as erroneous, and is frequently, if not usually, inconsistent with the results actually reached. Finally, even casual perusal of the Reporter's Notes shows how rarely the new drafts have heeded the nearly unanimous opposition of today's leading authors, very few of whom are included among his Advisers. But be this as it may, an obviously conclusive reason for discontinuing the *Restatement Second* is the Reporter's concession that "choice of law, even now, is not ripe for restatement in the sense that it is rarely possible to state hard and fast rules with the reasonable assurance based on precedent and the resources of human reasoning and imagination that these rules will work well in all situations to which they literally can be applied."<sup>8</sup>

Although having made this concession, Professor Reese still sees justification for a continuation of his effort in the hope to formulate "rules" which at least will not mislead<sup>9</sup> and will not be in the way of progress.<sup>10</sup> But even this aim, all too modest for this ambitious enterprise, is not reached with regard to the outstanding example for such a "rule," namely the recurring reference to the law with "the most significant relationship." In its most recent application in the conflicts law of torts this reference is not only misleading, being admittedly contrary to existing law, but also in the way of progress and thus contrary to reason.

Professor Reese admits that "until recently the courts with rare unanimity applied the law of the place of injury to determine rights and liabilities in tort,"<sup>11</sup> but discounts that practice because "recently...several important courts have either expressed dissatisfaction with the rule or else have reached results that are inconsistent with it."<sup>12</sup> That fact might have justified a detailed analysis of results actually reached in individual fact situations.<sup>13</sup> But it does not justify the American Law Institute under the pretext of "restating" existing law to advance a general proposition which, prior to its tentative announcement, had never been adopted by any court. A "restatement" cannot be properly used to "aid in inducing the courts to

<sup>7</sup> See TREATISE § 123, at 310-11, 439 n.10, 449 n.3, 466 n.11, and *passim*.

<sup>8</sup> Reese, *supra* note 2, at 681.

<sup>9</sup> *Id.* at 699.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* See also Reese, *The Ever Changing Rules of Choice of Law*, 1962 NED. TIJDSCHR. INT. R. 389, 390; *id.*, Comment, 63 COLUM. L. REV. 1251, 1254 (1963).

<sup>12</sup> Reese, *supra* note 2, at 699.

<sup>13</sup> There is only *one* problem among *twenty* "issues covered" (§§ 379l-390g) as to which the Draft is not satisfied with the law of the "most significant relationship," namely the problem of intra-family immunity (§ 390g). Here, where the Draft, by referring to the law of the parties' common domicile, follows prevailing opinion, it was almost immediately approved by an outstanding court. *Thompson v. Thompson*, 193 A.2d 439 (N.H. 1963).

depart from [a presumably accepted rule—here the place of injury rule]... in situations where this is desirable."<sup>14</sup>

But the new "rule" is not only admittedly contrary to prevailing authority. It is quite apt to be in the way of progress. This may be shown by the analysis of the first decision by an outstanding court,<sup>15</sup> which is squarely based on the second *Restatement's* formula.

This case is *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co.*<sup>16</sup> decided by the United States court of appeals for the fourth circuit (North Carolina), speaking through Chief Judge Sobeloff. Plaintiff, a North Carolina business corporation, in order to qualify for a loan of \$2,000,000 for the expansion of its business, found it necessary to seek insurance in that amount on the life of its president. Attempting to distribute such insurance among several companies, plaintiff applied to defendant, a Pennsylvania company, for a \$200,000 policy. Approximately three weeks later defendant informed plaintiff's agent that only a \$50,000 policy could be approved and this counter offer was accepted with the request for further consideration of the matter. Its president having died two days later, plaintiff sought damages based on defendant's allegedly negligent delay in acting on the application. Although the court assumed, without so holding, that North Carolina law would permit such actions, it affirmed a summary judgment for defendant based on the law of Pennsylvania to the contrary.

In applying the law of that state the court discounted a line of North Carolina traffic accident cases in which foreign law had been applied as the law of the place of wrong, on the ground that in all of those cases the place of wrongful conduct had coincided with that of the injury, so that the North Carolina courts had never had occasion to consider "the multi-state features presented here."<sup>17</sup> Treating the case,

<sup>14</sup> Reese, *supra* note 2, at 699. Cf. Reese, *supra* note 11, at 392, where the author expresses doubt as to the wisdom of the rule now advocated in his draft for the *Restatement Second*. The inadequacy of the procedure underlying the preparation of the *Restatement Second* is dramatically illustrated by the fact that the crucial "most significant relationship" formula was first introduced by a 13 to 12 vote of the Council of the American Law Institute. RESTATEMENT (SECOND), CONFLICT OF LAWS § 332b (note) (Tent. Draft No. 6, 1960).

<sup>15</sup> To be sure, that decision, *infra* text at notes 16 *et seq.*, relied on *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279 (1963), as a precedent for the use of the *Restatement Second* formula. See Leflar, Comment, 63 COLUM. L. REV. 1247, 1249 (1963). But *Babcock* goes beyond that formula by weighing state "interests" foreign to the *Restatement*. This technique, it should be noted, cannot be identified with Currie's analysis which precludes a weighing of his "governmental interests." See Ehrenzweig, Comment, 63 COLUM. L. REV. 1243, 1244-1245 (1963); Currie, *id.* at 1233, 1234-1235, 1241. Leflar, *id.* at 1247, 1248, rightly suggests that "in later years it will be easy to merge the ideas of 'significant relationship' and 'governmental interests,'" in what Cavers (*id.* at 1218, 1222-1229) would deprecate as a new "jurisdiction-selecting rule." My own views, both agreement and disagreement, concerning Currie's approach are stated in Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules,"* 49 CALIF. L. REV. 240, 243-248 (1961); and TREATISE § 122.

<sup>16</sup> *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co.*, 319 F.2d 469 (4th Cir. 1963).

<sup>17</sup> *Id.* at 472. But see *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co.*, 206 F.Supp. 427, 429 (M.D. N.C. 1962), *aff'd, supra* note 16, where the court felt bound by "the more traditional conflict-of-law rule" presumably adopted by North Carolina. In support of that rule, see again the later case of *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963), criticized by Currie, Comment, 63 COLUM. L. REV. 1233, 1236-1237 (1963).

therefore, as one of novel impression, the court would have been free to start its analysis with the basic law of the forum. As I have tried to show elsewhere, courts whose jurisdiction is properly invoked have at all times and in all countries, unless misled by wrong dogma, applied their own law except where legislative or settled judicial rules of choice of law or the policy of the forum's municipal rule have required a different answer.<sup>18</sup> If the court had followed this approach, it would have analyzed the policy of the initially applicable rule of the forum. It might have determined that the North Carolina tort rule was primarily designed to admonish insurers to improve their practice in handling applications.<sup>19</sup> It might then have permitted defendant to exculpate itself under the law of Pennsylvania as the law to which the conduct of its business was properly adjusted,<sup>20</sup> or precluded such exculpation on the ground that defendant was admitted to do business in North Carolina, a fact that apparently was the basis of the court's jurisdiction.<sup>21</sup> In choosing between these answers the court might have wished to ascertain whether the defendant or the plaintiff had initiated their relationship. Or the court might have interpreted the North Carolina rule as primarily designed to distribute fairly the losses inevitably caused by modern interstate mass operations and given priority to the law of North Carolina as the law of that state by which the plaintiff could reasonably expect to be protected.<sup>22</sup> In any event, the court would have established a new rule of choice of law on grounds of forum policy that would have been a meaningful guidepost for the future. And there is little doubt that this distinguished court would have done just that—were it not for the fact that the American Law Institute had just announced its new *facile* formula.

<sup>18</sup> Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); and TREATISE §§ 102-120. For an example of judicial recognition of this "fact of life," see Judge Tate's opinion in *Universal C.I.T. Credit Corp. v. Hulett*, 151 So.2d 705, 711 (La. App. 1963): "...in many instances the courts actually choose those formal conflict-of-law principles which justify the application of the law of the forum whenever there are sufficient factual contacts with the forum as to justify the application of its own law." See also *Downs v. American Mutual Liability Ins. Co.*, 243 N.Y.S.2d 640, 644 (App. Div. 1963), per Breitel, J. P., and Leflar, Comment, 63 COLUM. L. REV. 1247 (1963).

<sup>19</sup> Regarding the distinction, for choice-of-law purposes, between admonitory and compensatory torts, which I have advocated for some time, see, e.g., Ehrenzweig, *The Place of Acting in Intentional Torts: Law and Reason versus the Restatement*, 36 MINN. L. REV. 1 (1951); *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595 (1960); *Alienation of Affections in the Conflict of Laws: Towards the Lex Fori for Admonitory Torts*, 45 CORNELL L.Q. 514 (1960); and generally TREATISE § 212. The distinction is recognized in RESTATEMENT (SECOND), CONFLICT OF LAWS, comment *b* at 9-10 (Tent. Draft No. 8, 1963).

<sup>20</sup> This rationale would support the decision for the defendant insurer in *Killpack v. National Old Line Ins. Co.*, 229 F.2d 851 (10th Cir. 1956), where the court denied the claim under the law of the location of the defendant's home office in erroneous reliance on the first *Restatement*, Beale, and Vrooman v. *Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950) (law of place of conduct applied to products liability claim, see TREATISE 588 n.7). Conversely, assumption of an admonitory ("penal") purpose of a liability rule of the foreign *lex actus* may result in denial of liability under the *lex fori*. See *Consolidated Auto Warranty Corp. v. Bankers Fire & Marine Ins. Co.*, 183 F. Supp. 816 (N.D. Ala. 1960) (damages claimed for delay of payment).

<sup>21</sup> On the Law of the Proper Forum: Ultimate Harmony of the Rules of Conflict of Laws and Choice of Jurisdiction, see Ehrenzweig, *Il diritto del tribunale adatto*, 17 *Diritto Internazionale* 3 (1963), and TREATISE §§ 124, 174(5).

<sup>22</sup> See *Mann v. Policyholders' Nat. Life Ins. Co.*, 78 N.D. 724, 51 N.W.2d 853, 857-58 (1952); TREATISE 564 n.56. See also for a similar situation (attorney's fees against insurer), *Tierney v. Safeco Ins. Co.*, 216 F. Supp. 590, 596 (D. Ore. 1963).

Plaintiff had claimed applicability of the law of North Carolina because it was in that state that its president had resided and died, that it was engaged in business, and that it suffered the loss. But, feeling called on "to inquire which state has the most significant relationship with the events constituting the alleged tort and with the parties,"<sup>23</sup> the court held that Pennsylvania law was applicable since "the important events upon which liability, if any, would rest occurred in Pennsylvania."<sup>24</sup> The most significant relationship was thus found in that state in which "the alleged delay, the foundation of the cause of action, took place."<sup>25</sup>

With this reasoning we are back to the first *Restatement*, to that very theory of "analytical jurisprudence," of territorialism, and vested rights, which the "most significant relationship" formula of the tentative draft for the *Restatement Second* purports but fails to displace.<sup>26</sup> For again we are entangled in the circular reasoning which refers us to the law under which the "cause of action" is alleged to have vested, and again the place of wrong, so often fortuitous, assumes its predominant importance. But it must be noted that this reversion to obsolete dogma is by no means chargeable to the court. The authors of the draft would protest in vain that the "most significant relationship" test, if properly applied, would discard the theoretical basis of the first *Restatement*. To be sure, "in determining the relative importance of the contacts," the *Restatement Second* would among other things let the forum also consider "the relevant purposes of the tort rules involved."<sup>27</sup> But not only has it, among the significant contacts, retained the places of injury and conduct;<sup>28</sup> not only has it preserved the general theory of "legislative jurisdiction";<sup>29</sup> but it has generally maintained the concept of rules governing certain situations<sup>30</sup> in a "neutral forum."<sup>31</sup> Conflicts rules applicable in such a court are necessarily based on the erroneous assumption of a law that is applicable a priori wherever the suit is brought. If the neutral court was properly invoked, its primary reference would always have to be to its own law and the policies underlying it.<sup>32</sup>

The actual result in the *Lowe* case was no doubt prompted by its peculiar facts, namely the lack of any indication of wrongful conduct by the defendant<sup>33</sup> and the ambiguity of the law of the forum,<sup>34</sup> in the same manner as a much-noted contract case using the "most significant relationship" formula was no doubt prompted by

<sup>23</sup> *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mutual Life Ins. Co.*, 319 F.2d 469, 473 (4th Cir. 1963).

<sup>24</sup> *Id.* at 474.

<sup>25</sup> *Ibid.*

<sup>26</sup> RESTATEMENT (SECOND), CONFLICT OF LAWS 1-2 (Tent. Draft No. 8, 1963); *id.* at 3 (Tent. Draft No. 6, 1960).

<sup>27</sup> *Id.* § 379(3) (Tent. Draft No. 8, 1963).

<sup>28</sup> *Id.* § 379(2)(a), (b). For criticism, see Currie, Comment, 63 COLUM. L. REV. 1233, 1235 (1963).

<sup>29</sup> *Id.* at 20 (Tent. Draft No. 3, 1956). See TREATISE 12-13, 316. For an isolated actual use of this concept, see RESTATEMENT (SECOND), CONFLICT OF LAWS § 151(b), comment *g* (Tent. Draft No. 7, 1962).

<sup>30</sup> RESTATEMENT (SECOND), CONFLICT OF LAWS *passim*. See TREATISE §§ 103, 123.

<sup>31</sup> Reese, *supra* note 2, at 692.

<sup>32</sup> See notes 18 and 21 *supra*.

<sup>33</sup> See also *Killpack v. National Old Line Ins. Co.*, *supra* note 20, where the court expressly found lack of negligence.

<sup>34</sup> *Supra* note 16, at 472.

its equities. In that case the New York court of appeals, contrary to the law of New York, rejected a support suit by a New York mother by reference to the law of Illinois which permitted an alleged father to buy off his obligations to the child without judicial approval.<sup>35</sup> One may presume that the court did so because the father had generously fulfilled his moral duties.<sup>36</sup> Clearly, then, the "most significant relationship" formula is readily usable as a tool to give effect to equitable considerations. But this formula, if recognized and applied as an abstract rule for the choice of a governing law, may lead those courts unaware of the intricacies and pitfalls of conflicts law to arbitrary decisions unguided by the indispensable analysis of the primary law and policy of the forum.<sup>37</sup> *Ceterum censeo...*

<sup>35</sup> *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441 (1961).

<sup>36</sup> See Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 39-52 (1963); Ehrenzweig, *The "Bastard" in the Conflict of Laws—A National Disgrace*, 29 U. CHI. L. REV. 498 (1962); TREATISE 400.

<sup>37</sup> For critical analysis of the "most significant relationship" formula as originally advanced in the conflicts law of contracts, see particularly Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW 349-64 (Nadelmann, Von Mehren & Hazard ed. 1961), and Rheinstein, *Book Review*, 11 AM. J. COMP. L. 632, 655-58 (1962). See also TREATISE § 123.