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## Recommended Citation

Richard J. Conviser, *Conflict of Laws: Alas, Confusion Still Reigns*, 22 DePaul L. Rev. 16 (1972)  
Available at: <https://via.library.depaul.edu/law-review/vol22/iss1/3>

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## CONFLICT OF LAWS: ALAS, CONFUSION STILL REIGNS

RICHARD J. CONVISER\*

### THE BACKGROUND

MORE THAN six years have lapsed since the Illinois Supreme Court decided *Wartell v. Formusa*.<sup>1</sup> In issue there was the law governing interspousal tort immunity. The result: the law of common domicile governs, not the law of the place of the injury.<sup>2</sup> Thus, the court chose not to apply the standard vested rights rule, but opted in favor of a modern policy-oriented approach.

Some considered *Wartell* a watershed in Illinois conflicts law, to wit, the abandonment of the theretofore dominant vested rights approach.<sup>3</sup> This interpretation appeared unwarranted.<sup>4</sup> If doubts existed, subsequent decisions laid them to rest.

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1. 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

2. Mr. and Mrs. Gerald Wartell, residents of Illinois, were involved in an automobile accident in Florida. Mrs. Wartell commenced an action in Illinois against her husband's estate alleging wilful and wanton negligence. Florida permits suits between spouses; Illinois, by statute, does not. Illinois law was applied, and the suit dismissed.

3. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, n.2 (1969). Professor Juenger's conclusion might well have been induced by the authorities cited in *Wartell*. See 213 N.E.2d at 545. The court's string of citations included such "modern approach case notables" as *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See also Note, *Conflict of Laws, Illinois Tort Choice-of-Law Problems Move Toward Further Confusion*, 64 Nw. U.L. REV. 841 (1970).

4. See Note, *Husband and Wife—Conflicts of Laws*, 54 ILL. B.J. 824, 825 (1966); Note, *Conflict of Laws, The Most Significant Relationship Test in Multi-State Tort Cases*, 65 Nw. U.L. REV. 947, 948 (1971).

The *Wartell* decision would appear to stand for the rather narrow proposition that questions of interspousal immunity are to be governed by the law of the state of common domicile. But no more. The opinion itself appears to negate a broader interpretation. It states that the law of the place of wrong would ". . . of course determine whether or not a tort has in fact been committed . . ." 34 Ill. 2d at 59, 213 N.E. 2d at 545 [emphasis added].

The ensuing four-year period found the practicing bar mired in the midst of a foggy never-never land. Dicta in *Graham v. General U.S. Grant Post No. 2665*<sup>5</sup> indicated the willingness on the part of the court to adopt the Restatement (Second) of Conflicts "most significant relationship" approach.<sup>6</sup> But one year later, and again by dicta, it indicated approval of the vested rights approach without so much as the briefest mention of either the Restatement (Second) or the earlier *Graham* decision.<sup>7</sup>

Just as it began to appear that confusion would reign supreme,<sup>8</sup> the court handed down its decision in *Ingersoll v. Klein*.<sup>9</sup> It adopted there the Restatement (Second) approach for multi-state tort cases.<sup>10</sup>

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See also *Graham v. General U.S. Grant Post No. 2665*, 43 Ill. 2d 1, 5, 248 N.E.2d 657, 659 (1969), where the Illinois Supreme Court indicated that *Wartell* supports only this narrow proposition. This construction was also apparently adopted by a federal court in *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1166 (N.D. Ill. 1968), although the language in this decision, after an initial strong statement to this effect, equivocated somewhat.

5. 43 Ill. 2d 1, 248 N.E.2d 657 (1969).

6. In *Graham*, the supreme court considered whether Illinois' dramshop statute should be given extraterritorial effect. The court analyzed this issue in "most significant relationship" terms only to render it *dictum* by concluding that this matter should not be resolved by a judicially-applied conflicts analysis, but rather was a matter for the legislature to resolve.

7. *Marchlik v. Coronet Insurance Co.*, 40 Ill. 2d 327, 239 N.E.2d 799 (1968). *Marchlik* involved application of a Wisconsin direct action statute against Illinois insurers. After concluding that such statutes are generally a substantive matter to be governed by the *lex loci*—in this case Wisconsin—the court refused application of Wisconsin law on public policy grounds.

At least one author construed *Marchlik* as a reversion to the vested rights approach. See 64 NW. U.L. REV. at 843. This conclusion, however, would appear supportable only if one broadly interprets *Wartell*. As indicated above, this would be inappropriate. See notes 3-4 and accompanying text. Rather that decision would have been inapplicable in *Marchlik* because it is limited to interspousal suits. As such, the *Marchlik* decision was potentially in keeping with the then prevailing Illinois rule.

8. Compare Waxman, *Conflict in Illinois Courts on Choice of Law Theory in Torts—Is It Lex Loci Delictus or Substantive Interest?* 59 ILL. B.J. 212 (1970); Note, *Conflict of Laws, Illinois Tort Choice-of-Law Problems Move Toward Further Confusion*, 64 NW. U.L. REV. 841 (1970). The situation was not aided by the strict adherence of a number of Illinois appellate courts to the traditional rule. See, e.g., *Bridges v. Ford Motor Co.*, 104 Ill. App. 2d 26, 243 N.E.2d 559 (1968); *Kabak v. Thor Power Tool Co.*, 106 Ill. App. 2d 190, 245 N.E.2d 596 (1969).

9. 46 Ill. 2d 42, 262 N.E.2d 593 (1970).

10. *Ingersoll* involved application of a wrongful death statute. Even though the injuries causing death allegedly occurred in Iowa, the court applied Illinois law, finding that it as the forum state and domicile of both parties to the action, had a

## THE PROBLEM

*Ingersoll* clearly helped clarify matters. Unfortunately, the clarification was incomplete. Should the holding there be confined to multi-state tort cases? Or is it to have broader application? The opinion could support either conclusion.<sup>11</sup>

## A YEAR OF NON-RESOLUTION

Resolution of this problem was, without doubt, the main task confronting Illinois courts last year. The task remains. If anything, two decisions handed down subsequently have served to increase the uncertainty faced by Illinois practitioners.

The first, *Klondike Helicopters Ltd. v. Fairchild Hiller Corp.*,<sup>12</sup> was decided by a federal court.<sup>13</sup> The action was brought for damages resulting from the crash of a helicopter manufactured by the defendant and purchased by plaintiff. Plaintiff's complaint sounded both in tort and contract.<sup>14</sup>

Specifically in issue was whether the causes of action would survive the Illinois borrowing statute. The effect of such statutes is to bar actions if they run afoul of either of two statutes of limitation: (1) the forum's statute, or (2) the statute of another state or terri-

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more significant interest in the outcome of the litigation. The case was a particularly apt one for discarding the traditional rule. The injury occurred when defendant's car broke through the iced-over Mississippi River allegedly on the "Iowa side." This was the only Iowa fact contact. It could not have been more fortuitous or the application of Iowa law more arbitrary.

11. Clearly, the court's main focus was the quest for a meaningful resolution of conflicts tort issues. But, in support of its analysis, it quoted heavily from *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) and *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964). The quoted language and the authorities cited therein level an attack not only on the *lex loci delicti* in specific, but on the vested rights approach in general.

12. 334 F. Supp. 890 (N.D. Ill. 1971).

13. It has long been well settled that a federal district court in diversity of jurisdiction cases must apply the substantive law of the state in which it sits, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), including that state's conflict of law rules. *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941). See generally, R. LEFLAR, *AMERICAN CONFLICTS LAW* § 66, 150-54 (rev. ed. 1968).

14. Plaintiff had two counts alleging negligence and two asserting a claim based on products liability. The court characterized these in tort, 334 F. Supp. at 893. Cf. *Williams v. Brown Manufacturing Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970). The counts characterized as contract involved an alleged breach of a contractual provision as well as alleged breaches of both express and implied warranties, 334 F. Supp. at 893.

tory where the cause of action has arisen.<sup>15</sup> The court thus was faced with two fact determinations—where had the tort causes of action arisen and where had the contract causes of action arisen.

The court concluded that tort causes of action arise “where the last act occurred to create liability,” viz., where the actual accident occurred.<sup>16</sup> The court held that on facts such as these, contract causes of action arise when the contract is executed and where the article is sold.<sup>17</sup>

The court clearly indicates that *Ingersoll* and the therein adopted “most significant relationship” test does not control here, for that case did not speak to the issues of where and when a cause of action arose, but rather went to the question of what substantive law should govern it. However, the *Klondike* decision did not rest here. The court attempted to establish that even if *Ingersoll* were to gov-

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15. The Illinois borrowing statute provides: “When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state.” ILL. REV. STAT. ch. 83, § 21 (1969). The Illinois statute is rather typical. See generally, Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287 (1960); Comment, *Foreign Statute of Limitations: Borrowed Only to Shorten the Period of Limitations of the Forum*, 1962 U. ILL. L.F. 452 (1962); Ester, *Borrowing Statutes and the Conflict of Laws*, 15 FLA. L. REV. 33 (1962).

The rationale for borrowing statutes is said to arise by virtue of the forum state's statute which invariably calls for tolling the statute while the defendant is absent from the jurisdiction. In the absence of a borrowing statute this rule would permit actions against a defendant which otherwise might have been barred by the laws of any of the states involved in the controversy. Vernon, *supra*, at 290-93.

16. 334 F. Supp. at 894. In reaching this result the court placed considerable reliance upon *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170 (N.D. Ill. 1969). That decision, in turn, relied on the landmark Illinois case, *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), which construed an analogous problem under section 17 of the Illinois Civil Practice Act. ILL. REV. STAT. ch. 110, § 17(1)(G) (1971).

17. 334 F. Supp. at 895. The court here relied upon *Hardman v. Helene Curtis Industries, Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964) and *Harris v. American Surety Co.*, 372 Ill. 361, 24 N.E.2d 42 (1939). Neither case dealt with this problem, and, indeed, it's uncertain that they stand as good authority for this proposition. One leading commentator has stated that Illinois is the “leading advocate” of another approach, namely that the cause of action arises in any jurisdiction where defendant is amenable to process. Ester, 15 U. FLA. L. REV. at 52 and the cases cited therein at nn. 87-89. This position was also apparently accepted in *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. at 1175, n.6. Interestingly enough, even though *Klondike* relied so heavily on *Manos* in construing the tort count statute of limitations problems, see note 16, *supra*, it did not even mention the earlier decision when discussing this problem in regard to the contract counts.

ern, the result would be the same. Although statute of limitation issues are usually resolved by characterizing them as procedural matters governed by forum law, the court, in order to apply a "most significant relationship" analysis, treated the matter as one of substantive law. Notwithstanding the tendency in applying borrowing statutes to disregard the modern conflicts approaches in favor of more traditional rules,<sup>18</sup> the court's dictum is to be welcomed. Borrowing statutes should be treated as substantive, and subjected to a functional conflicts analysis.<sup>19</sup>

The second aspect of this dictum, however, was most unfortunate. The court discussed the Restatement (Second) of Conflicts approach *only* when it analyzed the tort count. There was no discussion of it whatsoever in the analysis relating to the contract count. This, obviously, would tend to support a conclusion that *Ingersoll* is applicable only to tort issues. But the decision does not say this and, indeed, it is entirely unclear that this was the court's intent. Nonetheless, it served to muddy the waters surrounding the *Ingersoll* interpretation.<sup>19a</sup>

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18. See also *Manos v. Trans World Airlines, Inc.*, 295 F. Supp. 1170 (N.D. Ill. 1969); *Mack Trucks, Inc. v. Bendix-Westinghouse Co.*, 372 F.2d 18 (3d Cir. 1966); R. LEFLAR, *AMERICAN CONFLICTS LAW* § 128, 308, n.2 (rev. ed. 1968).

19. See R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 50 (1971). The soundness of Professor Weintraub's position is aptly illustrated by the following example from his text: "For example, P and D, both with settled residences in state X, drive together into state Y. D is driving with P as passenger when, because of D's alleged negligence, the automobile leaves the road, strikes a tree, and P is injured. P receives all his medical treatment in state X. X's statute of limitations is one year; that of Y is five years. P sues D in X four years after the accident. Treating the statute of limitations issue as substantive and subjecting it to a full functional choice-of-law analysis, X decides that the policies underlying the X short statute are fully applicable and that no policy of Y would be significantly advanced if suit were permitted. X therefore applies its own statute of limitations and bars suit. This decision by X should be treated as a choice on the merits between X and Y statutes of limitations and should bar suit even in Y if P subsequently brings suit there before the Y five-year statute runs. Assuming that X's functional analysis is correct, Y should also apply the X statute of limitations and bar suit even if suit had not first been brought and barred in X. A decision by the forum to apply its own shorter statute of limitations should not, however, be binding on other states if the forum purports to act only *qua* forum. This might be the case if, in the preceding hypothetical, Y, the place of injury, had the one-year statute of limitations, X, the residence of both parties, had the five-year statute and suit were originally brought in Y four years after the accident. Y might rationally decide that, because of the danger of fraud and mistake from what it considered a stale claim, Y was not willing to serve as the situs of litigation, although Y should not be concerned if X subsequently elects to permit the action to proceed in X."

19a. Compare *Mitchell v. Burnett*, 1 Ill. App.3d 24, 26 (1971) (traditional rule governs contract case).

The second case "muddying the waters" was *People v. Saiken*.<sup>20</sup> Defendant, Samuel Saiken, an Illinois resident, was tried for conspiracy to obstruct justice because he helped his son, Joel Saiken, also an Illinois resident, bury the latter's murder victim. Although the murder was committed in Illinois, the "burial ceremony" occurred in Indiana. Subsequently, the son, apparently repenting, informed the Indiana police where the corpse was located. The officer to whom this information was given obtained a search warrant based on his own affidavit setting forth his conversations with the younger Saiken.

Defendant contended the evidence was improperly obtained and, hence, improperly admitted. His contention was based on Indiana law under which warrants predicated upon hearsay information are invalid. Illinois law would not have rendered it invalid.

As to admissibility of the evidence, the supreme court simply stated this to be a procedural matter governed by forum law, *i.e.*, Illinois law.<sup>21</sup> However, it characterized the preliminary issue of whether the evidence was wrongfully obtained as a substantive matter,<sup>22</sup> and proceeded to analyze it in "most significant relationship"

20. 49 Ill. 2d 504, 275 N.E.2d 381 (1971).

21. *Id.* at 510, 275 N.E.2d at 385.

22. *Id.* The court does not give any authority to support this conclusion, and, indeed, the one reported case dealing with this problem reached the opposite conclusion. *Burge v. State*, 443 S.W.2d 720 (Tex. Ct. App. 1969). There defendant was prosecuted for burglary with intent to commit rape. The victim managed to "bite and spit out" a piece of defendant's sweater during the ensuing struggle. This piece of fabric was recovered by the police and, subsequently, matched against defendant's sweater which was uncovered in his residence in Oklahoma. The search had been permitted by defendant's wife even though the police officers were without a search warrant. Defendant contended that the evidence was inadmissible because, under Oklahoma law, each spouse is given a separate and independent right to insist that a warrant be obtained before the home is searched. The Texas court held, however, that this was a procedural issue governed by forum law. But, query, whether this result would have obtained if it would have resulted in the evidence being inadmissible?

The Illinois position appears preferable as "substantive" rights appear to be involved here. See R. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS, 46-48 (1971); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333 (1933). Interestingly enough, the *Saiken* decision cites *Burge*, but with regard to an entirely different aspect of the case. Perhaps then the "oversight" concerning this particular issue had an element of intent.

The *Saiken* result would also square up with the Restatement (Second) treatment of the analogous problem of privileged communications. RESTATEMENT (SECOND) OF CONFLICTS § 139(2) (adopted 1969) provides: "Evidence that is privileged

terms. Finding that the crime was committed in Illinois, it was being prosecuted there, the defendant was a resident and citizen of Illinois, the great majority of witnesses who would testify at trial were Illinois residents, Indiana had no vital contact with the crime, and that application of Illinois evidentiary law would not offend the comity of interstate relationships between Indiana and Illinois, the court applied Illinois law.<sup>23</sup>

The result is correct. The problem lies in the language used by the court. It states that the Restatement (Second) approach governs because it has replaced the doctrine of *lex loci delicti* in Illinois.<sup>24</sup> Unfortunately, this is not a torts case, and *lex loci delicti* has no application. The "substantive" issue involved here is whether evidence had been wrongfully obtained. If one must pigeonhole this into a substantive area, that would probably be the area of constitutional law.<sup>25</sup> Indeed, query whether there is any neat little substantive law category into which one can tuck this away. Perhaps one would be best served by merely stating that substantive rights are involved, *i.e.*, one's right not to be subjected to improper searches.<sup>26</sup>

Does *Saiken* stand for the proposition that Restatement (Second) governs all areas of substantive law? The decision is not at all clear on this point. And, as its final "beclouding" act, the court does not even cite its own decision in *Ingersoll*; rather it relies upon the earlier dicta in *Graham v. General U.S. Grant Post No. 2665*.

#### WHERE TO NOW?

A discussion of "where to" presupposes that one knows the present state of the law. As indicated above, this presupposes too much. In only one area of substantive law—torts—does the Illinois

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under the local law of the state which has the most significant relationship with the communication, but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect." And the *Saiken* result was even more compelling, for Illinois was found to be the most significantly related state. See note 23 and accompanying text, *infra*.

23. 49 Ill. 2d at 510, 275 N.E.2d at 385.

24. *Id.*

25. *Cf. Burge v. State*, 443 S.W.2d 720, 723 (Tex. Ct. App. 1969).

26. *Cf. Levy v. Steiger*, 233 Mass. 600, 124 N.E. 477 (1919).



practitioner face certainty. Here, one no longer looks merely to the place of injury; rather the Restatement (Second) "most significant relationship" test controls.<sup>27</sup>

The test is two-pronged: both the connecting facts in a given case as well as certain specified policy-oriented principles are to be considered.<sup>28</sup> The Restatement (Second) aids in this task by assigning a qualitative value to specific factual contacts in each substantive area. In a tort case, the factual contacts generally regarded as most important are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.<sup>29</sup>

In most cases, however, the end result will not differ from that obtained under the former vested rights "place of injury" rule. This is so because the Restatement (Second) makes a still further qualitative fact assessment: it indicates that the law of the place of injury should govern most tort situations unless the application of the other specific contact and/or policy principles clearly indicate that another state bears a more significant relationship to the case.<sup>30</sup> In effect, this re-ushers the vested rights approach in again through the back door. But not quite. For even though the result will usually be the same, this need not be the case as the Restatement (Second)

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27. See notes 9-10 *supra* and accompanying text.

28. The basic controlling Restatement section is § 145. The factual contacts are spelled out here in subsection 2 and the policy principles of § 6(2) are incorporated by reference. These policy principles are applicable to all substantive areas of law. They are: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability and uniformity of result; and (7) ease in the determination and application of the law to be applied. These principles seem to reflect a compromise reached during the drafting of the Restatement (Second) calculated to satisfy at least some desires of the interest analysis proponents. Candidly, however, one wonders whether such generally stated principles will be of any practical value in the resolution of conflicts cases. The doubt is heightened by those decisions handed down to date which have utilized the approach taken in the Restatement (Second). These invariably rely almost in their entirety on a factual contact analysis in reaching a decision.

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1969).

30. *Id.*, comment f. This would clearly appear to be the approach taken by the court in *Ingersoll*. See 262 N.E.2d at 595. See also *Johnson v. Wood*, 6 Ill. App.3d 1015, 286 N.E.2d 637 (1972).

obviously supplies the court with freedom from compulsion of fixed rules, and encourages it to apply the law which it believes to have the strongest claim for application.<sup>31</sup>

It appears imperative that the court resolve as soon as possible what conflicts approach will govern the other substantive areas of law. Hopefully, this resolution will be in favor of a modern policy oriented approach. Clearly, *Ingersoll* could support this result.<sup>32</sup>

#### OTHER MATTERS OF NOTE

##### *Wartell v. Formusa* REVISITED

*Aurora National Bank v. Anderson*<sup>33</sup> found an Illinois court once more focusing on the issue of what law should govern intra-family tort immunity. The case differed from *Wartell* only insofar as the family relationship involved was one of parent and child.

Marilou Laughlin, an unemancipated minor, was a passenger in a car driven by her mother which was involved in an accident with a second car. The accident occurred in Iowa. The Laughlins were Illinois residents. Suit was brought by Marilou against her mother alleging willful and wanton conduct. Intra-family tort immunity would bar such an action in Iowa, but not in Illinois.<sup>34</sup> The trial court granted summary judgment in favor of the mother. The appellate court reversed the decision, relying heavily on *Wartell*, and concluded that the law of common domicile should control.<sup>35</sup>

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31. See Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 699 (1963), where the author states: "This rule of most significant relationship, at the very least, will not stand in the way of progress. It should aid in inducing the courts to depart from the place of injury rule in situations where this is desirable. And it should make clear to the lawyer and litigant that it can no longer be expected that the place of injury rule will always be applied."

32. See note 11 *supra* and accompanying text. The author, however, does not wish to imply that the best approach is necessarily that formulated in the Restatement (Second). It is to be hoped that Illinois courts, in formulating their own "final" choice of law approaches, will at least consider other alternatives.

33. — Ill. App. 2d —, 268 N.E.2d 552 (1971).

34. Illinois law permits parent-child suits for wanton and wilful conduct. *Mudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956). It is unclear whether Iowa would permit such suits, but, for purposes of this opinion, the court assumed that Iowa policy would not allow such an action, 268 N.E.2d at 553.

35. Counsel for defendant attempted to distinguish *Wartell* on grounds that the earlier decision involved interspousal immunity whereas a parent-child relationship was involved in the instant case. His contention was based on the fact that Illinois'

Although the court's reliance on *Wartell* appears clearly correct, its analysis of the earlier decision does not. It is cited for the proposition that such controversies are best resolved by characterizing the problem as one of family law. This appears to be an improper reading of *Wartell*.<sup>36</sup> Characterization of the issue there was in tort.<sup>37</sup> Indeed, the very Restatement section<sup>38</sup> relied upon both in *Wartell* and *Aurora National Bank* is to be found in the torts chapter and concerns tort immunities. As a practical matter, even if characterized in tort, the result would be precisely the same, a fact not overlooked by the court.

But, candidly, the above discussion begs the question. Is it even necessary to resort to a characterization process or strict adherence to Restatement (Second) approach? One would hope not. The courts should simply state that the question of intra-family tort immunity is generally to be governed by the law of common domicile.<sup>39</sup>

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policy regarding interspousal immunity is codified, *see* ILL. REV. STAT. ch. 68 (1963), whereas the policy underlying parent-child tort immunity is grounded only in the common law. Happily, the court rejected this argument, 268 N.E.2d at 555.

36. Judge Moran quotes a lengthy passage from *Wartell* which allegedly supports his position, 268 N.E.2d at 553-54 quoting from 34 Ill. 2d at 59, 213 N.E.2d at 545. It does not. Apparently, this conclusion was reached by reliance on some of those decisions cited in the earlier case. Thus, for example, the *Aurora Bank* court quotes heavily from *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), a case cited in *Wartell*. The case is typical of those predating widespread application of the modern, policy oriented approaches, *i.e.*, when the rigid, formalistic vested rights approach held sway. Then, characterization as to substantive area of law was a popular, oft-times necessary escape device for avoiding harsh, inequitable results. *See* W. REESE and M. ROSENBERG, CONFLICT OF LAWS 494-510 (6th ed. 1971). And even then Judge Traynor's sweeping language in *Emery* could probably support more than a mere "characterization" analysis. *See* Ehrenzweig, *Parental Immunity in the Conflict of Laws: Laws and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474 (1956); Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237, 263 (1962).

37. The court would have been well advised to note some of the other decisions cited in *Wartell*, *e.g.*, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), as well as some of the supreme court's later constructions of it in, *e.g.*, *Ingersoll and Graham*.

38. The decisions had referred to this section as adopted in Tentative Draft No. 9 of the Restatement (Second) as par. 390g. The present section as finally promulgated, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1971), differs from the earlier draft insofar as it specifically provides that the law of domicile will not control if another state is more significantly related to parties and transactions in accordance with the general principles governing tort issues as set out in Restatement § 145.

39. The impact, if any, of the change in the finally promulgated Restatement

As a practical matter, whatever road the analysis may take, it seems relatively clear that the Illinois practitioner can now safely rely upon this result.

#### MULTISTATE TORTS

In *Snead v. Forbes*,<sup>40</sup> plaintiff, the former president of a large trucking concern, alleged damage as a result of defamatory comments published in the *Forbes* business magazine. Since the magazine is distributed nationwide, plaintiff allegedly was injured in every state.

The inherent problems are obvious. Theoretically, each state might be a proper forum, and each state's law might be applicable. One would probably produce a literally unintelligible opinion if an attempt were made to try all the transitory causes of action in one suit. Moreover, the cost and harassment potential of such litigation could be staggering. Thus, judicial economy makes it desirable that one jurisdiction's law be selected to govern the litigation.

This result was accomplished in *Snead*. The court applied Illinois law because that was plaintiff's domicile at the time of the alleged defamation. The court, relying on *Ingersoll*, concluded this fact made Illinois the state "most significantly related" to the parties and transaction.<sup>41</sup> The Restatement (Second) assumption, relied upon in *Snead*, is that the place of greatest potential injury to plaintiff's reputation is where plaintiff has lived and worked. This assumption would generally hold true for multi-state defamations.<sup>42</sup> If not, *i.e.*, plaintiff suffers the greatest harm elsewhere, then that state's law should govern rather than the law of the domicile.<sup>43</sup> This, however,

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section, see note 38 *supra*, remains to be seen. Practically speaking, it appears unlikely that another state will be found to be more significantly related than that of the common domicile. This would be particularly true where the state of common domicile is also the forum.

40. 2 Ill. App. 3d 22, 275 N.E.2d 746 (1971).

41. *Id.* at 26, 275 N.E.2d at 748-49.

42. Implicit in this assumption, of course, is the fact that the allegedly defamatory matter was published in the "domiciliary" jurisdiction. A logical extension of this rule where plaintiff is not a natural person, but rather a legal entity, *e.g.*, a corporation, would be to apply the law of the principal place of business or engagement in the activity to which the defamation relates. R. LEFLAR, *AMERICAN CONFLICTS LAW* 336 (rev. ed. 1968).

43. The nexus applied by the Restatement (Second) appears to be the preferable

is nothing more than a question of fact, clearly fitting within the analysis and language of *Snead*.

The result in *Snead* is analytically consistent with Illinois' treatment of the analogous "multiple publication" defamation problem. It has adopted the Uniform Single Publication Act.<sup>44</sup> Under its terms, the plaintiff is given but "one cause of action" for a tort "founded upon any single publication." It provides that a judgment in any jurisdiction in this action "shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication." Although the Act does not contain any indication as to what law would govern plaintiff's "one cause of action," its language would appear to require an analysis as in *Snead*.

But one caveat of warning should be added. Potentially, the law of plaintiff's domicile could be relied upon by defendant to shield it from liability without in any significant way advancing a substantive policy of the domicile. This may conflict with interests of other states that might hold the defendant liable for such publications. Thus, for example, if the publication has appeared in very few states, or it is fairly clear on the facts that a cause of action would not exist under the law of only one or very few states, then it is entirely possible that no rational purpose would be served by giving the defendant the benefit of a rule existing in plaintiff's domicile that would relieve it from liability existing under the laws of other

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one. Others are available, however. Thus, the law of defendant's domicile, place of incorporation or main publishing office could govern. This approach would obviously make it easy to obtain service on the defendant. It would also often result in the forum court being able to apply its own law. Its principal disadvantage lies in the fact that this state might otherwise bear no relationship to either the defamation or resulting harm. See note, *Single Publication Doctrine and Conflicts of Law Problems in Multi-State Libel*, 43 ILL. L. REV. 556, 560 (1948); Note, *Multi-State Libel and Conflict of Laws*, 35 VA. L. REV. 627, 633 (1949). One could apply the law of that state where defendant's acts commencing the alleged defamation occurred. See Ehrenzweig, *The Place of Acting in Intentional Multi-State Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1, 34 (1951), where the author proposes that the law of the place of acting govern all intentional torts including defamation. See also Comment, *The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem*, 60 HARV. L. REV. 941, 946 (1947). Lastly, the forum could simply apply its own law. See *Willenbacher v. McCormick*, 229 F. Supp. 659 (D. Colo. 1964). Compare *Dale System, Inc. v. General Teleradio, Inc.*, 105 F. Supp. 745, 748 (S.D.N.Y. 1952).

44. ILL. REV. STAT. ch. 126, §§ 11-15 (1971).

states having an interest in compensating the plaintiff and in discouraging tortious conduct of this kind within their own jurisdictions.<sup>45</sup> In short, the search for judicial economy should not be regarded as a definitive, inflexible end-all for such problems.

One should also note that the *Snead* principles would be applicable to other multi-state torts situations, most importantly those involving invasion of the right of privacy.<sup>46</sup>

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45. An argument to this effect was presented by the plaintiff in *Snead*, viz., defendant had the benefit of Illinois' innocent construction rule although the state of its principal place of business and most other states would not have accorded it this protection. The court did not find this persuasive. 275 N.E.2d at 749.

46. Compare *Ettore v. Philco Television Broadcasting Corporation*, 229 F.2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956); *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68 (S.D. Cal. 1958). See generally, Ludwig, "Peace of Mind" in *48 Pieces v. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948).