CHOICE OF LAW – TORT ACTIONS

A New Model for Interprovincial Conflict of Laws Settled by the Supreme Court

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Introduction

In its recent decision on choice of law in tort in *Tolofson v. Jensen; Lucas v. Gagnon*,[1] the Supreme Court of Canada has taken bold steps to bring order to a much vexed subject. In doing so, it has laid the cornerstone for a new structure for interprovincial conflict of laws in tort cases, one which has the potential to serve as a model for other federal and regional systems. This article examines the *Tolofson* decision in light of other recent developments in the conflict of laws and considers its implications for the relationship between choice of law and jurisdiction in interprovincial conflict of laws determinations.

The Tolofson Decision

The companion cases *Tolofson v. Jensen; Lucas v. Gagnon* arose as a result of car accidents in which the plaintiff passengers were injured in provinces other than those of their residence. In *Tolofson*, a young man sued his father and the driver of the other car in the province of his residence, and not where the accident occurred, because he thought the limitation period had run in the province where the accident occurred and because his father would be liable under the law of that province only if his father had engaged in willful or wanton misconduct. In *Lucas*, a woman sued her husband and the driver of the other car on behalf of her children and herself in the province of her residence, and not where the accident had occurred, because the no-fault automobile insurance scheme in the province where the accident occurred prohibited civil suits. Although the courts below had generally upheld the actions, the Supreme Court unanimously allowed the appeals and dismissed the actions.

On behalf of the majority, La Forest J. found that the law of the place where the accident occurred should apply in tort actions regardless of where the action was tried. He said this accorded with the territorial principle of international law that states have exclusive jurisdiction within their own territories and it was certain, easy to apply and in accordance with the normal expectations of ordinary people and the majority of other states. In contrast, applying the law of the forum could create different legal consequences for the same act and this would give rise to forum shopping.

The emphasis on the application of the law of the place of tort reflected a trend in the jurisprudence throughout the common law, but the elimination of exceptions to its application was unprecedented. Justices Major and Sopinka disagreed with the majority on whether an exception to this choice of law rule should continue to be available. They joined in a brief concurring decision in which they held that parties in tort actions should be able to choose to be governed by the law of the forum and courts should continue to have discretion to apply their own law in tort actions where to do otherwise would work an injustice.

Distinguishing Choice of Law from Jurisdiction

Critical to the analysis that led to the key finding in the judgment that the law of the place of tort should apply was a clear distinction between the issues of choice of law and of jurisdiction. Although the distinction seems obvious in decided cases and the two issues are treated as independent subjects in academic commentary, the distinction between them is often unclear in ongoing disputes. In the *Tolofson* and *Lucas* cases, the plaintiffs had chosen particular fora for litigation in order to secure the application of the law of those fora.

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[1] [1994] 3 SCR 1022.

In response, the defendants in *Tolofson*[2] had argued that the court was a *forum non conveniens*. Both sides had done so in the belief that the court taking jurisdiction would apply its own law. This meant that if the British Columbia court heard the case, it would apply the British Columbia limitation period and if it declined jurisdiction in favour of the Saskatchewan court, the Saskatchewan limitation period would apply.

With the change in the law brought about by the ruling of the Supreme Court in *Tolofson*, it is clear that, in circumstances such as those in the *Tolofson* and *Lucas* cases, questions of appropriate forum and applicable law will be determined independently. In choosing a jurisdiction for litigation, plaintiffs will not generally be able to alter the law that will apply. Similarly, in challenging the choice of jurisdiction, defendants will not be able to secure or avoid the application of a particular substantive law.

The *Tolofson* and *Lucas* decisions themselves illustrate the soundness of this approach. In those cases, the actions were commenced in the courts of the province in which the majority of the litigants resided. Except in cases where key witnesses or evidence are available only in some other jurisdiction, the forum that provides the greatest convenience to the litigants is generally the appropriate forum and an action commenced in it should not be stayed. However, this approach to jurisdiction can serve the ends of justice only where there exists a uniform or, at least, rational approach to determining the applicable law. In this way, the Supreme Court decision in *Tolofson* took the first step in establishing between the Canadian provinces the kind of rational choice of law system in tort that would discourage forum shopping and enable courts to determine challenges to jurisdiction on the basis of convenience to litigants and witnesses.

It is acknowledged that a distinction between jurisdiction and choice of law in tort actions cannot completely eliminate the problem of forum shopping in that courts will always apply their own rules of procedure and there will always remain a small number of disputes that will turn on procedural points. However, La Forest J. indicated through his finding that statutory limitations are substantive that he favoured restricting the characterization of laws as procedural and thereby reducing the occasions in which the applicable law does not govern the issues in dispute.

Procedural Implications

Beyond this, La Forest J. demonstrated his commitment to the governance of the law of the place of tort by suggesting that in situations where a court feels incapable of applying that law, it should decline jurisdiction rather than apply its own law. As he explained:

> [t]he fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issues of *forum non conveniens*....

This is a sound approach because it enhances legal certainty. For example, a stay was granted in *Bank Van Parijs en de Nederlanden Belgie N.V. v. Cabri*[3] in part because the dispute involved contracts in Flemish governed by Belgian law and dealings subject to unique Belgian trade customs. It is acknowledged that this approach will fail if the obvious alternative forum is itself a *forum non conveniens*. However, since the viability of the alternative forum is a prerequisite to a motion for a stay based on *forum non conveniens*, this consideration will be an integral part of the analysis in any event.

Just as the distinction in *Tolofson* enables questions of the appropriate forum to be addressed independently and determined principally in accordance with factors affecting the litigation of the matter, so too it suggests that questions of the applicable law might usefully be determined in the same pretrial format. *Tolofson* itself provided a good example of a situation in which this would be effective as did *Tomlinson v. Turner and Big Wheels Transport and Leasing Ltd.*[4] In that case, the plaintiff, a Nova Scotia resident was on his way to Manitoba when his car collided in Quebec with a car driven by a Prince Edward Island resident. He took up residence in Manitoba and he and his parents, who lived in Saskatchewan, sued the defendant in Prince

[2] (1989), 40 BCLR (2d) 90 (BCSC).

[3] (1993), 19 CPC (3d) 362 (Ont Ct Gen Div).

[4] (1993), 108 Nfld & PEIR 346 (PEICA).

Edward Island. The defendant argued that the Prince Edward Island court should decline jurisdiction on *forum non conveniens* grounds in favour of the courts of Saskatchewan or Manitoba which were argued to be equal or better fora.

The chambers judge stayed the action upon finding that Quebec, where the accident occurred, was the appropriate forum. However, with the benefit of the analysis in *Tolofson,* it is clear that the motion reflected a concern regarding the applicable law and not the appropriate forum. The plaintiffs had chosen to sue thousands of miles away from their residence in the jurisdiction of the defendant's residence, despite the inconvenience to them, to ensure both that the court they chose would have jurisdiction over the defendant and that the law of Quebec would not be applied to prevent their civil action. Although the choice of jurisdiction could be challenged on the basis that it sought to manipulate the applicable law, there could be little genuine complaint about the convenience of the forum when distant plaintiffs litigate in the defendant's residence. Moreover, despite the fact that, following *Tolofson,* Quebec law should govern a dispute such as this, a trial in Quebec might be inconvenient for all in view of language factors and differences in procedure in a civil law system. Accordingly, in a case such as this, where the forum is clearly appropriate but the defendant is concerned by the possible application of the local law, it may be advisable to address the issue of the applicable law directly by bringing a pre-trial motion to seek a determination of the governing law.

Litigation Convenience and Access to Justice

A cursory review of the common law of jurisdictional disputes suggests that questions of the enforceability of judgments and the governing law continue to be significant in determining the appropriate forum in international litigation and that litigation inconvenience would rarely be sufficient by itself to determine whether a forum is inappropriate. In Canada, the question of enforceability in interprovincial litigation has largely been resolved through the establishment of a full faith and credit approach to interprovincial judgments in *Morguard Investments Ltd. v. De Savoye.*[5] In view of the distinction between choice of law and jurisdiction in tort actions following *Tolofson,* it would seem likely that pre-trial motions to determine the governing law would come to be of increasing importance and that motions for stays based on *forum non conveniens* would become relatively rare. However, in Canada, litigation convenience arguably continues to be of unique importance in determining which of the various Canadian fora is appropriate for the resolution of a dispute and it is likely to continue to form an independent basis for determining jurisdiction.

The combined effect of the geographical size of Canada and the general absence of a contingency fee approach to litigation can readily produce situations in which the ability of a plaintiff to litigate in a particular forum amounts to a question of access to justice.

This point was recently illustrated in the case of *Shewan v. Canada (Attorney General)*[6] involving allegations of infringement by the Yukon Department of Tourism of the plaintiff's proprietary rights to a musical composition. Uncontested evidence of the plaintiff's impecuniousness and her son's ongoing requirement for medical care led the master to conclude that "[i]f the plaintiff is not allowed to bring this action in Ontario it is quite likely that she will not be able to bring the action at all."

Strong statements concerning the importance of litigation convenience were also made by La Forest J. in his judgment in *Hunt v. T&N plc.*[7] In that case, the Court considered whether a Quebec blocking statute, enacted to protect Quebec businesses against American anti-trust actions, was constitutionally inapplicable to litigation in British Columbia. In finding that the constitutionality of a rule relating to the relationship between provincial legal systems could be raised and determined in the course of ordinary private litigation, La Forest J. commented that "above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction."

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[5] [1990] 3 SCR 1077.
[6] (1994), 27 CPC (3d) 244 (Ont Ct Gen Div).
[7] [1993] 4 SCR 289.

'Real and Substantial Connection'

One additional benefit to the distinction established in *Tolofson* between questions of appropriate forum and applicable law is the key it provides to resolving the difficult question of the nature of a "real and substantial connection" and the weight that should be accorded to various connections. Although both the appropriate forum and the applicable law in tort actions will be those that have a real and substantial connection to the matter, the reasoning in *Tolofson* suggests that some connecting factors that comprise real and substantial connections are relevant to the issue of which law should be applied and others are relevant to which court should try the action. As a rule of thumb, factors connecting a cause of action in tort to a particular jurisdiction will be relevant to which law should be applied and those connecting the litigants, witnesses or evidence to a particular jurisdiction will be relevant to which forum is appropriate.

Many conflict of laws disputes do not require the weighing of connecting factors relating both to the cause of action and to the litigation for the simple reason that many conflict of laws disputes relate only to the applicable law or only to the appropriate forum and not to both. The *Tolofson* case is a good example both of the confusion that can be produced by mixing together different connecting factors and of the sensible result that can be achieved by distinguishing them. In *Tolofson,* the connecting factors relating to choice of law (where the accident occurred) indicated that the law of one province was applicable while the connecting factors relating to the appropriate forum for the litigation (the residence of most of the litigants) indicated that a different province was the appropriate forum. The significant achievement of the Supreme Court of Canada in its judgment was to distinguish between the two. Thus, while the case had been argued at first instance to be a question of *forum non conveniens,* the plaintiffs' chosen fora were clearly appropriate. Accordingly, at the Supreme Court, the matter was argued as an issue of choice of law and it was determined that the relevant "real and substantial connection" was that of the location of the accident.

Conclusions – A New Model for Interprovincial Conflicts of Laws

By securing the distinction between questions of the appropriate forum and the applicable law in tort actions, the decision in *Tolofson* established the basis for a rational model for interprovincial conflicts: one that is largely free of forum shopping and one that determines each of these questions on their own distinct merits. A rational approach to choice of law and to the relationship between issues of forum and applicable law cannot readily be secured on an international scale at this time. In the absence of an international convention, there is no mechanism between sovereign authorities for ensuring the application in another country of a particular choice of law rule. Accordingly, determinations of the appropriate forum in cases involving international elements must continue to encompass questions of whether the law of the forum taking jurisdiction would be applied and whether the relative advantages or disadvantages of that law would constitute an injustice in the particular case. Moreover, until the two questions can be distinguished in international cases, the best that can be achieved in seeking just resolutions of conflicts of laws is an inexact determination of the appropriate forum. This will involve a confusing admixture of factors relating both to forum and applicable law. Although it may be feasible only in a federal structure such as Canada, with its single court system of plenary jurisdiction, to rationalize choice of law before jurisdiction, a comprehensive scheme based on the model suggested by *Tolofson* has the potential to set the standard for conflict of laws regimes in other federal and regional legal systems.