CHOICE OF LAW IN TORTS: THE NEW RULE

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Following release of the Supreme Court's decision in *Jensen* v. *Tolofson* and *Lucas* v. *Gagnon*,[1] lawyers across Canada scrambled to accept or withdraw outstanding settlement offers in actions involving torts and the Conflict of Laws. The connecting factor of combined *lex fori/lex loci delicti*, last affirmed by the Supreme Court almost 50 years ago in *McLean* v. *Pettigrew*,[2] was rejected to the surprise of no one. But, to the surprise of many, so was the American revolution in choice of law. Instead, the Court turned to the very connecting factor that the American revolutionaries sought to displace, *lex loci delicti*.

Background

The *locus classicus* of the *lex fori/lex loci delicti* rule for choice of law in torts is the 1870 decision of Willes J. in *Phillips* v. *Eyre*.[3] In words destined to be construed as if contained in a statute, Willes J. stated a general rule of double civil actionability premised on two conditions – that the matter be (i) actionable by the law of the forum, and (ii) not justifiable by the *lex delicti*.[4] Problems soon arose. Was this a rule of choice of law or jurisdiction? Subsequent cases clearly determined, whatever may have been the intention of Willes J., that *Phillips* established a rule of choice of law in favour of the substantive law of the forum.

Machado v. *Fontes*[5] modified the *Phillips* rule by interpreting the "not justifiable" condition as meaning "not innocent". In *Machado*, the presumably forum-seeking Brazilian plaintiff was permitted to sue the Brazilian defendant in England for defamation published in Brazil, notwithstanding that there was no civil liability for defamation in Brazil. The court determined that the act was "not innocent" as defamation was subject to criminal liability in Brazil. As this case illustrates, to satisfy the "not innocent" condition the plaintiff merely had to demonstrate that the defendant's conduct constituted a criminal or quasi-criminal

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[1][1995] 1 W.W.R. 609, [1994] S.C.J. No. 110 (QL) [hereinafter *Tolofson* cited to W.W.R.].

[2][1945] S.C.R. 62, [1945] 2 D.L.R. 65 [hereinafter *McLean* cited to S.C.R.].

[3](1870), L.R. 6 Q.B. 1 (Ex. Ch.) [hereinafter *Phillips*]. Phillips brought an action in England against Governor Eyre for a false imprisonment alleged to have occurred during a rebellion in Jamaica. The Governor successfully defended the action because an Act of Indemnity, enacted by the Jamaican legislature, "declared lawful and confirmed" the acts of the Governor in quelling the rebellion.

[4]Ibid. at 28-29: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be filled. First, the wrong must be of such character that it would have been actionable if committed in England ... Secondly, the act must not have been justifiable by the law of the place where it was done."

[5][1897] 2 Q.B. 231 (C.A.) [hereinafter *Machado*].

offence under the law of the *locus delicti*. This rule, developed in a simpler time, proved a very useful device for plaintiffs in the modern regulatory world and provided obvious advantages to the motor vehicle accident plaintiff.[6]

The Supreme Court of Canada applied this *Phillips/Machado* choice of law rule in *McLean*.[7] In *McLean*, a gratuitous passenger, resident in Québec, brought an action in Québec against her driver, also a Québec resident, for injuries sustained in a single vehicle accident in Ontario. Ordinary delictual responsibility under the law of the forum, Québec, satisfied the first branch of the *Phillips* rule. The problem before the Court was the gratuitous passenger law of Ontario, the law of the place of the tort, under which a gratuitous passenger had no cause of action against her driver.[8] Taschereau J., for a majority of the Court,[9] held that, notwithstanding his actual acquittal on a charge of driving without due care and attention, the defendant driver had in fact committed that offence and, accordingly, his conduct was "not innocent" within the meaning of the *Machado* gloss on *Phillips*.

For almost 50 years *McLean* was the final word of the Supreme Court on the issue. During this period, academics and judges were not silent.

The Road Not Taken

Critics of the traditional choice of law rules in torts were not hard to find. In England, J.H.C. Morris, drawing upon the concept of the proper law of the contract, suggested the connecting factor of the proper law of the tort – the proper law being the law with the most significant connection to the parties and the

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[6]It is important to note that the effect of satisfying the two branches of the *Phillips/Machado* rule is to apply the law of the forum as the choice of law in tort. In other words, the two branch connecting factor points to the substantive law of the forum. A successful plaintiff must overcome not only all defences under the law of the forum but also all absolute defences under the law of the place where the act was done – only absolute defences would make the act justifiable by that law. Stated another way, a defendant has the advantage of all defences available under the law of the forum but also all absolute defences under the law of the place where the act was done. In considering this rule, it must be remembered that it is the plaintiff who selects the forum in which to litigate and therefore has control over the defences available to the defendant.

[7]*Supra* note 2.

[8]*Highway Traffic Act*, R.S.O. 1937, s. 47(2).

[9]Rinfret C.J.C., and Hudson and Estey JJ. concurring. Kellock J. delivered separate concurring reasons. (Hudson J. expressly reserved his concurrence from the contractual liability analysis of Taschereau J.).

conduct in relation to the particular legal issue in dispute.[10] Though not well received in England, the concept flourished in the United States.

In the United States, the American *Restatement*[11] rule of the place of the wrong (*lex loci delicti*) came under severe criticism. Based on the vested rights theory, the place of the wrong was defined as the state where the last event necessary to make an actor liable in tort took place.[12] Was justice achieved with such a rule? What of the purely fortuitous place of the wrong; for example, an airplane crash? Why should the law of the place where the airplane crashed govern tort claims of passengers from a multitude of states – a true multi-state tort. Or, what of motor vehicle accidents in state A involving plaintiffs and defendants from state B. Why should issues of compensation be determined by the law of the place of the accident (state A) rather than that of the state of both parties (state B), a state truly interested in the proper compensation of its citizens for conduct occasioned by another of its citizens? And, what of cases of negligent manufacture of goods in state A, but the injury occuring in state B? Where is the place of the tort to be localized?

In response, a number of revolutionary approaches were suggested, many criticized as pro-plaintiff and pro-recovery biased. David Cavers, a principal proponent of rule-seeking rules,[13] focused on combinations of higher and lower standards of conduct and compensation in five relevant contact states – the state of acting, the state of injury, the home states of the plaintiff and defendant, and the state in which the relationship between the parties has its "seat" – to develop five "principles of preference" to identify the preferred result in choice of law in tort cases.[14]

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[10]See J.H.C. Morris, "Torts in the Conflict of Laws" (1949) 12 Modern L.R. 248 at 252. See also J.H.C. Morris, "The Proper Law of a Tort" (1951) 64 Harvard L.R. 881.

[11]American Law Institute, *Restatement of the Law of Conflict of Laws* (St. Paul: American Law Institute Publishers, 1934) at § 377 et seq [hereinafter *First Restatement*].

[12]*Ibid.*

[13]See D.F. Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47 Harvard L.R. 173 at 194; P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992) at 31-34; J.-G. Castel, *Canadian Conflict of Laws*, 3rd ed. (Toronto: Butterworths, 1994) at 30-32.

[14]Cavers, *The Choice of Law Process* (Ann Arbor: University of Michigan Press, 1965) at 139 as quoted in Castel, *ibid.* at 42-44. For example, if the state of injury set a higher standard of conduct or compensation, Cavers favoured application of the law of the state of injury over the state of acting, even if the defendant acted in his or her home state. However, if the state of injury and the state of acting are the same state and that state sets a lower standard of conduct or compensation than the home state of the injured plaintiff, Cavers favoured application of the lower standard.

Brainerd Currie's offering to the choice of law revolution was government interest analysis.[15] This approach focuses on the policy interests of conflicting states in applying their own law to the legal issue in dispute. Currie found that many conflicts were false conflicts – those that upon closer examination revealed that a state did not have an interest in having its law apply – thereby leaving the applicable substantive law to the one state with a real policy interest. For example, a state where a motor vehicle accident occurred involving non-residents only, would have no real interest in applying its law to issues of compensation between the parties. Or, the laws of the interested states may be found to be identical and, therefore, not in conflict. Currie had a problem when resolving a real conflict of interested states. In his view, a court could not properly decide between two conflicting interested states. The best solution to this conundrum was to apply the law of the forum, which, of course, would favour forum shopping. A valuable refinement to Currie's work was made by William Baxter who contributed the theory of comparative impairment to resolve Currie's dilemma of the true conflict.[16] Under comparative impairment, a court would weigh the respective interests of the states concerned and apply the law of the state most impaired by the non-application of its law.

Of less significance, in terms of broad acceptance, is the contribution of Robert A. Leflar. Leflar reduced the basic policy considerations of a conflicts system to five factors: "A. Predictability of results; B. Maintenance of interstate and international order; C. Simplification of the judicial task; D. Advancement of the forum's governmental interests; E. Application of the better rule of law."[17] This approach creates a flexible analytical framework which leads in many cases to the application of the law of the forum.

The most influential approach is that adopted by the American Law Institute's *Restatement of the Law Second, Conflict of Laws 2d*.[18] The *Restatement Second*, adopted in 1969, rejected the vested rights theory of the *First Restatement* in favour of a policy-driven approach in which particular issues are governed by the proper law, or the law of the state with the "most significant relationship to the occurrence and the parties". The determination of the proper law is to be informed by seven policies reflecting the basic objectives of a system of Conflict

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[15]B. Currie, "Comments on *Babcock* v. *Jackson*, A Recent Development in Conflict of Laws" (1963) 63 Col. L. Rev 1233.

[16]W.F. Baxter, "Choice of Law and the Federal System" (1963-64) 16 Stan. L. R. 1.

[17]R.A. Leflar, "Choice-Influencing Considerations in Conflicts Law" (1966) 41 N.Y. U. L.R. 267 at 282. Examples of courts applying the Leflar approach are *Clark* v. *Clark*, 222 A.2d 205 (1966) and *Roy* v. *Star Chopper Co. Inc.* 584 F.2d 1124 (1st Cir. 1978).

[18](St. Paul: American Law Institute Publishers, 1971) [hereinafter *Restatement Second*].

of Laws.[19] Fortunately, the drafters of the *Restatement Second* applied their policy approach and identified the resultant connecting factors in the various areas of law. In relation to torts, the drafters further identified four key contacts to be considered in determining the law with the most significant relationship: the place of injury; the place of acting; the domicil, residence, nationality and place of business of the parties; and the place where the relationship between the parties is centred.[20] Finally, the drafters also applied the policy objectives and the key contacts to determine that the choice of law rule governing personal injuries is "the local law of the state where the injury occurred ... unless, with respect to the particular issue, some other state has a more significant relationship ... to the occurrence and the parties, in which event the local law of the other state will be applied".[21]

Accordingly, after all the innovation, the drafters retained *lex loci delicti* as the principal choice of law rule, though subject to the very important exception in favour of the law of some other more significant state. It would not be unfair, though perhaps a bit simplistic, to view the *Restatement Second* as an amalgam of *lex delicti*, Cavers' principles of preference, Currie's interest analysis and the basic policy objectives of a conflicts system.

What then is the choice of law rule in tort in the United States? The answer, it would seem, is that there is a diversity of rules rather than a predominant or majority rule. A 1993 survey[22] of choice of law rules in tort revealed the

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[19] *Ibid.* at § 6:

> [T]he factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the form,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and,
> (g) ease in the determination and application of the law to be applied.

These policy considerations reflect in large measure the work of Yntema, "The Objectives of Private International Law" (1957) 35 Can Bar Rev. 721; Cheatham and Reese, "Choice of the Applicable Law" (1952) 52 Col. L. Rev. 909; and Reese, "Conflict of Laws and the *Restatement Second*" (1963) 28 Law and Contemp. Prob. 679.

[20] *Ibid.* at § 145(2).

[21] *Ibid.* at § 146.

[22] See S.C. Symeonides, "Choice of Law in the American Courts in 1993 (and in the Six Previous Years)" (1994) 42 Am. J. of Comp. Law 599. For a 1987 survey, see G.E. Smith "Choice of Law in the United States" (1987) 38 The Hastings L.J. 1041.

following statistics: thirteen states follow the *First Restatement* rule of *lex delicti*; twenty-two, the *Restatement Second*; one, a centre of gravity or significant contacts approach; two, interest analysis; five, Leflar's policy considerations; two, the *lex fori*; and five, a combination of various approaches including Caver's principles of preference and modified interest analysis.

The Judicial Road

In *Boys* v. *Chaplin*,[23] the House of Lords rejected the proper law of the tort, but recognized that the *Phillips/Machado* choice of law rule required modification. The action concerned a motor scooter/car collision in Malta involving two British soldiers. Under the law of Malta, the plaintiff was limited to special damages of £53, but the law of England, the forum, permitted additional recovery of £2250 in general damages. The Law Lords delivered five separate reasons for decision resulting in the view that no true *ratio* can be discerned from these varied reasons.[24] Notwithstanding that view, *Boys* has been interpreted as declaring a

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In terms of the three key elements of plaintiff, defendant and place of the tort, four classic fact patterns logically arise in relation to motor vehicle accidents: (i) the plaintiff, defendant and place of the tort are localized in three different countries (1-2-3); (ii) the plaintiff is injured in his or her country of residence by the conduct of a visiting defendant (1-2-1); (iii) the visiting plaintiff is injured by the conduct of a defendant acting within the defendant's country of residence (1-2-2); and (iv) visiting plaintiff and visiting defendant, both of whom are residents of the same country, are involved in tortious activity in a second country (1-1-2). A *general and crude* consideration of American case-law points to a rule of thumb of 2 out of 3. In other words, when applying any of the modern American approaches, the appropriate choice of law is the law of that country identified when 2 out of the 3 elements of plaintiff, defendant and place of the tort are localized in the same country. This should not be a surprise. Whether the analysis is framed in terms of government interest, centre of gravity or preferred result, the combination of any two of plaintiff, defendant and place of the tort is a good predictor of the choice of law selected by the court. The rule obviously cannot apply in the 1-2-3 situation in which the plaintiff, defendant and place of the tort are located in three different countries. In that event, the choice of forum by the plaintiff can be considered to achieve a 2 out of 4 result or, a predetermined rule such as *lex loci delicti* can be applied, as for example, with the *Restatement Second*.

[23][1971] A.C. 356 [hereinafter *Boys*].

[24]Castel, *Conflict of Laws : Cases, Notes and Materials*, 6th ed. (Butterworth's: Toronto, 1988) at 12-39 summarizes the reasons of the House as follows:

> To sum up, three of the five Lords overruled *Machado* v. *Fontes* (Lord Hodson, Lord Guest, Lord Wilberforce) and held that *Phillips* v. *Eyre* was a double actionability rule. Only two of them favoured the proper law of the torts doctrine (Lord Hodson and Lord Wilberforce). The others rejected it. Lord Donovan and Lord Pearson would retain *Machado* v. *Fontes*. Four of them held that the question before the court was one of substance and not procedure.

McLeod, *The Conflict of Laws* (Carswell: Calgary, 1983) at 544 summarizes the case as follows:

rule of double civil actionability with a limited exception permiting application of the law of the country with the most significant relationship to a particular issue.[25] It will be recalled that, under the *Phillips/Machado* rule for choice of law, the applicable substantive law was that of the forum, subject to the condition of non-justifiability by the law of the place where the tort occurred. The new rule continued the dominant role of the substantive law of the forum subject to the condition that actionability exist by the law of the place where the tort occurred.[26] In other words, *Machado* was overruled.

In Canada, direct impetus for reconsideration of the choice of law rule in torts came with enactment of Québec's no-fault motor vehicle insurance scheme.[27] This scheme abolished a civil cause of action for damages arising from a motor vehicle accident in that province. The result was that a plaintiff bringing an action in his or her home province for injuries sustained in a motor vehicle accident in Québec could not satisfy the double civil actionability rule of *Phillips* ("not justifiable") and had to rely on the *Machado* gloss ("not innocent"). Given developments in the United States, and the House of Lords decision in *Boys*, judges, particularly in Ontario, began the process of deconstructing *McLean*.

> What is clear is that a majority of the House of Lords upheld the validity of the rule in *Phillips* v. *Eyre*. As well, a majority of the House overruled *Machado* v. *Fontes* and held that the rule in *Phillips* v. *Eyre* was a rule requiring dual actionability. A majority of the House also held that the question before the House was one of substance and not procedure.

As stated above, the issue before the court in *Boys* was whether general damages were recoverable. This was treated by some of the Lords as equivalent to whether general damages were actionable under the law of the forum (England) - Yes - and under the law of the place of the tort (Malta) - No. Double civil actionability did not exist. In this context, Lord Wilberforce recognized a limited exception to the double actionability rule. He determined that Malta had no interest in applying its law to an English plaintiff against an English defendant and excluded Maltese law in favour of the application of English law. It is significant that Maltese law was excluded because it was a disinterested state.

[25]Dicey & Morris, *The Conflict of Laws*, 11th ed. (London: Stevens, 1987) at 1365-66, has been accepted as a proper statement of the case:

> Rule 205(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England would be a tort; and (b) actionable according to the law of the foreign country where it was done.
> (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

[26]This view was confirmed by the English Court of Appeal decision in *Coupland* v. *Arabian Gulf Oil Co.* (1983) 1 W.L.R. 1151 (C.A.). The plaintiff was a Scotsman employed by the defendant Libyan Company to work in Libya and was injured in Libya during the course of his employment.

[27]*Automobile Insurance Act*, S.Q. 1977, c. 68; R.S.Q. 1977, c. A-25.

In Ontario, a series of cases in the early 1980s applied the *Machado* gloss to permit recovery by Ontario plaintiffs for injuries sustained in motor vehicle accidents in Québec.[28] In 1989, an appropriate case for reconsideration of the rule reached the Ontario Court of Appeal. As with most of the earlier cases, *Grimes* v. *Cloutier*[29] arose as a result of a motor vehicle accident in Québec involving Ontario plaintiffs and Québec defendants. Under the law of Québec, the defendants were not civilly liable due to Québec's no-fault insurance regime, while under the law of Ontario the defendants would be civilly liable. If the Court applied *McLean*, the substantive law of Ontario would have been applicable. This was because the defendant driver had been convicted of driving without due care and attention and, therefore, the act was "not innocent" under the law of Québec. The Ontario Court of Appeal, per Morden J.A., concluded that the Supreme Court did not intend to establish a universally applicable choice of law rule and limited *McLean* to its specific fact pattern. Morden J.A. stressed that the *McLean* rule had been prefaced by the phrase "under these conditions". Having distinguished *McLean*, Morden J.A. rejected the application of the "not innocent" *Machado* gloss, in favour of a rule of double civil actionability per *Phillips* and *Boys*. As there was no civil cause of action under the law of the place where the tort occurred – Québec – the rule was not satisfied. Morden J.A. reproduced with apparent approval the rule from Dicey & Morris as a general statement of his approach.[30]

In New Brunswick, there was also some dissatisfaction with the *McLean* approach to choice of law. In *Martin* v. *McNeely*, Stevenson J. applied the most significant relationship approach.[31] In *McCutcheon* v. *McCutcheon and Pitre*,[32] Higgins J. adopted an identical earlier version of the Dicey & Morris rule to apply

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[28]*Going* v. *Read Bros. Motor Sales Ltd.* (1982), 35 O.R. (2d) 201 (H.C.); *Guerin* v. *Proulx et al.* (1982), 37 O.R. (2d) 558 (Co. Ct.); *Eades* v. *Hamilton*. (1985), 52 O.R. (2d) 307 (Dist. Ct.); and *Ang* v. *Trach* (1986), 57 O.R. (2d) 300 (H.C.). See also *Bouchard* v. *J.L. Le Saux Ltée.* (1986), 11 C.P.C. (2d) 170 (C.A.); and *Lewis* v. *Leigh* (1986), 54 O.R. (2d) 324 (C.A.).

[29](1989), 69 O.R. (2d) 641 [hereinafter *Grimes*].

[30]In a subsequent decision, *Prefontaine Estate* v. *Frizzle* (1990), 71 O.R. (2d) 385, the Ontario Court of Appeal per Griffiths J.A. confirmed that (i) the basic choice of law rule in tort is found in *Phillips*, (ii) described Dicey & Morris Rule 205 as "authoritative" and (iii) stated:

> Grimes v. Cloutier stands for the proposition that in deciding the choice of law to be applied in Ontario to a tort committed outside the province, *generally* the two rules of *Phillips* v. *Eyre*, as expanded by Dicey & Morris, should apply. The two rules, however, should not be applied where to do so would produce an "unfair and unsound" result.

The Court of Appeal held that the general rule of double civil actionability was not satisfied due to the lack of a civil action under Québec's *Automobile Insurance Act* and that this result was not unfair.

[31](1975), 10 N.B.R. (2d) 473 at 509 (Q.B.), rev'd (1976), 12 N.B.R. (2d) 665 (C.A.).

[32](1989), 102 N.B.R. (2d) 271 (Q.B.).

Georgia law to an issue of compensation between Georgia residents for injuries sustained in a motor vehicle accident in New Brunswick. For the most part, however, New Brunswick cases reflect the traditional approach.[33]

Jensen v. *Tolofson* and *Lucas* v. *Gagnon*

Tolofson arose as a result of a motor vehicle accident in Saskatchewan involving vehicles from British Columbia and Saskatchewan. The plaintiff, a then 12 year old passenger in the British Columbia vehicle, brought action in British Columbia against both the driver of that vehicle (his British Columbia father) and against the driver of the Saskatchewan vehicle. Similarly, *Lucas* concerned a motor vehicle accident in Québec involving vehicles from Ontario and Québec. The plaintiffs, a mother and her children who were passengers in the Ontario vehicle, brought action against the driver of that vehicle (their Ontario husband/father) and against the driver of the Québec vehicle. The plaintiffs' action against the Québec driver was subsequently discontinued; however, a cross-claim by the Ontario driver against the Québec driver had been instituted and was not discontinued.[34]

In both *Tolofson* and *Lucas*, the respective plaintiffs sought to apply the substantive and procedural laws of the forum and to avoid the unfavourable laws of the place where the accidents occurred. In *Tolofson*, the plaintiff sought to avoid Saskatchewan's gratuitous passenger law[35] and its twelve month limitation period in favour of the ordinary negligence standard and longer limitation period of British Columbia, the action having been commenced eight years after the accident. In *Lucas*, the plaintiffs sought to avoid the liability and compensation limits of Québec's no-fault regime in favour of Ontario's negligence regime.

In *Tolofson*, the British Columbia Court of Appeal[36] had considered itself bound by *McLean* given the identical fact patterns presented in the two cases – plaintiffs and defendants from the same country involved in tortious conduct in a second country. Cumming J.A., for the Court, did not consider that the additional factor of a co-defendant from the *locus delicti* was sufficient to distinguish *McLean*. He also concluded that since the motor vehicle trip began and was intended to end in British Columbia, the application of the law of British Columbia "most closely

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[33]See *Martin* v. *Marmen* (1969), 1 N.B.R. (2d) 611 (C.A.); *Perron* v. *Parise* (1983), 44 N.B.R. (2d) 409 (Q.B.); *Hyslop* v. *Trenholm* (1983), 48 N.B.R. (2d) 357 (Q.B.).

[34]Both *Tolofson* and *Lucas* presented the Court with the third (1-2-2) and fourth (1-1-2) fact patterns identified *supra* note 22.

[35]Which denied recovery unless the defendant driver breached the "wilful or wanton misconduct" standard of care.

[36](1992), 89 D.L.R. (4th) 129.

accords with the reasonable expectations of the parties".[37] Cumming J.A. distinguished the Ontario Court of Appeal decision in *Grimes* on the basis that both defendants in that case were from the *locus delicti*. He also offered the rationalization that a civil action might have been reasonably expected to have been commenced within the one year Saskatchewan limitation period so that the Saskatchewan defendant was not similarly situated to a defendant whose conduct was not actionable *per se*.

In *Lucas*,[38] the Ontario Court of Appeal applied *McLean* to the main action between the Ontario plaintiffs and defendant – again, an indistinguishable fact pattern – and *Grimes* to the action involving the cross-defendant from the *locus delicti*. The reasoning of Tarnopolsky J.A., like that of Morden J.A. in *Grimes*, was a torturous exercise in distinguishing *McLean* on the basis of fact pattern differences. Bound by *Mclean* in the main action, Tarnopolsky J.A. considered that justice demanded, and *Grimes* permitted, the cross-defendant to be held subject to Québec law for conduct not actionable by the law of Québec.[39]

Choice of Law in the Supreme Court

The Supreme Court of Canada allowed the appeals in both actions. In reasons for decision written by La Forest J., the Court declared a clear and simple choice of law rule – *lex loci delicti*.

The logic of La Forest J. is unambiguously grounded in two concepts – territoriality and comity. Recognition of what he described as the "underlying reality" of the international legal order, that each country or "state has jurisdiction to make and apply law within its territorial limit",[40] leads him inexorably to the conclusion that the proper functioning of the international order and accommodation of the modern mobility of persons and wealth requires comity as a controlling principle. Comity, he defines, as "the deference and respect due by other states to the actions of a state legitimately taken within its territory".[41]

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[37]*Ibid.* at 144.

[38](1992), 59 O.A.C. 174.

[39]Carthy J.A. concurred in the result but through different reasoning. In his view, the cross-defendant, not being liable under the main action, could not be held liable under the *Negligence Act*, R.S.O. 1990, c. N-1, s. 2 as a "tortfeasor who is, or would if sued have been, liable". Blair J.A. concurred with both Tarnopolsky and Carthy JJ.A.

[40]*Supra* note 1 at 625.

[41]*Ibid.* at 626, quoting *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 [hereinafter *Morguard*], in which La Forest J. quoted the definition of comity given by Gray J. of the United States Supreme Court in *Hilton* v. *Guyot*, 159 U.S. 113 at 163-64 (1895); 16 S.Ct. 139 at 143, and approved by La Forest J. in *Morguard* at 1096:

Comity, in turn, logically leads to the selection of *lex loci delicti* as the appropriate choice of law rule. In other words, the logic is syllogistic and circular. Territoriality leads to comity which leads back to territoriality.

Why did La Forest J. choose this rule?

In his view, after *Phillips* v. *Eyre*, English courts departed from the realities of the international order in favour of a "positivistic rule-oriented approach that has since seriously inhibited the development of rational principles in this area".[42] For La Forest J., Willes J. in *Phillips* v. *Eyre* had stated a "general rule" which had been treated subsequently as both universal and statutory. That such an interpretation favoured application of the *lex fori* in an age of imperialism and eased the burden of proof of foreign law, served to demonstrate the narrowness of the approach in light of the decline of English imperialism, the present overriding importance of comity and the present ease of proof of foreign law thanks to modern methods of transportation and communication.[43] More significantly, such a rule favoured forum shopping as plaintiffs' sought a more favourable law.

The practical advantages of *lex loci delicti* identified by La Forest J., in addition to consistency with the territoriality and comity principles, are threefold: certainty; ease of application; and predictability. He did recognize that localizing the tort may be problematic in certain situations such as those involving conduct in one country and injury in another; but, as he said, that is not this case and, in any event, the place of harm may be used to localize the place of the tort.[44]

In words reminiscent of Willes J. in *Phillips*, La Forest J. prefaced his *lex loci delicti* rule with the phrase "at least as a general rule".[45] He recognized the jurisdictional limits of Canadian courts, in terms of the requirement of "a real and substantial connection" between the forum and the matter in litigation,[46] and the

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> "Comity" in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ... .

[42]*Ibid.*

[43]*Supra* note 1 at 629-30.

[44]See for example, *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393.

[45]*Supra* note 1 at 627.

[46]Referring to: *Morguard*, and *Hunt* v. *T & N, plc*, [1993] 4 S.C.R. 289.

general control device of *forum non conveniens*.[47] Thus, La Forest J. accepted a rare but possible exception to *lex loci delicti* in relation to truly international tort situations in which a court would have a discretion to apply the law of the forum "in certain circumstances" in order to avoid injustice. This reasoning is not developed and is mired in a consideration of the efficacy of the first branch of the *Phillips* rule (actionable according to the law of the forum) which he dismissed as more related to jurisdiction than choice of law. La Forest J. is satisfied to merely wonder if the actionable in the forum requirement is "really necessary".[48]

La Forest J. Rejected any Exception Within Canada.[49]

His analysis repeats much of the essential elements of his analysis of the international level – particularly, favouring certainty. Most of his attention is devoted to the troublesome fact pattern actually before him – both plaintiffs and defendants are from the forum and were involved in allegedly tortious conduct in another province. Does justice not require an exception in relation to this fact pattern? La Forest J. answers with a firm, but at times hesitant, "no". Agreeing with Lord Wilberforce in *Boys*, he rejects the American revolution in choice of law because of the uncertainty that a doctrine of the proper law of the tort would create. Quite remarkably, La Forest J. bolstered this conclusion by reference to a *1962* decision of the United States Supreme Court for the statement that the majority of American states "still apply the law of the place of the injury".[50] Compared with the statistics presented above, this statement is patently in error and its vintage should have aroused some suspicion in so learned a Justice as La Forest J.

Having firmly, but falsely, established *lex loci delicti* as the predominant American approach, and having rejected the proper law of the tort, La Forest J. tackled the arguments in favour of an exception for the problematic fact pattern on three bases: fairness and public policy considerations; convenience; and reasonable expectation of the parties. Regarding fairness considerations, La Forest J. concluded that an exception to *lex loci delicti* was developed by courts which did not like the law of the place of the tort – it was considered unfair or against public policy either because it denied recovery (*McLean* – gratuitous passenger law) or denied full compensation (*Boys* – limited to special damages). Rejection of the *lex loci delicti* in such situations required the court to deny the territoriality principle and favoured visitors over those who live in the *locus delicti*.

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[47]See: *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

[48]*Supra* note 1 at 631.

[49]In brief concurring reasons, Sopinka and Major JJ. "would not foreclose the possibility" of an exception to the *lex loci delicti* rule in relation to intra-Canada interjurisdictional torts, *ibid.*, at 648.

[50]*Richards* v. *United States*, 82 S.Ct. 585 (1962), 369 U.S. 1 (1962).

Such analysis may have been considered to accord with a court's sense of fairness, but, for La Forest J., "order comes first".[51] Fairness coupled with the territoriality principle logically implies that a "fortunate" plaintiff, injured in the *locus delicti* by a fellow resident of the forum, should not be advantaged over a plaintiff injured by a resident of the *locus delicti*.[52]

For La Forest J., the convenience rationale is minimized within Canada by the similarity of substantive law, at least in the common law jurisdictions, and the ready access through law reports, online services and the availability of lawyers in Canada who maintain memberships in more than one Bar. Finally, the reasonable expectation of the parties rationale is simply rejected by La Forest J. who intuitively accepts that parties involved in a motor vehicle accident in another province reasonably expect the law of that province to govern their rights and liabilities.

La Forest J. identifies two fundamental benefits in favour of a strict rule. First it promotes judicial efficiency by preventing plaintiffs from seeking to fit an exception to the *lex loci delicti* rule through frivolous cross-claims; second, it promotes settlements due to the certainty of the rule. If there is to be an exception to the rule, La Forest J. prefers a legislative rather than judicial creation notwithstanding that he is considering common law choice of law rules.[53] His main reason for this stance is the federalism factor.

Under the heading "Federal Problems", La Forest J. reaffirms his commitment to the implicit "full faith and credit" constitutional imperative developed in

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[51]*Supra* note 1 at 633.

[52]La Forest J. further rejects rationalizations for an exception based on protection of the health care and insurance systems of the forum for its residents injured in another province. These "considerations would 'come out in the wash'" (See *ibid.* at 634) on a global analysis and are lessened by the existence of a national health care system funded in part by federal transfer payments.

[53]La Forest J. noted in passing article 3126 of the *Civil Code of Québec* S.Q. 1991, c. 64 which expressly provides an exception from the general *lex loci delicti* rule:

> 3126. The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.
>
> In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.

He also referred to the similar exception contained in the *Hague Convention on the Law Applicable to Traffic Accidents* (1971) (ratified by nine European countries). The Convention was dismissed as a precedent founded on international sovereignty and judicial convenience, both of which factors were considered not significant within Canada.

Morguard. The source of this imperative rests in a narrow vision of Canadian federalism analogized to the American and Australian models, both of which expressly contain full faith and credit clauses in their respective constitutions. For La Forest J., and the Supreme Court majority, a federal state necessarily implies that substantive rights and liabilities should not vary depending on the province of litigation. This naturally favours the certainty of the *lex loci delicti* rule. Yet, the "universal" solution is one of the principal theoretical reasons for a system of private international law. What added dimension does federalism contribute? La Forest J. does not develop his thesis. Instead, he shifts focus to the constitutional source of provincial conflicts rules jurisdiction, "Property and Civil Rights in the Province"[54] and declares a preference for a rule that clearly respects the territoriality principle inherent in that head of power rather than embarking upon the shallow waters of "intractable constitutional problems".[55] In his view, "an extensive concept of 'proper law of the tort' might well give rise to constitutional difficulties".[56]

The New Choice of Law Rule

Certainty and simplicity have triumphed in Canadian conflict of laws. Having *lex loci delicti* as the strict choice of law rule for intra-Canadian multi-jurisdictional torts – but with a rare exception in relation to international torts – simplifies the judicial task and *will* promote settlements, reduce transaction costs[57] and promote efficiencies within the legal system. However, one would be foolish to believe that the final word has been written by the Supreme Court on choice of law in torts.

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[54]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3., s. 92(13).

[55]*Tolofson, supra* note 1 at 639.

[56]*Ibid.*:

> [A]n attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns. Such legislation applying solely to the forum province's residents would appear to have more promise. However, it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident.

[57]R. Posner, *Economic Analysis of Law*, 4th ed. (Toronto: Little, Brown and Company, 1992) at 587-88. Judge Posner favours application of the law of the state with the comparative regulatory advantage in relation to particular issues. As with other approaches, he would apply the law of the place of the tort to locate specific factors such as traffic regulation and, if a state of common residence of plaintiff and defendant, the law of that state to govern standard of care and compensation.

The rule itself remains subject to the very criticisms which led American writers to formulate new approaches to choice of law. The troublesome fact pattern of plaintiffs and defendants from the forum province litigating tortious conduct in a second province will not go away. The basic question remains – what interest does a province have in applying its substantive law to issues of liability and compensation between non-resident plaintiffs and defendants litigating in their home forum? Phrased another way, did the legislature intend its law to apply in such a situation? Did the legislature contemplate such a situation? It is clear that the Supreme Court in *Lucas* clearly held that the Québec legislature intended its no-fault scheme to apply to all motor vehicle accidents in Québec, but is that true for all tortious conduct to be governed by the strict *lex loci delicti* rule? Might not a court read down a substantive rule so that it would not apply to the non-resident parties? There is some precedent for this approach outside of the proper law approaches. In *Bernkrant* v. *Fowler*,[58] a California court refused to apply the California Statute of Frauds to an oral Nevada contract on the ground that it did not apply to out-of-state contracts. A similar reading is possible in tort areas.

One should expect that eventually an exception to the strict *lex loci delicti* rule will be recognized. In *Tolofson* and *Lucas* itself, two of the seven justices made their concurrence with the majority subject to the possibility of an exception to the strictness of the rule. As noted by La Forest J., the 1971 *Hague Convention on the Law Applicable to Traffic Accidents* adopts the *lex loci delicti* rule, but subject to displacement in favour of the law of the country of vehicle registration when there is a one vehicle accident or when the two vehicles are registered in a country other than the *locus delicti*. La Forest J. rejected the precedential weight of this Convention because of its inherent respect of national sovereignty and the factor of judicial convenience, both of which he disregards in relation to an intra-Canadian rule. Further weight favouring an exception may be found in the American Law Institute's *Restatement Second* which, as noted above, applies a combination of a number of approaches to achieve *lex loci delicti*, but subject to displacement in relation to any issue by the law of the state with the most significant relationship to the occurrence and the parties. The Australian Law Reform Commission, in 1992, recommended *lex loci delicti* as the general choice of law rule subject to displacement "if the parties and the occurrence had an insignificant connection with that country and the law of another country had a real and substantial connection with the occurrence and with the parties".[59] While the recommended rule is to apply to both intra-national and international torts, it is significant that the Commission recommended analysis of the purposes or objects of the law (a form of interest analysis) for interstate claims.[60] The

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[58]360 P.2d 906 (1961).

[59]The Law Reform Commission, *Report No. 58: Choice of Law* (1992) at 49.

[60]*Ibid.*, *Draft Bill* at 175.

Swiss Statute on Private International Law, which entered into force in 1989, similarly provides for the application of the *lex loci delicti* when the tortfeasor and injured party have no habitual residence in the same state, with displacement in favour of the law of the state of common habitual residence or, if selected by the parties, the law of the forum.[61] The trend is becoming clear.[62]

If there are any doubts about the trend in choice of law in torts, such doubts will surely be dispelled by developments in the United Kingdom. Based on a 1990 Report of the Law Commission and the Scottish Law Commission,[63] a government bill is presently before the British Parliament to substitute, for the common law choice of law rule in tort, a general rule of *lex loci delicti* subject to displacement in favour of the law of another country which is substantially more appropriate in light of the significance of the factors connecting the tort with that country.[64]

It is clear that this trend will eventually come to Canada, if not by judicial action, then by legislative intervention. But why wait? The time for legislation is now.

Must lawyers return to the former days of arguing *where* a tort occurred? Do the various theories have to be resurrected as the focus of argument – place of acting, place of harm, last act?[65] The practice in other reforming jurisdictions, as for example the Bill before the British Parliament, is to particularize tort localization rules. An additional concern relates to compensation limitations. Recognizing the general conflicts rule that heads of damage are substantive and quantification of damages are procedural, must lawyers now argue over the characterization of statutory compensation limits under, for example, Québec and Ontario no-fault insurance schemes?[66] A recent decision in Australia held that such statutory compensation limitations are procedural.[67] The better view in Canada, particularly in light of the Supreme Court's discussion in *Tolofson*

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[61] *Switzerland: Statute on Private International Law* (1990) 29 I.L.M. 1244 at article 132 et seq.

[62] See, for example, G.A.L. Droz, "Cours général de droit international privé", [1991] IV Recueil des Cours 9 at 282 et seq.

[63] The Law Commission and the Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict* (London: H.M.S.O., 1990)

[64] *Private International Law (Miscellaneous Provisions) Bill*, (London: H.M.S.O., 1 March 1995) (HL Bill 39).

[65] See discussion of various theories in *Moran*, *supra* note 44.

[66] *Automobile Insurance Act*, *supra*, note 27 ; *Insurance Act*, R.S.O. 1990, c. I-8 as am. by S.O. 1993, c. 10.

[67] *Kontis* v. *Barlin* (1993), 115 A.C.T.R. 11 applying *Stevens* v. *Head* (1993), 112 A.L.R. 7 (H.C.).

regarding limitations of actions, is that such limitations are substantive.[68] Beyond the issue of characterization of compensation limits, it must be recognized that pro-plaintiff, pro-recovery trial judges may now be more receptive to substantive/procedural characterization arguments in order to avoid application of the substantive law of the *locus delicti*.

If legislation is to come, should it be federal or provincial?

As noted by La Forest J., in passing, there is the possibility of federal legislative intervention in Canadian Conflict of Laws. The notion of federal legislation regarding interprovincial enforcement of judgments certainly occurred to all who read *Morguard*. In the commercial area, such legislation could be supported as a matter within federal jurisdiction in relation to interprovincial and international trade and commerce. In other areas, such as personal injury, it is arguable whether purported federal jurisdiction – for example, as a matter of national concern under POGG, could escape a constitutional challenge.[69] Similar reasoning could apply to choice of law rules. Choice of law in contract is an obvious illustration of interprovincial and international trade. Yet, rules in tort are harder to justify.

On the provincial level, conflict of laws legislation is not unusual. Yet, judicial consideration of such legislation is essentially unknown in Canada. The seeds for such review have been planted by La Forest J. in *Morguard*, *Hunt* v. *T & N, plc*, *Amchem*, and now *Tolofson*, cases in which he expounds on the concepts of "full faith and credit" and "real and substantial connection" to potentially justify and limit provincial jurisdiction under the *Constitution Act, 1867*. But, this analysis has been preliminary. The opportunity for real consideration of such issues by the Court has not yet been presented. In *Tolofson*, La Forest J. considered the compatibility of an exception to the *lex loci delicti* rule with provincial jurisdiction under "Property and Civil Rights in the Province" and suggests, as discussed above, that:

> an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties ... [and] it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such

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[68]The Court approved an approach to characterization by which the laws of the *lex causae* are, *prima facie*, characterized as substantive. See: *Block Bros. Realty Ltd.* v. *Mollard* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.).

[69]Consider application of the "provincial inability" test per *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

circumstances, this would open the possibility of conflicting rules in respect of the same incident.[70]

It is clear that La Forest J. is not concerned in this passage with local sense jurisdictional issues, but rather with substantive law. The implication is that, as a "civil right in the province", the *lex loci delicti* may attach immutably to the civil right created by tortious conduct in the *locus delicti*. Again, it is his vision of federalism which leads to this implication. The classic cases dealing with the "in the province" limitation, e.g. *Royal Bank of Canada* v. *The King*,[71] *Ladore* v. *Bennett*,[72] and *Churchill Falls (Labrador) Corp.* v. *Attorney-General for Newfoundland*,[73] were all concerned with *ex post facto* legislative changes to contracts localized outside of the province and with contractual parties outside of the province. It is not inconceivable that a court would characterize a provincial law governing a cause of action between resident plaintiffs and defendants for conduct which occurred outside of the province as, in pith and substance, a matter of property and civil rights in the province. Both *Ladore* and *Churchill Falls* accepted the distinction between legislation in relation to a property and civil rights in the province and legislation which incidentally affects property and civil rights outside the province. After all, notwithstanding that a civil right is created by the *lex loci delicti*, it does not follow that the right remains permanently localized in that province for constitutional purposes. In *Ladore*, it was held that a contract was located where the debtor was located; in *Churchill Falls*, the contract was located in Québec because of the rule that a contract is located where an action can be brought. A tort right is not necessarily static. Note, for example, that the Ontario statutory benefits automobile insurance scheme provides that an owner, occupant or person present at an accident scene is not liable in Ontario for loss or damage arising from an accident anywhere in Canada, the United States or a designated country.[74] In other words, the civil right created by the law of another Canadian province is not enforceable in Ontario; it has been supplanted by an insurance scheme.

A final word. For those uncomfortable with Conflicts issues, the certainty and simplicity of *lex loci delicti* is no doubt welcome. For those who enjoy Conflicts issues, that very certainty and simplicity takes away part of the intellectual challenge. Gone, at least temporarily, are the fine points of dépeçage and interest analysis. One more challenge to the human spirit deflated.

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[70]*Supra* note 1 at .

[71][1913] A.C. 283 (J.C.P.C.)

[72][1939] A.C. 468 (J.C.P.C.) [hereinafter *Ladore*].

[73][1984] 1 S.C.R. 297 [hereinafter *Churchill Falls*].

[74]*Insurance Act*, *supra* note 66 at s. 267.1(1).