

# Indiana Choice-of-Law Doctrine After *Gollnick v. Gollnick*

PETER T. SNOW\*

## INTRODUCTION

Indiana choice-of-law doctrine for torts has become increasingly complex as it has progressed from the traditional rule of *lex loci delicti*<sup>1</sup> to the two-step rule announced by the Indiana Supreme Court in *Hubbard Manufacturing Co. v. Greeson*.<sup>2</sup> In *Hubbard*, the supreme court declined to adopt the “most significant relationship” test of the *Restatement (Second) of Conflict of Laws*<sup>3</sup> (“*Second Restatement*”) and instead created a hybrid rule that represents a compromise between *lex loci delicti* and the *Second Restatement* approach.<sup>4</sup> Presumably, the supreme court wanted to retain the advantages of *lex loci delicti*—such as its “certainty, predictability, uniformity, and discouragement of forum shopping”<sup>5</sup>—while avoiding its sometimes “anomalous result[s].”<sup>6</sup> Unfortunately, the supreme court did not draw a particularly bright line in *Hubbard*. As a result, lower courts<sup>7</sup> and commentators<sup>8</sup> have struggled to discern

---

\* J.D. Candidate, 2001, Indiana University School of Law—Bloomington; B.A., 1998, Rhodes College. I thank my father, Judge P. Thomas Snow of Wayne County Superior Court I in Richmond, Indiana, for directing me to this topic and sharing with me his experience and insight while I drafted this Note.

1. Under the doctrine of *lex loci delicti*, the law of the state where the last event necessary to make the defendant liable took place governs all substantive issues in the case. *See* BLACK’S LAW DICTIONARY 911 (6th ed. 1990).

2. 515 N.E.2d 1071 (Ind. 1987).

3. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(1) (1971) [hereinafter SECOND RESTATEMENT]. Under the *Second Restatement* test, the court considers a variety of factors bearing on the plaintiff’s relationship to multiple states to determine the law that will govern each individual issue in the case. *See id.* (emphasis added).

4. *See Hubbard*, 515 N.E.2d at 1073; *see also* Geri J. Yonover, *The Golden Anniversary of the Choice of Law Revolution: Indiana Fired the First Shot*, 29 IND. L. REV. 1201, 1207 (1996) (“In *Hubbard* . . . the Indiana Supreme Court finally abandoned a strict *lex loci* approach to choice of law for tort cases.”).

5. Yonover, *supra* note 4, at 1207 (“Perhaps the perceived advantages of the *First Restatement* approach . . . gave *lex loci* its longevity in Indiana and elsewhere . . .”).

6. *Hubbard*, 515 N.E.2d at 1073 (“Rigid application of [*lex loci delicti*] to this case, however, would lead to an anomalous result. Had plaintiff . . . filed suit in any bordering state the only forum which would not have applied the substantive law of Indiana is Indiana.”).

7. *See, e.g., Castelli v. Steele*, 700 F. Supp. 449, 454 n.5 (S.D. Ind. 1988) (“Although 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 . . .”); *Thomas v. Whiteford Nat’l Lease*, 580 N.E.2d 717, 718 (Ind. Ct. App. 1991) (“[T]he First District found that Illinois rather than Indiana tort law applied to a negligence action . . . between Indiana residents in Illinois. . . . However, the *Tompkins* court erroneously stated that the last event necessary to make the defendant liable in *Hubbard* took place in Indiana.” (citations omitted)); *Gollnick v. Gollnick ex rel. Gollnick*, 517 N.E.2d 1257, 1260 (Ind. Ct. App. 1988) (Sullivan, J., dissenting) (“I do not agree with the majority’s interpretation of the effect to be given *Hubbard Manufacturing Co., Inc. v. Greeson*. . . . The second step of the *Greeson* test . . . is not applicable in this case.” (citation omitted)), *aff’d and adopted per*

both when to consider certain factors and how much weight to assign them under the new rule.

Shortly after *Hubbard*, the supreme court granted transfer of *Gollnick v. Gollnick ex rel Gollnick*.<sup>9</sup> In *Gollnick*, the First District Court of Appeals of Indiana applied the choice-of-law rule from *Hubbard* to decide whether California or Indiana intrafamily-immunity doctrine should govern a California father's liability for his daughter's injury from a sledding accident in Indiana.<sup>10</sup> As Part III of this Note will discuss, the court of appeals in *Gollnick* interpreted the *Hubbard* rule in a manner inconsistent with the precedent set by the supreme court in *Hubbard*. On transfer, however, the supreme court did not address this inconsistency, but instead affirmed and adopted the court of appeals's opinion as its own.<sup>11</sup> As a result, opposing counsel may argue two conflicting interpretations of the *Hubbard* rule before a trial court because both claim the official sanction of the Indiana Supreme Court.<sup>12</sup>

Ultimately, the supreme court's adoption of *Gollnick* must stand for one of two propositions: (1) the *Hubbard* rule allows the consideration of a broad range of factors at the outset of every choice-of-law determination and so operates closer to the *Second Restatement* model, or (2) the *Hubbard* rule focuses initially on the independent significance of the place where the injury occurred, *except* in the resolution of family disputes, where strong policy concerns justify applying the law of the parties' domicile.

This Note argues that the latter proposition is a more accurate and workable understanding of Indiana choice-of-law doctrine. Part I analyzes the Indiana Supreme Court's decision in *Hubbard* and explains how the *Hubbard* rule should operate in practice. Part II discusses how the supreme court's adoption of *Gollnick* spurred an exception to the *Hubbard* rule. Part III addresses how the family-law origin of the *Gollnick* exception shapes its nature and scope.

To highlight its scope, Part IV considers whether the *Hubbard* rule governs the applicability of a guest statute or whether the *Gollnick* exception should apply. The

---

*curiam* by 539 N.E.2d 3 (Ind. 1989).

8. See Yonover, *supra* note 4, at 1210 ("An examination of Indiana choice of law cases since *Hubbard* leaves the reader with a feeling of unease. Most cases do not explain fully *why* the place of tort does or does not bear a significant connection to the case." (emphasis in original)).

9. 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989). *Gollnick* has an interesting procedural history. The court of appeals decided *Gollnick* for the first time prior to the Indiana Supreme Court's decision in *Hubbard* and applied *lex loci delicti*. See *Gollnick v. Gollnick ex rel. Gollnick*, 514 N.E.2d 645 (Ind. Ct. App. 1987), *on reh'g*, 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989). After *Hubbard*, the first district granted a petition for rehearing and decided the choice-of-law issue under the new rule. See *Gollnick*, 517 N.E.2d at 1257. For the purpose of this Note, I will use the case name *Gollnick* to refer only to the opinion rendered by the first district court of appeals on rehearing, unless otherwise noted.

10. See *Gollnick*, 514 N.E.2d at 647 (reciting facts); *Gollnick*, 517 N.E.2d at 1258-59 (applying *Hubbard* analysis).

11. See *Gollnick v. Gollnick*, 539 N.E.2d 3, 4 (Ind. 1989).

12. See, e.g., *Baca v. New Prime, Inc.*, No. 89D01-9804-CT-014 (Ind. Wayne County Super. Ct. I Oct. 11, 2000) (unpublished state trial court case on file with the *Indiana Law Journal*).

sharp contrast between the familial nature of many guest statutes—a shared familial relationship is often a required element for their application—and the purposes offered for their enactment—such as the prevention of insurance fraud—makes guest statutes an excellent starting point from which to consider the *Gollnick* exception's scope. Concluding that the *Gollnick* exception does not apply to guest statutes, Part IV's comparison of the unique history of Indiana's guest statute with the policy concerns behind the *Gollnick* exception also provides a nice example of how courts might consider the exception's scope in other contexts as well.

### I. THE HUBBARD RULE

Before the supreme court's decision in *Hubbard*, Indiana adhered to the choice-of-law doctrine of *lex loci delicti commissi*, more commonly known as *lex loci delicti* or *lex delicti*.<sup>13</sup> "The 'lex loci delicti,' or 'place of the wrong,' is the state where the last event necessary to make an actor liable for an alleged tort takes place."<sup>14</sup> Once a court determines which state is the *lex loci delicti*, that state's law will govern all substantive issues in the case.<sup>15</sup> Some of the benefits of the doctrine are that it is simple to apply and highly predictable.<sup>16</sup> As a result, litigants spend less time debating the applicability of the law and more time arguing the merits of the case.<sup>17</sup> However, *lex loci delicti* may also lead to potentially unfair outcomes by subjecting claimants to the law of a state with which they have only a tenuous relationship at best.<sup>18</sup> Wary of such results, the supreme court abrogated *lex loci delicti* and crafted a more complex choice-of-law rule in *Hubbard*.

#### A. The Indiana Supreme Court Decision

In *Hubbard*, the plaintiff's husband died from injuries sustained while he was working in Illinois on a lift unit manufactured in Indiana.<sup>19</sup> Plaintiff filed a wrongful death action against the manufacturer and premised both of her theories of liability on the manufacture of the lift unit.<sup>20</sup> Under the doctrine of *lex loci delicti*, the choice-of-law rule for torts at the time, the supreme court noted that the law of Illinois would govern all substantive issues because the injuries that led to decedent's death had

---

13. See *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1073 (Ind. 1987); see also BLACK'S LAW DICTIONARY 911 (6th ed. 1990).

14. BLACK'S LAW DICTIONARY 911 (6th ed. 1990) (citing *Sestito v. Knop*, 297 F.2d 33, 34 (7th Cir. 1961)).

15. See *Gollnick*, 514 N.E.2d at 645.

16. See *Yonover*, *supra* note 4, at 1207 (stating one of the advantages of the *lex loci delicti* doctrine is its predictability).

17. See *id.* (providing discouragement of forum shopping as an advantage of the *lex loci delicti* approach).

18. See *id.* at 1201-07 ("Noting that all states bordering Indiana would not apply Illinois law as the place of injury, the [*Hubbard*] court found it 'anomalous' and 'inappropriate' that Indiana would do so.").

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

20. *Id.*

occurred in Illinois.<sup>21</sup> However, the supreme court also noted that all of the states bordering Indiana, none of which follow *lex loci delicti*, would have applied Indiana substantive law if given the same facts.<sup>22</sup> Displeased with this "anomalous result,"<sup>23</sup> the supreme court departed from the strict application of *lex loci delicti* in torts cases and devised a new choice-of-law rule. Chief Justice Shepard stated for the court:

In a large number of cases, the place of the tort will be significant and the place with the most contacts. . . . In such cases, the traditional rule serves well. A court should be allowed to evaluate other factors when the place of the tort is an insignificant contact. In those instances where the place of the tort bears little connection to the legal action, this Court will permit the consideration of other factors . . . .<sup>24</sup>

From this statement of the rule, two propositions are immediately clear: (1) in some instances, the "traditional rule" of *lex loci delicti* will apply and (2) in other instances, *lex loci delicti* will not apply.

Most courts have reduced the rule set out by the supreme court in *Hubbard* to two steps,<sup>25</sup> even though there are actually three inquiries to be made. As a preliminary matter, courts must determine the "place of the tort" with respect to the plaintiff's cause of action before engaging the "first step" of the *Hubbard* rule.<sup>26</sup> In *Hubbard*, the supreme court held that Illinois was the place of the tort, because it was where the "last event necessary" to make the defendant liable occurred.<sup>27</sup> Put simply, the death of plaintiff's husband in Illinois was the last event that had to occur before her wrongful death action could proceed. In practice, the place of the tort will always be where the plaintiff's injuries occur or where damages accrue, because a plaintiff cannot have a claim without an injury or damages even if someone is negligent.<sup>28</sup>

After identifying the place of the tort, the first recognized step of the *Hubbard* rule is to determine whether that place is a significant contact.<sup>29</sup> Applying the language in *Hubbard*, courts determine significance by asking whether the place of the tort "bears

---

21. *Id.* at 1073-74.

22. *Id.*

23. *Id.*; see also *Castelli v. Steele*, 700 F. Supp. 449, 452 (S.D. Ind. 1988) (explaining that the "anomalous results" that the Indiana Supreme Court sought to avoid in *Hubbard* occur "[w]hen the injury and the tortious conduct do not coincide").

24. *Hubbard*, 515 N.E.2d at 1073 (citations omitted).

25. In *Castelli*, Judge McKinney stated, "[F]or simplicity sake . . . this Court will refer to *Hubbard* as requiring a three pronged analysis, for as the *Hubbard* and *Gollnick* opinions make clear, there are three separate inquiries." *Castelli*, 700 F. Supp. at 452 n.2. However, most courts have referred to and applied the *Hubbard* rule in two steps. See, e.g., *Thomas v. Whiteford Nat'l Lease*, 580 N.E.2d 717, 718 (Ind. Ct. App. 1991) (referring to the "two-step choice-of-law rule" adopted in *Hubbard*); *Bencor Corp. v. Harris*, 534 N.E.2d 271, 272 (Ind. Ct. App. 1989).

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

27. *Id.* at 1074.

28. See *Castelli*, 700 F. Supp. at 453 (citing EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 17.2, at 552 (Lawyer's ed. 1984)).

29. *Hubbard*, 515 N.E.2d at 1074.

little connection to the legal action.<sup>30</sup> When applying this step in *Hubbard*, the supreme court focused exclusively on the contacts that tied Illinois (the place where plaintiff's husband died) to plaintiff's action for wrongful death.<sup>31</sup> More specifically, the plaintiff alleged that the defendant's defective manufacture of a lift unit in Indiana caused her husband's death in Illinois.<sup>32</sup>

The supreme court noted several contacts with Illinois that did not factor into its determination because they were irrelevant to the cause of action.<sup>33</sup> Among the irrelevant contacts, the court listed (1) the decedent's employment in Illinois at the time of his death, (2) the involvement of an Illinois vehicle in the accident, (3) the coroner's inquest in Illinois, and (4) the receipt of worker's compensation benefits in Illinois by the family of decedent.<sup>34</sup> The court refused to give the above contacts any weight in its analysis under the first step because "[n]one of these facts relate[d] to the wrongful death action filed against Hubbard."<sup>35</sup>

Without these contacts to bolster the plaintiff's relationship to Illinois, the supreme court held that the place of the tort was insignificant.<sup>36</sup> Therefore, *lex loci delicti* did not apply, and the court was free to consider other factors under the second step.<sup>37</sup>

Under the second step of the *Hubbard* rule, courts may consider "other factors" in making their choice-of-law determination.<sup>38</sup> The supreme court suggested that courts consider "(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."<sup>39</sup> At least one court of appeals has suggested that courts are not limited to examination of only those contacts suggested by the supreme court under the second step.<sup>40</sup> Moreover, courts must balance all contacts "according to their relative importance to the particular issues being litigated."<sup>41</sup>

The supreme court did not provide a mechanism to determine how much weight to give individual contacts under the second step.<sup>42</sup> In *Hubbard*, the supreme court stated that "Indiana has the more significant relationship and contacts"<sup>43</sup> and then named the factors that supported the application of Indiana law. The supreme court stated:

---

30. *Id.* at 1073.

31. *See id.*

32. *Id.* at 1071.

33. *Id.* at 1074.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.* at 1073 ("A court should be allowed to evaluate other factors when the place of the tort is an insignificant contact.").

38. *Id.*

39. *Id.* at 1073-74.

40. *See In re Estate of Bruck*, 632 N.E.2d 745, 748 (Ind. Ct. App. 1994) ("[W]e are not confined to the three factors specifically suggested in *Hubbard*.").

41. *Hubbard*, 515 N.E.2d at 1074.

42. *Id.*; *see also Yonover*, *supra* note 4, at 1210 ("[Indiana] courts seem to be contact-counting, without furnishing an adequate method to determine the weight or priority of certain contacts compared to other contacts.").

43. *Hubbard*, 515 N.E.2d at 1074.

The plaintiff's two theories of recovery relate to the manufacture of the lift in Indiana. Both parties are from Indiana; plaintiff Elizabeth Greeson is a resident of Indiana and defendant Hubbard is an Indiana corporation with its principal place of business in Indiana. The relationship between the deceased and Hubbard centered in Indiana. The deceased frequently visited defendant's plant in Indiana to discuss the repair and maintenance of the lift.<sup>44</sup>

*B. Analysis of the Rule and Its Effects*

By hinging the application of *lex loci delicti* on the discrete relationship between the place of the tort and the legal action, the supreme court maintained a balance between *lex loci delicti* and the more liberal approach of the second step. The supreme court retained some advantages of the old rule—litigants can more easily predict whether *lex loci delicti* will apply knowing that it depends on how a clearly defined set of facts relates to a distinct legal issue. After a determination that the place of the tort is insignificant—that *lex loci delicti* does not apply—courts are provided more flexibility under the second step.<sup>45</sup>

The sharp contrast between the focus of the first and second steps of the *Hubbard* rule makes it clear that the supreme court did not intend to adopt the *Second Restatement's* most-significant-relationship test in its entirety.<sup>46</sup> Under the *Second Restatement* test, a plurality of factors is taken into account from the outset to determine which forum has the "most significant relationship to the occurrence and the parties" involved.<sup>47</sup> In contrast, the *Hubbard* rule dictates that the court first consider only the facts bearing on the relationship between the place of the tort and the specific legal action before considering the broad range of factors suggested by the *Second Restatement*.<sup>48</sup>

Naturally, the outcome under the first step is determined by only a fraction of the total contacts a suit may have with a variety of jurisdictions. If that subset of contacts bears more than a "little connection" to the legal action, then the place of the tort is significant and *lex loci delicti* applies.<sup>49</sup> Conversely, *lex loci delicti* does not apply when the only contacts between the place of the tort and the suit are of little or no relevance to the legal action.<sup>50</sup> A suit with dozens of contacts to the place of the tort

---

44. *Id.*

45. *See id.* at 1073-74.

46. *See* SECOND RESTATEMENT, *supra* note 3, § 145(1).

47. *Id.*

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

49. *See* *Bencor Corp. v. Harris*, 534 N.E.2d 271, 273 (Ind. Ct. App. 1989). In affirming the trial court's application of *lex loci delicti*, the court of appeals stated: "[T]he performance of the construction contract, the direction of the workman, the instrumentality that caused injury, the alleged negligence, and the injury all occurred in Indiana. . . . All of the acts relative to the commission of the tort occurred in Indiana." *Id.*

50. *Castelli v. Steele*, 700 F. Supp. 449, 454 (S.D. Ind. 1988).

Under the facts of this case, it is clear that the state of Illinois bears "little connection" to the cause of action. The only contacts with Illinois are that the injury accrued there, the plaintiff resides there, and that a phone call to Dr. Steele originated from there. . . . However, just as in *Hubbard*, these facts have little

theoretically will not trigger the application of *lex loci delicti* if none of those contacts are relevant to the legal action. (In that case, however, it would be strange if the law of the place of the tort ultimately did not apply after analysis under the second step of the *Hubbard* rule.) In short, *lex loci delicti* presumptively applies in tort cases unless the place of the tort is legally insignificant.<sup>51</sup>

The narrow focus of the first step is an important element of the *Hubbard* rule that appellate courts have applied inconsistently.<sup>52</sup> In *Tompkins v. Isbell*,<sup>53</sup> two Indiana residents were in an automobile accident in Illinois.<sup>54</sup> The First District Court of Appeals of Indiana focused on the relationship between Illinois and the alleged negligent operation of a tractor, the basis of plaintiffs' legal action. The first district held that Illinois had "extensive connection" to the legal action because Illinois's rules of the road governed the defendant's operation of the tractor while in Illinois.<sup>55</sup> When explaining its holding, however, the first district incorrectly stated that the last event necessary to make the defendant liable in *Hubbard* occurred in Indiana.<sup>56</sup>

In *Thomas v. Whiteford National Lease*,<sup>57</sup> the Third District Court of Appeals of Indiana cited this flaw in the *Tompkins* opinion and held that Indiana law applied to an automobile accident in Michigan between Indiana residents.<sup>58</sup> The third district's holding in *Thomas* was in direct conflict with the first district's holding in *Tompkins*. In *Tompkins*, the site of an automobile accident was significant enough to trigger *lex loci delicti*.<sup>59</sup> In *Thomas*, it was not.<sup>60</sup> Although the first district was not accurate when it said that the "last event necessary to make the defendant [in *Hubbard*] liable" occurred in Indiana,<sup>61</sup> its choice-of-law analysis followed the supreme court's analysis in *Hubbard* more closely than did the third district's analysis in *Thomas*.

In *Thomas*, the third district stated that "[i]f the place of the tort has *extensive*

---

relationship to this medical malpractice action.

*Id.*; see also *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283, 1287 (Ind. Ct. App. 1997) (holding that the place of the tort bore little connection to an accounting negligence action, even though it was both where the plaintiffs' injury occurred and where the plaintiffs, almost 600 farmers, worked).

51. *In re Estate of Bruck*, 632 N.E.2d 745, 747 (Ind. Ct. App. 1994) ("[L]ex loci delicti is the rule presumptively to be applied unless the place of the tort is an insignificant contact, in which case other factors may be considered.").

52. See, e.g., *Thomas v. Whiteford Nat'l Lease*, 580 N.E.2d 717, 718 (Ind. Ct. App. 1991) (applying the first step of the *Hubbard* rule with a broad focus); *Tompkins v. Isbell*, 543 N.E.2d 680, 681-82 (Ind. Ct. App. 1989) (applying the first step with an appropriately narrow focus).

53. 543 N.E.2d 680 (Ind. Ct. App. 1989).

54. *Id.* at 681.

55. *Id.* at 682.

56. *Id.* at 681. On the contrary, the supreme court's decision to adopt a new choice-of-law rule in *Hubbard* stemmed from the fact that the last event necessary to make the defendant liable occurred in Illinois. See *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1072 (Ind. 1987).

57. 580 N.E.2d 717 (Ind. Ct. App. 1991).

58. *Id.* at 718.

59. *Tompkins*, 543 N.E.2d at 681-82.

60. *Thomas*, 580 N.E.2d at 718.

61. *Tompkins*, 543 N.E.2d at 681.

connection with the legal action, the traditional rule of *lex loci delicti* . . . applies.”<sup>62</sup> However, in *Hubbard* the supreme court did not say that the place of the tort must have “extensive connection” with the legal action. The supreme court said only that the place of the tort must be significant for *lex loci delicti* to apply.<sup>63</sup>

The third district’s misstatement of the *Hubbard* rule is telling, yet understandable. In *Hubbard*, the supreme court stated: “[I]n a large number of cases, the place of the tort will be significant and the place with the most contacts. In such cases, the traditional rule serves well.”<sup>64</sup> By saying “[i]n such cases, the traditional rule serves well,”<sup>65</sup> the supreme court did not limit the application of *lex loci delicti* to only those cases in which both the “significance” and “most contacts” criteria are met. Rather, the supreme court made a statement as to the particular propriety of *lex loci delicti* in cases where the place of the tort is both significant and has the most contacts. The supreme court then diminished the reach of *lex loci delicti* by suspending its presumptive application in cases where the significance factor is not satisfied.<sup>66</sup> By “significance,” the supreme court refers solely to the relationship between the place of the tort and the legal action. As discussed, this understanding of “significance” is supported by the supreme court’s own application of the rule in *Hubbard*.<sup>67</sup>

In *Thomas*, the third district misapplied the *Hubbard* rule by prematurely weighing the factors of the second step against the connection between the place of the tort and the legal action.<sup>68</sup> The additional contacts considered by the third district—the residences of the parties, their place of employment, and the place where they received workers’ compensation benefits<sup>69</sup>—may only be considered where the court has determined that the place of the tort bears little connection to the legal action.<sup>70</sup> If the third district had applied the *Hubbard* rule properly, it would have found that the place of the tort was significant because the conduct of the defendant in Michigan determined his liability.<sup>71</sup> That determination would have foreclosed the court’s consideration of any additional factors and *lex loci delicti* would have applied.<sup>72</sup>

---

62. *Thomas*, 580 N.E.2d at 718 (emphasis added).

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

64. *Id.* (citation omitted).

65. *Id.*

66. *Id.*

67. See *supra* notes 46-48 and accompanying text.

68. *Thomas v. Whiteford Nat’l Lease*, 580 N.E.2d 717, 718 (Ind. Ct. App. 1991).

69. *Id.*

70. See *Hubbard*, 515 N.E.2d at 1073.

71. See *Thomas*, 580 N.E.2d at 718.

72. See *Cox v. Nichols*, 690 N.E.2d 750, 752 (Ind. Ct. App. 1998). In *Cox*, two Michigan residents sued their uninsured motorist carrier and an uninsured Indiana driver for damages arising out of a car accident in Indiana. *Id.* at 751. The court of appeals held that Indiana law applied after finding that the collision in Indiana was significant with respect to the plaintiffs’ action. *Id.* at 752. The court noted that the case had several contacts with Michigan—both plaintiffs resided there and their relationship with their insurance carrier was centered there—but recognized that the accident itself was “not insignificant” and that defendant was also an Indiana resident. *Id.* The significance of the place of the tort to the legal action triggered the application of *lex loci delicti* and so the court did not weigh the Michigan contacts against the Indiana contacts in the suit. *Id.*; see also *Bencor Corp. v. Harris*, 534 N.E.2d 271, 273 (Ind. Ct. App. 1989). In *Bencor*, the court of appeals applied Indiana law under the first step of the



When courts, like the third district in *Thomas*, fail to restrict their focus under the *Hubbard* rule, they invite a troubling degree of uncertainty and litigiousness to every case involving a choice-of-law dispute. These courts not only must entertain the flood of irrelevant contacts that will be presented by the parties to the suit, but they also must take into account the supreme court's direction to balance those contacts "according to their relative importance to the particular issues being litigated."<sup>73</sup> Consequently, these courts may find themselves parceling a suit into several distinct legal issues, reweighing the parties' contacts with respect to each of those issues, and then determining the applicable law as to each one. In a single suit, a court may apply Kentucky law on the issue of intrafamily immunity because the parties are family members from Kentucky, Indiana law as to standard of liability because the tort occurred in Indiana, and Ohio law as to the defendant's right of indemnification against her employer because that is where their employment relationship and most of the defendant's work-related activities were centered. The mere thought of introducing such unbridled complexity into the courtroom is enough to make some trial judges cringe.

### III. GOLLNICK: THE EXCEPTION OR RULE?

The appellate decisions that misinterpret the *Hubbard* rule would be easier to dismiss if the supreme court never adopted *Gollnick*.<sup>74</sup> The First District Court of Appeals of Indiana heard the case two times before the supreme court finally adopted and affirmed its opinion.<sup>75</sup> When the first district originally heard the case,<sup>76</sup> the supreme court had not decided *Hubbard*<sup>77</sup> and so the doctrine of *lex loci delicti* still governed choice-of-law questions in tort cases. After *Hubbard*, the first district agreed to rehear the original *Gollnick* to resolve the choice-of-law dispute under the new rule.<sup>78</sup>

The facts of *Gollnick* are as follows. Gregory and Verna Gollnick, California residents, shared joint legal custody of their two daughters.<sup>79</sup> In exercise of his visitation rights, Gregory took his daughters to visit their aunt and uncle in Indiana.<sup>80</sup> While in Indiana, one of the daughters, Karen, was injured when she sledded out of her aunt and uncle's driveway and into the street.<sup>81</sup> Karen and her mother, Verna,

---

*Hubbard* rule. *Id.* at 272-73. The court recognized that "[a]ll of the acts relative to the commission of the tort occurred in Indiana" while "[n]one of the Tennessee contacts affected this legal action." *Id.*

73. *Hubbard*, 515 N.E.2d at 1074.

74. *Gollnick v. Gollnick*, 539 N.E.2d 3 (Ind. 1989).

75. *Gollnick v. Gollnick ex rel. Gollnick*, 514 N.E.2d 645, 645 (Ind. Ct. App. 1987), *on reh'g*, 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989).

76. *Id.* (decided October 1987).

77. *Hubbard*, 515 N.E.2d at 1071 (decided December 1987).

78. *Gollnick v. Gollnick ex rel. Gollnick*, 517 N.E.2d 1257, 1258 (Ind. Ct. App. 1988), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989).

79. *Gollnick*, 514 N.E.2d at 647.

80. *Id.*

81. *Id.*

subsequently filed a complaint against both Karen's father and her aunt and uncle.<sup>82</sup> The complaint alleged that Karen's father had negligently supervised Karen and that her aunt and uncle had failed to warn Karen of a known danger.<sup>83</sup> All three defendants moved for summary judgment.<sup>84</sup> The father's motion requested the application of Indiana law and immunity from suit under Indiana's parental-immunity doctrine.<sup>85</sup>

When first before the court of appeals, Karen's father argued for the application of Indiana law under the doctrine of *lex loci delicti* even though all parties were domiciled in California.<sup>86</sup> The court of appeals acknowledged that there was an argument that California law should be applied, because the issue presented is not a tort question, but immunity based upon a familial relationship, and California has an exclusive interest in governing their family relationship.<sup>87</sup> Moreover, the application of California law would provide continuity in the "rights and duties attendant to the family relationship."<sup>88</sup> However, the court of appeals also recognized that *lex loci delicti* governed Karen's claim because it was an action in tort.<sup>89</sup> The court held that, under *lex loci delicti*, Indiana law applied to all substantive issues in the case, including the issue of intrafamily immunity, because Karen's injuries occurred in Indiana.<sup>90</sup>

On rehearing, the court of appeals applied the *Hubbard* rule to the same set of facts and held that California, not Indiana, law applied.<sup>91</sup> The court of appeals first asked "whether the site of Karen's injury is a significant contact warranting the application of Indiana substantive law."<sup>92</sup> In answering this question, however, the court of appeals gave little attention to Karen's cause of action for negligent supervision, Indiana, or the relationship between the two. Instead, the court discussed several cases generally holding that intrafamily immunity is a family-law issue to be decided by the law of the parties' domicile.<sup>93</sup> None of the cases cited by the court of appeals were Indiana cases.<sup>94</sup> Presumably, the court of appeals reasoned that the place of the tort was insignificant after its review of these cases, because it moved on to the consideration of other factors under the second step.<sup>95</sup> The court of appeals then

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 647-48.

87. *See id.*

88. *Id.* at 648.

89. *See id.* at 648-49.

90. *See id.*

91. *See Gollnick v. Gollnick ex rel. Gollnick*, 517 N.E.2d 1257 (Ind Ct. App. 1987), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989).

92. *Id.* at 1258.

93. *See id.* at 1258-59 (citing *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968), *Emery v. Emery*, 289 P.2d 218 (Cal. 1955), *Wartell v. Formusa*, 213 N.E.2d 544 (Ill. 1966), *Aurora Nat'l Bank v. Anderson*, 268 N.E.2d 552 (Ill. App. Ct. 1971), and *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967)).

94. *Id.* (relying on cases from Alaska, California, Illinois, and Kentucky).

95. *See id.* at 1259.

noted that California's interest in the parties' family relationship was predominant with respect to the issue of intrafamily immunity and held that California law applied.<sup>96</sup>

When the state supreme court considered *Gollnick*, it did little more than affirm and adopt the court of appeals's opinion on rehearing.<sup>97</sup> The supreme court did offer a brief, yet perplexing comment on the court of appeals's opinion. It said that "the court of appeals did not alter Indiana law on parental immunity; it merely applied California law to the claim against Gregory E. Gollnick in accordance with the choice-of-law rule announced in *Hubbard*."<sup>98</sup> However, the court of appeals's reasoning in *Gollnick* is inconsistent with most Indiana courts' understanding of the *Hubbard* rule.<sup>99</sup> In fact, courts generally do not cite *Gollnick* when they apply the *Hubbard* rule.<sup>100</sup> With this in mind, it is more reasonable to consider *Gollnick* as an exception to the general rule, rather than an example of its application.

In *Gollnick*, on rehearing, the court of appeals departed from a strict application of the *Hubbard* rule by prematurely weighing the parties' contacts with regard to the issue of intrafamily immunity instead of focusing on the relationship between the place of the tort and the legal action.<sup>101</sup> The court of appeals broadened its initial focus to include the issue of intrafamily immunity for policy reasons, namely to foster consistency in the duties owed between family members as they travel from state to state.<sup>102</sup> The court of appeals also reasoned that the state of the parties'

---

96. *Id.*

97. See *Gollnick v. Gollnick*, 539 N.E.2d 3 (Ind. 1989).

98. *Id.* at 4.

99. See *supra* Part I.

100. See, e.g., *Cox ex rel. Zick v. Nichols*, 690 N.E.2d 750, 752 (Ind. Ct. App. 1998) (citing *Hubbard Mfg. Co. v. Greeson*, 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 Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987), *Castelli v. Steele*, 700 F. Supp. 449 (S.D. Ind. 1988), and *Travelers Ins. Cos. v. Rogers*, 579 N.E.2d 1328 (Ind. Ct. App. 1991)); *In re Estate of Bruck*, 632 N.E.2d 745, 747-49 (Ind. Ct. App. 1994) (citing *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987), and *Thomas v. Whiteford Nat'l Lease*, 580 N.E.2d 717 (Ind. Ct. App. 1991)); *Thomas v. Whiteford Nat'l Lease*, 580 N.E.2d 717, 717-18 (Ind. Ct. App. 1991) (citing *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987), and *Tompkins v. Isbell*, 543 N.E.2d 680 (Ind. Ct. App. 1989)); *Tompkins v. Isbell*, 543 N.E.2d 680, 680-82 (Ind. Ct. App. 1989) (citing *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987), and *Bencor Corp. v. Harris*, 534 N.E.2d 271 (Ind. Ct. App. 1989)).

101. The American Law Institute supports this understanding:

This court [of appeals in *Gollnick*] affirmed in part and reversed in part, holding, inter alia, that although Indiana substantive law would usually be applied because the site of the injury bore a significant relationship to the action, with regard to the issue of intrafamily immunity, the law of the state of the parties' domicile applied because California had a predominant interest in the family's relationship that outweighed any interest this state had.

SECOND RESTATEMENT, *supra* note 3, § 169 app. at 306-07 (Supp. 1995).

102. See *Gollnick v. Gollnick ex rel. Gollnick*, 517 N.E.2d 1257, 1258 (Ind. Ct. App. 1987), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989) ("To hold otherwise, . . . would subject the rights and duties attendant to the family relationship to constant change as family

common domicile had a greater interest in the maintenance of the family relationship.<sup>103</sup> From this perspective, it is clear that the court of appeals's concern about these issues guided its decision much more than the *Hubbard* rule.

The family-law issues in *Gollnick*, however, were substantial. Karen and her mother, Verna Gollnick, brought their action against Kareu's father Gregory (Verna's former spouse) as well as Karen's aunt and uncle, John and Margaret Gollnick.<sup>104</sup> Karen was injured in a sledding accident outside of her aunt and uncle's home in Indiana while spending time with her father pursuant to his visitation rights under a divorce agreement.<sup>105</sup> Karen, her mother Verna, and her father Gregory were all California residents.<sup>106</sup> It is no wonder that the court of appeals was reluctant to apply Indiana law. Everyone in the suit was related by either blood or marriage, and California law governed the family relationship most central to the suit—that of Verna and Gregory Gollnick and their daughter Karen.<sup>107</sup>

To avoid Indiana law, the court glossed over the significance of the place of the tort when considering the first step of the *Hubbard* rule, emphasizing instead the number of California ties and policy reasons for applying the law of the parties' common domicile.<sup>108</sup> As a result, the court of appeals was able to apply California law to a suit that would have been decided by Indiana law if the *Hubbard* rule were properly applied.

Judge Sullivan's dissent in *Gollnick* describes the proper application of the *Hubbard* rule by comparing the facts of *Hubbard* to the facts of *Gollnick*.<sup>109</sup> He explained:

In [*Hubbard v.*] *Greeson*, the place of the tort was virtually irrelevant to the lawsuit. The lawsuit there involved an act of negligence or acts giving rise to products liability which took place solely in another state and the parties all had contacts solely with that other state. The only contact with the "place of the tort" was the injury itself.

In the case before us, all relevant incidents and acts took place in Indiana, including the injury. The only significant contact with California is that the parties reside there. The place of the tort is not only significant but is the dominant factor with respect to this litigation. The second step of the *Greeson* test, therefore, is not applicable in this case.<sup>110</sup>

Judge Sullivan's strong dissent in *Gollnick* makes the supreme court's adoption of the majority opinion as "in accordance with the choice-of-law rule announced in *Hubbard*"<sup>111</sup> problematic. The only way that Judge Sullivan's approach to the

members crossed state lines during temporary absences from home." (citations omitted)).

103. *See id.*

104. *Gollnick v. Gollnick ex rel. Gollnick*, 514 N.E.2d 645, 647 (Ind. Ct. App. 1987), *on reh'g*, 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd and adopted per curiam by* 539 N.E.2d 3 (Ind. 1989).

105. *Id.*

106. *Gollnick*, 517 N.E.2d at 1258.

107. *See id.* at 1259 (citing SECOND RESTATEMENT, *supra* note 3, § 169(2)).

108. *See id.* at 1258-59.

109. *See id.* at 1259-60 (Sullivan, J., dissenting).

110. *Id.* at 1260.

111. *Gollnick v. Gollnick*, 539 N.E.2d 3, 4 (Ind. 1989).

*Hubbard* rule could survive the supreme court's adoption of *Gollnick* as it generally has<sup>112</sup> is if *Gollnick* is considered an exception to the rule and not an example of its application. Moreover, the supreme court cannot honestly treat *Gollnick* as a proper application of the *Hubbard* rule without effectively overruling *Hubbard* altogether.

If *Gollnick* were "the rule" and not the exception, the two steps of *Hubbard* must collapse into a shotgun balancing approach. First, every legal issue in a suit would have to be considered independently with respect to the competing interests of individual states. Then, the collective weight of all the interested states would be balanced against the significance of the relationship between the place of the tort and the legal action. Given that the number of discrete legal issues in a suit is likely to be limited only by the imaginations of the attorneys involved, there will seldom be a case under this approach where *lex loci delicti* will prevail.<sup>113</sup> While this result may be commendable in its own right, it is so drastically different from the choice-of-law analysis in *Hubbard* that the supreme court could not have meant to institute it as a universal rule, especially in a *per curiam* opinion.<sup>114</sup>

As an exception, *Gollnick* should apply only to cases with issues intricately related to the maintenance of the family unit. In *Gollnick*, the issue of intrafamily immunity was before the court of appeals and ultimately the supreme court. Intrafamily-immunity doctrine governs whether a family member can be held liable to another family member in tort.<sup>115</sup> Specifically, the doctrine forbids tort actions between spouses and between parents and their children.<sup>116</sup> Although these two immunities are attributed to different sources,<sup>117</sup> their continued existence in American law is

---

112. See *Judge v. Pilot Oil Corp.*, 205 F.3d 335 (7th Cir. 2000) (holding that the place of the tort was significant and so there was no need to consider additional factors under the second step of the *Hubbard* rule); *Cox ex rel. Zick v. Nichols*, 690 N.E.2d 750, 752 (Ind. Ct. App. 1998) (holding that "tort analysis presumes that the location of the injury is the proper choice-of-law forum unless the place of the injury is insignificant," roughly nine years after the supreme court's adoption of *Gollnick*); *In re Estate of Bruck*, 632 N.E.2d 745, 747 (Ind. Ct. App. 1994) (holding that "*lex loci delicti* is the rule presumptively to be applied unless the place of the tort is an insignificant contact," roughly five years after the supreme court's adoption of *Gollnick*); *Tompkins v. Isbell*, 543 N.E.2d 680, 682 (Ind. Ct. App. 1989) (applying *lex loci delicti* where place of the tort was significant, roughly four months after the supreme court's adoption of *Gollnick*); see also *supra* text accompanying notes 52-56.

113. The supreme court's presumption that *lex loci delicti* will apply except where the place of the tort bears little connection to the legal action makes it clear that in some cases the law of the place where the injury occurred will govern all substantive issues. *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071, 1073 (Ind. 1987). On the breadth of *lex loci delicti* when it applies, see *Hubbard Mfg. Co. v. Greeson*, 487 N.E.2d 825 (Ind. Ct. App. 1986), *vacated by* 515 N.E.2d 1071 (Ind. 1987); *Gollnick v. Gollnick ex rel. Gollnick*, 514 N.E.2d 645, 645 (Ind. Ct. App. 1987), *on reh'g*, 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd and adopted per curiam by* 539 N.E.2d 3 (Ind. 1989) (court of appeals's original decision prior to *Hubbard*).

114. *Gollnick*, 539 N.E.2d at 3. The supreme court's opinion is just one paragraph long—a total of 146 words.

115. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 901-07 (5th ed. 1984 & Supp. 1998); W.E. Shipley, Annotation, *Conflict of Laws as to Right of Action Between Husband and Wife or Parent and Child*, 96 A.L.R.2d 973 (1964).

116. See KEETON ET AL., *supra* note 115, § 122, at 901-07.

117. *Id.*

justified by the same reasons.<sup>118</sup> The main argument advanced in support of intrafamily immunity is "maintenance of domestic peace and tranquility of the family."<sup>119</sup>

Within this context, *Gollnick's* exception to the *Hubbard* rule is logical. In order to preserve stability in the family relationship, choice-of-law doctrine ought to ensure that a single body of law is consistently applied to an individual family. Of course, the state of a family's common domicile is the best choice because it has a predominant interest in the family relationships of its residents and will most often be the site of the family's disputes. Stretching the *Gollnick* exception to apply in situations that are not patently a matter of family law is not justified because it denies the rationale for the exception.

Without doubt, legislatures have enacted and will continue to enact statutes that impact families qua families, yet defy categorization as family-law statutes. Once the inevitable choice-of-law disputes arise involving these statutes, courts will be forced to determine whether the statute's applicability will be controlled by the *Hubbard* rule or the *Gollnick* exception. Guest statutes are excellent examples of the kind of dual character statute that will place courts in this very position. Such statutes limit motor vehicle operators' liability to certain guest passengers, often only those who have a family relationship with the operator.<sup>120</sup> It is this familial dimension of some guest statutes that raises the question of whether they are subject to the ordinary operation of the *Hubbard* rule or are within the *Gollnick* exception in a choice-of-law dispute. In order to flesh out the limits of the *Gollnick* exception and provide an example of the task before judges who must determine the fate of such dual-character statutes, the following Part of this Note will examine where guest statutes fit within Indiana choice-of-law doctrine.

#### IV. THE GUEST STATUTE

Guest statutes limit or in some cases eliminate the liability of a host driver to a guest passenger.<sup>121</sup> Consequently, a defendant who is able to invoke the protection of a guest statute has a considerable advantage in any suit; in many instances, the plaintiff will no longer be able to maintain a cause of action. Some guest statutes apply to all host-guest relationships alike, while others apply only when the host and guest share a unique relationship.<sup>122</sup> Regardless of any given statutory language, the application of a guest statute begins to resemble an intrafamily-immunity issue like that in *Gollnick* whenever the host and guest are family members.

---

118. *Id.* at 905 ("[Regarding parental immunity] as in the case of husband and wife, the chief reason offered is that domestic tranquility and parental discipline and control would be disturbed by the action and again on the theory that an uncompensated tort makes for peace in the family and respect for the parent . . .").

119. *Gollnick v. Gollnick ex rel. Gollnick*, 514 N.E.2d 645, 649 (Ind. Ct. App. 1987) (describing the purpose of the Indiana doctrine of parental immunity), *on reh'g*, 517 N.E.2d 1257 (Ind. Ct. App. 1988), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989); *see also* KEETON ET AL., *supra* note 115, § 122, at 905.

120. *See* KEETON ET AL., *supra* note 115, § 34, at 215.

121. *Id.*

122. *Id.*

When the applicability of a guest statute is disputed before an Indiana court, it is likely that the Indiana guest statute<sup>123</sup> will be a factor. Given that likelihood, the determination of where guest statutes generally fit within Indiana choice-of-law doctrine should be informed by the Indiana statute. Further, the Indiana guest statute is an excellent foundation for the choice-of-law analysis because it highlights family-law issues especially pertinent in light of *Gollnick* that would not be as obvious under a generic statute.

Under Indiana's guest statute, the "owner, operator, or person responsible for the operation of a motor vehicle" is liable to a parent, spouse, child or stepchild, brother, sister, or hitchhiker solely for acts of "wanton or willful misconduct" while operating the motor vehicle.<sup>124</sup> While the statute's limitation of liability to hitchhikers may be explained by the fact that hitchhiking is illegal in Indiana,<sup>125</sup> the policy underlying the treatment of family members is more difficult to pin down. Over the course of the guest statute's evolution, the supreme court has suggested that the following purposes were behind its enactment:<sup>126</sup> (1) to insulate "generous drivers from lawsuits instituted by ungrateful guests,"<sup>127</sup> (2) to prevent fraudulent or collusive suits,<sup>128</sup> (3) to protect insurance companies from juries' sympathies toward injured plaintiffs,<sup>129</sup> and (4) "to foster a cooperative atmosphere among family members regarding the use of family members' automobiles."<sup>130</sup> Whether a court should treat guest statutes with the same deference afforded intrafamily immunity in *Gollnick* is a function of how they weigh these competing policies behind the guest statute.

The easiest argument to dismiss is that it is unjust to allow "ungrateful guests" to bring lawsuits against "generous drivers."<sup>131</sup> With the universal requirement of automobile insurance, drivers will seldom be held financially responsible for the damages they cause and so are not likely to consider it a personal insult to be sued for negligent behavior.<sup>132</sup> Further, it is foolish to suggest that a driver should be able

---

123. IND. CODE § 34-30-11-1 (1998).

124. *Id.*

125. *Davidson v. Davidson*, 558 N.E.2d 849, 851 n.2 (Ind. Ct. App. 1990) ("The statute as it relates to hitchhikers is perhaps better justified by noting that hitchhiking, or standing in a roadway in an effort to solicit a ride from passing vehicles, is illegal in the State of Indiana . . .").

126. The Indiana guest statute was first challenged on state constitutional grounds in *Sidle v. Majors*, 341 N.E.2d 763 (Ind. 1976). The version of the statute before the supreme court in that case, IND. CODE § 9-3-3-1 (1971) (amended 1984) (repealed 1991), did not distinguish between passengers but limited liability solely on the basis of the host-guest relationship. In 1984, the legislature amended the guest statute to apply only to immediate family members and hitchhikers. *See Davidson*, 558 N.E.2d at 850.

127. *Sidle*, 341 N.E.2d at 768.

128. *Id.*; *Davidson*, 558 N.E.2d at 851.

129. *Sidle*, 341 N.E.2d at 771.

130. *Davidson*, 558 N.E.2d at 851-52.

131. *Sidle*, 341 N.E.2d at 768.

132. *See* Albert A. Ehrenzweig, *Guest Statutes in the Conflict of Laws Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws": I*, 69 YALE L.J. 595, 599 (1960). *But see Davidson*, 558 N.E.2d at 851 (arguing that drivers still suffer through the possible cancellation of insurance or an increase in their premiums).

to relax his standard of care when in the company of an invited guest.<sup>133</sup>

The policy of promoting a "cooperative atmosphere"<sup>134</sup> within the family is of dubious merit and should be considered only an incidental benefit of the statute. First of all, it is questionable whether allowing a family member's injuries to go uncompensated because they are attributable to the negligence of another family member really fosters a healthy family relationship at all.<sup>135</sup> Secondly, the supreme court upheld the Indiana guest statute against a state equal protection challenge in *Davidson v. Davidson*<sup>136</sup> on the ground that it is aimed primarily at the prevention of fraudulent or collusive suits.<sup>137</sup>

Of the policies behind the guest statute, the prevention of fraudulent and collusive suits should be given the most emphasis. In *Davidson*, the guest statute at issue applied exclusively to immediate family and hitchhikers as does the current statute.<sup>138</sup> The plaintiff argued that the statute should not apply to her because as a "non-custodial stepchild" she would not be within the scope of the Indiana doctrine of parent-child immunity.<sup>139</sup> By analogy, she further argued that she was outside the scope of the guest statute because its family-oriented language indicated that promoting "family harmony" was its main purpose.<sup>140</sup> In response to plaintiff's argument, the supreme court offered an alternate explanation for the amended guest statute's focus on the family, suggesting that "[t]he legislature may have perceived a greater risk of collusive lawsuits among family members, than among mere acquaintances."<sup>141</sup> With that rationale in mind, the guest statute could withstand the plaintiff's equal protection challenge based solely on the purpose of preventing fraudulent and collusive suits. The supreme court held, "The legislature's concern about increased opportunities to engage in collusion and insurance fraud due to the familial relationship constitutes the substantial state interest to be protected under the statute."<sup>142</sup> It is important to note that the supreme court treated the legislative purpose behind the guest statute as distinct from that underlying the doctrine of parent-child immunity. According to the court, the legislature was mainly concerned about fraud when it passed the guest statute, while the judiciary sought to maintain "domestic peace and tranquility" by promulgating the doctrine of parent-child

---

133. See Ehrenzweig, *supra* note 132, at 599.

134. *Davidson*, 558 N.E.2d at 851-52.

135. See KEETON ET AL., *supra* note 115, § 122, at 905 (discussing the purported benefits of intrafamily immunity).

136. 558 N.E.2d 849 (Ind. Ct. App. 1990).

137. *Id.* at 850.

138. *Id.* at 850.

139. *Id.* at 852.

140. *Id.*

141. *Id.* at 851-53.

142. *Id.* at 852. The supreme court also distinguished between parent-child immunity and the guest statute on the basis that the former is a judicially created doctrine while the latter was legislatively enacted. *Id.* For that reason, the court pointed out that it had more freedom to modify the doctrine of parent-child immunity than the application of a statute. *Id.* However, the court's later emphasis on the substantive difference between the purposes behind parent-child immunity and the guest statute diffused the argument for treating them similarly. Consequently, the judicial capacity distinction also became moot.



immunity.<sup>143</sup>

The two remaining policies in support of the Indiana guest statute may be discussed together. The prevention of fraudulent and collusive suits,<sup>144</sup> which has already been referred to above, encompasses for all practical purposes the protection of insurance companies against juries' predisposition toward injured plaintiffs. On the one hand, the concern is that the parties to the suit will defraud the insurance company with a false claim. On the other hand, the concern is that the jury will defraud the insurance company by "colluding" with the plaintiff and then, out of sympathy, it will find the negligence requirement satisfied regardless of the strength of plaintiff's case. In both instances, the focus is on protecting the public from the cost of fraudulent suits.

The presumption that the costs to the public result from an increase in costs to insurance companies is evident from the criticism levied against guest statutes for being the product of powerful insurance lobbies.<sup>145</sup> However, another valid reason for legislatures to enact prophylactic measures against fraudulent suits is to prevent scarce judicial resources from being squandered on cases that should have never been filed.<sup>146</sup> From the position of the legislature, the latter reason may even have more weight given its immediate impact on the state budget.

A comparison of the purposes behind the Indiana guest statute and those underlying intrafamily immunity reveals that the guest statute should not fall within *Gollnick's* exception to the *Hubbard* rule. Just as the supreme court argued in *Davidson*, the guest statute was originally enacted for the purpose of preventing fraud and collusion.<sup>147</sup> The later amendment of the statute to focus on immediate family and hitchhikers did not alter that purpose. Rather, the legislature narrowed the statute to pinpoint more precisely the relationships in which the threat of fraud was especially great.<sup>148</sup> Meanwhile, judges have preserved the doctrine of intrafamily immunity in order to foster a peaceful environment within families.<sup>149</sup> The overlap of the guest statute and the doctrine of intrafamily immunity is incidental and does not justify treating them identically for choice-of-law purposes. In fact, treating the guest statute as an issue of family law would actually subvert the intent of the legislature in some instances.

The following hypothetical demonstrates the error of including the guest statute within the *Gollnick* exception: Husband and Wife take a road trip from their home

---

143. *Id.* (citing *Buffalo v. Buffalo*, 441 N.E.2d 711, 714 (Ind. Ct. App. 1982)).

144. *Sidle v. Majors*, 341 N.E.2d 763, 768 (Ind. 1976); *Davidson*, 558 N.E.2d at 851.

145. See KEETON ET AL., *supra* note 115, § 34, at 215 n.75 (citing Chas. Chaflin Allen, *Why Do Courts Coddle Insurance Companies?*, 61 AM. L. REV. 77 (1927)); J. Walter White, *The Liability of an Automobile Driver to a Non-paying Passenger*, 20 VA. L. REV. 326 (1934); see also Ehrenzweig, *supra* note 132, at 603.

146. See *Wessling v. Paris*, 417 S.W.2d 259, 260 (Ky. 1967). On the application of the Indiana guest statute, the Kentucky court of appeals said, "While it might be said that Indiana has a policy of protecting drivers on their highways from claims by passengers, surely this must extend no further than an interest in protecting Indiana residents or those who sue in Indiana courts." *Id.*

147. *Davidson*, 558 N.E.2d at 851.

148. See *id.*

149. See KEETON ET AL., *supra* note 115, § 122, at 901-06; see also *Buffalo v. Buffalo*, 441 N.E.2d 711 (Ind. Ct. App. 1982) (abrogating partially the Indiana parental-immunity doctrine).

state (no guest statute) to Indiana (guest statute) where they have an accident. In order to take advantage of Wife's hefty insurance policy, they agree that Husband will sue Wife for negligently causing the accident and his subsequent injuries. While Husband "convalesces" due to "extensive" and virtually unimpeachable neck and back injuries in a local Indiana hospital, his attorney files suit in an Indiana court. Wife's insurance company pleads the Indiana guest statute and motions for summary judgment, alleging that Husband's complaint fails to show "wanton or willful misconduct."<sup>150</sup> Husband responds by citing *Gollnick*<sup>151</sup> and claiming that the application of the guest statute is an issue of intrafamily immunity to be governed by the law of the parties' common domicile and that the Indiana guest statute does not apply.

If the court rules for the Husband and includes the guest statute within the *Gollnick* exception, it does a regrettable disservice to the Indiana legislature.<sup>152</sup> Husband and Wife will have successfully brought a fraudulent suit in an Indiana court, using up precious judicial resources, in direct conflict with the purposes behind the Indiana guest statute. This result is especially disenchanting after taking into account that Indiana residents will always be subject to the guest statute. In the end, Indiana courts will sponsor the intrafamily negligence suits of out-of-state litigants while denying virtually identical causes of action to Indiana residents. The legislature could not have intended this result.

A close reading of *Gollnick* reveals that neither the court of appeals nor the supreme court intended to endorse a particular choice-of-law approach regarding guest statutes.<sup>153</sup> The court of appeals's *Gollnick* opinion cited to only a few cases where a guest statute was at issue. In each of those cases, the guest statute was treated uniquely.<sup>154</sup> This ambiguity in *Gollnick* supports the proposition that guest statutes should not be treated the same as intrafamily immunity. Guest statutes are problematic enough without subjecting them to a choice-of-law exception that was adopted for another purpose. If guest statutes do warrant special treatment, the

150. IND. CODE § 34-30-11-1 (1998).

151. *Gollnick v. Gollnick*, 539 N.E.2d 3 (Ind. 1989).

152. The Ohio Supreme Court clearly expressed the duty of its state courts in *Schiltz v. Meyer*, 280 N.E.2d 925 (Ohio 1972). The supreme court held that the substantive law of Ohio, including its guest statute, would apply to an Ohio suit arising out of an Ohio accident between a Kentucky plaintiff and defendants from Kentucky and Ohio. *Id.* at 927. The supreme court explained:

In this case, the plaintiffs have chosen Ohio rather than their state of residency as the forum state. In so doing, they have increased our governmental interest beyond that of merely being the state in which the accident occurred. We now have the additional interest of advancing, in our courts, those policies which our General Assembly has seen fit to maintain in this area of tort law. Until such time as the General Assembly amends or repeals our guest statute, we are bound to apply it in cases before our courts wherein the accident occurred in Ohio.

*Id.* at 927; see also *Conklin v. Horner*, 157 N.W.2d 579 (Wis. 1968) (refusing to apply the Illinois guest statute to a suit involving an accident in Wisconsin between Illinois residents).

153. See *Gollnick v. Gollnick ex rel. Gollnick*, 517 N.E.2d 1257, 1257-59 (Ind. Ct. App. 1988), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989).

154. *Id.* at 1258-59 (citing *Emery v. Emery*, 289 P.2d 218 (Cal. 1955), and *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967)).

supreme court should create an exception that is crafted to the peculiarities of the guest statutes and preserves the legislative intent behind their enactment.

In *Gollnick*,<sup>155</sup> the court of appeals cites *Emery v. Emery*,<sup>156</sup> a case in which the California Supreme Court applied the law of the parties' domicile (California) to determine the issue of parental immunity.<sup>157</sup> It is particularly significant that in *Emery* the court also applied the guest statute of the place of the tort (Idaho) to determine the applicable standard of liability.<sup>158</sup> The Idaho guest statute, like the Indiana guest statute, did not bar an action by a guest against a host but limited liability to situations in which the guest proves a certain standard of gross misconduct.<sup>159</sup> According to the supreme court in *Emery*, the guest statute was a duty-of-care issue in tort while parental immunity was an issue of family law.<sup>160</sup>

The distinction between a "capacity to sue"<sup>161</sup> and a standard of liability is also significant. In *Gollnick*, parental immunity would ultimately decide whether the plaintiff could maintain a cause of action against her father. The court of appeals in *Gollnick* relied on several cases that addressed the question of capacity to sue and not the standard of liability.<sup>162</sup> Where a true capacity-to-sue question is involved, the courts are more inclined to apply the law of the parties' domicile.<sup>163</sup> It is reasonable to infer from this fact that courts understand that a statute altering the standard of liability probably has more nuanced underlying purposes than does the basic immunity doctrine.<sup>164</sup>

---

155. *Id.* at 1258.

156. 289 P.2d 218 (Cal. 1955).

157. *See id.* at 223.

158. *See id.* at 221.

159. *See id.* The Idaho guest statute provided:

No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others.

*Id.* (citing IDAHO CODE § 49-1001 (1948) (current version at IDAHO CODE § 49-2415 (2000))).

160. *See id.* at 221-22

161. *See, e.g., id.* at 222.

162. *See* *Armstrong v. Armstrong*, 441 P.2d 699, 699 (Alaska 1968) (noting Canadian statute bars tort action between spouses while living together); *Wartell v. Formusa*, 213 N.E.2d 544, 545 (Ill. 1966) (noting Florida law bars interspousal action in tort during coverture); *Aurora Nat'l Bank v. Anderson*, 268 N.E.2d 552, 553 (Ill. App. Ct. 1971) (assuming for the purposes of its opinion that Iowa law grants complete parental immunity).

163. *See Emery*, 289 P.2d at 222-23.

164. The *Second Restatement* is also clearer on the question of interspousal immunity than on the proper choice of law regarding interspousal standards of liability:

In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved. So if a husband injures his wife in a state other than that of their domicil, it may be that the state of conduct and injury has the dominant interest in *determining whether the husband's conduct was tortious or whether the wife was guilty of contributory negligence*. On the other hand, the state of the spouses' domicil is the state of dominant interest when it comes to the

The court of appeals also cites *Wessling v. Paris*<sup>165</sup> in *Gollnick*.<sup>166</sup> In *Wessling*, two Kentucky residents in a host-guest relationship had an accident in Indiana.<sup>167</sup> The Kentucky Court of Appeals<sup>168</sup> noted the substantial Kentucky contacts in the case and asserted that the occurrence of the accident in Indiana was "fortuitous."<sup>169</sup> The court said that Indiana did not have any interest in the case before it, but added, "While it might be said that Indiana has a policy of protecting drivers on their highways from claims by passengers, surely this must extend no further than an interest in protecting Indiana residents or those who sue in Indiana courts."<sup>170</sup> Not surprisingly, a pattern emerges among cases where courts find that the state in which the accident occurred has no interest in the application of its guest statute.<sup>171</sup> Especially when the suit is not brought in the state with the guest statute where the "fortuitous" accident occurred. Often the forum state is the domicile of one or more parties to the suit as well, and consequently, the concerns leading to the enactment of the guest statute—insurance fraud within the state and wasting of the state's legal resources—are no longer an issue.

Outside the *Gollnick* exception, the applicability of a guest statute will be subject to the ordinary application of the *Hubbard* rule. In most automobile accident cases—the only cases where the guest statute comes into play—the place of the tort will be the same as the place where the alleged negligent conduct occurred.<sup>172</sup> Because whether the defendant's conduct is negligent will be determined by the rules of the road of that same place, the significance factor of the first step of the *Hubbard*

question *whether the husband should be held immune from tort liability to his wife.*

SECOND RESTATEMENT, *supra* note 3, § 6 cmt. f (emphasis added). This ambiguity is most likely rooted in the difference between the policies responsible for the immunity doctrine and those behind laws like the guest statute that alter the standard of liability.

165. 417 S.W.2d 259 (Ky. 1967).

166. *Gollnick v. Gollnick ex rel. Gollnick*, 517 N.E.2d 1257, 1259 (Ind. Ct. App. 1988), *aff'd and adopted per curiam* by 539 N.E.2d 3 (Ind. 1989).

167. *Wessling*, 417 S.W.2d at 259.

168. Before 1976, the Kentucky Court of Appeals was the highest court in Kentucky. In 1976, the term "Kentucky Supreme Court" replaced "Kentucky Court of Appeals" as the name of the highest court. See K.Y. CONST. of 1891, § 109, *as amended by* 1974 Ky. Acts. Ch. 84, §§ 1-3 (effective Jan. 1, 1976).

169. *Wessling*, 417 S.W.2d at 261.

170. *Id.* at 260.

171. See *id.* at 261 (declining to apply the Indiana guest statute to a Kentucky suit involving an accident in Indiana between Kentucky residents); *Tooker v. Lopez*, 249 N.E.2d 394, 398 (N.Y. 1969) (declining to apply the Michigan guest statute to a New York suit involving an accident in Michigan between New York residents); *Babcock v. Jackson*, 191 N.E.2d 279, 284-85 (N.Y. 1963) (declining to apply the Ontario guest statute in a New York suit involving an accident in Ontario between New York residents). *But see* *Neumeier v. Kuehner*, 286 N.E.2d 454, 456 (N.Y. 1972) (applying the Ontario guest statute in a New York suit involving accident in Ontario between an Ontario plaintiff and a New York defendant to the advantage of the New York defendant).

172. The only exception that this author can fathom is where a driver negligently causes his vehicle to spin out of control and then slides across the state line before his passenger suffers any injuries.

rule will be satisfied and *lex loci delicti* should apply.

The de facto result of the *Hubbard* rule is that the doctrine of *lex loci delicti* will determine the applicability of a guest statute in practically every case. The advantages of applying *lex loci delicti* are its "predictability, uniformity, and discouragement of forum shopping."<sup>173</sup> While the faults of *lex loci delicti* in this context are well documented,<sup>174</sup> it remains the only doctrinally sound approach to the guest statute under the *Hubbard* rule—at least until the supreme court chooses to address the unique history of the guest statute through an appropriate exception.

#### CONCLUSION

When the Indiana Supreme Court departed from the strict application of *lex loci delicti* in *Hubbard*,<sup>175</sup> the *Second Restatement*<sup>176</sup> was already sixteen years old. In crafting the *Hubbard* rule, however, the Indiana Supreme Court appeared just as wary of the *Second Restatement* as it was disappointed with *lex loci delicti*.<sup>177</sup> Certainly, the supreme court's doubts about the *Second Restatement* were justified. Upon its publication, academics greeted the *Second Restatement* with a flurry of criticism, some of it rather brutal.<sup>178</sup> They argued that the *Second Restatement* was "too much of a compromise among conflicting philosophies, too vague, exceedingly elastic, unpredictable, directionless, and rudderless."<sup>179</sup> By retaining the presumptive application of *lex loci delicti* when the place of the tort is significant, the Indiana Supreme Court avoided some of the concerns about vagueness and unpredictability that so animated the critics of the *Second Restatement*.

In contrast to the Indiana supreme court, other state judiciaries have been quicker to adopt the *Second Restatement*.<sup>180</sup> As of the latest survey, twenty-one jurisdictions within the United States follow the *Second Restatement* in tort conflicts.<sup>181</sup> Now that the *Second Restatement* has become a powerful force nationally in choice-of-law doctrine, academics have begun to question whether it is time to begin drafting a new restatement of conflicts.<sup>182</sup> Many of the problems anticipated by early critics have been realized in practice, as courts applying the *Second Restatement* find little

173. See Yonover, *supra* note 4, at 1207.

174. See, e.g., Ehrenzweig, *supra* note 132, at 599-600; Charles D. Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 IND. L.J. 297 (1958); Yonover, *supra* note 4, at 1208 n.58 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 316 nn.21-22 (1981)).

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

176. SECOND RESTATEMENT, *supra* note 3, § 6 cmt. f.

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

178. See Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1249 & n.3 (1997).

179. *Id.* at 1250.

180. See generally Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 439 (2000).

181. See *id.* at 439 & n.12 (citing Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327, 329 (1999)).

182. See Symposium, *Preparing for the Next Century—a New Restatement of Conflicts?*, 75 IND. L.J. 399 (2000).

guidance in the accumulation of confusing and even contradictory precedents.<sup>183</sup> The conflict between *Hubbard*<sup>184</sup> and *Gollnick*<sup>185</sup> certainly deserves to be placed in the latter category—even though, ironically, the Indiana Supreme Court sought to stop short of adopting the *Second Restatement*. The resurgence of interest in more standard, workable rules should cue the Indiana Supreme Court to clear up the confusion surrounding the *Hubbard* rule so that Indiana choice-of-law doctrine does not drift further into the abyss of the *Second Restatement*.

The *Hubbard* rule may not be perfect, but it can be a workable compromise between *lex loci delicti* and the *Second Restatement*. The last thirty years under the auspices of the *Second Restatement* have shown that the Indiana Supreme Court had good reason to craft the *Hubbard* rule in the manner that it did. All that is left for the supreme court to do is to step in and clarify its earlier position so that the *Hubbard* rule has a chance to prove its merits. To that end, the Indiana Supreme Court is well advised to take note of the criticism lodged against the *Second Restatement*, especially when it fleshes out the second step of the *Hubbard* rule.

---

183. See Symeonides, *supra* note 180, at 447 & n.60.

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

185. *Gollnick v. Gollnick*, 539 N.E.2d 3 (Ind. 1989).