

## TORTS AND CHOICE OF LAW: SEARCHING FOR PRINCIPLES

**By:**

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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 that can arise 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. 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 to torts conflicts (lex loci).

### 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 that can arise 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, 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 in one of 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 various interests. 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. 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.

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 the balancing of 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.

The traditional approach starts with *lex loci* and considers the site of conduct (which could be distinguished from site of decision in some cases) where there is no clear relevance to the site of injury – e.g., the injury could have happened anywhere or it isn’t clear where the site of the injury is. Consider for example, a tort suit for interference with a marriage relationship. The adulterous act takes place in state X, and the faithful 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 these cases. 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 (see Sections 155 and 156 of RST). 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 in conflict of law situations.