

Hubbard v. Greeson: Indiana’s Misapplication of the Tort Sections of the Restatement (Second) of Conflict of Laws

DAVID A. MOORE^o

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INTRODUCTION

In 1963, the watershed case of *Babcock v. Jackson*¹ set off the American choice-of-law revolution in state courts by asking the question “[s]hall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?”² The Court of Appeals of New York, much to the delight of conflict of laws scholars,³ adopted what came to be known as the “most significant relationship” test.⁴ This new approach displaced the traditional *lex loci delicti* choice-of-law doctrine for torts which had all too often led to “the inexorable application of the law of the place of the tort where that place ha[d] no reasonable or relevant interest in the particular issue” disputed in the case.⁵ The traditional *lex loci delicti* approach blindly applied the law of the place of the injury to the dispute with few exceptions; but the “most significant relationship” test asks the judge to consider the interests of other jurisdictions in the resolution of the dispute besides just the interests of the jurisdiction where the plaintiff’s injury occurred.⁶ Since *Babcock*, over forty-one jurisdictions have deserted the vested rights theory and the mechanical use of *lex loci delicti* for tort conflicts in favor of one of the modern approaches to choice-of-law questions such as the *Restatement (Second) of Conflict of Laws* [hereinafter *Restatement (Second)*] or some form of governmental interest analysis.⁷

In 1987, Chief Justice Shepard’s opinion in *Hubbard Manufacturing Co. v. Greeson*⁸ sought to align Indiana with the majority of jurisdictions that had adopted the *Restatement (Second)* in full or in part as their choice-of-law doctrine.⁹ The Indiana Supreme Court wanted to avoid the anomalous results that would be caused by that application of the traditional *lex loci delicti* rule; and therefore adopted a more progressive approach to choice-of-law questions citing section 145(2) of the

1. 191 N.E.2d 279 (N.Y. 1963).

2. *Id.* at 280-81 (emphasis in original).

3. See generally David F. Cavers et al., *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963) (discussing the importance of the case in the development of the law of conflict of laws). Professor Brainerd Currie was heartened by *Babcock* “because as a replacement for the discredited rule it provides something very much better than the rather-to-be-expected ‘center of gravity’ or ‘grouping of contacts’ theory.” *Id.* at 1233. Professor Willis L.M. Reese felt that Judge Fuld’s opinion was “almost certain to have a profound effect upon future developments in many other areas of choice of law.” *Id.* at 1251.

4. *Babcock*, 191 N.E.2d at 283-84.

5. *Id.* at 283. *Lex loci delicti* is defined as “[t]he law of the place where the tort was committed.” BLACK’S LAW DICTIONARY 923 (7th ed. 1999).

6. *Babcock*, 191 N.E.2d at 280-82.

7. Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1251-55 (1997).

8. 515 N.E.2d 1071, 1073-74 (Ind. 1987).

9. Symeonides, *supra* note 7, at 1268-69. As of 1997, twenty-one states had adopted the *Restatement (Second)* as their choice-of-law doctrine for tort conflicts and twenty-five had done so for contract conflicts. *Id.* If you add to that group those states that follow the kindred significant contacts approach and those states that follow the *Restatement (Second)* in part, you have a majority of the states following some version of the *Restatement (Second)*. *Id.*

Restatement (Second) for a grouping-of-contacts analysis.¹⁰ Although the court has taken this small step toward adopting the *Restatement (Second)*, the court has limited the strength of the analysis by considering only the geographical contacts listed in section 145(2) while ignoring section 145's directive to consider those contacts in light of the choice-of-law principles laid out in section 6.¹¹ Among those principles ignored by the *Hubbard* court were the relevant policies of the forum and other interested states, the relative interests of those states in the determination of the particular issue, and the protection of the justified expectations of the parties involved.¹² As discussed below, these principles are inseparable from a proper application of the *Restatement (Second)*.¹³

Indiana must complete its own conflict of laws revolution by adopting the *Restatement (Second)* sections dealing with torts in their entirety or at least by allowing governmental interest analysis to play some role in Indiana's choice-of-law doctrine. In the process, the court should leave its current approach, the *Hubbard* test, behind. In Part I, this Note explains some of the fundamental theoretical compromises made in drafting the *Restatement (Second)* that led to certain difficulties in its application. Further, Part I discusses the principal sections of the *Restatement (Second)* dealing with conflicts between competing tort laws and explains how the sections function together in one harmonious doctrine. Part II of this Note discusses the *Hubbard* case, explains how the *Hubbard* test does not parallel the *Restatement (Second)*'s "most significant relationship" test, and explains the type of test *Hubbard* actually articulates. Then, the Note documents *Hubbard*'s legacy by emphasizing the unfulfilled promise of *Gollnick v. Gollnick*,¹⁴ by summarizing several subsequent cases that illustrate a small divergence from the *Hubbard* test in lower courts; by reviewing *Allen v. Great American Reserve Insurance Co.*,¹⁵ the last word on the *Hubbard* test; and by previewing *Simon v. United States*,¹⁶ in which the Third Circuit has certified questions regarding *Hubbard* to the Indiana Supreme Court for review. Part III briefly highlights four gleaming problems found in the *Hubbard* test: 1) the test lacks a definitive standard for when the *lex loci delicti* approach still applies; 2) the test does not, in practice, differ significantly from the *lex loci delicti* approach; 3) the second prong of the test uses a grouping-of-contacts approach that lacks the *Restatement (Second)*'s substantive credibility; and 4) the test does not explain how to choose between more than one non-situs jurisdiction when the situs has been deemed insignificant. This Note concludes by suggesting that when deciding *Simon v. United States*, Indiana should incorporate the choice-of-law principles found in section 6 of the *Restatement (Second)*—most important among them, governmental interest analysis—into its choice-of-law analysis.

10. *Hubbard*, 515 N.E.2d at 1073-74.

11. Symeon C. Symeonides, *Choice of Law in American Courts in 1988*, 37 AM. J. COMP. L. 457, 460 (1989).

12. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

13. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAWS 212 (3d ed. 2002).

14. 517 N.E.2d 1257 (Ind. Ct. App. 1987), *aff'd*, 539 N.E.2d 3 (Ind. 1989).

15. 766 N.E.2d 1157 (Ind. 2002).

16. 341 F.3d 193 (3d. Cir. 2003), *certifying questions to* 794 N.E.2d 1087 (Ind. 2003).

I. THE *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*

The *Restatement (Second)* is the most influential choice-of-law doctrine in modern conflict of laws history.¹⁷ The efforts to draft the *Restatement (Second)* began in 1953 as a response to the growing distaste among academics for the *Restatement (First) of Conflict of Laws* [hereinafter *Restatement (First)*] and its "strong territorial bias."¹⁸ The final draft, published in 1971, is a "complex, negotiated settlement among several warring factions of choice-of-law revolutionaries."¹⁹ The popularity of this negotiated settlement among American judges is linked to the deference it gives to courts, its ease of application, its lack of forum or substantive bias, its broad scope, and the prestige of the American Law Institute.²⁰

A. *Understandable Confusion Caused by the Compromise of Schools*

The apparent confusion among some courts, such as the *Hubbard* court, regarding the proper application of the *Restatement (Second)* can be traced to the settlement over the doctrine's methodological foundation. This "methodological foundation consists of various incongruous elements which were borrowed from various new theories and forged into an oddly eclectic approach" and is a "compromise between neutral allocation and policy evaluation."²¹ Professor William L. Reynolds has described the *Restatement (Second)* as a "curious cross between vested rights theory and the legal process school."²² For example, *lex loci delicti* and vested rights theory found their way into the *Restatement (Second)*'s various presumptive law choices, such as section 146 for personal injuries.²³ The legal process school's "reasoned elaboration," although not as easily recognizable,

17. See Patrick J. Brochers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233 (1997).

18. RICHMAN & REYNOLDS, *supra* note 13, at 205. The *Restatement (First) of Conflict of Laws* required courts to apply the law of the place of injury when determining whether the plaintiff had sustained a legal injury, what the applicable standard of care is, what defenses are available, and so on. See *RESTATEMENT (FIRST) OF CONFLICTS OF LAWS* §§ 378-390 (1934).

19. RICHMAN & REYNOLDS, *supra* note 13, at 205.

20. See Symeonides, *supra* note 7, at 1269-76.

21. TH. M. DE BOER, *BEYOND LEX LOCI DELICTI: CONFLICTS METHODOLOGY AND MULTISTATE TORTS IN AMERICAN CASE LAW* 199 (1987) (offering a Dutch perspective on American choice-of-law methodology).

22. William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1386 (1997). Professor Joseph Beale's vested rights theory requires the application of the law of the jurisdiction where a right "vested." A tort right vested, for example, in the state where the injury occurred (rather than, say, where the wrongful conduct occurred); a contract right vested in the state where the last act necessary to make the contract took place (usually the acceptance), and so on.

Id. at 1376.

23. *Id.* at 1387.

resonates in section 6 and section 145—both of which require policy analysis and recognition of the reasonable expectations of the parties in a legal dispute.²⁴

The final version of the *Restatement (Second)* contains territorial choice-of-law rules, interest analysis, and grouping-of-contacts.²⁵ Understandably, the inclusion of these conflicting choice-of-law frameworks has led to confusion in judicial opinions. Professor Ted M. de Boer pointed out that the *Restatement (Second)* “has provided the courts with virtually unlimited license to motivate any choice of law result they prefer in the phraseology of [the text], which lends a semblance of legitimacy to even the most dubious decision.”²⁶ Although Professor de Boer’s comments may have gone too far, a court that does not have a full grasp of how the “three central elements” work together may be applying only one of these methodologies while believing that it has applied the *Restatement (Second)* correctly.²⁷ A court in a tort dispute can apply interest analysis through section 6, grouping-of-contacts through section 145, or traditional *lex loci delicti* through one of the many presumptive sections while ignoring the rest of the *Restatement (Second)*. This is not to say that all courts that misapply the *Restatement (Second)* do so intentionally; some of their misunderstanding is attributable to the *Restatement (Second)* itself.²⁸

B. Proper Application of the *Restatement (Second)*’s Key Sections.

Although the *Restatement (Second)*’s theoretical inconsistencies led some courts to misapply it, there is a consensus on the drafters’ intended application. An overview of the key sections used in resolving conflicts between competing jurisdictions’ tort laws will be helpful. First, section 6—which sets out the basic principles of the entire *Restatement (Second)*—will be discussed, including an explanation of Professor Brainerd Currie’s governmental interest analysis. Next, section 145, the general rule for conflicts between tort laws, will be elucidated. Lastly, the territorial presumptions, a remnant of the traditional *lex loci delicti*, will be discussed.

24. *Id.* at 1387-88 (discussing the ideas found in HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative edition 1954) (William N. Eskridge Jr. & Philip P. Frickey eds., 1994)). A legal process judge practicing Hart and Sacks’ “reasoned elaboration”

must *explain* her decision; she must *elaborate* it by showing reasons why society will be better off than it would be if the decision had gone otherwise. That explanation must be tied closely to the facts, and it must reflect shared values. Those values, in turn, can be derived from many sources: precedents, statutes, or deeply held societal beliefs.

Id. at 1387 (emphasis in original) (footnote omitted). For examples of what Reynolds describes as “exemplar cases,” see *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889) and *The T.J. Hooker*, 60 F.2d 737 (2d Cir. 1932). *Id.*

25. RICHMAN & REYNOLDS, *supra* note 13, at 205-06.

26. DE BOER, *supra* note 21, at 201.

27. RICHMAN & REYNOLDS, *supra* note 13, at 214.

28. *Id.* at 215.

1. Section 6: Choice-of-Law Principles

“In Section 6, one finds the various policies and choice-of-law values that are said to underlie *all* other Sections of the *Restatement*.”²⁹ Section 6 outlines the basic choice-of-law principles for a court to consider when making a decision between competing laws. First, the court is directed to follow any statutory directive of the forum state on choice-of-law.³⁰ Where there is no such statute, the court is instructed to consider the following factors relevant to the choice of the applicable rule-of-law:

- (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 interest of those states in the determination of the particular issues,
- (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.³¹

Professors Richman and Reynolds describe section 6 as “the heart of the *Restatement (Second)*” and it is referred to in section after section.³² Professors Scoles, Hay, Borckers, and Symeonides have gone further, stating that “[s]ection 6 is the cornerstone of the entire *Restatement*,” while the “‘most-significant-relationship’ formula is the *Restatement*’s other fundamental concept.”³³

Factors (b) and (c) of section 6—which incorporate governmental interest analysis into the *Restatement (Second)*—are the most important factors to the topic of this Note.³⁴ Interest analysis is a product of unilateralist thought.³⁵ Unilateralism seeks to find the appropriate sovereign, as opposed to making a substantive decision about which sovereign has the superior law.³⁶ At the same time, unilateralism also pays close attention to the content of the competing laws.³⁷ A unilateralist looks to see if the actual dispute is of the type that the law was designed to govern; only then will the law be truly applicable.³⁸

29. Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653, 659 (1995) (emphasis in original).

30. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).

31. *Id.* § 6(2).

32. RICHMAN & REYNOLDS, *supra* note 13, at 207 (emphasis added).

33. EUGENE F. SCOLES ET AL., CONFLICTS OF LAW 58 (3d ed. 2000). “While Section 6 enunciates the guiding principles of the choice-of-law process, the most-significant relationship formula describes the **objective** of that process: to apply the law of the state that, with regard to the particular issue, has the most significant relationship with the parties and the dispute.” *Id.* at 60-61 (emphasis in original).

34. RICHMAN & REYNOLDS, *supra* note 13, at 207.

35. Gene R. Shreve, *Introductory Note*, in A CONFLICT-OF-LAW ANTHOLOGY 71 (Gene R. Shreve ed., 1997).

36. *Id.* at 3.

37. *Id.*

38. *Id.*

a. Brainerd Currie's Governmental Interest Analysis

To understand the policy analysis found in section 6, a discussion of Professor Brainerd Currie's governmental interest analysis is necessary.³⁹ Currie's approach to choice-of-law problems recognizes that law is purposive, that it is intended to achieve various social policies or goals.⁴⁰ Professor Gene Shreve has provided a clear summary of how Currie's governmental interest analysis functions:

When a court must choose between conflicting rules of decision, it should proceed in order through the following series of steps.

1. The first step is to determine how many of the competing laws come from places that would have an interest in having them applied. So we must ask regarding each law: do the particular facts of the case implicate the policies that account for the existence of the law? If so, the sovereign (law source) who created that rule of law is interested in its application. On the other hand, if refusal to apply a particular rule of law would not frustrate the purpose behind its creation, that law source is uninterested.
2. If only one of the competing laws is from an interested place, the court should apply that law. It should do so because there is only a false conflict.
3. If it initially appears that two places might each be interested in having their conflicting laws applied, there may be a true conflict. But the court must move carefully before concluding that a true conflict exists. Specifically, the court should first consider whether (upon closer

39. *Id.* at 71.

40. RICHMAN & REYNOLDS, *supra* note 13, at 239. Currie outlined his basic method along these lines:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
2. When it is suggested that the law of the foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially a familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but the foreign state has, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178.

examination) a more restrained interpretation of the policies supporting either one of the competing laws suggest that the source from which the law is taken is not interested after all. If (through this process of reconsideration) the number of interested places is reduced to one, [the] choice is made in the manner indicated in step (2) above. However, if on further examination, it still appears that a true conflict exists, and if one of the laws vying for application is that of the forum, the court should resolve the conflict by applying forum law.⁴¹

The overall goal of interest analysis is to see that a law is not applied unless its application will realize the policy goal intended to be achieved when the sovereign created it.⁴²

b. Diagramming Interest Analysis

To assist legal scholars in conceptualizing Professor Currie's vision of interest analysis, Professor William M. Richman produced diagrams that demonstrate visually how interest analysis works.⁴³ Richman places the relevant contacts, law, and policy in the appropriate state's column.⁴⁴ Then, he uses arrows to show the relationship of the law's policy to the facts of the case.⁴⁵

Richman's diagram of the landmark case of *Babcock v. Jackson* is quite helpful in understanding the role interest analysis plays in choice-of-law decisions.⁴⁶ In *Babcock*, the plaintiff and defendant, both New York residents, were involved in an automobile accident while traveling in Ontario, Canada.⁴⁷ The plaintiff passenger brought suit against the defendant driver in New York. The choice-of-law problem was a common one: Ontario's guest statute prohibited passengers from recovering against their drivers, but New York law allowed for such recovery.⁴⁸ The policy behind New York's pro-recovery law was to force a tortfeasor to compensate his victim.⁴⁹ Conversely, Ontario sought to prevent fraudulent claims by passengers colluding with drivers against insurers.⁵⁰ Under Currie's interest analysis, *Babcock* is a false conflict. If New York law is applied, New York's policy of compensating victims will be advanced by allowing plaintiff, a New York resident, to recover damages.⁵¹ If Ontario's law is applied, Ontario's interest in preventing fraud against Ontario insurers will not be advanced because the defendant, a New York resident, was not insured in Ontario. Interest analysis dictates that New York law, the only interested law, should be applied.⁵²

41. Gene R. Shreve & Hannah L. Buxbaum, *Cases and Materials on Conflicts of Law* 161 (2000) (unpublished casebook, on file with author) (emphasis omitted).

42. RICHMAN & REYNOLDS, *supra* note 13, at 239-40.

43. William M. Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis*, 43 OHIO ST. L.J. 317, 318-19 (1982).

44. *Id.* at 318.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 319.

50. *Id.*

51. *Id.*

52. *Id.*

Diagram of *Babcock v. Jackson*⁵³

	NEW YORK	ONTARIO
CONTACTS	Forum Plaintiff's Domicile Defendant's Domicile Car Garaged & Insured Trip Began	Accident Injury
LAW	No Guest Statute	Guest Statute
POLICY	Compensate Victims	Avoid Insurance Fraud

Richman explains that:

The arrows graphically depict Currie's insight. The arrow from New York's policy (compensate auto accident victims) points toward a New York contact: the New York Plaintiff. The arrow from Ontario's policy, however, does not point toward an Ontario contact. Rather, it crosses the center line, indicating that the Ontario policy has no Ontario referent, and thus, that Ontario's interests will not be advanced by the application of its laws. Since the arrows from both relevant policies point to contacts in New York, the case is a false conflict.⁵⁴

Richman uses the case of *Lilienthal v. Kaufman*⁵⁵ to illustrate Currie's true conflict scenario. In *Lilienthal*, the defendant, adjudicated a spendthrift in Oregon,⁵⁶ contacted the plaintiff in San Francisco for a loan to finance a joint venture.⁵⁷ The defendant spendthrift's guardian declared the obligation void causing the plaintiff to bring suit in Oregon.⁵⁸ While California law did not recognize the status of spendthrift and would have enforced the contract, Oregon law held the contract voidable.⁵⁹ Oregon was interested in protecting the spendthrift's family and protecting the state's own funds from being used to pay for public assistance.⁶⁰ California was interested in enforcing a contract created in California and providing a remedy for one of its residents.⁶¹

53. *Id.*

54. *Id.* at 319-20.

55. 395 P.2d 543 (Or. 1964).

56. A spendthrift is "[o]ne who spends lavishly and wastefully; a profligate." BLACK'S LAW DICTIONARY 1408 (7th ed. 1999).

57. *Lilienthal*, 395 P.2d at 545.

58. *Id.* at 544.

59. *Id.* at 545.

60. RICHMAN, *supra* note 43, at 320-31.

61. *Id.* at 321.

Diagram of *Lilienthal v. Kaufman*⁶²

	CALIFORNIA	OREGON
CONTACTS	Plaintiff's Domicile Contract Made Contract To Be Performed	Forum Defendant's Domicile Defendant's Guardian Defendant's Family
LAW	No Spendthrift Statute	Spendthrift Statute
POLICY	Ensure Security of Contracts	Protect Spendthrift's Family & Public Funds

Richman explains:

The diagram helps to show the true conflict. California's policy arrow points toward a California contact, thus indicating that the application of California law would advance its policy interests. Similarly, Oregon's policy refers to an Oregon contact; that state's interests would also be advanced by the application of its law. The court, following Currie's program for resolving true conflicts, applied the law of Oregon.⁶³

c. Interest Analysis in Section 6

Although the drafters did not incorporate Professor Currie's interest analysis into the *Restatement (Second)* in its entirety, interest analysis was explicitly included in section 6(2)(b) and (c), which reference the relevant policies of the forum and other interested states. The comments that follow section 6 expound on this:

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. . . .

In determining a question of choice of law, the forum should give consideration not only to its own relevant policies . . . but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied.⁶⁴

62. *Id.*; 395 P.2d 543 (Or. 1964).

63. *Id.* at 321-22.

64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) cmt. e, f (1971).

A striking difference between section 6 of the *Restatement (Second)* and Currie's interest analysis is that the *Restatement (Second)* chose to abandon Currie's forum presumption.⁶⁵ It should also be noted that unlike Currie, the *Restatement (Second)*'s drafters did not outline a specific method for courts to follow when analyzing competing state interests.

2. Section 145: The General Principle for Torts

Section 145 of the *Restatement (Second)* outlines the principle to be applied generally to all tort issues.⁶⁶ The section first explains that all rights and liabilities in a tort dispute are to be governed by "the local law of the state which, with respect to that issue, has the most significant relationship to the occurrences and the parties under the principles stated in [section] 6."⁶⁷ The section then highlights the contacts to be considered when applying the principles of section 6:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.⁶⁸

The contacts vary in importance depending on the particular issue before the court.⁶⁹ It is of particular importance to note that section 145 instructs the court to apply the principles of section 6 twice in the text and further explains in comment (b) that "[t]he principles stated in section 6 underlie all rules of choice of law and are used in evaluating the significance of relationship" between the dispute and the interested states.⁷⁰

3. The Territorial Presumptions

The traditional doctrine of *lex loci delicti* was integrated into the *Restatement (Second)* sections for particular torts, such as personal injuries or invasion of privacy, which can be characterized as territorial presumptions.⁷¹ The territorial presumptions focus on geographical contacts to determine which state's law presumptively will be applied.⁷² These sections, however, differ from the

65. See Currie, *supra* note 40, at 178. Currie felt that courts should not weigh the interests of competing laws and choose between them accordingly in the case of a true conflict. *Id.* at 176. He believed that this was a political function not within the scope of a court's duties in a democracy. *Id.* Currie felt that when a true conflict did arise, the court had no choice but to apply forum law. *Id.* at 177-78.

66. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. a (1971).

67. *Id.* § 145(1).

68. *Id.* § 145(2).

69. *Id.* § 145.

70. *Id.* § 145 cmt. b.

71. See *id.* §§ 146-47, 175.

72. See *id.* For example, section 146 states that

[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties,

Restatement (First)'s blind application of the law of the place of injury in that they are only presumptive rules.⁷³ The presumptive law will only be applied after the court has further analyzed the conflict under the most significant relationship tests of section 6 and section 145.⁷⁴ For example, section 146 states that "[i]n 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 [section] 6 to the occurrence and the parties, in which event, the local law of the other state will be applied."⁷⁵

A. How the Sections Should be Applied Together

Although the three key sections may have different underlying theoretical foundations, these sections were nonetheless intended to be applied together when making choice-of-law decisions in tort disputes. The first step in the process is to determine whether there is a forum choice-of-law statute that governs the issue in dispute. If such a statute exists, the court has no choice but to follow that statute's choice-of-law direction.⁷⁶ If there is no governing statute, the court must look to see if the dispute falls under one of the sections for particular torts with territorial presumption.⁷⁷ If the dispute is not covered by a specific section, the analysis will be guided by the residual section for torts, section 145.⁷⁸ Regardless of whether a state's law is presumed to apply or whether section 145 must be used, the *Restatement (Second)* mandates that the principles of section 6 be used to determine which state has the most significant relationship to the parties and occurrences.⁷⁹ The presumptive law will not be applied if it does not have the most significant relationship to the dispute.

Again, the tie that binds all of the sections together to form the most significant relationship test is section 6.⁸⁰ The *Restatement (Second)* does not allow courts to apply the law of the place of the injury without first analyzing the interest of the various states connected to the dispute; nor does the *Restatement (Second)* allow section 145 to be used as a simple grouping-of-contacts approach devoid of policy

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.

Id. at § 146.

73. RICHMAN & REYNOLDS, *supra* note 13, at 209.

74. *Id.*

75. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971) (emphasis added).

Another example is section 149 which states that

[i]n an action for defamation, the local law of the state where the publication occurs determines the rights and liabilities of the parties, except as stated in § 150, 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.

Id. at § 149.

76. *Id.* § 6(1); RICHMAN & REYNOLDS, *supra* note 13, at 212.

77. RICHMAN & REYNOLDS, *supra* note 13, at 212.

78. *Id.*

79. *Id.*

80. *Id.* at 207.

analysis.⁸¹ The other sections should be viewed as guides to help in the application of the principles in section 6. It is likely that one of the specific sections such as section 146 will govern a tort dispute. After the court has performed an interest analysis, if only one state is deemed interested, the court should apply that state's law.⁸² If more than one state is interested, but one can clearly be said to have a more significant relationship to the dispute than the others, its law should be applied.⁸³ If no state can be said to be more interested than the other vying for application of its law, the court should fall back on the territorial presumption and apply the law of the place of the injury.⁸⁴ If the factors laid out in section 6 are not taken into account when analyzing which state has the most significant relationship to the dispute, the "formula would indeed suffer from circularity, . . . since the 'significance' of the relationship is the very question which the conflicts rule has to answer."⁸⁵

81. *Id.* at 212.

82. *Id.*

83. *See id.*

84. *See id.*

85. DE BOER, *supra* note 21, at 202 (quoting ALBERT A. EHRENZWEIG, A TREATISE ON CONFLICT OF LAWS 351 (1962) (quotations omitted)). For examples of courts using section 6 in their choice-of-law analysis, see *Ehredt v. DeHavilland Aircraft Co. of Canada*, 705 P.2d 446, 453 n.9 (Alaska 1985) (citing § 6 in footnote with limited discussion of rule); *Bryant v. Silverman*, 703 P.2d 1190, 1191-97 (Ariz. 1985) ("Our analysis starts with the four contacts specified in § 145(2), which will be taken into account in applying the principles enunciated in § 6 . . ."); *Scheer v. Scheer*, 881 P.2d 479, 480-82 (Colo. Ct. App. 1994) ("The relative interests of the states in the determination of the outcome and the purpose sought to be achieved by the relevant tort rules of the interested states are the factors of greatest importance in multistate tort cases." (quotations omitted)); *O'Connor v. O'Connor*, 519 A.2d 13, 22-26 (Conn. 1986) ("Applying the choice of law analysis of §§ 145 and 6 to the facts of this case involves a weighing of the relative significance of the various factors that § 6 lists."); *Turner v. Lipschultz*, 619 A.2d 912, 914-16 (Del. 1992) ("Pursuant to Section 145 of the Restatement of Conflicts, the local law of the state which 'has the most significant relationship to the occurrence and the parties under the principles stated in [Section 6]' will govern the rights of litigants in a tort suit." (alteration in original)); *State Farm Mutual Automobile Insurance Co. v. Olsen*, 406 So. 2d 1109, 1111 (Fla. 1981); *Grover v. Isom*, 53 P.3d 821, 823-25 (Idaho 2002) ("Once these factors are considered, they are evaluated in light of [section 6's] policy concerns . . ."); *Nelson v. Hix*, 522 N.E.2d 1214, 1217-18 (Ill. 1988) ("Section 145 directs courts to consider the applicable contacts in light of the relevant general principles embodied in section 6 governing all choice-of-law decisions."); *Veasley v. CRST International, Inc.*, 553 N.W.2d 896, 897-99 (Iowa 1996) ("[T]he situation-specific sections of the Restatement, such as section 145, incorporate the provisions set forth in section 6 thereof" and "[t]he theory behind this approach is that rather than focusing on a single factor, the court of the forum should apply the policy of the state with the most interest in the litigants and the outcome of the litigation." (quotations omitted)); *Flaherty v. Allstate Insurance Co.*, 822 A.2d 1159, 1165-68 (Me. 2003) ("Furthermore, section 145 of the RESTATEMENT provides that in determining which state has the most significant contacts and relationship, the principles in section 6 of the RESTATEMENT should be considered." (emphases in original)); *Mitchell v. Craft*, 211 So.2d 509, 516 (Miss. 1968) (adopting the *Restatement (Second) of Conflict of Laws*); *D.L.C. v. Walsh*, 908 S.W.2d 791, 794-98 (Mo. Ct. App. 1995) ("Although this court will apply both § 6 and § 145, [t]he basic principles governing choice of laws are those enumerated in § 6. Section 145 simply provides that certain contacts may be taken into account in determining the choice of law under the principles of § 6." (alteration and emphasis in original) (quotation omitted));

II. THE LEGACY OF HUBBARD

Traditionally, Indiana followed the doctrine of *lex loci delicti* in tort actions.⁸⁶ Like the *Restatement (First) of Conflict of Laws*,⁸⁷ the law of the place of the tortious conduct governed the substantive rights and liabilities of the parties involved in the dispute.⁸⁸ The courts did not consider the relevant policies behind the laws, the other various geographical contacts, the domiciles and residences of the parties, or the relationships between the parties. Only one exception to the traditional rule had previously been laid out in Indiana—namely, that the law of the forum would be applied when the law of the situs was against the “good morals or natural justice or prejudicial to the general interests of the citizens” of Indiana.⁸⁹ While the insight of *Babcock v. Jackson*’s “most significant relationship” test had been widely known for quite some time,⁹⁰ not until 1987 did Indiana realize the need to move away from *lex loci delicti* as its choice-of-law doctrine in tort disputes.⁹¹

A. Hubbard v. Greeson

The question of whether Indiana needed to move away from *lex loci delicti* was finally answered in the affirmative by *Hubbard Manufacturing Co. v. Greeson*.⁹² In *Hubbard*, the plaintiff, Elizabeth Greeson, filed a wrongful death action against Hubbard Manufacturing Co., Inc. (“Hubbard”).⁹³ The plaintiff’s deceased husband, Donald Greeson, an Indiana resident, was a street light repairman employed by Asplundh Tree Expert Company (“Asplundh”), a

Phillips v. General Motors Corp., 995 P.2d 1002, 1008-15 (Mont. 2000) (“Any conflict of law analysis under the Restatement must begin with § 6.”); *Malena v. Marriott International, Inc.*, 651 N.W.2d 850, 856-58 (Neb. 2002) (“These contacts must be balanced in accordance with their significance to the general principles under § 6”); *Morgan v. Biro Manufacturing Co.*, 474 N.E.2d 286, 288-89 (Ohio 1984) (adopting the *Restatement (Second)*); *Chambers v. Dakota Charter, Inc.*, 488 N.W.2d 63, 67-68 (S.D. 1992) (adopting the *Restatement (Second)*); *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992) (adopting the *Restatement (Second)*); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848-50 (Tex. 2000) (“In a choice of law analysis, the number of contacts with a state is not determinative. . . . Rather, we must evaluate the contacts in light of the state policies underlying the particular substantive issue.”); *Martineau v. Guertin*, 751 A.2d 776, 778-81 (Vt. 2000); *Williams v. State*, 885 P.2d 845, 849 (Wash. Ct. App. 1994) (“[W]e examine which state has the most significant interest in applying its law on a particular issue in light of the principles stated in Restatement of Conflicts § 6.”).

86. *Hubbard Mfg. Co. v. Greeson*, 487 N.E.2d 825, 826 (Ind. Ct. App. 1986), *vacated* by 515 N.E.2d 1071 (Ind. 1987).

87. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934) (“The law of the place of wrong determines whether a person has sustained a legal injury.”).

88. *Hubbard*, 487 N.E.2d at 826-27.

89. *Id.* at 827 (quoting *Wabash R.R. Co. v. Hassett*, 83 N.E. 705, 709 (Ind. 1908)).

90. *See Maroon v. State*, 411 N.E.2d 404, 417-20 (Ind. Ct. App. 1980) (Ratliff, J., concurring) (expressing the need to adopt the most significant relationship test discussed in *Babcock* and the *Restatement (Second)*); Caavers et al., *supra* note 3 (analyzing the benefits of the Babcock approach).

91. *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987).

92. *Id.* at 1072.

93. *Hubbard*, 487 N.E.2d at 826.

Pennsylvania firm.⁹⁴ Hubbard produced lift units for Asplundh specifically to be used in cleaning, maintaining, and replacing street lights.⁹⁵ Hubbard was an Indiana corporation and produced the lift units in Indiana.⁹⁶ On October 29, 1979, Donald Greeson died in the process of using one of the defendant's lifts to repair a street light in Illinois.⁹⁷ The lift unit that Greeson was using when he died was produced in Indiana, but was licensed and stored in Illinois at the time of the accident.⁹⁸

The plaintiff's suit claimed that her husband's death was the result of Hubbard's negligence and "the defective and unreasonably dangerous condition of [the] lift."⁹⁹ She argued that Illinois's product liability law governed the case.¹⁰⁰ In response, Hubbard filed a motion for the determination of the applicable law.¹⁰¹ Indiana law precluded recovery on a product liability claim if it was found that the product represented an open and obvious danger.¹⁰² Further, any finding of misuse would also bar recovery.¹⁰³ Illinois law, however, would allow liability even if the product's danger was open and obvious and any misuse would merely reduce the amount of recovery.¹⁰⁴ The differences would clearly affect Greeson's ability to recover.

The trial court determined that Indiana followed the *lex loci delicti* approach for tort disputes and held that Illinois law governed the rights and liabilities of the parties.¹⁰⁵ Hubbard filed an interlocutory appeal and the Indiana Court of Appeals affirmed the trial court's decision.¹⁰⁶ In a footnote of the court's opinion, Judge Ratliff expressed his view "that the better rule in these cases is the so-called 'modern rule' or 'most significant relationship approach' discussed in *Babcock v. Jackson* . . . and later adopted by the American Law Institute [in the] Restatement (Second)."¹⁰⁷

The Indiana Supreme Court, perhaps listening to Judge Ratliff's suggestion that Indiana adopt the most significant relationship test for torts, accepted the case for review. The supreme court observed in *Hubbard* that "[r]igid application of the traditional rule to this case . . . would lead to an anomalous result."¹⁰⁸ All the states bordering Indiana had moved away from strict applications of the *lex loci delicti* doctrine and would have applied the substantive law of Indiana.¹⁰⁹ In fact, the only

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1072 (Ind. 1987).

100. *Id.*

101. *Id.*

102. *Id.* at 1073.

103. *Id.*

104. *Id.*

105. *Hubbard Mfg. Co. v. Greeson*, 487 N.E.2d 825, 826 (Ind. Ct. App. 1986), *vacated* by 515 N.E.2d 1071 (Ind. 1987).

106. *Id.* at 826-27.

107. *Id.* at 827 n.1 (citing *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963)).

108. *Hubbard*, 515 N.E.2d at 1073.

109. *Id.* (citing *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970) (holding that the "most significant contacts" rule best serves the interest of Illinois and the parties in multi-state tort actions); *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843 (Mich. 1982) (applying Michigan law when two residents are involved in an accident even if the injury occurred in

jurisdiction that would not have applied Indiana law to the dispute was Indiana.¹¹⁰ Indiana had already moved away from its traditional rule in contract cases that the law of the place where the breach occurred would govern and had adopted a rule allowing the state with the most significant contact to the dispute to apply its law.¹¹¹ The court understood that it was time to look elsewhere to avoid inappropriate results in the tort context as well.

The court, however, was not in a rush to abandon the traditional rule of *lex loci delicti* in its entirety. The court felt that in many cases “the place of the tort will be significant and the place with the most contacts.”¹¹² In those cases, the court thought that “the traditional rule serves well.”¹¹³ The court did recognize that in cases “where the place of the tort bears little connection to the legal action” a court should be permitted to consider and evaluate other factors.¹¹⁴ Those factors included: “1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered.”¹¹⁵ The court cited section 145(2) of the *Restatement (Second)* for these factors and indicated that they “should be evaluated according to their relative importance to the particular issues being litigated.”¹¹⁶

The first step in the *Hubbard* court’s new choice-of-law approach was to determine “whether the place of the tort ‘bears little connection’” to the dispute.¹¹⁷ Even though the injury took place in Illinois while the decedent was at work there, the coroner’s inquest took place in Illinois, and the decedent’s family received workers compensation from the State of Illinois, the court held that “[n]one of these facts relate[d] to the wrongful death action.”¹¹⁸ Therefore, the place of the tort was insignificant.¹¹⁹

The second step in the court’s analysis was to apply the additional factors.¹²⁰ Both of the plaintiff’s theories of recovery concerned the manufacturing of the lift unit in Indiana.¹²¹ The Greasons were Indiana residents and Hubbard was an Indiana corporation.¹²² The decedent had taken the lift unit to Hubbard’s Indiana plant for repairs and maintenance and, therefore, the relationship between the parties was centered in Indiana.¹²³ The court found that Indiana had “the more significant relationship and contacts” and applied Indiana law.¹²⁴

another state)); *Fox v. Morrison Motor Freight, Inc.*, 267 N.E.2d 405 (Ohio 1971) (stating that in Ohio *lex loci delicti* will not be automatically applied); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967) (applying Kentucky law despite occurrence of accident in Indiana)).

110. *Id.*

111. *Id.* (citing *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417 (Ind. 1945)).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1073-74.

116. *Id.* at 1074.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

1. No Mention of Section 6

For the *Hubbard* court's new choice-of-law approach in tort cases it cites the contacts listed in *Restatement (Second)* section 145(2): the place of the alleged tortious conduct, the domicile of the parties, and the place where the relationship between them is centered.¹²⁵ Although section 145 does require courts to consider these contacts,¹²⁶ the *Hubbard* court's attempted application of section 145 does not follow the drafters' intent. The most obvious divergence from the *Restatement (Second)* is the absence of any mention of, let alone any application of section 6's choice-of-law principles. Section 145(2) explicitly states that these contacts are only "to be taken into account in applying the principles of [section] 6."¹²⁷ Also absent is citation to section 145(1), which requires courts to apply the law of the state which "has the most significant relationship" to the dispute.¹²⁸ Although the *Hubbard* opinion refers to Indiana as having the "more significant relationship" to the dispute,¹²⁹ this is not the same test articulated in the *Restatement (Second)*.

The *Restatement (Second)* drafters clearly emphasized that the "principles stated in section 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, to the potentially interested states, the occurrence and the parties."¹³⁰ Professor Reese, the American Law Institute's Reporter for the *Restatement (Second)* wrote:

The choice of law provisions of the Restatement Second revolve around a central theme or theory. This theory is that the values stated in section 6 underlie the entire field of choice of law and that all of the black letter rules stem from these values. The clear inference is that further development of choice of law rules should be made in light of these values.¹³¹

Thus, any purported application of the *Restatement (Second)* without reference to the principles of section 6 cannot be characterized as a proper application. A court, when applying section 145, should keep in mind that:

The purpose sought to be achieved by the relevant tort rules of the interested states, and the relation of these states to the occurrence and the parties, are important factors to be considered in determining the state of most significant relationship. This is because the interest of a state in having its tort rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and by the relation of the state to the occurrence and the parties.¹³²

125. *Id.*

126. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

127. *Id.*

128. *Id.*

129. *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1074 (Ind. 1987).

130. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. b (1971).

131. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 516 (1983).

132. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. c (1971).

Nowhere in the *Hubbard* opinion is there a consideration of the relative policies of either Indiana or Illinois law.¹³³ Nor is there a direction by the court for the lower courts to consider factors like the relevant policies of the forum and other interested states, the needs of interstate and international systems, or the ease in the determination and application of the law to be applied.¹³⁴ Without taking into account these considerations or conducting any form of interest analysis, Indiana cannot characterize itself as a *Restatement (Second)* jurisdiction or claim to be applying the most significant relationship test inspired by *Babcock v. Jackson*.

2. Which "Most Significant Relationship" Test is This?

The choice-of-law rule handed down in *Hubbard v. Greeson* is not the most significant contact test found in the *Restatement (Second)*; rather, it is an approach that was plainly rejected by the American Law Institute. As noted above, the principles of section 6—the heart of the *Restatement (Second)*—are not part of Indiana's choice-of-law analysis. Although the Indiana Supreme Court did not explicitly direct lower courts not to consider the relevant policies underlying the laws of the interested states, it is clear that the courts are not required to include any sort of governmental interest analysis as part of their choice-of-law decisionmaking process.¹³⁵ Professor Symeonides concurs in this assessment, stating that Indiana's "significant-contacts approach differs from section 6 of the *Restatement (Second)* in that it calls for a consideration of the factual contacts alone, rather than of a set of policies in light of the factual contacts as does the *Restatement (Second)*."¹³⁶

The *Hubbard* approach might be best characterized as an approach starting with a tremendously strong territorial presumption that falls back on a grouping of contacts approach when the place of the tort is first deemed insignificant. The *Hubbard* test's presumption that the law of the situs will control the dispute is considerably stronger than the various presumptions found in the *Restatement (Second)*. While the *Restatement (Second)*'s presumptions can be displaced by a showing that "some other state has a more significant relationship" to the dispute,¹³⁷ the *Hubbard* approach does not go that far. *Hubbard* only requires that the situs's connection to the legal dispute not be insignificant.¹³⁸ The court was confident that in most cases the place of the tort would not be insignificant.¹³⁹ Once a court has found that the place of the tort bears more than a little connection to the case, the analysis ends and that state's law will be applied.¹⁴⁰ Unlike the *Restatement (Second)*, which always considers the relationship of all interested states to the dispute,¹⁴¹ so long as the connection of the place of the tort to the

133. See *Hubbard*, 515 N.E.2d 1071.

134. See *id.*

135. See *id.*

136. See Symeonides, *supra* note 7, at 1272 n.159.

137. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-47, (1971).

138. *Hubbard*, 515 N.E.2d at 1073-74.

139. See *id.* at 1073.

140. See *id.* at 1074.

141. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

dispute is found to be significant, Indiana courts are not to consider whether another state has a more significant relationship to the dispute.¹⁴²

In the rare instance that a court finds that the situs of the dispute bears little connection to the legal dispute, *Hubbard* requires a grouping-of-contacts or center-of-gravity analysis.¹⁴³ The contacts to be considered in this analysis are those outlined in section 145 of the *Restatement (Second)*.¹⁴⁴ Although courts are to evaluate these factors or contacts according to the relative importance to the case, Indiana courts are basically required to add up the contacts of each state and weigh the aggregate of each interested state's contacts against those of others.¹⁴⁵ This weighing of contacts is the result of the *Hubbard* court's refusal to allow policy analysis into the equation and the denial of the importance of the purposive nature of law.

C. The Promise of Gollnick

Two years after the Indiana Supreme Court decided *Hubbard Manufacturing Co. v. Greeson*, the questions regarding Indiana's choice-of-law doctrine were augmented by *Gollnick v. Gollnick*.¹⁴⁶ This personal injury case was originally decided before the Indiana Supreme Court broke away from the strict application of *lex loci delicti* in *Hubbard*.¹⁴⁷ Gregory and Verna Gollnick, both California residents, were married in 1967.¹⁴⁸ After their divorce, Verna was awarded physical custody of their daughters, subject only to Gregory's reasonable visitation rights.¹⁴⁹ In 1983, Gregory took his daughters to Indiana to visit their aunt and uncle.¹⁵⁰ On a morning during their visit, Gregory gave his daughter, Karen, permission to sled down her aunt and uncle's driveway.¹⁵¹ The night before, the children had sled down the driveway under adult supervision and the children had been warned to be aware of cars entering the cul-de-sac. The view of oncoming motorists was obscured at the end of the driveway by embankments.¹⁵² This time, however, there was no adult supervision; Karen was struck by a car and suffered extensive injuries.¹⁵³

The question before the court was whether Gregory, a California resident, would be protected by Indiana's parental immunity doctrine.¹⁵⁴ At the time the court decided the case, Indiana still followed the rule of *lex loci delicti*.¹⁵⁵ The injury occurred in Indiana, so Indiana substantive law applied.¹⁵⁶ Gregory,

142. *Hubbard*, 515 N.E.2d at 1073.

143. *Id.* at 1073-74.

144. *Id.*

145. *See id.*

146. 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd*, 539 N.E.2d 3 (Ind. 1989).

147. *Gollnick v. Gollnick*, 514 N.E.2d 645 (Ind. Ct. App. 1987), *vacated by* 517 N.E.2d 1257 (Ind. Ct. App. 1988).

148. *Id.* at 647.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See id.*

155. *Id.* at 648.

156. *Id.*

however, was not protected by Indiana's parental immunity doctrine because non-custodial parents were not covered under the rule.¹⁵⁷

The court of appeals accepted Gregory's petition for rehearing after *Hubbard* was decided to determine whether a different result would be reached under the newly adopted "most significant relationship" approach.¹⁵⁸ After the court discussed the *Hubbard* test, it went on to discuss several tort cases involving conflicts between interested states' family laws regarding capacity to sue.¹⁵⁹ The court's discussion of these cases bordered on what was described above as governmental interest analysis, constantly concerning itself with California's *interest* in governing its family relationships.¹⁶⁰ None of the cases discussed were concerned with which state had the most contacts with the dispute, but all addressed which state's policy concerns would be most affected.¹⁶¹ The court went further outside the *Hubbard* approach by citing the *Restatement (Second)* section 169(2) which, regarding intra-family immunity, directed courts to apply the law of the state of the parties' domiciles.¹⁶² The result of the court's analysis was a finding that California had an overriding interest in the parent-child relationship and California law was to be applied.¹⁶³ Unfortunately for Gregory, California had abolished parent-child immunity and Karen could still maintain her negligence action against him.¹⁶⁴

1. The Indiana Supreme Court's Review of *Gollnick*

When the case finally made its way to the Supreme Court of Indiana, the court's opinion did not offer an extensive review of the court of appeals'

157. *Id.* at 647.

158. *Gollnick v. Gollnick*, 517 N.E.2d 1257, 1258 (Ind. Ct. App. 1987).

159. *Id.* at 1258-59.

160. *See id.* The *Gollnick* court first discussed *Emery v. Emery*, 289 P.2d 218 (Cal. 1955), in which a mother and her unemancipated children brought a suit against their father (all parties were California residents) for injuries resulting from an automobile accident that occurred in Idaho. The court applied California parental immunity law because to hold otherwise "would subject the rights and duties attendant to the family relationship to constant change as family members crossed state lines during temporary absences from home." *Gollnick*, 517 N.E.2d at 1258 (discussing *Emery*, 289 P.2d 218). Second, the *Gollnick* court discussed *Wartell v. Formusa*, 213 N.E.2d 544, 545-46 (Ill. 1966) in which a wife sued the executor of her husband's estate after both were injured in an automobile accident while vacationing in Florida. The court held that because the couple was from Illinois, "Illinois has the predominant interest in the preservation of the husband-wife relationship of its citizens, and to apply the laws of Florida to the question of whether interspousal tort suits may be permitted between Illinois residents would be illogical and without a sound basis." Third, the *Gollnick* court discussed *Aurora National Bank v. Anderson*, 268 N.E.2d 552 (Ill. App. Ct. 1971), in which a bank, as guardian, sued on behalf of a minor child who was injured in a car accident while riding with his mother in Iowa. All the parties involved were Illinois residents, including the driver of the other car. *Gollnick*, 517 N.E.2d at 1259. The court felt the question of the child's capacity to sue her mother was a question of family law. *Id.* Illinois had the predominant interest in the parent-child relationship and its law was applied. *Id.*

161. *See Gollnick*, 517 N.E.2d at 1258-59.

162. *Id.* at 1259.

163. *Id.*

164. *Id.*

decision.¹⁶⁵ The supreme court found that the court of appeals had “applied California law to the claim against Gregory E. Gollnick in accordance with the choice of law rule announced in *Hubbard*.”¹⁶⁶ The court said little else about the court of appeals’s application of *Hubbard* approach, except to reiterate that the lower court’s “decision was correct.”¹⁶⁷ The Indiana Supreme Court did not explain whether the court of appeals’s apparent use of interest analysis was permissible under the *Hubbard* approach, nor did it answer the question of whether lower courts were permitted to look to other sections of the *Restatement (Second)* besides section 145 in their choice-of-law analysis.¹⁶⁸ The court’s brief opinion arguably suggested that the *Hubbard* case had opened Indiana’s door to the *Restatement (Second)* and that *Gollnick* was part of a gradual adoption of the *Restatement (Second)*’s entire philosophy on choice-of-law decisionmaking, including the consideration of the principles outlined in section 6.

2. *Gollnick* Viewed As an Exception to *Hubbard*

Although it was possible that *Gollnick* had opened the door completely in Indiana to the choice-of-law principles of the *Restatement (Second)*, subsequent judicial history has not been fully supportive of it. It seems more likely that that Indiana courts view *Gollnick* as an exception to the *Hubbard* rule for choice-of-law disputes involving intra-family disputes.¹⁶⁹ Most decisions after *Gollnick* do not cite *Gollnick* and continue to cite *Hubbard* as the controlling decision in Indiana choice-of-law disputes.¹⁷⁰

The reasons for departing from a strict application of *Hubbard* in intra-family disputes are significant. The state of domicile will likely have a predominate interest in governing and preserving its residents’ familial relationships and the laws governing familial rights and liabilities should not vary as members move about the country temporarily.¹⁷¹ These reasons, of course, are based in policy and the desire to realize the purposive nature of the various states’ familial laws. It is not clear why the Indiana Supreme Court has chosen to allow for the consideration

165. *Gollnick v. Gollnick*, 539 N.E.2d 3 (Ind. 1989) (per curiam).

166. *Id.*

167. *Id.*

168. *See id.*

169. *See* Peter T. Snow, *Indiana Choice-of-Law Doctrine After Gollnick v. Gollnick*, 76 IND. L.J. 961, 973 (2001).

170. *Id.* at 971. Mr. Snow compiled a long list of Indiana Court of Appeals decisions demonstrating that *Gollnick* has been ignored. *See id.* at 971 n.100 (citing *Cox ex rel. Zick v. Nichols*, 690 N.E.2d 750, 752 (Ind. Ct. App. 1998) (citing *Hubbard Manufacturing Co. v. Greason*, 515 N.E.2d 1071 (Ind. 1987) and *In re Estate of Bruck*, 632 N.E.2d 745 (Ind. Ct. App. 1994)); *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283, 1286-88 (Ind. Ct. App. 1997) (citing *Hubbard*, 515 N.E.2d 1071, *Castelli v. Steele*, 700 F. Supp. 449 (S.D. Ind. 1988), and *Travelers Insurance Cos. v. Rogers*, 579 N.E.2d 1328 (Ind. Ct. App. 1994)); *In re Estate of Bruck*, 632 N.E.2d at 747-49 (citing *Hubbard*, 515 N.E.2d 1071, and *Thomas v. Whiteford National Lease*, 580 N.E.2d 717 (Ind. Ct. App. 1991)); *Thomas*, 580 N.E.2d at 717-18 (citing *Hubbard*, 515 N.E.2d 1071, and *Tompkins v. Isbell*, 543 N.E.2d 680 (Ind. Ct. App. 1989)); *Tompkins*, 543 N.E.2d 680, 680-82 (citing *Hubbard*, 515 N.E.2d 1071, and *Bencor Corp. v. Harris*, 534 N.E.2d 271 (Ind. Ct. App. 1989)).

171. *See Gollnick v. Gollnick*, 517 N.E.2d 1257, 1258-59 (Ind. Ct. App. 1987); *see also* Snow, *supra* note 169, at 974.

of the various policy interests of interested states in the context of family law, but not in other areas of law. All areas of law, including family law, are propelled in some sense by transcendent social goals that lawmakers intend to achieve. It is possible that the Indiana Supreme Court, although not ready to accept the entire *Restatement (Second)*, is willing to tolerate those lower courts concerned with the various policies of the interested states to consider those policies when making choice-of-law decisions.

C. *The Lower Indiana Courts and the Federal Diversity Courts Take on Hubbard*

Although *Gollnick* presented the opportunity for confusion among lower Indiana courts and those federal courts sitting in diversity in Indiana regarding how to properly apply the choice-of-law approach enunciated in *Hubbard*, there has been very little deviation from the approach laid out in *Hubbard*. Most courts have followed a straightforward application of *Hubbard*, some have actually been more conservative than *Hubbard*, and a rare few allow interest analysis to creep into the thought process.

1. Straightforward Application of the *Hubbard* Test

As noted above, the majority of courts attempting to apply the *Hubbard* approach have had little problem applying the simple test.¹⁷² For example, in *Consolidated Rail Corp. v. Allied Corp.*, the Seventh Circuit Court of Appeals found that the traditional *lex loci delicti* rule should be applied following the first step in *Hubbard*.¹⁷³ While the defendant Allied Corporation's tanker car filled with anhydrous hydrogen fluoride was in route from its chemical plant in Canada to Elkhart, Indiana, the tanker stopped in Metropolis, Illinois where the chemicals were unloaded and the car was labeled empty by the defendant.¹⁷⁴ Sometime before the car reached Elkhart, the plaintiff, Consolidated Railroad, took control of the car and transported it to Elkhart to be stored in Consolidated's rail yard.¹⁷⁵ The toxic chemicals in the car had not been properly unloaded and began to leak, causing the evacuation of nearly 1500 Elkhart residents.¹⁷⁶ Consolidated sued Allied on a theory of strict liability for an abnormally dangerous activity to recover \$125,000 which Consolidated had voluntarily paid to the local residents to cover medical treatment, economic losses, and property damage resulting from the chemical leak.¹⁷⁷ The theory of liability tied the cause of action to Indiana because the escape

172. See *Judge v. Pilot Oil Corp.*, 205 F.3d 335, 337 (7th Cir. 2000) (finding the place of injury to be significant and applying *lex loci delicti*); *Jean v. Dugan*, 20 F.3d 255, 261 (7th Cir. 1994) (finding the place of injury to be the most important contact when applying *Hubbard's* additional factors); *Consol. Rail Corp. v. Allied Corp.*, 882 F.2d 254, 258 (7th Cir. 1989) (finding the place of injury to be significant and applying *lex loci delicti*); *Bencor Corp. v. Harris*, 534 N.E.2d 271, 273 (Ind. Ct. App. 1989) (finding place of injury to be significant and applying *lex loci delicti*).

173. *Consol. Rail Corp.*, 882 F.2d at 256.

174. *Id.* at 255.

175. *Id.*

176. *Id.*

177. *Id.* at 255-57.

of the toxins took place in Indiana; therefore, Indiana had a significant contact with the litigation and Indiana substantive law was applied.¹⁷⁸

2. Conservative Application of the *Hubbard* Test

The First District Court of Appeals of Indiana appears to have had even more trouble abandoning *lex loci delicti* than did the *Hubbard* court. In *Tompkins v. Isbell*, the plaintiffs brought suit to recover damages suffered during an automobile crash in which the defendant's tractor collided with the plaintiff's automobile close to the Indiana border at Robinson, Illinois.¹⁷⁹ The plaintiff, an Indiana resident, was returning from his business in Illinois.¹⁸⁰ At the time of the accident, the defendant, also an Indiana resident, was driving a tractor for an Indiana corporation and was also in route to Indiana.¹⁸¹ Illinois followed the pure comparative negligence rule which reduced the plaintiff's recovery according to the fault attributed to him.¹⁸² Indiana, however, still followed the more traditional contributory negligence rule which barred all recovery if the plaintiff was partly responsible for his injury.¹⁸³

In reviewing the trial court's application of the *Hubbard* test, the court of appeals was particularly moved by the fact that the last event necessary to make the defendant liable, the injury, occurred in Illinois.¹⁸⁴ The court stated that the parties' operation of their vehicles would be the focus of the case and Illinois' rules of the road would govern their conduct.¹⁸⁵ The court then concluded the place of the tort, Illinois, had "extensive connection" to the case; therefore, the trial court was correct to apply *lex loci delicti*.¹⁸⁶ The court of appeals did not delineate what was Illinois' "extensive connection" to the case. Besides being the situs, the only other connection Illinois had to the dispute was the fact that the plaintiff worked in Illinois.¹⁸⁷ How this gave Illinois a significant relationship to the case is unclear. What is clear from this case is how strong the presumption is, under *Hubbard*, that the law of the place of the injury is to be applied.

The court's finding that Illinois did have a significant relationship to the case forced the court to stop its analysis under *Hubbard* immediately. Without being able to move past the first prong of the *Hubbard* test, it was unable to consider the facts that clearly showed that Indiana had a more significant interest in the resolution of the case. Even under the second prong of the *Hubbard* analysis, Indiana substantive law would have been applied because all the parties were Indiana residents in route to Indiana. More importantly, if the principles of section 6 of the *Restatement (Second)* had been applied, Indiana's interest in governing the rights and liabilities of fellow Indiana residents would outweigh Illinois' regulatory

178. *Id.* at 258.

179. 543 N.E.2d 680, 681 (Ind. Ct. App. 1987).

180. *Id.*

181. *Id.*

182. *Id.* at 682 n.1. Interestingly, after the accident, "the Illinois legislature altered this 'pure' comparative negligence rule and adopted a contributory fault system similar to that presently in force in Indiana." *Id.*

183. *Id.*

184. *Id.* at 682.

185. *Id.*

186. *Id.*

187. *Id.* at 681.

interest. Why the court was quick to apply *lex loci delicti* is not apparent. Perhaps underlying the court's decision was a substantive preference to avoid placing possible limits on the plaintiff's ability to recover against the defendant that could arise if Indiana's anti-recovery contributory negligence rule had been applied.

3. Interest Analysis Creeping Into Applications of the *Hubbard* Test

Although they did not cite *Gollnick*, two courts appear to have allowed some interest analysis into their application of the *Hubbard* test. In *Castelli v. Steele*, an Illinois patient brought a medical malpractice action against her Indiana doctor and hospital for misdiagnosis, improper treatment of her kidney condition, and failure to inform her that she may lose her kidney.¹⁸⁸ Indiana law required a claimant to first present her complaint to a medical review panel but Illinois law allowed patients to go directly to court.¹⁸⁹ The defense moved for dismissal for lack of subject matter jurisdiction under Indiana law because the complaint had not first gone before such a panel.¹⁹⁰ Although the defendant doctor's negligent conduct clearly occurred in Indiana, the subsequent injury to the plaintiff's kidney occurred in Illinois.¹⁹¹ The court was not convinced that, under *Hubbard*, Illinois bore more than a "little connection" to the dispute, even though the plaintiff resided there, some phone communication originated there, and the injury occurred there.¹⁹² When applying the additional *Hubbard* factors, the court felt that the negligence occurring in Indiana was "the most important factor because Indiana doctors are strictly regulated by the state of Indiana and must conform their practices to the laws of [Indiana]."¹⁹³ Although the court did not delve very far into the policy behind the specific section of the Indiana Medical Malpractice Act that required the initial review of a complaint by a medical panel, the court was clearly considering more than just geographical contacts. The court was considering what general state policies were implicated by those contacts.

The Fourth District Court of Appeals of Indiana has also inserted a brief amount of interest analysis into the *Hubbard* test in *KPMG Peat Marwick v. Asher*.¹⁹⁴ In *KPMG Peat Marwick*, Merchants Grain, Inc. ("MGI"), an operator of grain elevators, had the defendant, KPMG Peat Marwick ("KPMG") of Missouri audit and report on MGI's financial conditions.¹⁹⁵ MGI then sent the report to the USDA to renew its grain elevator operating license under the U.S. Warehouse Act.¹⁹⁶ Later, the plaintiffs, Indiana farmers, deposited grain with MGI on a credit sale basis.¹⁹⁷ MGI soon went bankrupt and was unable to pay the plaintiffs.¹⁹⁸ The

188. 700 F. Supp. 449, 450-51 (S.D. Ind. 1988).

189. *Id.* at 451.

190. *Id.*

191. *Id.* at 453-54.

192. *Id.* at 454. The court did note that "[a]lthough the *Hubbard* decision is well-reasoned, it does not provide a definitive standard for determining whether a state in which the injury occurred bears 'little connection' to the cause of action so as to reach the third level of inquiry." *Id.* at 454 n.5.

193. *Id.* at 454-55.

194. 689 N.E.2d 1283 (Ind. Ct. App. 1997).

195. *Id.* at 1284.

196. *Id.*

197. *Id.*

198. *Id.* at 1284-85.

plaintiffs' complaint alleged that only because of KPMG's negligent audit of MGI was MGI able to renew its license and take the plaintiff's grain.¹⁹⁹ Finding the place of the tort to bear little connection to the dispute, the court went on to apply the additional *Hubbard* factors.²⁰⁰ Citing *Castelli*, the court found the paramount factor to be that the negligent acts occurred in Missouri.²⁰¹ The court stated that "Missouri has a substantial interest in applying its law on a professional negligence case to accountants conducting 'their professional activity' in Missouri."²⁰² Again, like the court in *Castelli*, the *KMPG* court did not conduct a comprehensive governmental interest analysis to ascertain the purposes that might be realized behind each state's competing law. However, the court did at least consider Missouri's interest in regulating its resident accountants as opposed to simply looking at which state had the most contacts with the dispute.

D. Allen, *Still Unclear*

In 2002, the Indiana Supreme Court had a second opportunity to clarify the *Hubbard* test in *Allen v. Great American Reserve Insurance Co.*²⁰³ The plaintiffs, insurance agents from North and South Carolina, were recruited by the defendant, Glen H. Guffey of Jefferson National Life, to sell the Flex II, a tax-deferred annuity, to individual residents of the Carolinas.²⁰⁴ Jefferson National Life later merged into defendant Great American Reserve Insurance Company ("GARCO") which succeeded to the policies.²⁰⁵ Guffey was a South Carolina resident and GARCO was a Texas insurance company with its principle place of business in Indiana.²⁰⁶ The individual plaintiffs' contracts with GARCO all contained both a choice-of-law provision providing that Indiana choice-of-law would control and a forum selection clause providing that any action between the parties must be brought in Hamilton County, Indiana.²⁰⁷ Guffey was responsible for training the plaintiffs; and in so doing, Guffey instructed the plaintiffs that "[i]n exchange for annual premiums, the Flex II promised annuity income in the future" but had no front-end load.²⁰⁸ In other words, no fees or commission would reduce the value of the policy.²⁰⁹ Unbeknownst to the plaintiffs, the Flex II did have a front-end load in the first five years and the entire premium did not go to enhance the value of the annuity until the sixth year.²¹⁰ Upon discovery by the South Carolina Department of Insurance, the plaintiffs signed consent decrees and admitted to having misrepresented the annuity to their clients.²¹¹ The plaintiffs brought suit against both Guffey and GARCO on various counts of fraud, unfair trade practices, civil

199. *Id.* at 1285.

200. *Id.* at 1287.

201. *Id.*

202. *Id.* (quotation omitted).

203. 766 N.E.2d 1157 (Ind. 2002).

204. *Id.* at 1160.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1160-61.

210. *Id.* at 1161.

211. *Id.*

conspiracy, negligence, and indemnification.²¹² No party attempted to argue that North Carolina law should govern any of the claims; thus, the Indiana Supreme Court only had to consider whether South Carolina or Indiana law should be controlling.²¹³

As to the plaintiffs' common law fraud claim based in tort, the court applied the *Hubbard* test.²¹⁴ The court observed that the "last event necessary to establish the elements of misrepresentation of a material fact reasonably relied upon," which were "reliance and consequent damages," occurred in South Carolina.²¹⁵ Not fully explaining why, the court announced that "South Carolina has a sufficient relationship to this action to satisfy traditional *lex loci delicti* under *Hubbard*."²¹⁶ Not stopping there, however, the court went on to say that "[e]ven if this were not the case, as in *Hubbard*, and some of the factors enunciated in the Restatement (Second) of Conflict of Laws are considered, or other reasonable choice of law doctrines are applied, the result is the same."²¹⁷ In a footnote, the court explained:

Under a "state interests" analysis, South Carolina clearly has the strongest interest in maintaining the integrity of its insurance markets. To the extent choice of law should be informed by the result the choice produces, we perceive no clear effect on the result in this case, though one may unfold as the facts develop. South Carolina also emerges victorious under Section 148 of the *Restatement (Second)* of Conflict of Laws, which specifically addresses claims of fraud and misrepresentation. According to it, where, as in the present case, the alleged misrepresentations and the reliance upon them occur in different states, the following factors must be considered to determine which state has the most significant relationship to the occurrence and the parties: (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations; (b) the place where the plaintiff received the representations; (c) the place where the defendant made the representations; (d) the domicile, residence, nationality, place of incorporation and place of business of the parties; (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time; and (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant. *Restatement (Second)* of Conflict of Laws § 148 (1971). With regard to GARCO, contacts (a), (b), and (f) clearly point to South Carolina, and only contact (c) points unequivocally to Indiana. Contact (d) is evenly divided between the two, and contact (e) is largely irrelevant to this action. As comment j to section 148 points out, when contacts (a), (b), and (f) are all in the same state, that state will "usually be the state of the applicable law." *Id.* at cmt. j. With regard to Guffey, all the section 148 factors support the application of South Carolina law.²¹⁸

212. *Id.* at 1162-70.

213. *Id.* at 1162.

214. *Id.* at 1164.

215. *Id.* at 1164-65 (quotations omitted).

216. *Id.* at 1165 (emphasis added).

217. *Id.*

218. *Id.* at 1165 n.3.

The court also explained that South Carolina law would govern the allegations of conspiracy, tortious interference with a business relationship, and negligence against Guffey and GARCO for the same reasons the court had found that South Carolina law would govern the fraud claim.²¹⁹ In determining that South Carolina law governed the negligence claim against GARCO, the court cited *Restatement (Second)* section 174 for the rule that “when questions of vicarious liability arise, ‘the law selected by application of the rule of [section] 145 determines whether one person is liable for the tort of another.’”²²⁰

As to the claim against Guffey for breach of contract accompanied by a fraudulent act, the court cited *Restatement (Second)* section 291; if “the agent is employed to do a number of acts on the principal’s behalf in a single state, the local law of this state will usually determine the rights and duties owed by the principal and agent to each other.”²²¹ The agency relationships were substantial in South Carolina and, therefore, South Carolina law was applied.²²² The court also used this reason to find that South Carolina law also governed the indemnification claim against GARCO.²²³

The Indiana Supreme Court’s discussion of the various choice-of-law issues in *Allen* left much to be desired. The court continued to cite various sections of the *Restatement (Second)* without explaining when lower courts may look to sections other than section 145 when the place of the wrong is deemed insignificant. The court cited section 291 but again ignored the *Restatement (Second)*’s command to apply the law of the state with the most significant relationship under the principle of section 6.²²⁴ The court also ignored section 6 in its discussion of section 148 and section 174.²²⁵

The *Allen* opinion did, however, implicitly solve the question left by *Gollnick* of whether family law was an exception to the *Hubbard* test or alternatively, whether instead that some degree of interest analysis would be tolerated under the *Hubbard* test. As noted above, in *Allen* the court continued to cite other sections of the *Restatement (Second)* besides section 145 while simultaneously ignoring each of those sections’ instructions to use the principles of section 6 in their application. Further, in the footnote discussion of “other reasonable choice of law doctrines,” the court discusses “state interest analysis.” Surely, the Indiana Supreme Court would not systematically ignore [section] 6 each time it cites the *Restatement (Second)* and refer to interest analysis as another choice-of-law doctrine if it did not consider section 6’s governmental interest analysis to be completely outside the *Hubbard* approach. Further, the court made no reference to *Gollnick* anywhere in

219. *Id.* at 1168-69.

220. *Id.* at 1169.

221. *Id.* at 1163.

222. *Id.*

223. *Id.* at 1169.

224. This section explains that “[t]he rights and duties of a principal and agent toward each other are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties and the transaction under the principles stated in § 6.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 291 (1971).

225. Section 148(1) also directs courts to use the principle of § 6 to determine which state has the most significant relationship to the case. *Id.* at § 148(1). Section 174 directs courts to use § 145 to decide whether one party is liable for the tort of another and as discussed above, § 145 directs courts to use § 6 as well. *Id.* at § 174.

the *Allen* opinion; therefore, family law appears to be the only exception allowing for a state's policy interest to be considered in a choice-of-law determination. What is left after *Allen* is likely the same overall approach outlined in *Hubbard* and discussed above.

E. Simon v. United States of America, an Opportunity for Section 6

Recently, the Third Circuit Court of Appeals certified questions to the Indiana Supreme Court about the *Hubbard* approach raised by *Simon v. United States*.²²⁶ The case arose from an airplane crash in Somerset, Kentucky that killed the pilot and three passengers.²²⁷ Two of the passengers were from Pennsylvania, one was from Ohio, and the pilot was a New Jersey resident working in Pennsylvania.²²⁸ The plane was owned by a Pennsylvania corporation and was hanged there, as well.²²⁹ Severe weather necessitated an instrument flight rules landing.²³⁰ Air traffic controllers in Indianapolis cleared the flight for a Simplified Direction Facility ("SDF") runway approach at the airport in Somerset.²³¹ SDF is a system that facilitates a plane's blind landing.²³² However, the SDF system in Somerset had been out of service for nearly five years, as reflected in the Federal Aviation Administration's Airport Facility Directory.²³³ Unable to communicate with air traffic controllers because of the weather conditions, the pilot relied on the Instrument Approach Procedure ("IAP") to guide the landing.²³⁴ The IAP, created by the government in Washington, D.C., lists navigable approaches to the nation's many airports.²³⁵ As the plane neared Somerset it was unable to use the SDF system, causing the plane to lose its course and ultimately crash several miles from the airport.²³⁶

The various decedents' estates brought suit against the United States alleging two counts of negligence: (1) that the government negligently published the IAP, which stated that the Somerset airport's SDF system was active; and (2) that the air traffic controllers negligently relied on the IAP, failed to monitor the plane's landing approach, and failed to maintain communication with the plane during its descent.²³⁷

The plaintiffs sought application of the Pennsylvania substantive law, while the United States sought application of Indiana substantive law.²³⁸ The laws conflict in three ways. First, Pennsylvania permits joint and several liability and right of contribution; Indiana does not.²³⁹ Second, Pennsylvania allows recovery for

226. 341 F.3d 193 (3d Cir. 2003), *certifying questions to* 794 N.E.2d 1087 (Ind. 2003).

227. *Id.* at 196-97.

228. *Id.* at 196.

229. *Id.*

230. *Id.*

231. *Id.* at 197.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 204 (citing IND. CODE ANN. § 34-51-2-12 (West 1999); 42 PA. CONS. STAT. ANN. §§ 8322, 8324 (West 1998)).

both wrongful death and survival damages; Indiana does not.²⁴⁰ Third, Pennsylvania also allows damages for the “decedent’s conscious pain and suffering from the moment of injury to the time of death”; Indiana does not.²⁴¹

The district court, after concluding that both Indiana’s conflict law and substantive law applied, certified its choice-of-law analysis to the Third Circuit Court of Appeals for immediate review pursuant to the interlocutory decisions rule, 28 U.S.C. § 1292(b) (2003).²⁴² The Third Circuit explained that the Federal Tort Claims Act requires federal courts in a multi-state tort action “to apply the [conflicts] law of the place where the acts of negligence occurred.”²⁴³ This raised the question of whether to apply Indiana’s conflict law, where the air traffic controllers were negligent, or the District of Columbia’s conflict law, where the government negligently published the IAP, assuming the two rules conflict.²⁴⁴ Upon examination, the court characterized Indiana’s test as “a modified *lex loci delicti* test” and the District of Columbia’s test as “a hybrid of ‘governmental interest’ and *Restatement (Second)* methodologies.”²⁴⁵ Further, the court found that the District of Columbia explicitly recognizes the choice-of-law doctrine of depeage—“the process whereby different issues in a single case arising out of a single set of facts are decided according to the laws of different states”—while Indiana’s case law has not answered the question of depeage.²⁴⁶

The Third Circuit held that in Federal Tort Claims Act cases it would “apply the choice-of-law regime of the jurisdiction in which the last significant act or omission occurred” and that “the ‘last significant act’ approach clearly points to Indiana, the location of the air traffic controllers’ negligence.”²⁴⁷ This brought the court to the question important to this Note: whether the *Hubbard* test would apply Indiana or Pennsylvania substantive law? The parties agreed that the place of injury, Kentucky, bore little connection to the dispute and moved on to the *Hubbard* test’s second prong.²⁴⁸

When the Third Circuit applied the *Hubbard* test’s second prong, the court realized that “*Hubbard* gives no guidance as to which factor is most important or how to ‘break a tie’” between two quantitatively equal states.²⁴⁹ The court’s analysis highlights this problem:

The first factor, “the place where the conduct causing the injury occurred,” clearly favors Indiana because no negligence occurred in Pennsylvania. The second factor, “the residence or place of business of the parties,” seems to favor Pennsylvania. Hart Delaware, which owned the plane, was incorporated in Pennsylvania, and plaintiff Fare [the pilot] worked in Pennsylvania. Although plaintiff Schalliol lived in

240. *Id.* (citing *Cahoon v. Cummings*, 715 N.E.2d 1 (Ind. App. 1999)).

241. *Id.* at 204-05.

242. *Id.* at 194-95.

243. *Id.* at 194 (citing 28 U.S.C. §§ 1346(b), 2674 (2003); *Richards v. United States*, 369 U.S. 1 (1962)).

244. *Id.* at 200.

245. *Id.*

246. *Id.* at 201 (citing *Broome v. Antlers’ Hunting Club*, 595 F.2d 921, 923 n.5 (3d Cir. 1979)).

247. *Id.* at 204.

248. *Id.* at 205.

249. *Id.*

Indiana, three of the four Simon plaintiffs lived in Pennsylvania. While the air traffic controllers presumably lived in Indiana, they are not the defendants—the United States is the defendant, and it is assumed to reside in all states or no state. On balance, the “residence or place of business of the parties” seems to favor Pennsylvania.

The third factor, “the place where the parties’ relationship is centered,” is somewhat difficult to conceptualize on these facts. At no time were the parties located in the same state—their only relationship involved reliance on a map and communication over a radio, neither of which seems “centered” in a particular place.

Surveying the three *Hubbard* factors, the first points to Indiana, the second to Pennsylvania, and the third is indeterminate.²⁵⁰

The Third Circuit, refusing to speculate, certified the following questions to the Indiana Supreme Court:

(1) whether a true conflict exists between Indiana’s and D.C.’s choice-of-law rules; and (2) if there is a true conflict and Indiana’s choice-of-law rules therefore control . . . , how to resolve a split among the *Hubbard* factors . . . and what substantive law Indiana would choose under these facts.²⁵¹

The answers to these questions will hopefully illuminate whether the Indiana Supreme Court has rejected section 6 of the *Restatement (Second)* or whether the court has in its common law tradition only adopted those sections of the *Restatement (Second)* necessary to resolve the disputes previously before it.

III. THE PROBLEMS WITH THE *HUBBARD* TEST

When the Indiana Supreme Court decided *Hubbard v. Greeson*, it took a much needed step away from the traditional rule of *lex loci delicti*. And although the court’s decision to do so followed sound reasoning, there are still unresolved problems with the *Hubbard* approach. The court’s review of *Simon v. United States* gives the court the opportunity to resolve the following issues.

A. *The Lack of a Definitive Standard*

Judge McKinney pointed out in *Castelli v. Steele* that the *Hubbard* opinion “does not provide a definitive standard for determining whether a state in which the injury occurred bears ‘little connection’ to the cause of action.”²⁵² Neither of the subsequent Supreme Court opinions have clarified what degree of connection is necessary for the situs to meet the first prong of the *Hubbard* test—whether the place of the tort “bears little connection”²⁵³—and thereby avoid consideration of another state’s relationship to the dispute. Would a finding that one of the parties is domiciled or employed in the state of the injury be adequate? It would be plausible for a lower court to assume that this would satisfy a test looking only for more than

250. *Id.* (citations omitted).

251. *Id.*

252. 700 F. Supp. 449, 454 n.5 (S.D. Ind. 1998).

253. *Hubbard Mfg. Co. v. Greeson*, 515 N.E. 2d 1071, 1073-74 (Ind. 1987).

a little connection to the dispute. This is exactly what happened in *Tompkins v. Isbell*, where Illinois was found to bear more than a little connection to a car accident occurring there, when the only other connection between Illinois and the parties was that the plaintiff's place of business was located there.²⁵⁴ The ambiguity in the first step of the *Hubbard* analysis may result in the test being inconsistently applied; therefore, the court should clarify this standard.

B. *Hubbard* is Still Holding Strong to Ideas It was Meant to Fight

When the court decided *Hubbard*, it was concerned that the mechanical application of the traditional *lex loci delicti* rule for torts would in some cases lead to anomalous results. Despite this sound observation, the court continues to hold tenaciously to a slightly loosened version of the old rule. The idea that applying the *lex loci delicti* rule when the court finds that the place of injury bears more than just a "little connection" to the dispute does not always insure that the law of the state with the most significant relationship to the dispute is applied. There is always a possibility that several states will bear more than a little connection to a dispute. Just having more than a little connection to a dispute does not mean that a state has *the most significant relationship to that dispute*. The first prong of the test can be satisfied all too easily and without thorough consideration of other factors and policies, as evidence by *Tompkins*.

There is little practical difference between a test that looks at whether a state has more than just a little connection to a dispute (*Hubbard*) and a test that looks for the state where the last event necessary for rights to vest in the injured party occurred (*lex loci delicti*). Neither the *Hubbard* test's first prong nor the traditional *lex loci delicti* test require any thoughtful consideration of whether it is the right law to apply—each approach more often than not blindly applies the law of the situs. The *Hubbard* court's unwillingness to consider whether other interested states have a more significant relationship to a dispute in which the situs bears just more than a *little* connection is difficult to explain. It can be assumed that the court was not actually ready to step away from the traditional doctrine. This facet of the test is too rigid and should be replaced with a looser presumption, similar to those actually found in the *Restatement (Second)*, which may be displaced when a court finds that another state has a more significant relationship to the suit.

C. *Grouping-of-Contacts* Should be Supplemented or Replaced by Interest Analysis

As discussed above, the second prong of the *Hubbard* test can fairly be characterized as a grouping-of-contacts analysis.²⁵⁵ Once the place of the tort is found to bear little connection to the dispute, a court can simply add up each state's contacts to see which state has the most contacts with the dispute, without making any policy consideration. A state may have several contacts with a dispute, but it doesn't necessarily follow that all those contacts are relevant or important to the resolution of the dispute. This choice-of-law technique has not become the

254. 543 N.E.2d 680 (Ind. App. 1989).

255. The grouping-of-contacts or center-of-gravity approach were the names given to the most significant relationship test in its early form. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 264 (4th ed. 1986).

dominant method for making conflict of laws resolutions for good reasons. Professor Brainerd Currie lamented:

The trouble with the [grouping-of-contacts] theory is that the quest . . . that it enjoined was not implemented by any standard according to which significance could be determined "The 'contacts' are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is more significant. The reasons for the conclusion are too elusive for objective evaluation."²⁵⁶

Although the judicial opinions on which Currie was commenting may not have simply looked at the aggregate of the contacts in each state as he may have believed,²⁵⁷ he was indeed anticipating what the *Hubbard* decision allows to occur in Indiana courts: a quantitative assessment of sets of contacts with no regard to the social policy behind the states' laws.

Of course, a court should identify all the contacts that each interested state has with the dispute; however, this process is meaningless without further identification of the social policies behind those laws. All laws have some purpose, policy, or social aim that should not be ignored when determining whether that law should control a given situation. Once the policy behind a law has been identified, a court should look to see if applying that law to a given dispute will realize that policy. If not, the law's purpose will not be realized by its application, there is no legitimate reason to apply that law. It can be argued that the grouping-of-contacts test may more often than not call for the application of the same law that would be chosen under a test involving governmental interest analysis; however, without a proper consideration of the policy behind the law, there is no certainty that the proper law will indeed be applied in all instances.

D. Grouping-of-Contacts Lacks a Tie Breaker

The quantitative tie found in *Simon v. United States* underscores the main argument of the Note—a court can struggle with a choice-of-law analysis that makes no reference to the qualitative principles of section 6. One may argue that the Indiana Supreme Court's earlier choice-of-law decisions could be resolved without reference to the principles of section 6; however, the *Hubbard* test does not provide the framework for answering *Simon's* choice-of-law questions. As noted above, the parties in *Simon* have agreed that the place of injury is not relevant and the court has found that Indiana and Pennsylvania have an equal quantitative interest in the dispute. Section 6 provides the framework for the Indiana Supreme Court to determine whether Indiana or Pennsylvania has the *most significant relationship* to the dispute through policy analysis. The court's research will reveal whether the social policies behind each state's law will be advanced by the application of that law to this case.

256. Cavers et al., *supra* note 3, at 1233 (quoting Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 40).

257. *Id.* at 265. Currie made these comments about *Haag v. Barnes*, 175 N.E.2d 441 (N.Y. 1961) and even the much heralded *Babcock v. Jackson*, 12 N.Y.2d 473 (1963). LEFLAR ET AL., *supra* note 255, at 265 n.4.

CONCLUSION

The *Hubbard* test was an improvement over the traditional application of the *lex loci delicti* approach. However, whether the *Hubbard* test was a significant improvement over the traditional *lex loci delicti* approach is greatly in doubt. The tremendous presumption given to the law of the situs does not deviate greatly from the traditional rule. In the rare case that the presumption that the law of the situs controls is displaced, “[t]he contacts are totted up and a highly subjective fiat is issued to the effect that one group of contacts or the other is more significant.”²⁵⁸

A fair look at the *Hubbard* test and its progeny in light of the omission of interest analysis reveals that Indiana is not a *Restatement (Second)* jurisdiction. The language of the *Hubbard* opinion indicates an implicit disapproval of one of the *Restatement (Second)*'s core pillars—section 6's general principles which include interest analysis. “It bears re-emphasis that all other sections of the *Restatement* ultimately trace back to section 6,” thereby referring to interest analysis in every section.²⁵⁹ The Indiana Supreme Court has given no rationale for excluding section 6 from its choice-of-law analysis and cannot claim to be applying the *Restatement (Second)* in its intended form.

Because of the omission of any form of governmental interest analysis, Indiana courts may apply the law of a state whose underlying purpose behind that law is not being advanced. The Indiana Supreme Court took a small step forward in *Hubbard*, but the court must go further in *Simon v. United States* if it desires to be aligned with modern conflict of laws theory. If the court is not content with the *Restatement (Second)* in its entirety, perhaps the court will allow some form of policy analysis in its choice-of-law decisionmaking. Policy analysis, by way of section 6, has been incorporated into the vast majority of modern choice-of-law doctrines.²⁶⁰ Without a consideration of whether the social policies and goals of a law are being advanced, the *Hubbard* test fails to truly ask whether it is proper for a court to apply a certain law. This denies the purposive nature of law. Every time a court is making a choice-of-law decision, it should ask whether the given law's underlying social policy will be advanced by its application to the case. Without such an inquiry, judges are carrying out the “highly subjective fiat” Professor Currie feared and this cannot be reconciled with modern choice-of-law theory.²⁶¹ The Indiana Supreme Court should take advantage of the opportunity in *Simon v. United States* to improve the working operation of Indiana conflicts law for torts by including the policy analysis of section 6 thereby aligning itself with modern choice-of-law theory.

258. See LEFLAR ET AL., *supra* note 255, at 265 (quoting Brainerd Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233 (1963) [hereinafter Currie, *Comment*]; Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 40 [hereinafter Currie, *Conflict*]).

259. M. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653, 659 (1995). The sections dealing with particular torts that don't explicitly refer to section 6 in their text generally refer to section 145, which requires consideration of section 6's general principles. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-74 (1971).

260. See *supra* note 85.

261. LEFLAR, *supra* note 254, at 265 (quoting Currie, *Comment*, *supra* note 257; Currie, *Conflict*, *supra* note 257, at 40).

