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Abstract: If a tortious act (e.g., negligently firing a rifle) occurs in state *X* and the harm (e.g., killing a bystander) occurs in state *Y*, which state's law should apply? This is a simple example of the "choice of law" problem in torts. The problem arises between states or provinces with different laws within one nation and between different nations. In this comment, prepared for the 2006 American Association of Law Schools Annual Meeting, I examine this problem largely in terms of incentive effects, and briefly consider how the analysis could be incorporated into the standard introductory course on tort law. I conclude that a *zone of foreseeable impact* rule provides the best underlying principle in conflict of law situations. This rule supports the traditional legal approach (*lex loci*) to conflicts of laws and helps to explain modern approaches as well.

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I. Introduction

If a tortious act (e.g., negligently firing a rifle) occurs in state *X* and the harm (e.g., killing a bystander) occurs in state *Y*, which state's law should apply? This is a simple example of the "choice of law" problem in torts. The problem arises between states or provinces with different laws within one nation and between different nations. In this comment I will discuss this problem largely in terms of incentive effects,[1] and also consider where this topic might be addressed in a torts course.

Choice of law is a complicated area and I will not attempt to provide a detailed account here. The approaches fall into several categories: law of place of harm (*lex loci delicti commissi*), law of place of conduct, law of forum (*lex fori*), and other tests that attempt to balance interests.[2] In this latter category is the "significant relationship" test of the Second Restatement, which looks to apply the law of the state which has the most significant relationship to the occurrence and the parties.[3] Also in the last category is the "proper law" test that looks to the law that has the greatest relevance to the issues involved in the dispute.[4]

I think the approaches can be put into four categories:
1. Law of forum.
2. Law of injury site.
3. Law of decision site.
4. Balancing tests.

The fourth category, balancing tests, includes both the significant relationship test of the Second Restatement, the proper law test, and any other test that involves balancing the different interests at stake. The third category, law of decision site, refers to the state in which the tortfeasor made the decision to commit the tort. This approach is not explicitly offered in most of the treatments of choice of law, but it is suggested by some of the analyses of specific examples. I want to identify the "decision site" option as a separable category.

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[1] On the economics of choice of law, see Richard A. Posner, Economic Analysis of Law 645-646 (Aspen, 5th ed. 1998); Michael E. Solimine, An Economic and Empirical Analysis of Choice of Law, Georgia Law Review, v. 24, 49-93 (1989); Stuart Thiel, Choice of Law and the Home-Court Advantage: Evidence, American Law and Economics Review, v. 2, 291-317 (2000). Other economic analyses focus on liability for environmental harms, see Andrew Eckert, R. Todd Smith, and Henry van Egteren, Environmental Liability for Transboundary Harms: Law and Forum Choice (University of Alberta, Edmonton, Working Paper No. 2005-01-10, 2005), available at http://papers.ssrn.com/abstract_id=653184; James R. Markusen, Edward R. Morey, and Nancy Olewiler, Competition in Regional Environmental Policies when Plant Locations are Endogenous, Journal of Public Economics, v.56, 55-77 (1995); Michael Rauscher, Environmental Regulation and the Location of Polluting Industries, International Tax and Public Finance, v.2, 229-244, (1995); Mads Greaker, Strategic Environmental Policy when the Governments are Threatened by Relocation, Resource and Energy Economics, v. 25, 141-154 (2003); Alistair Ulph, Harmonization and Optimal Environmental Policy in a Federal System with Asymmetric Information, Journal of Environmental Economics and Management, v. 39, 224-241 (2000).

[2] See Eugene F. Scoles, Peter Hay, Patrick Borchers, and Symeon C. Symeonides, Conflict of Laws 687-741 (West: St. Paul, Minn, 3d ed. 2000); Luther L. McDougal, Robert L. Felix, and Ralph U. Whitten. American Conflicts Law 447-487 (5th ed. 2001).

[3] Id. at 732.

[4] Id. at 725-31.

The traditional approach starts with *lex loci* and considers the site of conduct (which can be distinguished from site of decision) when there is no clear relevance to the site of injury – e.g., the injury could have happened anywhere or it is not clear where the site of the injury is.[5] Consider for example, a tort suit for interference with a marriage relationship. The adulterous act takes place in state *X*, and the faithful (injured) spouse lives in state *Y*. The site of the conduct is state *X*, while the site in which the injury is perceived is state *Y*. The traditional approach substitutes the law of state *X* in this case.[6] Another illustration of this problem is a tort suit for unfair competition. The unfair competition could take place in state *X*, while the injury could occur in state *Y*.

The most widely-accepted modern approach starts with the traditional focus on *lex loci* and deviates from that according to the significant relationship test of the Second Restatement.[7] To return to the marital infidelity example, the modern approach starts with the site of the injury as the default option, and then asks whether there is an alternative site that has a more significant relationship with the occurrence and the parties.

As this brief description suggests, *lex loci* remains alive and well in spite of the modern extensions and modifications. It is also the default rule in international conflict of laws settings. The discussion below examines the incentive arguments supporting or contradicting the traditional approach. I find that the incentive arguments generally support the traditional approach. I also conclude that a *zone of foreseeable impact* rule provides the best underlying principle or default rule in conflict of law situations.

II. Theory and Applications

Since I find the tests largely uninformative in the absence of specific examples, let us consider two. Both of the examples below have two versions.

A. Example 1

A accidentally shoots *B* with his hunting rifle. *A* is in state *X* and *B* is in state *Y*. *B* brings suit in state *Z*. Which state's law should apply, that of state *X* (site of decision and conduct), state *Y* (*lex loci*), or state Z (*lex fori*)?

1. *Version 1 of Example 1*

[5] This is probably an overly broad statement of the exception. However, the exceptions that had developed under *lex loci* seem to have this general feature in common – i.e., that the site of the injury seemed to bear no obvious relationship to the site of the conduct. See Scoles, et al. at 692-695 (discussing exceptions in cases of defamation, invasion of privacy, unfair competition, fraud, and several others).

[6] Scoles, et al. at 693; Albert v. McGrath, 278 F.2d 16 (D.C. Cir. 1960).

[7] Restatement (Second) of Conflicts of Laws (1971), §§145-178. Before the *Restatement (Second)*, Brainerd Currie's critique of lex loci encouraged many courts to rethink conflicts issues. See Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L. J. 171.

Suppose state *X* holds that hunters have no duty to avoid negligently injuring bystanders and state *Y* applies the negligence rule to hunting accidents. This difference in law might arise because of differences in local conditions. Suppose, for example, the deer in state *X* are unusually dangerous (e.g., spreading a fatal type of Lyme disease), so that there is a great benefit to the public from killing them. Under these conditions, courts in state *X* might excuse negligent shootings of bystanders and hold hunters liable only when they acted recklessly.

Since there is no duty to take care while hunting deer in state *X*, hunters in state *X* will not take care to avoid injuring bystanders. If the law of state *X* applies to hunting accidents in which the bullet travels from state *X* to state *Y*, hunters in state *X* will not take care to avoid injuring bystanders in state *Y*.

If we assume that the legal rules in each state provide the most desirable level of deterrence within that state, the fact that hunters in state *X* do not take care to avoid injuring within-state bystanders provides no basis for rejecting state *X*'s law. However, when hunters in state *X* shoot bystanders in state *Y*, they are imposing costs onto state *Y*, while providing no potentially offsetting benefit to state *Y*. On the assumption that state *Y*'s law is best (optimal) within its borders, these costs are likely to be excessive from a social perspective. In order to correct this problem, state *Y*'s law should be applied.[8]

This simple example supports the *lex loci* rule, and suggests that the underlying principle imposes liability based on the *zone of foreseeable impact*. Put another way, *lex loci* reflects the following principle: if the potential tortfeasor can foresee the zone of impact, or equivalently the place in which the victim will be harmed, the law of that zone applies to the tortfeasor's conduct. This principle also suggests that if the tortfeasor cannot foresee the zone of impact, the law of the place in which the tortfeasor committed the tort should apply, since there are no other reasonable options. In this example, if the tortfeasor cannot foresee that his conduct would injure a bystander in state *Y*, state *X*'s law should apply.

One could offer a moral basis for the zone of foreseeable impact principle. People should be encouraged to rely on the laws that apply to them. The argument is similar to that of *Vaughan v. Menlove*,[9] where the court held that an objective standard applied to torts, largely because an objective standard permits potential victims to rely on the assumption that the potential injurer would comply with that standard. However, the exception to the zone of foreseeable impact rule – that the law of the place of conduct applies if the zone of impact is not foreseeable – suggests that the moral argument is not entirely predictive of the underlying principle.

2. *Version 2 of Example 1*

[8] Suppose the hypothetical is reversed, so that the gunfire goes from state *Y* into state *X*. Since state *X* has an interest in shooting deer, there is an offsetting benefit, which justifies application of the no duty rule.
[9] 132 Eng. Rep. 490 (C.P. 1837).

Suppose that state *X* applies the negligence rule to shootings and state *Y* applies the strict liability rule. Although the alternative legal rules are easily stated, this example turns out to be considerably more complicated than the previous one. It requires us to take a closer look at deterrence analysis. The literature has distinguished care level and activity level effects.

Care level effects

By care level, I refer to the instantaneous level of precaution that an actor adopts when engaged in some activity. For example, one takes more or less care while driving by regulating the speed or looking frequently for pedestrians in the road. By activity level, I refer to the extent to which one engages in an activity. For example, one increases one's activity level by choosing to drive more.

One basic proposition from the deterrence theory literature is that negligence and strict liability have equivalent effects on care levels, while only strict liability affects activity levels.[10] The intuition for this is as follows. Suppose there is a negligence rule, and the actor chooses not to comply with it. He chooses not to comply because the cost of compliance, $2, is greater than the harm that would result from his failure to comply, $1; and given these numbers he would not be held liable under the negligence rule (as described by the Hand formula).[11] Now suppose the rule is switched to strict liability. Will the actor take more care? No. It is still the case that the cost of compliance is $2 while the additional liability is $1. He will not choose to spend $2 to avoid a liability charge of $1. This implies that we will observe the same care levels under strict liability and under negligence.[12]

There is a different result for activity levels. Under the negligence rule, the actor will not be held liable if the incremental cost of care exceeds the incremental harm. Under strict liability, the actor will be held liable in this case. This implies that actors who are engaged in activities that expose them to liability for injuries to others will bear higher costs under strict liability than under negligence, even though both are exercising the same level of care. Because activity costs are higher under strict liability than under negligence, activity levels will be lower under strict liability than under negligence.

The Coase theorem is also relevant to the choice of law problem.[13] If the parties involved in an accident could bargain ex ante over the rule of law that would apply, they would choose the rule that is optimal in light of their joint interests. The chosen rule may not be the best from society's perspective, because the parties may have ignored the interests of

[10] See, e.g., Steven Shavell, Strict Liability Versus Negligence, 9 Journal of Legal Studies 1 (1980).
[11] According to the "Hand formula", an actor is negligent if he fails to take care when the burden of taking care is less than the incremental harm that results from failing to take care. See United States v. Carroll Towing Co. 159 F.2d 169 (2d. Cir. 1947) (opinion in which Judge Learned Hand sets out the formula).
[12] This basic equivalence proposition does not necessarily hold if we take other factors such as litigation costs and uncertainty into account. However, it would complicate matters too greatly to do so, and the thought exercise usually conducted as the first effort to understand incentive effects is to imagine the rules working in a frictionless world of zero costs and perfect certainty.
[13] R.H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

third-party bystanders in choosing their preferred rule. However, if there are no third parties to worry about, their choice will be optimal as between themselves and for society overall. This is an implication of the Coase theorem (though that theorem also implies that the parties might choose to design their own rule).[14] We need not concern ourselves with this issue because in most accident settings the parties are not able to bargain ex ante over the legal rule that they would like to apply in the event that an accident occurs.

Recall that state *Y* has a strict liability rule and state *X* has a negligence rule. On deterring careless conduct, we know that, to a first approximation, the rules in states *X* and *Y* have the same effect. So in order to choose between these rules, we must consider activity level effects.

Activity level effects

Now we have to take a few steps back from the problem. Why would state *X* (the shooter's state) choose to adopt a negligence rule and state *Y* (the victim's state) a strict liability rule? If one state has adopted a socially desirable or optimal rule while the other has adopted a socially undesirable or suboptimal rule, then there is no reason to prefer the suboptimal law. The choice of law problem becomes simple under this assumption. However, suppose the rules are optimal given the conditions in each state.[15]

Why might a strict liability rule be optimal in state *Y* while a negligence rule is optimal in state *X*? The most likely answer is that the activity falling under the rule has a higher benefit-cost ratio in state *X* than in state *Y*.[16] For that reason, state *X* does not perceive a great need to discourage the activity, in comparison to state *Y*'s perception. In particular, if the ratio of externalized benefits to externalized costs is higher in state *X* than in state *Y*, it may be optimal for state *X* to adopt a negligence rule for shooting accidents while state *Y* adopts a strict liability rule.[17] Indeed, if we assume that the benefit-cost ratio is unusually high in state *X*, it may be optimal for state *X* to adopt a no-duty rule, as in the first example.

Suppose state *X* has a larger population of hunters than state *Y*. Hunting offers a few benefits to the general public. Suppose, for example, hunters reduce the deer population in state *X*, which reduces the population of deer predators (wolves, coyotes) and the harms caused by an excessive deer population (Lyme disease). The general public in state *X* benefits from reductions in the population of deer predators, because the animals

[14] In general, we should expect the parties to choose the legal regime that provides the greatest surplus of regulatory benefits in excess of enforcement costs, see Keith N. Hylton, Arbitration: Governance Benefits and Enforcement Costs, 80 Notre Dame L. Rev. 489 (2005). In some settings, the parties might choose to forgo a liability rule altogether and adopt in its place a "live and let live" rule. See Robert Ellickson, Order Without Law: How Neighbors Settle Disputes (Cambridge: Harvard University Press, 1991).
[15] As Posner notes, this immediately implies an advantage for the lex loci approach, because the home state is likely to have an advantage in determining optimal rules in light of local conditions, see Posner, supra note 1, at 646. For an earlier article noting the state's advantage in determining the best law given local conditions, see William F. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1 (1963).
[16] Keith N. Hylton, A Missing Markets Theory of Tort Law, 90 Northwestern U. L. Rev. 977 (1996).
[17] Id.

that hunt deer fawn might take an interest in hunting small children as well. The public also benefits from reducing the incidence of Lyme disease. On the other hand, hunting also externalizes costs to the general public (e.g., accidental shootings of people).

Conditions are different in state *Y*. The deer population is miniscule, so the external benefits of hunting are trivial. On the other hand, criminal activity is more rampant, and the guns hunters carry often get used for criminal purposes. Thus, in state *Y*, the externalized costs of the activity of shooting rifles is relatively high.

Given these assumptions, *lex loci* is the best rule on incentive grounds. The rule has to be evaluated in terms of its activity level effects, since we have already established that the care level effects of the two rules are equivalent. *Lex loci* deters the general activity of shooting from state *X* to state *Y*, which is desirable given the assumptions. Shooting from state *X* into state *Y* does nothing to help cull the deer population in state *X* and only imposes costs on people in state *Y*; hence it is desirable to reduce the activity of shooting from state *X* into state *Y*. Also, *lex loci* does not alter incentives within state *X* (victim and shooter both in *X*) or within state *Y*.

Suppose we use the law of the place of the conduct, the law of state *X*? Under this approach, we observe undesirable incentives. The activity of shooting from state *X* into state *Y* would be carried on at a socially excessive scale. In addition, shooters have an incentive to leave state *Y* in order to stand in state *X* and shoot into state *Y*. This is the activity level effect that would result from using the law of the site of conduct in this example. Since shifting activity from just within the border of state *Y* to just within the border of state *X* imposes costs without offsetting benefits, the change would be undesirable.

The general proposition implied by Example 1 is that when the choice of law rule affects activity levels, *lex loci* is the best rule. It avoids giving incentives to actors to shift their activities in a way that imposes new costs on society. It follows from this that the law of the forum state is generally not an attractive option on incentive grounds.

B. Example 2

This is a railroad example, based roughly on *Alabama Great Southern R.R. Co. v. Carroll.*[18] The train starts in state *X* and the injury occurs in state *Y*. An employee of the railroad is injured as the result of the negligence of a fellow employee. The fellow-servant rule applies in state *Y*.[19] State *X* holds railroads vicariously liable even when an employee is injured by the negligence of a fellow employee. The employee loses his suit against the railroad if the law of state *Y* applies, and he wins if the law of state *X* applies.

[18] 11 So. 803 (1892).

[19] Under the fellow-servant rule, an employer is not liable to employee *C* for injuries caused by the negligence of fellow employee *D*, unless the employer was negligent in hiring *D* or in monitoring employees. Farwell v. Boston & W.R. Corp., 45 Mass. 49 (1842).

Consider the following two versions of this case. Version 1: The negligent act of the fellow employee occurs in state *Y*. Version 2: The negligent act of the fellow employee occurs in state *X*.

1. *Version 1 of Example 2*

Under Version 1, the negligent act and the injury both occur in state *Y*. Which state's law should apply, state *X* (negligence) or state *Y* (fellow servant)? If the railroad has not been negligent in any way in training and monitoring the employee who caused the injury, then requiring compensation will do nothing to encourage precaution on the part of railroads. Compensating the injured employee, under this scenario, is equivalent to taxing the railroad's activity. This would be desirable to state *Y* only if it (or the courts of the state) perceived a need to reduce the activity levels of railroads operating in state *Y*. However, state *Y*'s decision to adopt the fellow-servant rule is an indication that it perceives no need to impose an additional tax on the provision of rail service within the state. It follows that there is no basis, in incentive concerns, for deviating from the *lex loci* rule. The only gain from deviating would be the compensation paid to the injured employee, but that is just a transfer, under the assumption of this hypothetical, from the railroad to the employee, serving no beneficial effect on the allocation of resources.

2. *Version 2 of Example 2*

Now consider Version 2, where the negligent act occurs in state *X* and the injury in state *Y*. In this case, the *lex loci* rule could have undesirable incentive effects. If the law that applies in state *X* (vicarious liability) provides the right level of deterrence, as assumed, applying *lex loci* introduces an exception that could weaken the state's law. First, applying *lex loci* allows the firm to escape paying damages for negligent acts of employees that result in injuries to fellow employees that occur in state *Y*. In addition, the rule would give the domestic railroad an incentive to move its activity to just outside of the boundary of state *Y*, in order to evade the regulatory effect of the negligence law in state *X*. Second, if state *X*'s adoption of this version of vicarious liability (recall that it applies even when the injury to an employee is caused by a fellow employee) reflected a desire to impose an additional tax on the activity of railroads, perhaps because state *X* perceives rail service as an activity with high social costs, applying *lex loci* undermines the state's effort to discourage the provision of rail service within its borders. Given this, the law of state *X* is preferable to that of state *Y*.

Version 2 of Example 2 can be altered so that state *Y* has the vicarious liability rule and state *X* has the fellow servant rule. Applying *lex loci* has the effect of taxing the activity of railroads in a manner that state *Y* clearly does not perceive as socially desirable, given its law.

This example supports carving an exception to the rigid form of *lex loci*, which would permit a deviation from the law of the injury state when the site of the injury is more or less random. Special exceptions that had developed under the *lex loci* rule incorporate such an exception, and modern balancing tests incorporate it explicitly. In the second

version of the hypothetical above, the site of the injury is unrelated to the decision that leads to the injury. Imposing the law of the decision state avoids weakening incentives for care, or incentives to reduce an activity, created by that state's law.

One could apply the significant relationship test to this example, to reach the same conclusions. The significant relationship test begins with *lex loci* as the default option and then asks whether it makes sense to adopt the law of the state with the more significant relationship to the parties and the accident. The foregoing argument could be used, within the framework of the significant relationship test, to reach the conclusion that state *X*'s law is the better choice in Version 2 of Example 2.

This is a good place to return to the *zone of foreseeable impact* rule. The traditional approach under *lex loci* seems now to be entirely consistent with the zone of foreseeable impact test mentioned earlier. The *lex loci* rule deviates in some cases from the law of the injury site when that site is incidental. This is consistent with a foreseeable impact approach, because such an approach would presumably deviate from the zone of impact when that zone is not foreseeable.

One question that the legal tests do not appear to address is what should be done when the site of the decision to commit a tort differs from the site of the conduct, both of which may differ from the site of the injury. Return to the example of interference with a marriage relationship. The adulterous parties may have entered into an agreement to commit adultery in state *Z*, agreeing to commit the act in state *X*, injuring one party's spouses in state *Y*. Under the view that the site of the injury is more or less incidental, the traditional law would look to the site of the conduct, state *X*. But in this hypothetical, state *X* may be more or less incidental too. This would suggest that the law of state *Z*, the state of the decision, should take effect. The difficulty with this solution is that there are instances in which the state of the decision, especially one involving a conspiracy, cannot be determined. The state of the conduct may be the only identifiable option in many instances.

III. Integrating Choice of Law into the Torts Course

How is all this connected to the basic torts course? One could view this material as related to the reasonable person standard and the determination of negligence – cases such as *Vaughan v. Menlove*, or *Stone v. Bolton*.[20] *Vaughan v. Menlove* shows that tort law adopts an objective rather than subjective standard. The choice of law question leads us to consider which objective standard among several should be applied, when several are available.

Just as *Vaughan v. Menlove* leads to a discussion of the reasonableness of relying on a certain objective care level taken by others, the choice of law problems takes us into reliance questions. A decision to apply the law of one state rather than another involves some implicit view that a certain standard of reliance is preferable to alternatives. *Lex*

[20] [1950] 1 K.B. 201 (C.A.); Bolton v. Stone, [1951] A.C. 850.

loci, coupled with *Vaughan v. Menlove*, says that people should be entitled to rely on the objective (perhaps average) standard of conduct determined by the law of the site of the injury.

Lex loci can be defended on the same grounds as the decision in *Vaughan v. Menlove*. *Vaughan v. Menlove* makes sense, one can argue, because potential victims of tortfeasors should not have to guess whether the tortfeasor is or is not capable of meeting the average level of care adopted by reasonable and conscientious agents. The *lex loci* rule says in effect that potential victims of tortfeasors should not have to guess whether the tortfeasor comes from another state which may apply an entirely different standard to the conduct leading to the injury.

However, *lex loci* does not always adhere to the principle that the law of the place of the injury governs. Courts make exceptions when the place of the injury is incidental or happenstance. This exception is hard to reconcile with the reliance argument that appears to support the decision in *Vaughan v. Menlove*.

Since the deterrence analysis in this note goes into questions of activity level effects and easily applies to transboundary pollution problems, the choice of law problem may fit better if covered in a course after the material on strict liability, specifically the nuisance and ultrahazardous activity cases.