Choice of Law in Washington—The Evolution Continues

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Twenty years ago an analysis of choice of law principles in the state of Washington concluded with the following observation: "The evolutionary process has finally begun in Washington. It will be a long time in developing. The limitations on that development are only those imposed by the ingenuity, insights and degree of in-depth research and work of counsel and the court."1

Much has happened in the twenty years since that statement was made. On the national level, the United States Supreme Court has for the most part withdrawn from the scene and has imposed little control upon the states in the sense of constitutional limitations.2 Indeed, the states are now almost totally free to devise their own choice of law doctrines.3 The result is much diversity between states with each independently developing its own choice of law principles.4

Washington now has its own unique methodology.5 This article will discuss the developments of the past twenty years. The discussion will include an analysis of what the Washington courts have said and actually done and an evaluation of problems still to be resolved.

I. THE BEGINNINGS

The present Washington approach to conflict of laws had its origin in two cases decided the same day in 1967. In Baffin Land Corp. v. Monticello Motor Inn, Inc.,6 an action was brought to collect delinquent payments under a television rental agreement between a Dela-

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5. The United States Supreme Court has stated that each of the fifty states "applies its own set of malleable choice-of-law rules." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981).
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ware corporation, authorized to do business in Washington, and Mr. Clark, who, on behalf of the marital community of himself and his wife, was operating a motor inn in Washington. The agreement was signed in Washington by Mr. Clark and a salesman of the corporation and forwarded to New York where it was signed by a vice president. Under the provisions of the agreement, a binding contract was not formed until the signature was affixed in New York. Subsequently, the Clarks were divorced. The trial court entered a judgment against the motor inn and Mr. Clark but denied recovery against the wife. The court held that the obligations of the contract were governed by the rule of *lex loci contractus*, and because the last act necessary to form a binding contract occurred in New York, New York law governed. The trial court further found that under New York law neither the wife nor the community was liable.

The Washington Supreme Court reversed. The court stated it would no longer adhere to the rule of *lex loci contractus* and the "largely discredited" theory of vested rights. Rather, the court adopted the "better rule" that the law of the state with which a contract has the most significant relationship will govern the validity and effect of the contract. Advantages seen in the new approach were more flexibility, less arbitrariness, and greater emphasis to the desires and expectations of the parties. Recognition was given to the drafters of the *Restatement (Second) of Conflict of Laws* as providing the "basic stepping stone" to a better contracts choice of law doctrine.

The court stressed that the new approach was not to count contacts, but rather to consider which contacts were most significant. Nevertheless, the court went on to list the contacts with Washington and New York and to conclude that Washington was the state with the most significant relationship to the contract. Although the court discussed the importance of various contacts, such as the place of rendition of services under the contract, it is not entirely clear why the Washington contacts were more significant than the New York contacts.

It is clear that the content of the law of the two states and the policies behind, and purposes of, such laws were not controlling nor even of any consequence. For it was only after the court had concluded that Washington was the most significant state that the court turned to

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7. The court stated that the "most significant relationship" theory, the "center of gravity" theory, and the "most significant contacts" approach are "roughly synonymous." *Baffin*, 70 Wash. 2d at 896 n.1, 425 P.2d at 625 n.1.

8. *Id.* at 900, 425 P.2d at 627.
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“the question of what the applicable Washington law is.” The court held that under Washington law the agreement signed by the husband created a community obligation and that the plaintiff was entitled to satisfy its judgment out of any property held by either spouse which was formerly the couple’s community property. Nothing was said about the content of the New York law.

On the same day as Baffin, the court decided Pacific States Cut Stone Co. v. Goble. Quarry machinery located in Oregon was sold by plaintiff, a Washington corporation, to Goble and Wallace, who, along with their wives, were Washington residents. The conditional sales contract was signed in Oregon, after which the machinery was removed to Washington. The purchasers defaulted in their payments, and an action was instituted against them, their wives, and the respective marital communities. The trial court applied the rule of lex loci contractus and held that because the contract was made in Oregon, that law governed. The trial court further held that under Oregon law neither the defendant wives nor the defendant communities were liable; judgment was entered only against Goble and Wallace. The Washington Supreme Court reversed the judgment as to the communities.

Relying upon Baffin, the court applied the most significant relationship approach. Although all the parties were from Washington, the court concluded that the most significant contacts, such as place of execution, negotiation, and performance, and situs of the subject matter of the contract, were in Oregon. As in Baffin, the decision was reached with only a listing of the contacts and without consideration of the laws of the two states.

The actual basis for the final judgment, however, was that the case did “not present a true conflict choice of law problem.” This was so because, in the court’s view, the result was the same under both Oregon and Washington law, namely, that the defendant communities were liable.

9. Id. at 903, 425 P.2d at 629.
10. It has been suggested that an examination of the laws of the two states would have concluded that both states’ internal law imposed liability on the wife. See J. Nafziger, supra note 4, at 162 (1985).
12. Id. at 909, 425 P.2d at 632.
13. This part of the Goble reasoning was later criticized by the Washington Supreme Court. In a footnote in Pacific Gamble Robinson Co. v. Lapp, 95 Wash. 2d 341, 345 n.1, 622 P.2d 850, 854 n.1 (1980), the court said:

In fact, Pacific States Cut Stone Co. v. Goble, 70 Wn.2d 907, 425 P.2d 631 (1967), was in error in finding a false conflict. The case involved a debt incurred in Oregon by two
The two cases laid the foundation for the creation of new conflict of laws doctrine. For contract questions, the orthodoxy of place of making or place of performance was no longer to be applied. To the extent that the laws of two states were the same, or, even if different, would produce the same result, and thus there was a "false" conflict, the case would be decided to reach that result. To the extent that there was a "true" conflict, the analysis would be in the context of determining which state was the one of most significant relationship.

II. BEYOND CONTACTS

Like Baffin and Goble, the third modern choice-of-law case in Washington arose in a contract-community property setting. The analysis, however, was much different than in the first two cases. In Potlatch No. 1 Federal Credit Union v. Kennedy, an Idaho creditor sought recovery on a note against several defendants including a Washington resident who had cosigned the note without his wife's knowledge. Recovery was also sought against the community although it had received no benefit from the husband's assumption of the comaker's obligation.

Under Washington law, community property was liable for the suretyship debt of one of the parties only if the community had been benefited by the obligation. Under Idaho law, the community was liable for the separate debts of the husband irrespective of whether they were incurred for the benefit of the community. The Washington Supreme Court affirmed the trial court's application of Washington law and held that neither the wife nor the community was liable.

The court restated the Baffin most-significant-relationship approach, said it applied to suretyship contracts, and reaffirmed that the principle did not involve merely counting contacts. The new analysis was the statement that an identification of contacts is meaningless without consideration of the interests and public policies of potentially concerned states and a regard as to the manner and extent of such policies as they relate to the transaction in issue. Further, the compet-

husbands who were Washington residents. The result under Oregon law would not subject the wives' earnings to the debt, because their wages were separate property, as that term is defined in Oregon, ORS 108.050. The result under Washington law would subject the wives' earnings to the debt, because (1) the debt was a community obligation, (2) community property was reachable to satisfy it, and (3) the wives' earnings were community property in Washington. Thus, a real, not false, conflict was presented in the Pacific States Cut Stone Co. case, although the court failed to recognize it (Emphasis in original).

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ing policies must be weighed against the justified expectations of the parties.

With this framework for analysis, the court noted that Idaho had an interest in applying its law to protect the Idaho creditor. Washington had an equal interest in applying its law to protect the Washington community. Further, the property which would be executed upon in the event of a judgment against the community was in Washington. Thus, a true conflict existed. This was so because the two states had conflicting public policies as to the liability of the community and each had an interest in the application of its law because of the contacts with the transaction.

The court resolved the problem by examining the expectations of the parties. It concluded that the wife, had she known of the transaction, would not have expected that her husband in Washington would become vested with a new power under Idaho law to override the protections she had under Washington law. On the other hand, the Idaho creditor knew it was dealing with Washington residents, and the court concluded that had the creditor considered the matter, it would have known that any execution of a judgment would be on Washington property in Washington courts. The court held that the law of Washington had the most significant relationship to the issue of community liability.

In Baffin, the court did little beyond listing the contacts and making a conclusory statement as to the most significant relationship. The opinion left uncertainty as to why the conclusion followed from the contacts listed. In Potlatch, in addition to the notation of contacts, there was a consideration of the public policies of the states, the interests of the states, and the expectations of the parties in a multistate context. One can more easily understand why Washington law was chosen. The opinion thereby represents considerable advancement in doctrine.¹⁵

The court also stressed that it was deciding only that Washington law governed on the issue of whether the community property of Washington residents was subject to the suretyship obligation of the husband entered into with the Idaho creditor with no benefit to the community. As to other issues, different policies, interests, and expectations might lead to a different law. This also represents doctrinal evolution.

¹⁵ Compare the evaluation in Powers, Formalism and Nonformalism in Choice of Law Methodology, 52 Wash. L. Rev. 27, 60–62 (1976).
One might speculate as to the result that would have been reached had suit been brought in Idaho with that court applying a similar analysis. Would an Idaho court have applied Idaho law and allowed recovery against the community? If so, would that mean that each court was actually applying its own law because it was the forum or because its law was the "better" law? We do know that the Washington court did not assert either of those factors as reasons for the application of its own law.

Almost five years elapsed before the Washington Supreme Court again dealt with a choice of law problem. During the interim, the courts of appeals noted that the older orthodoxy had been replaced by newer doctrine. Reference was made only to Baffin, however, and not to Goble and Potlatch. The courts of appeals simply recited the most significant contacts rule, listed contacts, and concluded that some were more significant than others.16 Little guidance was provided for the reader as to why this was so.

Two cases of consequence were decided by the supreme court in 1974. The first, Granite Equipment Leasing Corp. v. Hutton,17 involved a guaranty contract with contacts with Washington, New York, Arizona, and Oregon. The supreme court reversed the trial court judgment for the defendant which was based on a determination that Arizona law should govern. There were alternate bases for the supreme court decision. First, although the contract called for the application of New York law, neither party had pleaded such law. Consequently, New York law was assumed to be the same as Washington law and, under Washington law, the defendant had no defense.18

Second, the court stated that even if the above procedural rule did not exist so as to make the choice of law of the parties effective via substitution of the law of Washington for that of New York, Washington law governed. This conclusion followed from an application of the Baffin doctrine as embellished by Potlatch. That is, in the absence of a

16. In Warner v. Kressly, 9 Wash. App. 358, 512 P.2d 1116 (1973), an action to recover a real estate broker's commission, the contacts in Idaho were deemed more significant than those in British Columbia. In Burkett v. McCaw, 9 Wash. App. 917, 515 P.2d 988 (1973), as to a question of the effect of a settlement agreement, Alabama was deemed to have the most significant relationship.

17. 84 Wash. 2d 320, 525 P.2d 223 (1974).

18. In accord was Save-Way Drug, Inc. v. Standard Inv. Co., 5 Wash. App. 726, 490 P.2d 1342 (1971). It invoked the principle that the law of another state of the United States (in this instance, Oregon) would be judicially noticed, if pleaded. If not pleaded, the other state's law would be assumed to be the same as Washington law. In actuality, the court knew the content of the Oregon law, which was stated to be similar to that in Washington.
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choice of law by the parties, the significant relationship approach applied. The court identified the contacts of the several states, the interests and public policies of the potentially concerned states as they related to the transaction, and the expectations of the parties.

What, again, of the fact that the parties in the contract had called for the application of New York law? Apparently, if that law had been pleaded, it would have governed. This was suggested by the court's statement that:

If the choice of this law [New York] should become ineffective for any reason, the facts indicate that these parties would expect to proceed under Washington law to settle any contract difficulties. All their dealings occurred in Washington; they each maintained offices in Washington; and the officers and directors of respondent all lived in Washington.19

The court said that it was thereby clear that Washington was the state of the applicable law because it was the state with the most significant relationship to the contract of guaranty. In summary, then, the expressed intent of the parties apparently would have been implemented had either party advised the court of the New York law. Lacking that, an examination of the interests and public policies of Arizona and Washington and of the expectations of the parties led to Washington law. As in Potlatch, the reader can understand why Washington was chosen.20

The second, and even more noteworthy, case in 1974 was Werner v. Werner.21 The case was complex, but for present purposes may be viewed as a negligence action against California notaries. The plaintiffs contended that a notarized forgery was affixed in California to a document affecting interests in land in Washington and that the notaries were liable for the loss that thereby resulted.22

20. For a different evaluation, see Powers, supra note 15, at 62.
22. In addition to the choice of law disposition, the case was noteworthy for what was said about personal jurisdiction and forum non conveniens. The court first concluded that there was personal jurisdiction over the California notaries under the Washington long arm statute because of the "commission of a tortious act within this state" and that the exercise of such jurisdiction would not violate due process. See Wash. Rev. Code § 4.28.184(a)-(b). On the second point, the court approved the doctrine of forum non conveniens and thereby overruled Lansverk v. Studebaker-Packard Corp., 54 Wash. 2d 124, 338 P.2d 747 (1959), which had rejected that doctrine. See Trautman, Forum Non Conveniens in Washington—A Dead Issue?, 35 Wash. L. Rev. 88 (1960). The case was remanded to the trial court to determine in its discretion whether to proceed in Washington or to dismiss the action because of the California witnesses, parties, and law, the latter of which the court concluded should govern.
Relying upon *Baffin* and *Potlatch*, the court turned to the most significant contacts approach. Of major consequence was the fact that all previous modern cases involved contract problems. *Werner* was the first case in which the new approach was applied in a tort context.

In deciding whether to apply Washington or California law, the court identified the contacts with each state. The court noted that the land, the plaintiff purchasers, and the real estate agent were in Washington. On the other hand, the notaries, their employers and sureties, and probably the forgers were in California. Most importantly, according to the court, the notaries were public officers of the state of California. Without further discussion, the court stated, “Thus, their duties as notaries and potential liabilities must be defined according to California law.”

Nothing was said about the interests and public policies of the two states. Only California cases and statutes were cited and discussed in the principal text of the opinion. The court concluded that, if proved, the failure of the notaries to take the required care in properly ascertaining the identity of the forgers would constitute actionable negligence under California law. In a footnote, the court noted that Washington law exacted a similar burden of care from its notaries, thereby suggesting that the matter might have been resolved simply on the basis of a false conflict.

In one sense, *Werner* represented an extension of the new methodology, namely that it applied to tort questions as well as contracts. In another sense, *Werner* was a retrenchment. The court ignored the public policy/interest analysis of *Potlatch* and returned to the more simplistic and primitive analysis of *Baffin*.

Implicitly, however, *Werner* acknowledged the importance of one aspect of the *Potlatch* analysis. Although the court held that Califor-

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24. *Id.* at 370, 526 P.2d at 377.

R. LEFLAR, L. MCDOUGAL III & R. FEIX, *CASES AND MATERIALS ON AMERICAN CONFLICTS LAW* 367 (1982) says of the case: “Because both states prescribed similar burdens of care, the choice-of-law question seems less than crucial. . . .” The authors then ask: “What if Washington law had prescribed a noticeably higher standard of care, such as making Washington notaries insurers of the identity of affiants?”

Compare J. NAHzGIER, *supra* note 4, at 176, which speaks of *Werner* as a “true conflict.” Nafziger also states:

Beginning with the bold statement that “[t]he proper choice of law in this case is a rather clearcut matter,” . . . the court seemed to say that, although California and Washington impose a similar burden of care on notaries, it is easier to impose liability in California for the “misconduct or neglect” . . . of a notary than in Washington.

*Id.* at 175. In contrast, Nafziger characterizes *Werner* as “what may have even been a false conflict.” *Id.* at 183.

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nia law governed as to the duties and liabilities of the notaries, it stated in dictum that if a question of title to immovables were involved, it would apply the law of Washington as the state of the situs. Therefore, *Werner* reaffirmed that the newer doctrine anticipates an issue by issue analysis.

III. INTEREST ANALYSIS

The next major development of the new methodology came in *Johnson v. Spider Staging Corporation*. The defendants, Washington corporations, manufactured a scaffold in Washington. A resident of Kansas was killed in that state when he fell from the scaffold. A wrongful death action was brought on a theory that the scaffold was defectively designed. Kansas had a $50,000 recovery limitation for wrongful death whereas there was no damage limitation under Washington law. The Washington Supreme Court reversed a trial court summary judgment for the defendants which held Kansas law controlled.

The court relied upon the *Restatement (Second) of Conflict of Laws* and stated that the significant relationship rule applied to tort choice-of-law problems as well as to contract. The Washington contacts were as the state of incorporation and principal place of business of the defendants; the state in which the scaffold was designed, tested, and manufactured; the state of origination and development of the defendants' advertising; the state of shipment and passage of title to the scaffold; and the state which set the safety requirements for the scaffold. The Kansas contacts were as the state in which the decedent and his representative resided and were domiciled; the state of the decedent's

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25. Traditional choice of law rules support this position. In addition, the court cited the *Restatement (Second) of Conflict of Laws* § 222 topic 2 (1971).

26. One other significant case decided in 1974 was *Byrne v. Cooper*, 11 Wash. App. 549, 523 P.2d 1216 (1974). The court held that statutes or decisional law of a foreign country must be pleaded. This was said to mean that foreign country statutes should be set forth with their citations and decisional law should be concisely recapitulated. Judicial notice of foreign country law was refused and proof of such law required. In the event such proof was lacking, it was said that the claim or defense based thereon must fail. The latter conclusion was qualified by a suggestion that the trial court was free, in its discretion, to consider any source or material to resolve the issue of foreign law. Lastly, the issue was said to be one for the court not a jury. Until 1983, the case was often referred to as stating the general procedure for pleading and proving foreign country law. As of 1983, there is now a pertinent rule of court, *WASH. SUPER. CT. Civ. R. 9(k)*, discussed *infra* notes 100-08 and accompanying text.

27. 87 Wash. 2d 577, 555 P.2d 997 (1976).

28. In addition, the trial court had dismissed the wrongful death action on the ground of forum non conveniens. This determination was also reversed. *Id.* at 579-80, 555 P.2d at 999-1000.
place of business; the state in which the scaffold was ordered from the defendants' local distributor; and the state of the accident and the decedent's death. The court concluded that the contacts were evenly balanced.

The court then turned its attention to a consideration of the interests and public policies of the two states, an approach which the court labeled as "state interest analysis." The court stated that a state's interest in limiting wrongful death damages is to protect defendants from excessive financial burdens and to eliminate speculative claims and difficult computation issues. Since Kansas was not the forum and the defendants were not from Kansas, Kansas had no interest in the application of its law.

On the other hand, Washington's allowance of unlimited recovery was said to be a deterrent policy. Such recovery would deter tortious conduct and encourage manufacturers to make safe products. Since one of the states, Washington, had an interest in the application of its law and the other state, Kansas, had none, there was a classic false conflict and Washington law governed.

The result was buttressed by reliance upon a factor more often of consequence in a contract than in a tort setting, namely, the expectations of the parties. The court noted that the defendants advertised and sold their products in all fifty states, only a few of which had wrongful death limitations. They designed and manufactured their product in an unlimited recovery state. In addition, they carried liability insurance in excess of the Kansas limitation. The Johnson court concluded that the defendants could not have justifiably relied on the Kansas limitation.

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29. Id. at 582, 555 P.2d at 1001. The court stated that such analysis was contemplated by RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 comment d (1971), wherein it is stated:

Whether there is such another state should be determined in the light of the choice-of-law principles stated in § 6. In large part, the answer to this question will depend upon whether some other state has a greater interest in the determination of the particular issue than the state where the injury occurred. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and of the particular issue involved (see § 145. Comments c–d).

(Emphasis in original).

30. Interestingly, although Kansas was the state with the limitation, the court cited no Kansas authority, but rather two California cases, Hurtado v. Superior Court, 11 Cal. 3d 574, 580–81, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), and Reich v. Purcell, 67 Cal. 2d 551, 556, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

31. Interestingly, again, the court cited no Washington authority, but a California case, Hurtado, 522 P.2d at 672, as supporting such a policy.

32. Johnson, 87 Wash. 2d at 583 n.3, 555 P.2d at 1002 n.3.
The court might have supported its conclusion with another factor. Although Kansas had a $50,000 limitation at the time of the accident and death in 1971, in 1975, Kansas enacted a new statute which imposed a $25,000 limit on nonpecuniary damages, but placed no limitation on recovery for pecuniary loss. This change can be viewed as a movement toward the Washington position of no limitation whatsoever.

Although the court found a false conflict, the Kansas limitation could be seen as embodying an affirmative policy as to what is adequate compensation for the damage suffered, particularly when the injured party is from Kansas. Kansas would then have an interest in the application of its law just as Washington did in the application of its law. Thus, a true conflict might exist, requiring a different rationale to resolve the matter.

Also, the court might have found that the purpose behind the unlimited recovery provision in Washington was not one of deterrence of conduct by defendants but rather protection for plaintiffs. Because the plaintiff was not a Washington domiciliary, Washington would have no interest in limiting recovery by its resident. That would mean neither state had an interest. Instead of a false conflict, or a true conflict, there would be what has been labeled as the unprovided-for case, again requiring a different rationale.

Of the several possibilities, the result reached by the Washington court is preferable. The court's analysis and conclusion deserve commendation. Kansas and the plaintiff obviously had no objection to full recovery. Broad application of the Washington law might have a deterrent effect and allowing non-Washingtonians to benefit as much as Washingtonians achieved equality. The Washington defendant received fair treatment in that it needed only to look to its own law.

33. The court noted this development, but seemingly placed no reliance upon it in reaching its eventual conclusion. See id. at 578 n.1, 555 P.2d at 999 n.1.

34. That term was not used. The actual language was: “[w]hen one of the two states related to a case has a legitimate interest in the application of its law and the other state has no such interest, clearly the interested state’s law should apply.” Id. at 583, 555 P.2d at 1002. Kansas had “no interest” and Washington had a “legitimate interest.”


36. See also Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), wherein decedent an Ontario, Canada domiciliary was killed in Ontario in an automobile driven by the defendant, a New York domiciliary. Ontario had a guest statute which benefited the defendant whereas New York had no such statute thereby benefiting plaintiffs. Ontario law was held to govern.

and could insure in accordance with the anticipated risk. One must remember that the court was deciding a particular issue arising in the context of particular contacts, laws, interests, and policies. A change in any particular might have altered the outcome.\textsuperscript{38}

While the result reached seems the most desirable one, the fact that various policies and purposes for the law of Washington and Kansas can be hypothesized is to be noted. One danger in an interest-analysis approach is that counsel and/or the court will engage in speculation about policies behind the potentially governing laws, speculation not supported by legislative or judicial record or history. In the\textit{Johnson} case itself, no Washington or Kansas authority was cited in support of the stated purposes for the respective state laws. One must be careful about such speculative analysis. At the same time, it is not unusual for a court engaged in the common law judicial process to do so.

Another explanation for the case is possible. One might view\textit{Johnson} as an instance in which the Washington court applied what it thought to be the "better law," without so stating. After all, full recovery was the better result, was it not? Even if not the controlling consideration, it might weigh as a factor with the court and, at the very least, seems worthy of suggestion by counsel.\textsuperscript{39}

Although there may be some question whether\textit{Johnson} supports a "better law" approach, it is clear that the case extended the new methodology. State interests and policies were looked to in a tort setting. Thus, just as\textit{Potlatch} went beyond\textit{Baffin} in the resolution of contract choice-of-law problems,\textit{Johnson} went beyond\textit{Werner} in resolving tort problems.

Two decisions by the courts of appeals invoked and applied the supreme court doctrine as developed through\textit{Johnson}.\textsuperscript{40} First was

\textsuperscript{38} The court relied upon the\textit{Restatement (Second) of Conflict of Laws} in support of its general approach. Arguably, the resolution of the particular issue was not supported by the\textit{Restatement}. Section 175 anticipates that usually the law of the state of injury will apply in an action for wrongful death and Section 178 extends that application to a determination of the measure of damages. Comment \textit{a} specifically states that "[t]he law selected by application of the rule of this Section determines, for example, whether any limitations shall be imposed upon the amount of recovery. . . ." Arguably, this would call for Kansas law to be applied in\textit{Johnson} although the\textit{Restatement} approach does not so mandate and is flexible enough to allow for the result reached by the Washington court.

\textsuperscript{39} Professor Leflar, the leading proponent of a "better law" analysis, viewed\textit{Johnson} with approval. Leflar,\textit{Choice of Law: A Well-Watered Plateau}, \textit{41 Law \& Contemp. Probs.} 10, 19 (1977).

\textsuperscript{40} A Washington Supreme Court opinion in 1977 added nothing to the developing doctrine. See International Tracers of Am. v. Estate of Hard, 89 Wash. 2d 140, 570 P.2d 131 (1977),\textit{cert. denied}, 435 U.S. 1004 (1978). First, since no other state's law was pleaded, judicial notice of such law was not taken. Rather, it was assumed to be the same as Washington's. Second, the
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*Mentry v. Smith.* In *Mentry*, both parties were residents of Washington. While driving in Oregon, the defendant struck another car, which was driven by an Oregon resident. The plaintiff, a passenger in the defendant's vehicle, was injured, as was the driver of the other car. Under the Oregon host-guest statute, the defendant was not liable to the plaintiff for ordinary negligence. Washington had no such statute. The Washington trial court dismissed the plaintiff’s complaint after concluding that Oregon law governed and that there was no liability thereunder. The court of appeals reversed.

The court stated that under *Johnson* a tort choice-of-law problem is governed by the Restatement's most significant relationship rule. The court summarized the contacts with Washington and Oregon and said they were to be “evaluated” to determine which ones were most significant. The only contact evaluated, however, was that the other car was driven by an Oregon resident. Since she was not a party, the contact was “given very little weight.” The court concluded that upon a balance of the contacts, Washington had the most significant relationship to the occurrence and the parties.

The court of appeals then stated that in conjunction with the most significant relationship rule, *Johnson* “also” employed state interest analysis. The court’s meaning is not clear. If the court was still engaged in determining the most significantly related state, its analysis was correct. Apparently, however, the court had already decided, based on contacts, that Washington was the most significantly related state and then turned to a separate consideration, namely, state interest analysis. If that was the court’s meaning, this is a misreading or misapplication of *Johnson*. Under *Johnson*, interest analysis is part of the process of determining the state of most significant relationship.

In its application of interest analysis, the *Mentry* court selected the Washington law. Such analysis was said to involve a consideration of whether either state had a legitimate interest in having its law applied on the basis of the law’s purpose and whether the law’s application would advance that purpose. The court rejected a contention that a purpose of the Oregon guest statute was to protect the assets of a negligent host for injured nonguests. The other asserted purpose for the Oregon statute was to prevent collusive suits against insurance companies. That purpose would not be furthered by application of the stat-

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The court stated that under *Johnson* a tort choice-of-law problem is governed by the Restatement’s most significant relationship rule. The court summarized the contacts with Washington and Oregon and said they were to be “evaluated” to determine which ones were most significant. The only contact evaluated, however, was that the other car was driven by an Oregon resident. Since she was not a party, the contact was “given very little weight.” The court concluded that upon a balance of the contacts, Washington had the most significant relationship to the occurrence and the parties.

The court of appeals then stated that in conjunction with the most significant relationship rule, *Johnson* “also” employed state interest analysis. The court’s meaning is not clear. If the court was still engaged in determining the most significantly related state, its analysis was correct. Apparently, however, the court had already decided, based on contacts, that Washington was the most significantly related state and then turned to a separate consideration, namely, state interest analysis. If that was the court’s meaning, this is a misreading or misapplication of *Johnson*. Under *Johnson*, interest analysis is part of the process of determining the state of most significant relationship.

In its application of interest analysis, the *Mentry* court selected the Washington law. Such analysis was said to involve a consideration of whether either state had a legitimate interest in having its law applied on the basis of the law’s purpose and whether the law’s application would advance that purpose. The court rejected a contention that a purpose of the Oregon guest statute was to protect the assets of a negligent host for injured nonguests. The other asserted purpose for the Oregon statute was to prevent collusive suits against insurance companies. That purpose would not be furthered by application of the stat-

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41. *Baffin* for the proposition that in applying the significant contacts test, great emphasis should be put on the place of performance.

42. Implicitly, the Washington court thereby rejected a well-known New York opinion which had determined that one purpose underlying a Colorado host-guest statute was to protect the
ute since the defendant's insurer was not an Oregon carrier. The court concluded that Oregon had no interest in the application of its guest statute. Without explanation, Washington was said to have a legitimate interest in the application of its law. Although the court's interpretation of Johnson is questionable, the result it reached is commendable.

The second court of appeals opinion was Nelson v. Kaanapali Properties. Plaintiff, a specialty subcontractor and resident of Washington, was in compliance with the Washington contractor registration act. Defendant, a joint venture between a Washington and a Hawaiian corporation, both of which were controlled by a Washington resident, was involved in the construction of a condominium project in Hawaii. The plaintiff subcontracted to install flooring in the defendant's condominium units. A dispute arose regarding which party should bear the cost of certain extra expenditures. The trial court entered summary judgment for the defendant in the plaintiff's breach of contract action because the plaintiff was not licensed in Hawaii as a contractor. The court of appeals reversed after concluding that Washington, rather than Hawaii, law applied.

Relying upon Baffin, the court initially turned to the Restatement (Second) of Conflict of Laws. It noted that under the Restatement the place of performance was of special consequence in a personal service contract. However, as to a particular issue, other factors might on occasion call for the application of some other state law. As in Potlatch, the court considered the interests and public policies of the potentially concerned states and the expectations of the parties. The parties intended an enforceable contract with the defendant expecting the work to be performed and the plaintiff expecting to be paid. The interests and public policies of Hawaii and Washington in their registration acts were said to be the same, namely, to protect the public from irresponsible contractors. Finally, there was the policy of priority of injured parties in other cars in the assets of a negligent defendant. See Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).


43. It has been suggested that other purposes existed, or might have existed, for the Oregon guest statute, such as protecting host-drivers against ungrateful guests or discouraging hitchhiking. See J. NAZIGER, supra note 4, at 179–80.

44. Although the court had listed Washington contacts, a discussion of the purposes of the Washington law, and the possible advancement thereof by the law's application, would have enhanced the usefulness of the opinion.


46. RESTATMENT (SECOND) OF CONFLICT OF LAWS § 196 comment d.
providing a Washington resident with a forum for a dispute primarily between Washington residents.

The decision reached was that:

The significance of the place of contracting, the domicile and residence of the parties (except one member of the Kaanapali joint venture), the expectation interests of the parties, and the policy of Washington in providing a forum far outweigh the significance of the place of performance and the public policy of Hawaii in applying its rule. Washington law applies.47

In the late seventies, we have then two courts of appeals engaged in state interest analysis, one in a tort setting relying upon Johnson and the other in a contract setting relying upon Potlatch. In both, Washington law was held to govern. Are we to conclude that ordinarily we may expect forum law to control?

Consider that although the Washington court in the Nelson case determined that the underlying policy in both Hawaii and Washington was the protection of the public from unreliable and incompetent contractors, the fact remains that the Hawaii statute specifically prohibited recovery for work performed by a contractor who had not obtained a license in Hawaii. Might it not be that the plaintiff would have been unsuccessful in a suit in Hawaii? There is some indication that the Washington court believed so when it stated: "While Hawaii can control access to its courts, it should not as a matter of policy be able to control access to Washington courts, which have jurisdiction, for resolution of a dispute primarily between Washington domiciliaries."48 This suggests that the outcome turned on the forum selected.

Consider also that in almost every case in the decade following Baffin, whether decided by the supreme court or a court of appeals, Washington law was applied.49 This was so regardless of whether the

47. Nelson, 19 Wash. App. at 899-900, 578 P.2d at 1322. Review by the Washington Supreme Court was dismissed.

48. Id.

stated rationale was that of false conflict, most significant relationship, or state interest analysis. It would be incorrect, however, to characterize the Washington choice of law methodology as always calling for application of the law of the forum. This was made apparent by *Pacific Gamble Robinson Co. v. Lapp.*

In that case, a husband incurred an obligation on a promissory note in Colorado, the domicile at the time of the marital couple. The husband defaulted on the note, and thereafter, the couple moved to Washington. Recovery was sought in Washington against the husband individually and the marital community. Under the law of Colorado, a noncommunity property state, the husband's earnings were subject to the debt. Under Washington law, the husband's earnings were community property and not subject to the husband's obligation on the note. In a 2-1 split decision, the court of appeals affirmed a trial court holding that the husband's earnings, and other community property, could not be reached. In another split decision, 6-2, the supreme court reversed.

The majority first stated that because the result would be different under the law of the two states, there was a "real" conflict. To resolve that conflict, the court invoked the most significant relationship approach which was said to call for an analysis of interests and policies of the states and the expectations of the parties. Colorado's interest was assumed to be to ensure the predictability of business relations and to prevent the flight of debtors to other states to avoid payment of otherwise legitimate debts. While Washington was said to have a general interest in protecting marital communities from the entirely separate debts of one spouse, the court assumed it had no policy interest in maintaining a sanctuary for fleeing debtors.

With respect to the expectations of the parties, the court stated that both spouses would have expected at the time the note was executed that the transaction would be governed by Colorado law and could not justifiably believe that the obligation could be avoided by the device of moving to a state where a husband's wages would not be subject to the debt. The creditor's expectations were said to be the same.


50. 95 Wash. 2d 341, 622 P.2d 850 (1980).
The court concluded that the contacts, competing policies, and justifiable expectations of the parties established Colorado's interest as more significant than Washington's. The case illustrates that while Washington's methodology has usually resulted in the application of its own law, the law of the forum will not always govern.

*Pacific Gamble* also points up the lack of certainty and predictability which may develop from the newer methodology. Recall that the supreme court, as had been the court of appeals, was divided. The dissent's analysis of the interests and policies was quite different from that of the majority.

The newer methodology includes the possibility of different states' laws governing different issues in the same transaction. The dissent distinguished between "contractual validity and contractual payment source of funds." While agreeing that Colorado was the state of most significant relationship for the purpose of determining the contract's validity and effect, the dissent viewed the problem as one of determining the state of most significant relationship on the issue of the source of funds available for contract damages. That was said to be Washington.

In its examination of the policies involved, the dissent explicitly invoked the "better law" concept. The "better law" was said to be Washington's with its "unique, progressive system of property ownership that affords marital partners equal control over community assets." The conclusion was that Washington, the present marital domicile and forum, controlled because "Washington's interest in this decision and its impact on our citizens' marital property rights is far greater than any continuing interest by Colorado in the remedy available for breach of a transitory contract sued upon in this state."

Three points should be noted in comparing the two opinions in *Pacific Gamble*: First, is the importance of the characterization of the issue; second, is the possible significance of a "better law" argument; third, is the difficulty in predicting the court's evaluation of the com-

52. It is in the best tradition of modern conflict of laws analysis, considering the policies for application of one state's law, rather than another's because

[the natural desire of every good court [is] to achieve justice by applying what it regards as intrinsically the better rule of law . . .


*Lapp*, 95 Wash. 2d at 354, 622 P.2d at 859.

53. *Lapp*, 95 Wash. 2d at 355, 622 P.2d at 859.

54. *Id.* at 356, 622 P.2d at 860.
peting interests, policies, and expectations.  

How then is certainty to be provided for the parties? One possibility, at least in a consensual transaction, is a statement by the parties of the law which they wish to have applied. Both the majority and dissent in Pacific Gamble suggested this was of major consequence in the new methodology.  

McGill v. Hill illustrates the point. A separation agreement between spouses divided their property and specifically provided that it was to be interpreted in accordance with Pennsylvania law. Following a divorce, a dispute arose as to whether the agreement disposed of certain employment benefits, consisting of retirement and savings plans, which had been earned by the husband. Under Washington law, the agreement did not include the benefits. Pennsylvania law was to the contrary. 

Applying what it characterized as "general conflict of laws principles," the court of appeals stated that an express choice of law clause in a contract would be given effect. This meant Pennsylvania law controlled, and the retirement benefits were disposed of in accordance with the separation agreement. By effectuating the expressed intent of the parties, the basic objectives of certainty and predictability were achieved. 

However, the expressed intent of the parties will not always control under the new methodology. In O'Brien v. Shearson Hayden Stone, Inc., a class action was instituted on behalf of residents of Washington who maintained certain accounts with the defendant brokerage firm to determine whether interest rates charged on those accounts were usurious. The notes were usurious under Washington law, but not under New York law. Each member of the class had signed an agreement with the defendant specifying that it was to be governed by

55. This is indicated by the fact that both the majority and the dissent found support for their conflicting conclusions in the earlier foundation case of Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wash. 2d 806, 459 P.2d 32 (1969).

56. The majority said that the law of the state having the most significant relationship with the contract governed "in the absence of an effective choice of law by the parties. . . ." Lapp. 95 Wash. 2d at 343, 622 P.2d at 854.

The dissent stated:

The plaintiff Pacific Gamble's principal place of business is Washington; presumably familiar with the law of this state, it could have prevented the result of which it now complains by, for example, the simple device of obtaining an agreement signed by husband and wife at the time the debt was incurred. Id. at 356, 622 P.2d at 860 (Horowitz, J., dissenting).


the law of New York. In a 5-4 decision, the supreme court reversed the trial court and held that despite the expressed choice of the parties, Washington law controlled.

In the foundation Baffin case, much reliance was placed on the Restatement (Second) of Conflict of Laws.\textsuperscript{59} The O'Brien court noted that whereas in Baffin the parties had not expressly designated the law to govern their transaction, they had done so in O'Brien. Nevertheless, the court once again turned to the Restatement (Second) and in particular, Section 187 as the beginning point for its analysis.\textsuperscript{60}

Under Section 187, the court stated that three questions were posed in determining whether to apply the law selected by the parties as to

\textsuperscript{59} In Baffin, the court cited \textit{Restatement (Second) of Conflict of Laws} §§ 332, 332a, 332b (Tent. Draft No. 6, 1960). Baffin, 70 Wash. 2d at 899-901, 425 P.2d at 627-28.

The present section most relevant to the Baffin situation is \textit{Restatement (Second) of Conflict of Laws} § 188 (1971). Titled, "Law Governing in Absence of Effective Choice by the Parties," it provides:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-99 & 203.

\textsuperscript{60} \textit{Restatement (Second) of Conflict of Laws} § 187 (1971). Titled, "Law of the State Chosen by the Parties," it provides:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.
the issue of usury. First, the court concluded the higher New York rate was contrary to a fundamental policy of Washington. Second, Washington was deemed to have a materially greater interest than New York in the determination of the usury issue. Third, it was decided that if there had been no choice of law by the parties, Washington would be the state with the most significant relationship to the transaction. The conclusion was that Washington law controlled.

*O'Brien* is of importance on the general matter of the effect of an express choice of law by the parties. Under the new methodology, such a choice is a significant factor, but will not always control. The case is also of importance on the more particular problem of the governing law as to usury.

IV. USURY

In addition to Section 187, the *O'Brien* court was concerned with another provision of the *Restatement (Second)*. Section 203 speaks directly about usury as follows:

> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188. 61

The provision sets forth an alternative reference type rule which looks favorably on the state law which will sustain the contract’s validity. Nevertheless, the majority in *O'Brien* found a usurious violation.

The majority seemed to concede that New York, while not the most significantly related state, did have a substantial relationship to the transaction. 62 Washington law was held to control under Section 203, however, because the permissible interest rate of 25% in New York was greatly in excess of the 12% permitted in Washington. 63 Four justices in dissent argued that a proper construction of Section 203 called for an examination of the actual rate charged in the contract.

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62. The majority stated, “While New York, as previously illustrated, is not the state with the most significant relationship under section 188(2), it can be argued it does have a substantial relationship to the transaction.” *O'Brien* v. Shearson Hayden Stone, Inc., 90 Wash. 2d 686, 586 P.2d 834 (1978).

63. The majority concluded that California, rather than Washington, was the more significantly related state as to some members of the plaintiff class, namely, those whose “dealings, negotiations, and payments were conducted through defendant’s Los Angeles office.” *Id.* at 688. 586 P.2d at 834.
and not what might have been charged under New York law.\textsuperscript{64} The actual rate in the contract was 14%, an amount not greatly in excess of the 12% permitted in Washington.

Upon reconsideration, the court again split 5-4.\textsuperscript{65} The majority adhered to its original opinion with added comments. In dicta, it stated that if the contract had stipulated a rate of 13% or 14%, the contract would have been valid. No actual rate was stipulated; rather, the rate of interest was open ended. Since the 25% allowed under New York law was permissible under the contract, the rate was greatly in excess of that permitted by Washington law and was usurious.\textsuperscript{66}

The supreme court was again confronted with a usury problem in \textit{Whitaker v. Spiegel, Inc.}\textsuperscript{67} The defendant, a Delaware corporation with its principal offices in Illinois, was engaged nationwide in the mail order merchandising of retail consumer goods and solicited business in all fifty states. The plaintiff purchasers were Washington residents. As in \textit{O'Brien}, the parties had expressed their intent as to the governing law—in this instance, Illinois. The charged interest rate of 19.8% was permissible under Illinois law, but invalid under Washington’s 12% maximum rate. The supreme court held Washington law controlled.

The rationale was terse. The court stated that while parties may generally determine contract terms, this freedom is subject to public policy considerations. The policy of the Washington usury statute in providing a 12% maximum rate was to protect state residents from oppressive and burdensome rates. To further that policy, the legislature had enacted a choice of law provision as follows:

\begin{quote}
Whenever a loan or forbearance is made outside Washington state to a person then residing in this state the usury laws found in chapter 19.52 RCW, as now or hereafter amended, shall be applicable in all courts of this state to the same extent such usury laws would be applicable if the
\end{quote}

\textsuperscript{64} The dissent emphasized the following: The importance of effectuating the expectations of the parties by sustaining the validity of the contract; the fact that the contract was not adhesive or oppressive; the need to protect access to credit from out-of-state sources; and the insignificance of a few percentage points difference in the states’ laws. \textit{Id.} at 694-96, 586 P.2d at 837-39.

\textsuperscript{65} \textit{O'Brien v. Shearson Hayden Stone, Inc.,} 93 Wash. 2d 51, 605 P.2d 779 (1980). \textsc{Weintraub, Commentary on the Conflict of Laws} (3d ed. 1986), refers to the case as contrary to the result reached in most cases.

\textsuperscript{66} The dissent argued that the majority’s construction would “read out of section 203 any contract providing for a variable interest rate...” \textit{O'Brien.} 93 Wash. 2d at 55, 605 P.2d at 781 (Horowitz, J., dissenting). According to the dissent, the actual rate charged, 14%, was the critical factor in applying Section 203.

loan or forbearance was made in this state.\textsuperscript{68}

The court stated:

The legislative mandate is clear: In an interstate loan transaction, the Washington courts are not free to engage in conflict of law analysis to determine whether or not the parties' own choice of law provision should apply. Rather, the legislature has directed that, in an action brought in Washington on an allegedly usurious transaction, Washington's usury law will apply if the debtor was a resident of Washington at the time the loan was made, even if the loan was made outside the state. . . . It follows that Washington's usury law, RCW 19.52, applies to the present transaction. [Citations omitted.]\textsuperscript{69}

It appears that in view of the legislative policy, as construed in the \textit{Whitaker} case, one may ordinarily expect the Washington usury laws to apply if the debtor was a resident of Washington at the time the loan was made. In those instances in which the courts are free of the legislative mandate, the conflict problem will apparently be resolved on the basis of the \textit{Restatement (Second)}, particularly Sections 187, 188 and 203, as construed in the \textit{O'Brien} case.\textsuperscript{70}

\section*{V. PUNITIVE DAMAGES}

Another area which has generated difficult conflicts problems for the Washington courts is that of punitive damages. Two cases illustrate the hazards in predicting the result under the new methodology.

In \textit{Kammerer v. Western Gear Corp.},\textsuperscript{71} a Washington corporation, which was licensed to manufacture devices used in oil drilling, was

\textsuperscript{68} WASH. REV. CODE § 19.52.034 (1985).

\textsuperscript{69} \textit{Whitaker}, 95 Wash. 2d at 667–68, 637 P.2d at 235. The original opinion stated: "Rather, the legislature has directed that, in an action brought in Washington on an allegedly usurious transaction, Washington's usury law will apply, even if the loan was made outside Washington to a Washington resident." \textit{Whitaker}, 623 P.2d at 1151. The scope of the original opinion was narrowed by an amendment to read as stated in the text. See \textit{Kammerer v. Western Gear Corp.}, 96 Wash. 2d 416, 423, 635 P.2d 708, 712 (1981).

\textsuperscript{70} See, for example, Golden Horse Farms v. Parcher, 29 Wash. App. 650, 629 P.2d 1353 (1981), which involved an action on promissory notes and to foreclose a mortgage on Washington land. The notes, which had been executed in Canada by a Canadian corporation, provided for British Columbia law to govern the interest rates. After concluding that the Washington legislative mandate (WASH. REV. CODE § 19.52.034 (1985)) was not pertinent because the obligor was a Canadian corporation, the court of appeals turned to the \textit{O'Brien} decision and the \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 203 (1971). The contract was upheld under British Columbia law against the contention of usury.


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sued by California residents, who were holders of patents on the devices, for breach of the license contract and fraud in its inducement. Numerous issues were raised on appeal, one of which was whether California law, which allowed punitive damages, or Washington law, which prohibited such damages, applied to the fraud claim. The court of appeals affirmed a superior court decision which held California law was applicable and the court of appeals was in turn affirmed by the supreme court.72

Specific reference was made to the fact that the defendant chose to go to California to negotiate its contract, that the fraudulent representations were made in California, and that the parties had agreed that California law would apply.

The supreme court then stated:

Where the most significant relationships were in California and where the conduct and acts as to the fraud and misrepresentation were accomplished in California that state has a specific interest to be furthered. We hold under these circumstances that a Washington court can award punitive damages under the law of California.73

It is unclear what California interest the supreme court had in mind. The supreme court quoted with approval from the court of appeals opinion, which stated: "California has an obvious interest in the protection of its citizens against fraud, which is enhanced when the negotiations on which the fraud claim is based occurred in California. California has an interest in deterring fraudulent activities by corporations having a substantial business presence within its borders."74

To which California interest was the supreme court referring, that of protecting state citizens or that of deterring conduct? Or was it to both?

The ambiguity is further enhanced by the court's reference to two other cases. The court stated that Barr v. Interbay Citizens Bank75 was "completely different" in that Florida had had no interest in deterrence when the conduct and acts which might warrant punitive

72. The court of appeals decision is Kammerer v. Western Gear Corp., 27 Wash. App. 512, 618 P.2d 1330 (1980). The court of appeals concluded that California was the state of most significant relationship as to the issues of recovery for fraud and the right to punitive damages.

73. Kammerer, 96 Wash. 2d at 423, 635 P.2d at 712. Unlike the court of appeals which discussed the conflicts controversy in two parts, namely, the governing law as to the plaintiff's claim for fraud and punitive damages, the supreme court posed the conflicts problem as a singular issue of the governing law as to punitive damages.

74. Id. at 422, 635 P.2d at 712 (quoting Kammerer, 27 Wash. App. at 520, 618 P.2d at 1336).

75. 96 Wash. 2d 402, 635 P.2d 441, modified, 96 Wash. 2d 692, 649 P.2d 827 (1981). Barr was decided the same day as Kammerer. For a discussion of Barr see infra notes 84-87 and accompanying text.
damages had not occurred in Florida. This suggests that the important California interest in Kammerer was that of deterrence.

The Kammerer court also distinguished the earlier case of Whitaker v. Spiegel, Inc.,76 in which Washington's usury law had been applied to protect a Washington debtor. The Kammerer court said: "The distinction between Whitaker and this case is apparent: In Whitaker, the injured party was a resident of Washington. Here the plaintiffs were at all times residents of California."77 This suggests that the California interest of consequence in Kammerer was not that of deterrence of the Washington defendant but rather protection of the California plaintiff.

While it is unclear exactly why California law was applied in Kammerer, it is very clear that the presence of a strong forum public policy will not necessarily lead to Washington law under the new methodology. This is made apparent, not by anything said directly by the majority, but rather by the vigorous dissent.

The majority simply noted that under Washington law punitive damages were not allowed unless expressly authorized by the legislature. Nothing was said about the purposes or policies behind that law.78 In striking contrast, there was a lengthy dissent by Justice Stafford.79

The dissent is a scholarly review and presentation of the Washington position on punitive damages. The problem was whether that position, and the policy it represents, should control in a conflicts context.

78. The only reference by the 7-2 majority to any Washington interest or policy was the following quotation from the court of appeals opinion:

Washington has no interest in protecting persons who commit fraud. Western Gear asserts that differences in Washington and California law governing fraud suggest that Washington has a policy of greater caution in allowing judgments for fraud. Because we do not find any difference, material to this case, in the laws of the two states, we do not find any interest served by application of Washington law. Because Washington has no interests superior to or inconsistent with the interests of California in this controversy, application of the Restatement rule dictates that California law govern the Kammerers' claim for fraud. Id. at 422, 635 P.2d at 712 (quoting Kammerer, 27 Wash. App. at 520–21, 618 P.2d at 1336) It should be noted that the quoted comments are not directed towards punitive damages.

The court of appeals did briefly discuss Washington's public policy concerning punitive damages. Kammerer, 27 Wash. App. at 521–23, 618 P.2d at 1337. This discussion was not mentioned by the supreme court majority in Kammerer. Interestingly, in a companion case, Barr, 96 Wash. 2d 402, 635 P.2d 441 (1981), modified, 96 Wash. 2d 692, 649 P.2d 827 (1981), the supreme court did take note of the court of appeals opinion in Kammerer. In Barr, the supreme court said that contrary to the court of appeals view in Kammerer, punitive damages are contrary to the public policy of Washington. Barr, 96 Wash. 2d at 699, 635 P.2d at 444.

79. Justice Stafford was joined in dissent by Chief Justice Brachtenbach.
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Justice Stafford’s answer was as follows: “I agree with the abstract concept that under the ‘most significant contacts’ theory California law should govern this transaction. Nevertheless, the normal ‘choice of law’ result must be overridden by strong public policy in this, the forum state.”

Several questions are suggested by this response. Instead of an approach which determines the state of most significant contact and then looks to forum public policy, would it be better to incorporate the factor of the forum’s policy as part of the significant contact analysis? Would it make any difference in result? Should a strong forum public policy always prevail over all other contacts and policies?

Unfortunately, the majority opinion was silent on such matters. The result, however, was clear. Despite an unquestionably strong public policy in the Washington forum, that internal policy was not implemented.

Another case decided the same day as Kammerer was Barr v. Interbay Citizens Bank. In a complex factual setting, a Washington resident sued a Florida defendant for improper repossession of an automobile in Washington. Florida law permitted punitive damages while such damages were prohibited in Washington. In contrast to Kammerer, wherein California law was applied to allow punitive damages, the supreme court in Barr denied such damages by applying Washington law.

80. Kammerer, 96 Wash. 2d at 424–25, 635 P.2d at 713 (Stafford, J., dissenting).
81. Justice Stafford alluded to this in a footnote as follows:

Few recent cases have employed a “public policy” analysis to conflict of law decisions. This is not because public policy has become any less significant, however. Rather, many states (such as California) use “interest analysis” to determine choice of law, or use a “better law” analysis. Both methods are based almost entirely upon policy considerations, however. Id. at 427 n.1, 635 P.2d at 714 n.1 (Stafford, J., dissenting). Compare James v. Powell, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967), wherein New York, on the issue of punitive damages, looked to the law of the jurisdiction with the strongest interest in the resolution of that issue.
82. Conceivably, treating the forum’s public policy separately might more often lead to its implementation than treating it as part of an overall significant contact or interest analysis problem. Perhaps Justice Stafford had this in mind, when, in criticizing the majority’s result, he asked, “[W]ill it be necessary for us, in each case, to employ a different standard of appellate review depending upon which state’s law is applied?” See Kammerer, 96 Wash. 2d at 437, 635 P.2d at 720 (Stafford, J., dissenting).
83. Justice Stafford concluded it would not be unfair to the plaintiffs to be denied punitive damages even though the “otherwise applicable” California law allowed them. The plaintiffs could have brought suit in California. Since they chose Washington as the forum, Justice Stafford felt they should be bound by Washington policy. See id. at 438, 635 P.2d at 720 (Stafford, J., dissenting).
84. 96 Wash. 2d 402, 635 P.2d 441, modified, 96 Wash. 2d 692, 635 P.2d 441 (1981).
The court first asked which state had the most significant relationship on the issue of punitive damages. The court determined that the purpose for punitive damages in Florida was that of deterrence and that such an interest would not be furthered when the conduct and acts occurred in Washington. The court then noted the long history in Washington against punitive damages and said such damages were contrary to public policy. The conclusion was: “In the context of this case, the argument that compensatory damages fully compensate the plaintiff for all injuries to person or property, tangible or intangible, is particularly in point. . . . We hold in this case the state of most significant relationships on the imposition of punitive damages is Washington.”

What did the court mean by “In the context of this case”? Was the critical factor that the defendant’s conduct and acts in Barr were not in Florida, whereas in Kammerer they were in California? That was apparently the basis for the statement in Kammerer that Barr was “completely different.” Or was the critical factor that the plaintiff was a resident of Washington in Barr just as the plaintiff was a resident of California in Kammerer? After all, in Barr, the court stated that the fact that compensatory damages fully compensated the plaintiff was particularly in point.

What then would be the result if the plaintiff were a resident of one state and the defendant’s conduct occurred in another? Which law would determine punitive damages? The court in Barr noted that every tort rule is designed to some extent to both deter and compensate. Apparently, in Barr, and perhaps in Kammerer, the court felt that the factual situation was such that both purposes coincided. But what if that were not the case, as when the plaintiff is a resident of Washington and the defendant acts in state X, which allows punitive damages, or when the plaintiff is a resident of state X and the defendant acts in Washington? And what of the importance of the purpose in each state of its particular rule on punitive damages? Such problems remain to be answered.

VI. STATUTES OF LIMITATIONS

An area which has been greatly affected by recent developments is that of statutes of limitations. The principal change has occurred because of legislation, but a federal case is worthy of notice.

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85. There were contacts with Nevada, but since that law was not pleaded or proved, it was presumed to be the same as that in Washington.
86. Barr, 96 Wash. 2d at 700, 635 P.2d at 444–45.
87. Kammerer, 96 Wash. 2d at 422, 635 P.2d at 712.
In *Tomlin v. Boeing Co.*, 88 a federal court with diversity jurisdiction was confronted with the problem of applying Washington’s new methodology.89 Two servicemen were killed in a helicopter crash in Vietnam because of a defect in a rotor blade. The helicopter and blade had been built by Vetrol, a Pennsylvania based division of the defendant Boeing Company. Survivors of the servicemen lived in Alabama and Florida at the time of the accident. Wrongful death actions were instituted in a federal district court in Washington one day before the expiration of Washington’s three-year statute of limitations. The limitation period had elapsed in the other three states; Alabama and Florida had two-year limitations and Pennsylvania had a one-year limitation. The case thus turned on which state’s statute governed.90 The federal court of appeals invoked Washington’s new conflicts methodology, concluded Washington’s three-year period applied and held the action was not time-barred.

After noting the traditional conflicts approach of distinguishing statutes of limitations as procedural or substantive, the federal court predicted Washington would extend its newer choice-of-law analysis to the area of statutes of limitations. Principal reliance for this prediction was placed upon the Washington decision in *Johnson v. Spider Staging Corp.*, 91 in which the newer approach had been used to resolve a conflict as to the amount of damages recoverable under wrongful death statutes.

Application of the *Johnson*-type analysis involved a consideration by the court of the several states’ interests. The purpose of statutes of limitations was said to be to protect courts, by conserving judicial resources, and defendants, by providing repose. As to the former, the court concluded that the judicial resources of the other states would be unaffected by a suit in Washington, which had chosen to make its courts available for three years.

With respect to defendants, Alabama and Florida had no interest in protecting a Washington defendant, particularly when their own residents were the plaintiffs. It was true that Pennsylvania had an interest in protecting Boeing’s subdivision, Vetrol, which had manufactured

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88. 650 F.2d 1065 (9th Cir. 1981).
89. The case was filed in the Federal District Court for the Western District of Washington based on diversity. The federal court was obliged to apply Washington law, including its conflicts law. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).
90. None of the parties contended that the law of Vietnam should be applied and the court did not consider that possibility.
91. 87 Wash. 2d 577, 555 P.2d 997 (1976). See the discussion *supra* in conjunction with notes 27–39.
the rotor blade in Pennsylvania. The court noted, however, that the actual defendant was Boeing, which had its principal place of business in Washington. Washington's longer three-year period of limitations was seen as expressing a policy of deterring the conduct of tort defendants. The court concluded that Washington would be interested in deterring the wrongful conduct of its most prominent corporate business regardless where the actual manufacturing took place. Consequently, the Washington three-year period was applied.

The prediction that a Washington court would invoke its new methodology in a conflicts-statute of limitations context seems correct. The determination that a purpose of the Washington statute of limitations was to deter certain conduct seems questionable. The fact that the federal court cited no authority of any kind for this proposition is striking. The court sought support from the *Johnson* case in concluding that just as a provision for full compensation in a wrongful death statute expressed a deterrent policy so did a provision for a longer period of limitation. The analogy is strained.

Equally questionable is the federal court's reliance on another Washington case. The federal court quoted the Washington court as having stated that where it is "questionable which of . . . two statutes [of limitation] appl[y], the rule is that the statute applying the longest period is generally used."92 The quoted Washington case did not involve a conflict of laws question. The problem therein was whether to apply a shorter Washington statute relating to actions based on oral contracts or a longer Washington statute relating to actions for recovery of an interest in real property. It does not necessarily follow that because Washington applied the longer of two Washington statutes that it would apply a longer Washington statute rather than a shorter Pennsylvania statute. At the very least, further analysis was required.

Whether *Tomlin* properly invoked and applied the new Washington conflicts doctrine remains to be answered. Related to that question is a subsequent development of great importance in 1983.

The traditional approach has been to treat statutes of limitations as procedural in nature and thereby to apply the statute of the forum. This has led to forum shopping in instances in which the limitation period at the forum was longer than that in other contact states. In response, different states have created different exceptions whereby some statutes have been regarded as substantive in nature.

Choice of Law in Washington

To remedy the problems generated by the traditional procedure characterization and its often confusing exceptions, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Conflict of Laws-Limitations Act in 1982. In 1983, Washington became the first state to enact the uniform act. To date, there are no Washington appellate decisions applying or interpreting the act. Consequently, the expected impact and application of the Washington statutes must be determined from the comments of the commissioners about the uniform act.

Following a definitions section, the act provides:

(1) Except as provided by RCW 4.18.040, if a claim is substantively based:
   (a) Upon the law of one other state, the limitation period of that state applies; or
   (b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies.

(2) The limitation period of this state applies to all other claims.

Unlike the traditional approach, the statute treats limitation periods as substantive and thereby governed by the limitations law of a state whose law governs other substantive issues. This will be true whether the limitation period of the substantively governing law is longer or shorter than that of Washington. As to which state's law will govern, that will be determined in accordance with Washington's new conflicts methodology.

The Act then provides:

95. WASH. REV. CODE § 4.18.010 (1985) provides:
   As used in this chapter:
   (1) "Claim" means a right of action that may be asserted in a civil action or proceeding and includes a right of action created by statute.
   (2) "State" means a state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country, or a political subdivision of any of them.
97. In Tomlin v. Boeing Co., 650 F.2d 1065 (9th Cir. 1981), the federal court applied Washington's new choice-of-law analysis to the statute of limitations issue without consideration of the controlling law on other issues.

In contrast, the uniform act appears to direct a Washington court to determine which state's law governs a claim and then to apply that state's statute of limitations. See WASH. REV. CODE
If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply.\textsuperscript{98}

Under this section, tolling and accrual provisions are treated as parts of the limitations law of the state whose law is deemed applicable. It should be noted, however, that the limitation period of that state does not include its rules as to when an action is commenced. That will be determined by Washington law, as the forum. The last clause in the section directs the Washington court not to apply the other state's conflict of laws rules and thereby avoids renvoi problems.

The final provision requiring comment states:

If the court determines that the limitation period of another state applicable under RCW 4.18.020 and 4.18.030 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this state applies.\textsuperscript{99}

The point to be emphasized is that while the section provides an escape clause to avoid injustices, it should be invoked only in exceptional circumstances. To do otherwise will defeat the purpose of the act. In the ordinary case, the limitations period of a state whose law governs other substantive issues, as determined by Washington's new methodology, is to be applied.

VII. PLEADING FOREIGN LAW

In addition to the enactment of the uniform limitations act, a second important development occurred in 1983. In that year Civil Rule 9(k),\textsuperscript{100} relating to the pleading of foreign law, was adopted, and Civil Rule 44.1,\textsuperscript{101} relating to the determination of foreign law, was amended.\textsuperscript{102} As a result, a number of problems that existed were

\textsuperscript{98} WASH. REV. CODE § 4.18.020(1)(a) (1985). Thereby, there will be no independent determination on the statute of limitations issue.

There is a qualification, however. If a claim is substantively based upon the law of more than one state, apparently a Washington court will independently apply its new methodology to the statute of limitations issue to select among the several states. See WASH. REV. CODE § 4.18.020(1)(b) (1985).


\textsuperscript{100} WASH. REV. CODE § 4.18.040 (1985).

\textsuperscript{101} WASH. SUPER. CT. CIV. R. 9(k).

\textsuperscript{102} WASH. SUPER. CT. CIV. R. 44.1.

clarified.\textsuperscript{103}

In the present context, the term "foreign law" is used to include both the law of states, territories and other jurisdictions of the United States and the law of foreign countries. It is necessary, however, to distinguish between the law of other United States jurisdictions, which usually means the law of sister states, and the law of foreign countries.

There are now three methods by which a party may advise the adversary and the court of one's intent to rely upon the law of a sister state. They are: One, by setting forth in a pleading facts which show that the law of a sister state may be applicable; two, by stating in a pleading that sister-state law may be relied upon; or three, by serving other reasonable notice that the law of a sister state may be relied upon.\textsuperscript{104}

Cases prior to 1983 established that a failure to properly plead and prove the law of a sister state resulted in a presumption that that state's law was the same as the law of Washington.\textsuperscript{105} Presumably, that principle will continue to apply in the event of a failure to comply with the requirements of the new rule. If the rule is complied with and proper notice is given, the law of a sister state may be judicially noticed in accordance with established procedures.\textsuperscript{106}

The rules are different if a foreign country is involved. A party who intends to rely upon the law of a foreign country must give notice in a pleading of the country whose law it is contended may be applicable. Certain matters need not be pleaded, but are subject to the discovery process. These matters are the party's contentions as to which issues of law are governed by the foreign country law, the substance of such law, the expected effect of such foreign law on the legal issues and on

\textsuperscript{103} For an excellent discussion of the meaning and impact of the amendments to the rules see Simburg, Swisher & Brown, Pleading and Proving Foreign Law—The New Rules, 37 WASH. ST. BAR NEWS 61 (Sept. 1983). The authors characterize the result as one of "sweeping changes which provide a more comprehensive approach to pleading and proof of foreign law than any other in the country." Id. at 61.


\textsuperscript{106} WASH. SUPER. CT. CIV. R. 44.1(b) provides: "The law of a state, territory, or other jurisdiction of the United States shall be determined as provided in RCW 5.24." WASH. REV. CODE §§ 5.24.010–070 (1985) sets forth the procedures whereby judicial notice may be taken of a sister state's law.
the outcome of the case, and the specific statutes and decisions upon which the party intends to rely.\footnote{107}

If none of the parties requests in the pleadings that foreign country law be applied, the court is to apply the law of Washington, unless such application would result in manifest injustice.\footnote{108} If there is proper pleading, the court, in determining the foreign country law, may consider any relevant written material or other source, including testimony, having due regard for their trustworthiness, whether or not submitted by a party and whether or not admissible under the usual evidence rules.\footnote{109} Unlike with a sister state, there is no provision for judicial notice of foreign country law.\footnote{110}

VIII. CONCLUSION

In several recent cases, the courts of appeals have applied the new methodology. The conflicts issues have arisen in such diverse contexts as determining the validity of a foreign country marital agreement,\footnote{111} the effect of a nunc pro tunc decree on the validity of a subsequent marriage,\footnote{112} the status of paternity for property distribution purposes,\footnote{113} and the coverage under an automobile insurance contract.\footnote{114} Of principal concern in each instance were the contacts of the states, the interests and policies of the states, and the expectations of the parties.

Of greatest consequence, however, in illustrating the present status of choice-of-law analysis in Washington, is a supreme court opinion, \textit{Southwell v. Widing Transportation, Inc.}\footnote{115} Plaintiffs instituted a wrongful death action for the death of their son, a resident of British

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107. WASH. SUPER. CT. CIV. R. 9(k)(2).
108. WASH. SUPER. CT. CIV. R. 9(k)(4).
109. WASH. SUPER. CT. CIV. R. 44.1(c).
110. WASH. SUPER. CT. CIV. R. 44.1(c).
111. WASH. REV. CODE § 5.24.050 (1985) provides: “The law of any jurisdiction other than a state, territory or other jurisdiction of the United States shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.”
Columbia, in a truck-motorcycle accident in British Columbia. The defendants were the owner of the truck, an Oregon corporation which did business in Washington, and the driver, a Washington resident. The truck had been dispatched from Washington to British Columbia to pick up a load of steel castings from a Canadian corporation. While the truck was en route back to Washington, a casting fell from the truck, killing the decedent. British Columbia law did not allow for recovery for lost and future earnings while Washington law did. A court of appeals ruling on a pretrial motion that Washington law controlled was reversed by the supreme court on the ground there was not an adequate factual record to decide the choice-of-law issue.

Southwell restated several important points about Washington's present conflicts methodology. First, the approach outlined in Johnson v. Spider Staging Corp. \(^{116}\) controls. This was said to involve a two-step analysis, that of evaluating contacts and that of evaluating interests and public policies.\(^{117}\) Second, the evaluation is to be in the context of the particular issue, which in this instance was the amount of damages.\(^{118}\) Third, the analysis is not one of simply applying the law of the forum.\(^{119}\)

Several questions are suggested by Southwell. There is the pragmatic consideration for counsel of how to produce an adequate factual record in order that a choice-of-law issue can be resolved. Is the answer that this is no different than the need for a proper factual record to resolve any legal question? But what of the fact that the lawyers and the lower courts apparently felt that there was an adequate record? Does this suggest some confusion as to what the new methodology means?\(^{120}\) Or is this just another instance in which courts legiti-

\(^{116}\) 87 Wash. 2d 577, 555 P.2d 997 (1976).

\(^{117}\) The Johnson approach might be viewed as a one-step analysis. How can one evaluate a contact without considering the interests and public policies of the states? The Southwell court states its first step as "an evaluation of the contacts with each interested jurisdiction." Southwell, 101 Wash. 2d at 204, 555 P.2d at 480. Similarly, how can one evaluate interests and public policies without considering the contacts with a particular state? The court states its second step as "an evaluation of the interests and public policies of potentially concerned jurisdictions." Id.

Is the analysis really one step in determining the most significantly related state in view of the contacts, interests and public policies? Or is all of this merely a matter of semantics?

\(^{118}\) This contrasts with a blanket rule such as applying the law of the place of a tort or the place of the making of a contract.

\(^{119}\) The court stated: "[i]f we were to decide this case on this record, and find Washington law should govern the issue of damages, we would essentially be adopting a rule of lex fori." Southwell, 101 Wash. 2d at 207, 676 P.2d at 481.

\(^{120}\) R. Leflar, L. McDougal III & R. Felix, supra note 24, at 22 (Supp. 1985).
mately differ as to the adequacy of a particular record? The dissent in Southwell, a 7-2 decision, believed that the record was adequate, that the case was indistinguishable from Johnson and that therefore Washington law governed. Southwell, 101 Wash. 2d at 209-12, 676 P.2d at 483-84 (Dore, J., dissenting). 121

Critical to the new methodology is an analysis of interests. Cannot any lawyer worth his or her salt create some interests to justify the application of the desired law of one of the states with contacts? And cannot any lawyer explain away the interests asserted by the adversary? Is this a major defect in the methodology? Or is this like any issue to be resolved by a court following adversarial presentation of competing interests and policies, whether meritorious or not?

The Southwell majority stated that “[w]hile Johnson makes the analytical framework clear, the ultimate outcome, in any given case, depends upon the underlying facts of that case.” Has choice of law in Washington become an ad hoc approach without predictability for parties, counsel, or the lower courts? Or is the court simply functioning as one expects in having stated the essential guidelines and factors to be considered in the context of the individual case?

It is this writer’s conclusion that the supreme court is to be commended for its choice-of-law decisions over the past twenty years. The court has established an understandable methodology for the resolution of conflicts issues. Certainly, the answer to each possible choice-of-law problem is not clear. The framework to approach each problem has been set, however. That is as much as one can expect. The answer to each problem may depend on the individual facts. That likewise is to be expected. Such is the evolutionary process of choice of law, and, of the common law.

121. The dissent in Southwell, a 7-2 decision, believed that the record was adequate, that the case was indistinguishable from Johnson and that therefore Washington law governed. Southwell, 101 Wash. 2d at 209-12, 676 P.2d at 483-84 (Dore, J., dissenting).

122. Id. at 204, 676 P.2d at 480.