Case Comment: *Tolofson* v. *Jensen*

ROBIN M. JUNGER

TOLOFSON V. *JENSEN* and *Lucas* v. *Gagnon*[1] are the latest in a series of Supreme Court of Canada decisions dealing with the conflict of laws that imbue this difficult discipline with overarching principles of constitutional law and Canadian federalism.[2] In this case the court sought to refashion the choice of law rule for determining which law is to apply when a tort involves persons or factors from numerous jurisdictions. While the Court should be commended for seizing this opportunity to address the significant problems which have resulted from previous judicial pronouncements in this area, it is unfortunate that both the new rule which the court has fashioned, as well as the basis upon which it is premised, are likely to lead to continued problems for Canadian judges, lawyers and litigants alike, and will necessitate further and more fundamental rethinking in the years ahead.

I. Facts and Judicial History

The *Tolofson* case arises out of a motor vehicle accident which occurred in Saskatchewan in 1979. The plaintiff (a minor) was a passenger in a car driven by his father. Both were British Columbia residents and their vehicle was registered and insured in B.C. They collided with a vehicle driven by a Saskatchewan defendant (whose car was registered and licensed there). Upon reaching the age of majority the plaintiff son sued both his father and the driver of the other vehicle in the British Columbia courts. At issue was whether British Columbia or Saskatchewan law applied, because under the Saskatchewan law applicable at the time, the plaintiff as a gratuitous passenger would need to show "wilful and wanton misconduct" to recover against his father. In addition, under Saskatchewan law there would have been a 12 month limitation for commencing the action which had obviously expired. These impediments to recovery did not exist under B.C. law.

The *Lucas* v. *Gagnon* case which was heard at the same time presents a very similar set of facts. The plaintiff, Mrs. Gagnon, brought a suit on behalf of herself and her children as a result of an accident that occurred while they were riding in Quebec in a car driven by her husband. The Gagnons were all resident in Ontario, and the driver of the other vehicle was a resident of Quebec. The plaintiff Mrs. Gagnon collected no-fault benefits under the Quebec insurance scheme and then

---

1 [1994] 3 S.C.R. 1022

2 See also *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R.1077; 76 D.L.R. (4th) 256, and *Hunt* v. *T & N plc*, (1993) 109 D.L.R. (4th) 16. For academic commentary on this trend see: J. Blom, "Conflict of Laws -Enforcement of Extraprovincial Default Judgment - Real and Substantial Connection: *Morguard Investments* v. *De Savoye*" [1994] 70 Can. Bar Rev. 733; E. Edinger, "The Constitutionalization of Conflicts" (1995) Vol. 25, No. 1, Cdn. J. Bus. L. 38; V. Black and W. Mackay, "Constitutional Alchemy in the Supreme Court: *Hunt* v. *T & N plc*." [5 N.J.C.L.] 79.

sought to supplement the recovery with a suit brought in Ontario against the defendant husband, Mr. Gagnon, who in turn made a cross-claim against the Quebec driver.

For present purposes it is sufficient to note that in both cases the accident occurred in a non-forum jurisdiction and the plaintiffs sought to recover in their province of residence despite the fact that the *lex loci delicti* would preclude recovery for the damages claimed. In each case the plaintiffs were residents of the forum, and one defendant was from the forum, while the other was from the foreign jurisdiction.

In each of these cases the provincial appellate courts were required to consider the effect of the Supreme Court of Canada's 1945 decision in *McLean* v. *Pettigrew*[3] which held that to recover in a forum court for a tort which occurred in a foreign jurisdiction, it was necessary to show both (i) that the wrong would have been actionable if committed in the forum jurisdiction; and (ii) that it was not justifiable in the place where the tort occurred. In *Tolofson*, the British Columbia Court of Appeal[4] stated that it considered itself bound by the rule in *McLean*. It held that since the accident would have been actionable in B.C. if it occurred there, and since it was "not justifiable" in Saskatchewan because of an alleged violation of the *Saskatchewan Highway Traffic Act*, recovery under British Columbia law should be allowed. In *Lucas* the Ontario Court of Appeal held that *McLean* should be applied to the facts of the main action against Mr. Gagnon, such that further recovery under Ontario law was permissible, but the Court distinguished the cross-claim against the Quebec driver on the facts and held that recovery against him should be barred according to Quebec law.

Given the awkward and heavily criticised test which resulted from *McLean*,[5] both of these provincial appellate courts are to be commended for their efforts to reconcile reason and precedent in a way that arguably led to justice on the facts of each case. While one must always be mindful of the principle that hard cases make bad law, "[i]t must [also] be kept in mind that the principles and rules of the conflict of laws, like any other rules of law, must facilitate the adjudication of practical human situations and achieve justice."[6] By allowing the appeals, the Supreme Court of Canada has denied the plaintiffs compensation not only against the defendant from the foreign jurisdiction where the accidents occurred, but also against their family members (and ultimately their insurance companies)—despite the fact that under the

3 [1945] S.C.R. 62

4 (1992), 65 B.C.L.R. (2d) 114, 89 D.L.R. (4th) 129, 11 B.C.A.C. 94, 22 W.A.C. 94, 1992 3 W.W.R. 743, 9 C.C.L.T. (2d) 289, 4 C.P.C. 113.

5 See, e.g., William S. Maslechko, "Revolution and Counter-revolution: An Examination of the Continuing Debate over "Interest Analysis" in the United States and its Relevance to Canadian Conflict of Laws" (1986) 44 U.T. Fac. L.R. 57; Bryan Schwartz, "Choice of Law in Torts: One More Time for the Road" (1982) 12 Man L.J. 175; J.G. Castel, "Conflict of Laws - Foreign Tort - Not Justifiable by the *Lex loci delicti* - Residence of Defendant -Interprovincial Comity - Judicial Creativity" (1990) 28 Alta. L. Rev. 665; Paul Bates, "Foreign Torts: The Canadian Choice of Law Rule" (1987) 8 Advocates Q. 397; John Swan, "Case Comment: Paradigm Shift or Pandora's Box?: *Grimes* v. *Cloutier*; *Prefontaine* v. *Frizzle*" (1990) 69 Can. Bar Rev. 538; Joost Blom, "Recent Developments in Canadian Law: Conflict of Law" (1988) 20 Ottawa L. Rev. 415; John Swan, Choice of Law in Torts: A Nineteenth Century Approach to Twentieth Century Problem?" (1989) 10 Advocates' Q. 57.

6 J.G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto: Butterworths, 1994) at 57.

law of the jurisdiction where these families lived, where their cars were licensed and insured, and where the suits were brought, recovery would have been allowed.

II. The History of Choice of Law Rules for Tort

Mr. Justice LaForest, writing for the majority, canvasses the judicial history of choice of law rules for tort in Canada and Britain. This aspect of the decision is rather lengthy and need not be reviewed in full here.[7] For present purposes I will only note that he begins with consideration of the seminal case of *Phillips* v. *Eyre* which held that:

> 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 fulfilled. First, the wrong must be of such a 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.[8]

This test, which came to be known as the rule of double action ability, was subsequently modified in Britain by the case of *Machado* v. *Fontes* [9] where the second branch of the test was held to mean merely that the act *must not be innocent* according to the *lex loci delicti*. Thus, rather than requiring that the act be actionable as a tort under the *lex loci delicti*, the court concluded that even a breach of the foreign criminal law would render it "not innocent" and therefore sufficient to sustain the action in the forum court. La Forest J. notes that this decision was heavily criticised, and suggests that it represents a misunderstanding of what was originally intended by the rule in *Phillips*. He goes on to state at para. 29:

> Nonetheless, it was on the insecure foundation of *Phillips* v. *Eyre* as interpreted in *Machado* v. *Fontes* that *the* existing Canadian law was erected by this Court's 1945 decision in *McLean* v. *Pettigrew*. There, it will be remembered, a driver and his gratuitous passenger, both domiciled in Quebec, had a car accident in Ontario, and the passenger sued the driver in Quebec. Under Ontario law, the claim would not have been actionable. It would, however, have been actionable in Quebec had it occurred there. Applying the prevalent English law, the Court found that since the tort was actionable in Quebec, and the driver's conduct, though not actionable in Ontario, was prohibited under the *Highway Traffic Act* of that province, it was not "justifiable" in Ontario. It therefore upheld the plaintiff's action under Quebec law.
>
> The law as enunciated in *McLean* v. *Pettigrew* has remained the basic rule in Canada ever since. However, its fundamental weaknesses began to be revealed in a series of Ontario cases beginning in the 1980's.[10]

It is somewhat ironic to note that while the oft criticized rule in *Machado* v. *Fontes* has its origins in British law, the decision was overturned in Britain by the House of

---

[7] See paragraphs 23-34. For additional consideration of the judicial history of the choice of law rules for tort in Canada, see R. Junger, "A Proposed Choice of Law Methodology for Tort in Canada: Comparative Evaluation of British and American Approaches" (1994) Vol. 26, No. 1 Ottawa. L. Rev. 75.

[8] (1870), L.R. 6 Q.B. 1 at 28-29.

[9] [1897] 2 Q.B. 231

[10] For a review of the academic and judicial criticism of the *McLean* rule see note 5 *supra* and Junger, *supra* note 7 at 104.

Lords in *Chaplin* v. *Boys*[11] after it was entrenched into Canadian law by the Supreme Court.

Mr. Justice La Forest then went on to consider the difficulties which arose with application of the *McLean* rule in Canada in cases such as *Going* v. *Reid Brothers*,[12] *Ang* v. *Trach*,[13], *Grimes* v. *Cloutier*,[14] and *Prefontaine Estate* v. *Frizzle*,[15] including the many judicial requests for reconsideration of this entire matter. He concluded at paragraph 34:

> Under these circumstances it is incumbent on this court to respond to the prayer [for reconsideration of the McLean doctrine] originally appearing in the reasons of Henry J. in *Ang* v. *Trach* and repeatedly reiterated in subsequent cases.[16]

---

11 [1969] 2 All E.R. 1085. While the *ratio decidendi* of this decision is difficult to ascertain because of the several judgments written, the test as it has come to be understood is represented in A.V. Dicey, *Dicey and Morris on the Conflict of Laws*, 11th ed. (London: Stevens, 1987) at Rule 205 which states: "(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 action 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 a country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."

12 (1982), 35 O.R. (2d) 201 (H.C.) at 213: "It is not for this Court in this case to initiate a departure from the law as it applies at present in Canada. I have dealt with the developing alternatives in deference to the submissions of counsel (to whom I am greatly indebted) and in the hope that the future course of Canadian law in light of the developments in the United Kingdom, and in the United States, may be reviewed in the appellate courts or in the course of legislation.": *per* Henry, J.

13 (1986), 57 O.R. (2d) 300 (H.C.) at 315: " ... I remain of the opinion that I expressed in *Going* v. *Reid* that I am bound by the principle in *McLean* v. *Pettigrew*, [1945] 2 D.L.R. 65, [1945] S.C.R. 62, (the Anglo-Canadian Rule) and that it is not for this court to depart from it, even though the facts can be distinguished by reason of the presence of the defendants in the Province of Quebec. The important public policy issue is ultimately one for the appellate courts or the legislature to resolve.": *per* Henry, J.

14 (1989), 69 O.R. (2d) 640 (C.A.) at 661: "I incline to the view that the most effective method of reforming the law on this subject would be by legislative action. This would enable the matter to be reconsidered from the ground up and the relevant rules, principles and factors to be laid out in such a manner that the concerns of justice could be considered in an orderly manner and the predictability of results would be enhanced as much as possible."

15 (1990) 71 O.R. (2d) 385.

16 It should be noted that at paragraph 2 of the *Tolofson* decision La Forest, J. states: "In the two appeals before us we are called upon to reconsider the "choice of law rule," i.e., which law should govern in cases involving the interests of more than one jurisdiction, *specifically as it concerns automobile accidents involving residents of different provinces*.[emphasis added]" Although it might be argued that La Forest, J., purposely left open the possibility that the *Tolofson* decision could be limited to choice of law issues regarding inter-provincial automobile accidents, neither the nature of the problem addressed, nor the manner and scope of the Court's response, support this suggestion. Rejection of this narrow reading is also consistent with the minimal attention that has been given to the Uniform Law Conference of Canada's 1970*Model Uniform Conflict of Laws* (Traffic Accidents) Act. To date the only jurisdiction which has adopted this legislation (which establishes a specific choice of law regime for automobile accidents) is the Yukon. See *Conflict of Laws (Traffic Accidents) Act*, R.S.Y., 1986, c. 29). See also *infra* note 30.

III. The New Choice of Law Rule for Canada

La Forest, J., begins his critique and reformulation of Canadian choice of law rule for tort with a general criticism of the development of Anglo-Canadian choice of law rules during the last century.[17] He then launches directly into what he considers to be the framework in which private international law rules must be understood and articulated, and states at paragraph 36:

> On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be respected and accommodated in private international law.

There are, in my respectful view, two significant concerns which arise from this paragraph that present great problems for the remainder of the decision. First and most importantly, La Forest J. seizes upon the notion of "comity" as a principal factor in regulating and formulating choice of law rules. This rather ill-defined concept was also relied upon in his decision in *Morguard* where he calls it "the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory."[18] This notion of comity is not limited to "respect for the dictates of a foreign sovereign," but also includes the "convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind." In *Morguard* , La Forest, J. goes on to state at 268-269:

> For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the United States in *Hilton* v. *Guyot*, 159 U.S. 113 (1895), at pp. 163-4, in a passage cited by Estey J. in *R.* v. *Spencer* (1985), 21, D.L.R. (4th) 756 at 759, 21 C.C.C. (3d) 385, [1985] 2 S.C.R. 278, as follows:
>
> "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 other persons who are under the protection of its laws...

This definition was approved of and relied upon by Sopinka, J. in *Amchem Products* v. *B.C. (Workers' Compensation Board)*, in the context of anti-suit injunctions.[19] Similarly, the *Morguard* notion of comity was also relied upon by Mr. Justice

---

17 He states at paragraph 35: "What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality."

18 *Supra* note 2 at 268 (D.L.R.)

19 (1993) 102 D.L.R. (4th) 96. See 105-106 where Sopinka J. accepts the notion of comity as a principle which should limit the use of anti-suit injunctions, and suggests that if comity were fully re-

La Forest in *Hunt* in the context of recognition of extra-provincial court orders for production of documents where he states:

> Everybody realizes that the whole point of blocking statutes is not to keep documents in the province, but rather to prevent compliance [with production orders from other jurisdictions], and so the success of litigation outside the province that that province finds objectionable. *This is no doubt part of sovereign right, but it certainly runs counter to comity* [Emphasis added].[20]

There can be no doubt that the notion of comity is of significant import to private international law generally, and that our understanding of comity must be informed by the needs and dictates of contemporary society. However, the reliance on comity regarding choice of law rules, particularly in relation to the application of foreign law in the forum court, is a significant departure from traditional application of the principle and is not in accord with the views of J.G. Castel, who writes:

> A great deal of discussion has taken place among jurists in the field of the conflict of laws concerning the theoretical basis for the reception and application of foreign law.[21]

He notes that of several competing schools of thought, it is the "territorial" view which prevails in Canada:

> The territorialists consider conflict of laws principles and rules to be part of the domestic legal system. They maintain that since all laws are territorial, the local law has exclusive power within the territory of the sovereign enacting it and all persons, citizens or aliens within that territory are subject to the local law...
>
> Although the principle of territoriality indicates the territorial limits of the jurisdiction of a foreign or local sovereign and by way of consequence limits the application of foreign law to the benefit of the local law, those supporting this principle have been forced to find some explanation for the fact that in certain cases, by virtue of the conflict of laws principles and rules of the forum, foreign law is taken into consideration and applied. However, it is clear that whatever force the laws of one country have in another depends solely upon the laws of the latter.
>
> Three major theories, comity, vested rights, and local rights have been advanced to explain why in a given situation the foreign law will be received in contravention of the principle of territoriality.[22]

Castel goes on to note that Dicey has strongly argued against the notion of comity as the basis for application of foreign law (particular when understood as a "courtesy" toward other nations) and he concludes, "Not only is the doctrine of comity too vague, but the application of foreign law cannot be made a matter of caprice or option. [Notwithstanding this,] some Canadian decisions support the doctrine of comity."[23]

---

spected by all states, the anti-suit injunction would not be necessary.

20 *Supra* note 2 at 43. See also at 39 where he states: "A central idea in [*Morguard*] was comity. But as I stated at 270, "I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience" that underlie them. In my view, the old common law rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.

21 *Supra* note 6 at 20.

22 *Ibid.* at 22-24

Ultimately, Castel states:

> Actually, there is no need to reconcile the application of foreign law with the principle of territoriality. Conflict of laws rules are part of the territorial law. Thus the forum, when applying foreign law as required by its own conflict of laws rules, does not abdicate it sovereignty.
>
> This has been recognized in Canada. The conflict of laws rules of each province are part of its domestic law; they determine when and to what extent foreign law is to be applied. For instance, in *Stephens* v. *Falchi* [1938] S.C.R. 354, at 363, Duff C.J. said:
>
> The Courts of Quebec administer the law of Quebec and no other law. If they apply the rules of the law of another country, it is because the law of Quebec commands them to do so in the circumstances. Whether or not the conditions are such as to require the application of the rules of law of another country is a question they must decide under their own law...

In addition to the rather poorly defined extent and effect of the notion of comity, a further and more fundamental concern arises with the significance attached to it in *Tolofson* and *Lucas*: it conflates the needs and principles of *public* international law with those of *private* international law. The former deals primarily with relationships between states *qua* states; the latter with reconciling the potential applicability of several legal regimes as they relate to individual litigants. In choice of law it is generally the rights of the parties—and not the sensibilities or relationship of states—that must be given governing effect. Comity is thus not only a dull tool; it is also an inappropriate instrument with which to sculpt choice of law rules. Its application to private international law should be reserved for situations which clearly concern the respect or deference to be paid to another legal regime, e.g. anti-suit injunctions, recognition and enforcement of judgments of the courts of another state, and requests for foreign assistance in judicial proceedings.[24] While *Morguard*, *Hunt* and *Amchem* implicate these types of concerns, *Tolofson* and *Lucas* do not.

The second and related error is the view that in private international law cases courts will adopt choice of law principles that might result in the application of the law of a foreign jurisdiction because they "are hesitant to interfere with what another state chooses to do within its territory."[25] The frailty of this argument is immediately apparent when one considers that in a multi-state dispute, the courts of the *loci delicti* may, *according to their choice of law rules*, apply the substantive law of another

23 *Ibid.* at 24-25. Castel cites the following cases as supporting the doctrine of comity as a basis for applying foreign law in the forum court: *C.P.R.* v. *Great Western Union Telegraph Co.* (1890), 17 S.C.R. 151, at 155, per Ritchie C.J.; *Re Dartnell* (1916), 37 O.L.R. 483, at 485, per Boyd J.; *Kelly* v. *O'Brian* (1916), 37 O.L.R. 326, 31 D.L.R. 770 (S.C.); *Appeal Enterprises* v. *First National Bank of Chicago* (1984), 46 O.R. (2d) 590, 10 D.L.R. (4th) 317, 4 O.A.C. 102 (C.A.); *R.* v. *Zingre*, [1981] 2 S.C.R. 392, 10 Man R. (2d) 62, 127 D.L.R. (3d) 223. Of these cases, only *Kelly* and *Dartnell*, which were decided nearly 80 years ago, can be considered to have dealt with comity as it relates to choice of law or application of foreign law, and these matters were not considered in any depth. The other cases considered the notion of comity in relation to the ability of federally incorporated companies to operate outside the country in which they are incorporated (*C.P.R.* v. *Great Western Union*) and international legal assistance regarding examination of witnesses (*Appeal Enterprises* and *R.* v. *Zingre*). In the context of choice of law rules for tort, comity was briefly referred to in *Ang* v. *Trach*, *supra* at 317 and 319.

24 See *R.* v. *Zingre*, *supra* note 23 and *Appeal Enterprises*, *ibid.*

25 *Tolofson*, *supra* note 1 at paragraph 36.

jurisdiction. Thus, to suggest that application of the forum law would necessarily result in interference with what the foreign court would do within its territory is simply an error.

The deeper significance of this error is that it conflates the application of a state's law with source of authority. It is a fundamental principle of Canadian conflict of laws that when jurisdiction A chooses to apply the law of jurisdiction B to resolve a multi-state dispute, it is, from the perspective of source of authority, always jurisdiction A which governs the matter. As E. Edinger notes:

> In conformity with the international principle of territorial sovereignty the courts of one state will never apply foreign law *ex proprio vigore*. It is only through the medium of the conflict rules of the forum that the law of another state may be applied.[26]

A similar situation therefore exists where state A deems its law as the appropriate law to apply to the facts of a private dispute even if the subject matter arises in, or has ties to, jurisdiction B. Choosing to apply the forum law as a result of the forum court's choice of law rules should not be understood as an admonishment toward state B as to what it should do, nor as a determination of whether state B has jurisdiction consistent with its territorial integrity to dispose of the dispute according to its law. It is the *raison d'être* of conflict of law rules that courts may, but need not, apply foreign law where the subject matter of the dispute has ties to another jurisdiction. To suggest that application of the forum law is necessarily inconsistent with comity and due respect for the territorial integrity of another state in such instances renders the conflict of laws a defunct discipline.[27]

On what basis does Mr. Justice La Forest displace the underlying postulates of the conflict of laws as they relate to tort, and replace them with the territoriality principle tempered by comity? Unfortunately, very little. He does not tie this line of reasoning into the many previous decisions which have been rendered dealing with choice of law rules. Rather, he relies on the reasons he delivered in *Morguard* and states:

> All of this is simply an application to 'choice of law' of the principles enunciated in relation to recognition and enforcement of judgments in *Morguard, supra*. There this court had this to say at 267-268:
>
> The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century; see *Rajah* v. *Faridkote, supra*. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction ...

---

26 E. Edinger, "Territorial Limitations on Provincial Powers" (1982) 14 Ott. L. Rev. 57 at 63. See also Castel, *supra* note 6 at 30.

27 Any distinction which might exist in Canada between the "application" of foreign law in a domestic (forum) court, and the application domestic (forum) law to foreign events, arises not from principles of the conflict of laws, territoriality or comity, but rather through domestic constitutional structures which of course apply only to domestic courts. That is, while conflicts principles do not (at least for these purposes) differentiate between foreign law applying here, and domestic law applying to events arising elsewhere, our constitution may. This issue is discussed further at section V, *infra*.

Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in some circumstances ... This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory.[28]

In the context of simply rejecting the double-action ability test of *McLean*, this aspect of *Tolofson* might make sense. If state A were otherwise disposed to apply the law of state B to resolve a particular dispute, there is no reason consistent with sound private international law principles to require that the tort also be actionable in the forum court. Unfortunately however, having relied on territorial principles and comity to dispose of the old *McLean* rule, Mr. Justice La Forest continues to rely on these principles as though they are in and of themselves sufficient to provide a new choice of law rule for tort. As a result, it is not surprising that he decides the *lex loci delicti* should be the governing law in such cases. He states:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*.[29]

Mr. Justice La Forest goes on to offer several "sound practical considerations" which militate in favour of the *lex loci delicti* rule. First, he refers to the oft cited point that the *lex loci delicti* "would seem to meet with normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect the concomitant legal benefits and responsibilities will be defined accordingly."[30] Predictability and common expectations are of course only two of many competing concerns in choice of law determinations, and competing concerns of fairness, justice and practical realities must also be addressed. Moreover, one can seriously question whether the ostensible benefits attributable to certainty and predictability will be realized by the *lex loci delicti* rule. While it is clear that Ontario residents driving in Quebec would expect to be governed by Quebec highway traffic law, it is, for example, not beyond dispute that a husband and wife (who were married in Ontario and reside there) would know or expect that issues of inter-spousal immunity in tort would be determined according to the law of Quebec when they travel there. What gain brings the quest for certainty here? To the extent that those not inclined to study the complexities of this area of law become involved in inter-jurisdictional torts, it is debatable whether they ever consider either the possibility of an accident or the multiplicity of legal issues that may arise. Certainty and predictability should not be over-rated.[31]

---

28 *Supra* note 1 at paragraph 38.

29 *Ibid.* at paragraph 42.

30 *Ibid.* at paragraph 43.

31 One may, as a general principle, question whether the same degree of certainty and predictability should be sought in all conflict of law matters. In the case of contracts and relationships governing commerce, clearly a premium should be given to these concerns. The advantages of certainty in the context of tort are more difficult to perceive and should perhaps not be granted such a premium.

Mr. Justice La Forest also mentions that "most states until recently favoured exclusive reference to the *lex loci*" (para. 44). While I would not challenge that the *loci delicti* is one and likely the most important factor in choice of law determinations, the fact that other jurisdictions have not found it sufficient in and of itself obviously does not argue in favour of its utility as the only test for choice of law in Canada. On the contrary, the fact that many states are no longer using the *lex loci delicti* rule[32] argues against its utility as a comprehensive test. In this regard it is regrettable that the court did not delve into the rather rich American jurisprudence which has evidenced the unsuitability of a strict *lex loci delicti* test,[33] or the work of the English and Scottish Law Commission for Britain which, in the context of formulating a proposed new choice of law regime, rejected a strict *lex loci delicti* test in favour of a prima facie *lex loci delicti* rule with certain exceptions.[34]

IV. Should There be a Flexible Exception?

Having accepted that the *lex loci delicti* should be the governing test it remains necessary to consider whether a flexible exception, such as that provided for in Britain by *Chaplin* v. *Boys*, should form part of the choice of law rules for tort in Canada. In this regard, Mr. Justice La Forest immediately distinguishes between international and inter-provincial choice of law determinations. Without any discussion as to precisely what injustices an inflexible rule might visit upon litigants, he states:

> ... because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.[35]

In the context of inter-provincial matters, Mr. Justice La Forest considers certain arguments in favour of a flexible exception. He finds the assumption "that a flexible rule better meets the demands of justice fairness, and best practical results" is outweighed by "the most obvious defect of this approach—its extreme uncer-

---

32 See eg., *Gutierrez* v. *Collins*, (1979), 583 S.W. (2d) 312 (Tex. Sup. Ct.) at 316-317: "*Lex loci delicti* was at one point a universally accepted rule in American jurisprudence. It was incorporated in the Restatement (First) of Conflicts. It no longer occupies such a position of esteem. Less than half the states continue to adhere to the doctrine and the clear trend over the past fifteen years has been away from the old rule in favour of some alternative theory. When faced with the choice, more than twice as many states have abandoned *lex loci delicti* as have retained it [footnote omitted]." Similarly, the Uniform Law Conference of Canada's model *Uniform Conflict of Laws (Traffic Accidents) Act*, *supra* note 16 sets out the *lex loci delicti* as a basic test but with significant exceptions which, for example, might result in applications of the law of the jurisdiction where the vehicle is registered, or the law of the jurisdiction where the vehicle is habitually stationed. See especially sections 4, 5, 6 and 7.

33 See Junger, *supra* note 7.

34 U.K., The Law Commission and the Scottish Law Commission, *Private International Law: Choice of Law in Tort & Delict* (Law Commission Report No. 193) (London: Her Majesty's Stationary Office, 1990). See also Junger, *supra* note 7 at 98-103.

35 *Supra* note 1 at paragraph 49. Mr. Justice La Forest does not specify exactly what circumstances might call for the invocation of the flexible exception. This paragraph also seems to limit any flexibility to a binary choice of applying either the *lex loci delicti* or the *lex fori*. It does not anticipate cases where more than two jurisdictions are implicated and it may be appropriate for the law of another jurisdiction to apply.

tainty."[36] He also supposes that "there might ... be room for an exception where the parties are nationals or residents of the forum," but concludes on the whole that he is "unconvinced by these ... public policy arguments."[37] Finally, La Forest, J., gives very limited consideration of the more flexible American "approach" to these issues. He refers to the somewhat dated and best known of the American cases, *Babcock v. Jackson,* [38] and states:

> A means of achieving greater flexibility has been attempted in the United States through an approach often referred to as the proper law of the tort. This involves qualitatively weighing the relevant contacts with the competing jurisdictions to determine which has the most significant connections with the wrong.[39]

It is regrettable that greater comparative analysis has not been undertaken and that the experience of the United States courts with a wide variety of methodologies for dealing with these issues was not better used in the construction of a new Canadian rule. I have argued elsewhere that much British and Canadian discussion of the ostensibly unsophisticated and undisciplined "proper law of the tort" American approach is incorrect, and that it reflects a less than full appreciation of what has transpired in U.S. courts and commentary in recent decades.[40] Similarly, Mr. Justice La Forest's discussion of what Lord Wilberforce and Lord Pearson had to say 27 years ago in *Chaplin* v. *Boys* about the "American approach" is not sufficient to reflect contemporary British perspectives on this matter, given that *Chaplin* has not been particularly well received in that jurisdiction and that the English and Scottish Law Commissions have proposed a new methodology which reflects, in many ways, American developments in this area.[41]

In any event, it is clearly a rigid, territorial-bound conception of intra-Canadian conflict of law rules, animated by the homogenizing forces of *Morguard,*[42] that

---

36 *Ibid.* at paragraph 53.

37 *Ibid.* at paragraphs 54-6. Mr. Justice La Forest does these arguments a disservice by terming them "public policy" which he understands to "simply mean that the court does not approve of the law the legislature having the power to enact it within its territory has chosen to adopt": paragraph 56. This is most clearly not the reason for arguments in favour of displacing the *lex loci delicti* on a flexible basis. Use of the term "public policy" should, in the context of conflict of laws, be limited to circumstances where it has traditionally applied—situations where in all other respects the forum jurisdiction would apply a foreign law but refuses to do so because it is contrary to the public policy of the forum i.e. "essential public or moral interests," "founded in moral turpitude," and "inconsistent with the good order and solid interest of society": *Block Bros Realty* v. *Mollard* (1981), 27 B.C.L.R. 17; 122 D.L.R.(3d) 323 (C.A.). Situations of this type have been traditionally been very limited. See section VI below. The expanded use of the this term in different conflict of law contexts should be discouraged.

38 (1963) 12 N.Y. 2d 743.

39 *Supra* note 1 at paragraph 52.

40 See Junger, *supra* note 7 at 78-92. *Babcock* does not reflect a single dominant American approach to these issues, but rather incorporates a variety of different American methodologies and does not seek to differentiate or reconcile them very well at all.

41 *Ibid.* at 102-103.

42 The preference for the homogenization of substantive provincial laws is readily apparent in the *Tolofson* decision. It is in this regard that Mr. Justice La Forest offers (as a reason for avoiding the flexible exception) the following at paragraph 57:"[T]he "public policy" problems, particularly between the provinces, tend to disappear over time. Ever since the launching of the *Tolofson* case, Saskatche-

prevails at the expense of all other concerns in *Tolofson*. Mr. Justice La Forest states at paragraph 56:

> While, no doubt, as was observed in Morguard, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice.

He adds at paragraphs 64-65:

> Any exception adds an element of uncertainty, and leaves the door open to a resourceful lawyer to attempt to change the application of the law.
>
> Problems of this kind extend well beyond the courtroom. Clear application of the law promotes settlement.

This is of course true. The more important question, however, is whether certainty is worth the price. It is not ridiculous to suggest that the logical extreme of arguments in favour of certainty would be to deny recovery altogether. Clearly certainty must be only one of many factors considered. In fact, as British and American experience has shown, there is no magic in rigid adherence to any particular rule. These issues have long been debated by judges, lawyers, and scholars alike, and there has never been a consensus that certainty is to be prized above all else, or that one particular choice of law rule can *ever* offer a satisfactory solution for all situations. It is regrettable, therefore, that Mr. Justice La Forest has rejected the possibility of a properly defined flexible exception within Canada.[43]

V. Federal Problems

I noted at the outset that *Tolofson* is the latest in a series of Supreme Court of Canada decisions which have sought to imbue this area of law with constitutional and federal imperatives. Although the Court does not rule directly on the issue, it suggests that a further reason for adopting the *lex loci delicti* test is that it "has the advantage of unquestionable conformity with the Constitution, an advantage not to be ignored having regard to the largely unexplored nature of the area and the consequent danger that a rule developed in a constitutional vacuum may when explored not conform to constitutional imperatives."[44] Specifically, La Forest, J., states:

---

wan has repealed its guest passenger statute and has changed the rule regarding the limitation period of minors." For a decision which seeks to be attuned to Canadian constitutional imperatives, such a result is rather disconcerting. Rather than simply offering homogenization as a positive development, the Court should also have noted that there are sound constitutional and policy reasons for the distinctions between substantive laws of provinces in our federal system. For further consideration of this issue see, V. Black and W. Mackay, "Constitutional Alchemy and the Supreme Court : *Hunt* v. *T & N plc*" *supra* note 2.

43 It should be noted that both Major J., and Sopinka J., in brief concurring judgments, expressly sought to leave open the possibility of a flexible exception in inter-provincial litigation. Major, J., stated at paragraph 103: " ... I doubt the need in disposing of these appeals to establish an absolute rule admitting of no exceptions. La Forest J. has recognized the ability of the parties by agreement to choose to be governed by the *lex fori* and a discretion to depart from the absolute rule in international litigation in circumstances in which the *lex loci delicti* rule would work an injustice. I would not foreclose the possibility of recognizing a similar exception in interprovincial litigation."

44 *Supra* note 1 at paragraph 70.

It is useful, however, in understanding why one should not venture far from what is clearly constitutionally acceptable, to give some notion of the nature of these problems. Unless the courts' power to create law in this area exists independently of provincial power, subject or not to federal power to legislate under its residuary power—ideas that have been put forth by some of the Australian judges in *Breavington* v. *Godleman* ... but never so far as I know, in Canada—then the courts would appear to be limited in excising their powers to the same extent as the provincial legislatures; see John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" ... I note that provincial legislative power in this area would appear to rest on s. 92(13)—"Property and Civil Rights in the Province." If a court is thus confined, it is obvious that an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties. Thus an 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, 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 the 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. I go no further regarding the possible resolution of these problems. What these considerations indicate, however, is that the wiser course would appear to be for the Court to avoid devising a rule that may possibly raise intractable constitutional problems.[45]

Several serious concerns emerge from this remarkable paragraph. First, given the vagueness of these constitutional considerations and the significant limitation it appears to have had on the available options, it is disconcerting that the Court has once again addressed such important constitutional matters in the absence of significant argument.[46] As La Forest, J. noted:

The constitutional problems were not adverted to in the courts below and were largely dealt with in this Court as a mere backdrop to other issues. Importantly, too, (though I am not suggesting their presence was required by law), the Attorneys General were not present.[47]

This should be contrasted with the judgment of Wilson J. and Gaudron J. in *Breavington* v. *Godleman*,[48] where the relationship of constitutional principles to conflict rules in the federal state was first addressed by the High Court of Australia. There the Court stated:

The seeming incongruity in the determination of liability for tortious acts occurring in Australia but involving an interstate aspect by reference to the choice of law rules of private international law led to an invitation to the parties to address additional arguments by reference to s. 118 of the *Constitution*, s. 18 of the *State and Territorial Laws and Records Recognition Act* 1901 ("the *Recognition Act*") and s. 56 of the *Judiciary Act*. Submissions were also put on behalf of the Attorneys-General of the Commonwealth, New South Wales, Victoria, Queensland, South Australia and Western Australia intervening pursuant to s. 78A of the *Judiciary Act*, and the Attorney-General of the Northern Territory.[49]

---

[45] *Ibid.* at paragraph 71.

[46] This is the same manner in which these constitutional imperatives were given birth in *Morguard*. Although both *Morguard* and *Hunt* dealt with issues directly relevant to constitutional imperatives and were arguably ripe for consideration in the context of federal principles, the present cases were not of such a nature. One can only hope that any further extension of constitutional principles into conflict of law cases will not occur without the requisite deliberation and argument.

[47] *Ibid.* at paragraph 70.

[48] [1988-1989] 169 C.L.R. 41.

[49] *Ibid.* at 85

Second, several concerns arise in relation to the substantive issues alluded to by La Forest, J. Regarding the issue of extra-territorial application of provincial law, he is presumably referring to the type of issues considered by John Swan in "The Canadian Constitution, Federalism and the Conflict of Laws"[50]—the basic premise of which is set out by Professor Peter Hogg in his *Constitutional Law of Canada*: [51]

> Problems of choice of law are not usually seen as raising constitutional questions. If the court of province A determines a case on the basis of the "foreign" law of province B, this is not seen as an extra-provincial application of the law of province B. The court of province A is applying its own choice-of-law rule, which has the effect of incorporating the (foreign) substantive law of province B into the (domestic) law of province A. But, in the converse situation, where province A's (the forum's) choice-of-law rule directs the court to apply province A's (the forum's) own substantive law to a case having elements in province B, the question whether province A has given an unconstitutional extraterritorial application to its law cannot be avoided by the assertion that the result was demanded by province A's (the forum's) choice-of-law rule.[52]

Professor Hogg adds by way of footnote:

> If the court concludes that the law of the forum should be interpreted as applying to the facts directly on its own force, then the court will apply the law of the forum, provided that the law of the forum remains within the constitutional rule regarding extraterritoriality. If the court concludes that the law of the forum should not be interpreted as applying to the facts directly of its own force, then the court will invoke the applicable choice-of-law rule of the forum. The choice-of-law rule may direct application of the foreign law, or it may direct application of the law of the forum. The latter possibility is a second chance for the law of the forum to apply. Edinger ... argues that, if the substantive law of the forum applies by virtue of the choice-of-law rule, this application need not come within the constitutional limit of extraterritoriality. This opinion is not accepted by Castel, ... who says that "territoriality" can be used as an instrument of constitutional control over provincial conflict of law rules," and that "the courts of a particular province cannot apply the substantive lex fori [sic] to a legal situation that is not sufficiently connected with that province." Hertz ... argues that "there can be no doubt that provincial choice of law is regulated by the B.N.A. Act." Edinger's opinion would mean that a province, by altering its choice-of-law rules, could indirectly extend its legislative power.

Professor Edinger does not in fact argue that choice of law rules are beyond constitutional scrutiny for extraterritoriality. Rather, she holds that

> [t]he law of conflicts is, of course, a part of the domestic law of each province and it is now within the exclusive direction of each province whether to alter or replace the common law rules in relation to matters falling within section 92 of the *B.N.A. Act*. Logically, however, the conflicts rules of a province are subject to the same constitutional limits as are all other legislative endeavours.[53]

In any event, there is useful middle ground to be explored between the position that conflict rules are not subject to constitutional scrutiny at all and the view that they are subject to the same scrutiny as all other legislative endeavours. In this regard, we may distinguish between the constitutional validity of the direct application of provincial legislation and the constitutional validity of the choice of law rules

---

50 (1985), 63 Can. Bar Rev. 271. He states at 309: "In Canada, the use of section 92(13) may permit (if it does not require) that the federalism issue be expressly addressed. We could then consider the constitutionality of the decision of a provincial court to apply its own law by asking if doing so "would impair a predominant interest of a sister [province] or violate a national interest?"

51 Peter W. Hogg, *Constitutional Law of Canada*, 3d ed., (Scarborough: Carswell, 1992)

52 *Ibid.* at 335 (s. 13.5(d)).

53 Edinger, *supra* note 26 at 83.

themselves. While I would agree that both must fit within the confines of section 92(13) limitations, it is necessary to understand that they are not one and the same, and the effect of constitutional scrutiny need not be identical in each case. In the former, which Edinger calls the first way in which the forum law may be applied, the traditional analysis should be applied. This precludes the extra-territorial application of provincial law where the extra-provincial effects are anything more than incidental to a matter within the province.[54] In the latter—where the question is the constitutional validity of the choice of law rules themselves—the phrase "in the province" should be understood with reference to the nature of choice of law rules and the way in which they differ from substantive law.[55] In the United States it has been held that in order for a choice of law rule to respect due process and full faith and credit constitutional requirements, there must be a minimum degree of connection between the forum and the facts or parties of the dispute.[56] Such a modest constitutional requirement has not resulted in automatic application of a strict *lex loci delicti* rule in the United States where many flexible approaches exist. Similarly, consideration of the full faith and credit provisions of the Australian Constitution has not mandated that the strict *lex loci delicti* be the rule for choice of law in tort in that federal system.[57] The application of constitutional scrutiny to choice of law rules

54 See *Re Upper Churchill Water Rights* [1984] 1 S.C.R. 297.

55 That the conflict of law rules of a province are governed by the constitutional limitations in s. 92(13) has also been expressly argued by John Swan, *supra* note 50 who states at 299: "The issue of provincial extra-territoriality as applied to provincial legislative measures is, of course, based on section 92(13) of the Constitution Act, 1867, and in many cases can be found to support an argument that the territorial scope of provincial legislation is limited by the Constitution. I argue that provincial common law rules raise similar issues of extra-territoriality. It is true that the opening words of section 92, "[i]n each Province the Legislature may exclusively make laws...," suggest that the specific heads of section 92 refer only to provincial legislation. On principle, however, it is hard to see how the issues raised over the extra-territorial scope of provincial law depend in any way on whether the rules are based on statute, the common law or Civil Code. In other words, and in spite of the opening words of section 92, the limitation imposed on provincial power by the phrase "in the province" applies equally to any rules, whatever their source." This of course makes sense, but Swan does not consider Edinger's two bases for applying the forum law, and he does not therefore consider whether the nature or effect of the constitutional limitation on direct application of substantive laws should be any different than the constitutional limitation on choice of law rules.

56 As Professor Hogg notes, *supra* note 51 at 336n: "... the position of the United States is instructive. A state's choice-of-law rule will be unconstitutional as a denial of due process (which, as noted earlier, in this context is similar to Canada's doctrine of extra territoriality) if it directs the choice of the substantive law of the forum to facts and parties that have little contact with the forum state: see *Allstate Insurance Co.* v. *Hague* (1981) 449 U.S. 302 ... .

57 The rigid application of the *lex loci delicti* test which might result from strict reading of the full faith and credit provision of the Australian Constitution (s. 118) was rejected by Mason, C.J., in *Breavington* v. *Godleman*, *supra* note 48 at 82-83, where he stated: "It is evident from this brief sketch of the authorities that the full faith and credit clause has not hampered the elaboration and application of the principles of private international law in the disposition of interstate conflict problems in the United States. Indeed, the cases mark a retreat from the provisions of the Constitution to the more flexible provisions of judge-made law ... Although the principles which have evolved in the United States treat the *lex loci delicti* as the basic law, they allow for its displacement... Why then should we give to the facsimile [the Australian full faith and credit provision] an interpretation denied to the original?" An even stronger rejection of the argument that full faith and credit provisions dictate choice of law determinations came from Dawson, J. who stated at 150: "In my opinion, the requirement that full faith and credit be given to the laws of a State, statutory or otherwise, throughout the Commonwealth, affords no assistance where there is a choice to be made between conflicting laws.

in Canada, via the "in the Province" limitation in s. 92(13), should likewise not require a *lex loci delicti* rule, and should not present significant constitutional problems for a more flexible choice of law doctrine—*so long as it is not argued that the lex fori may be applied even if it has no connection with the facts or the parties at all.* [58]

The advantage of this reasoning is that it represents a middle ground between the two perspectives mentioned above. On one hand, application of forum law via conflict rules, tempered by a constitutional constraint on the conflict rules themselves, is not precluded by minimal and incidental effects it may have on factors related to another jurisdiction. On the other, it is clearly not within the realm of possible mischief contemplated by Professor Hogg whereby "a province, by altering its choice-of-laws rules, could indirectly extend its legislative power."[59] Extension of jurisdiction by changing provincial choice of law rules could not occur if the choice of laws rules had to ensure that forum law only applied where a minimum connection existed. A more rigid interpretation of the limiting words of s. 92(13) which be delivered, which LaForest, J. hints at would result in a profound disruption of many aspects of the choice of law system. It would seem, for example, that B.C. choice of law rules regarding the validity of wills could no longer apply to a will made in Quebec in respect of moveable assets there, even though the testator was domiciled in B.C.

There is an obvious similarity between the modest constitutional constraints on choice of law which I am advocating and the constitutional limitations established in relation to jurisdiction under *Morguard.* According to that decision, a judgment in state A in respect of matters occurring in state B would not occur and would not be enforceable outside state A unless it can be shown that there was a "real and substantial" connection between that jurisdiction and the parties or events. It is crucial to note that the *Morguard* "real and substantial connection" test does not dictate that a judgment from one province can never be delivered, or enforced elsewhere, simply because the underlying event occurred outside the forum—only "real and substantial" contacts to the forum are required. If our Constitution allows courts to take jurisdiction based on contacts that may be something less than "where the event occurred" and mandates that other provinces enforce those judgments, why should they be precluded from applying their own law in every such instance?[60]

Once the choice is made, then full faith and credit must be given to the law chosen but the requirement of full faith and credit does nothing to effect a choice." A somewhat different perspective is found in the judgement of Wilson and Gaudron JJ., who state at 98: "It is sufficient in the present case to note that effect is given to the requirement flowing from s. 118 that there should only be one body of State law determining the legal consequences attaching to a set of facts occurring in a State only by the adoption of an inflexible rule that questions of liability in tort be determined by the substantive law that would be applied if the matter were adjudicated in a court exercising the judicial power of the State in which the events occurred." Even this, of course, is not an automatic endorsement of a *lex loci delicti* rule, because the court in the jurisdiction where the event occurred may, according to its conflict rules, choose to apply a foreign law.

58 This of course assumes that jurisdiction even exists in such a case and that the court has not excised its discretion under the doctrine of *forum non conveniens* to decline to hear the case.

59 *Supra* note 51.

60 La Forest, J., seemed to realise that the limits upon the taking of jurisdiction enunciated in *Mor-*

VI. The Future of Canadian Choice of Law Determinations

I have argued above that the Supreme Court did not give full regard to all arguments militating against a strict *lex loci* test, that the Court relied unnecessarily on certain questionable constitutional concerns and, perhaps most importantly, that certainty and predictability were given an unjustifiable premium in reaching the strict *lex loci delicti* rule. If, however, the anticipated certainty and predictability were to actually be obtained, some might ultimately argue that the Supreme Court was right and that the intricacies of how it reached the decision are not entirely important. Unfortuately, I would submit that the new Canadian *lex loci delicti* rule will not deliver even the modest goods promised. Rather, judges will, when presented with torts involving several jurisdictions, remain pressured to adopt a level of flexibility and dexterity commensurate with the dictates of justice, fairness, and the needs of the multi-state system. There are several time-proven ways in which judges will avoid application of the *lex loci delicti* where such is desired, none of which have the benefit of direct and forthright consideration of the need for, and weaknesses of, a more flexible approach.

A. Procedure or Substance

This uncertain dichotomy, which holds that the forum court is bound to apply its own procedural law irrespective of whatever substantive law governs the dispute, is not amenable to satisfactory distinction and has longed plagued the area of conflict of laws. It was in fact a major issue in the *Tolofson* case where it was necessary for the Supreme Court of Canada to rule on the issue of whether limitation periods were to be considered substantive or procedural.[61] To the extent that this remains a difficult and grey area in respect of other matters, it remains open to judges to characterize certain laws of the *loci delicti* as procedural and avoid their application.[62]

B. Determining the *Loci Delicti*

While it may be relatively easy to determine where a car accident occurred,[63] numerous other torts may not be so readily located. In the case of injury causing death, is it the place where the injury occurred, or the location of the person at death that applies? In the case of defamation, is it the place of publication or the place where the harm results? In the case of product liability, is it the place where the goods

---

guard have the potential to obviate some other difficulties. He used this recognition to denounce the first branch of the *Phillips* test where he stated at paragraph 50: " ... given the fact that the jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection with the forum jurisdiction, I seriously wonder whether the requirement that the wrong be actionable in that jurisdiction is really necessary." La Forest, J., did not, however, go on to consider whether *Morguard* precluded much of the mischief he envisaged regarding state A ruling in accordance to its own laws on a matter that arose in, and related to people from, state B.

61 *Supra* note 1 at paragraphs 73-90. The Court held that the limitation rule of the *loci delicti* was substantive and should apply.

62 See Castel, *supra*note 6 at Chapter 5.

63 Difficulties may of course even arise in motor vehicle cases where, for instance, negligent repair work is completed in one jurisdiction and an accident occurs as a result in another.

were negligently manufactured or is it the place where they are used and harm occurs?[64] In our increasingly mobile world the chance of difficulty arising in locating where a tort occurred are significant indeed. It is for the reason that both American [65] and British[66] consideration of the choice of law question support the development of presumptive rules to specify how a tort is to be located. While useful, they certainly do not purport to cover all situations where difficulty locating the wrong may arise. Clearly this issue will always exist in choice of law for tort and will present problems for any rigid rule that seeks to achieve certainty and predictability above all else.

C. Recourse to "public policy" concerns

As noted earlier, public policy as properly understood in the field of conflict of laws, is a rather drastic doctrine which holds that a forum court will refuse to apply the laws of another jurisdiction which would otherwise govern the dispute if the substance of the foreign law is repugnant to the public policy of the forum. Traditionally the use of this doctrine has been rather constrained. As Castel notes:

> If foreign law is to be refused any effect on public policy grounds, it must violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum. This is especially true when the foreign law or judgment involved is that of a sister province or where public policy is invoked to defeat a claim or defence available under the foreign law.[67]

Given the severity associated with invocation of this doctrine and its rather obvious effects on inter-state comity as traditionally understood, it is to be regretted if it expands (particularly in the inter-provincial context) to provide the flexibility necessary to counter the perceived injustices of a rigid *lex loci delicti* rule.

D. Decapage

The *Tolofson* and *Lucas* decision does not consider the issue of decapage. That is, it does not address the issue of whether certain aspects of a legal dispute may be

---

64 The difficulty of determining where a tort occurred was briefly alluded to by La Forest, J., at paragraph 42. He suggests that the place of the consequences would govern. However, in *Moran* v. *Pyle*, [1974] 2 W.W.R. 586, the Supreme Canada considered this issue in the context of determining jurisdiction. It stated at 597-98: "[g]enerally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm are too arbitrary and inflexible to be recognized in contemporary jurisprudence." Castel, *supra* note 6 at 648-653 notes that it is unclear to what extent the test established regarding jurisdiction in *Moran* may be used in choice of law cases. At minimum it may be said that locating a tort for choice of law remains an unsettled matter.

65 See, e.g., *Second Restatement of the Law, Conflict of Laws* (St. Paul, Minn.: American Law Institute, 1971), at section 146 regarding personal injury: "[i]n an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to a particular issues, some other state has a more significant relationship under the principles stated in s.6 to the occurrence and the parties, in which event the local law of the other state will be applied." See also section 149 regarding defamation.

66 For example, the Law Commission and Scottish Law Commission Report, *supra* note 34, provides as the recommended model for statutory reform that personal injury and death be located where the injury was sustained, and that actions for property damages be governed by the law where the property was when damage occurred.

67 Castel, *supra* note 6 at 164.

distinguished and severed from the underlying cause of action, and be governed by a different choice of law rule. In practical terms, this might include issues such as heads of damages,[68] or inter-spousal and guest passenger liability in the context of a motor vehicle accidents. I have argued elsewhere that decapage is an essential element of an effective choice of law rule for tort and that it provides a useful degree of dexterity with which to deal with the many different factual situations that may arise in multi-state tort cases.[69] Whether such a practice is good or bad is not really the issue at present however. The more important question is whether it is to be allowed in relation to the new Canadian choice of law rule at all. Unfortunately, *Tolofson* and *Lucas* do not assist in this regard.

VII. Conclusion

The *Tolofson* and *Lucas* decision will have a profound effect on the conflict of laws and beyond. Its fundamental reassessment of both the underlying principles of private international law and the constitutional imperatives which animate this area are remarkable and demanding of further scrutiny. Unfortunately, it cannot be said that the Court's reasoning assists with either the theoretical understanding of this complex discipline, or the practical application of justice to individual litigants. One may reasonably predict that the new choice of law rule for tort will not prove satisfactory and that the lack of a flexible exception in the Canadian context will ultimately necessitate further reconsideration of this issue. It is fortunate that two of the seven members of the Court specifically recognized the potential problem with this aspect of the decision.

The decision might also be taken to elucidate the need for legislative reform in this very complex area of law. It is perhaps unreasonable to expect a court to resolve these matters in a comprehensive way and legislation may be the only effective option. Unfortunately, *Tolofson* and *Lucas* do more than render an unsatisfactory judicially created choice of law rule—its admonition about potential constitutional concerns will likely dissuade even the most ambitious legislators from entering this troubled area. One can only hope that it does not take another fifty years before the matter is again addressed at the highest level.

- Mr. Junger is a Sessional Instructor at the Faculty of Law of the University of Victoria. *The author would like to thank Elizabeth Edinger and Harvey Groberman for their comments on this paper.*

---

68 As in *Chaplin* v. *Boys*, *supra* note 11.

69 See Junger, *supra* note 7 at 117-8. Decapage of course must also be exercised in a forthright manner, based upon precedent and principles that may develop with time.