

# “ARE WE THERE YET?” TOWARDS A NEW RULE FOR CHOICE OF LAW IN TORT<sup>©</sup>

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The Supreme Court's effort to establish certainty in this area by basing a firm rule on a clear theory has failed. The intention was laudable but the proposed theory bore little relation to the courts' adjudicative concerns; and the rule sometimes produced injustice, prompting courts to circumvent it. This article considers the brief history of choice of law in tort and recent developments in common law and civil law jurisdictions, and suggests a new theory and a new rule (based on principles of tort law rather than public international law) which are likely to increase certainty by promoting fairness.

La cour suprême n'a pas réussi à établir la certitude dans ce domaine en se basant sur une règle définitive émanant d'une théorie claire. L'intention était louable, mais la théorie proposée avait peu de lien avec les questions juridiques à être tranchées par cette cour, et la règle produisait parfois des injustices qui incitaient les cours à la détourner. Cet article considère l'histoire brève du choix du droit en responsabilité civile délictuelle et les développements récents dans les traditions juridiques de common law et de droit civil. L'auteure suggère à la fois une nouvelle théorie et une nouvelle règle (basées sur des principes du droit des délits plutôt que sur le droit international public) qui devraient augmenter la certitude en encourageant l'équité.

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## I. INTRODUCTION

There is a classroom phenomenon that I have observed, as a student and a teacher, so consistently in certain conflict of laws lectures that I have come to call it “conflicts brow.” It is a look of consternation, not unlike that on the little faces in the back seat of a car on a long journey, chorusing “Are we there yet?” To be fair, conflicts brow is more prevalent in certain lectures than others. Topics like “total renvoi” and “the incidental question” are sure to bring it on. Some say that the reasons for this are obvious. But for less obvious reasons, conflicts brow has been a regular feature of late in discussions of the rules for choice of law in tort as well.

On occasion, when Professor Castel was confronted with this phenomenon in choice of law discussions, he would explain wryly that choice of law was one of the easiest subjects because there was really only one rule for all areas of private law: “You apply the law most substantially connected,” he would say with a subtle accent. As a student, I felt this was an unhelpful generalization. On other occasions, when students were troubled by inconsistencies between the implications of the established choice of law rule and the outcome of particular cases, he would observe calmly that the courts routinely manipulated the rules to produce a just result. I found this frustrating: either the decision in question was wrong, or the rule was in need of reformulation, or we had failed to appreciate the consistency between the two. I was simply not prepared to accept that “result-oriented reasoning” was an adequate explanation or a commendable practice. It has occurred to me since, however, that in certain respects he was right on both counts. This article tries to explain why it is helpful to bear these observations in mind in formulating a new choice of law rule for tort claims.

In Part II of this article, I review an example of the case law

following the Supreme Court of Canada decision in *Tolofson v. Jensen*:<sup>1</sup> that of the Ontario courts in *Hanlan v. Sernesky*.<sup>2</sup> In that case, the courts chose not to apply the law of the place where the tort occurred (the *lex loci*) as recommended in *Tolofson*. In doing so, the courts had to choose between two routes: distinguishing the *Tolofson* precedent by distinguishing the case before it—an international case—from interprovincial cases such as *Tolofson*; and reconsidering the rule in *Tolofson* and the theory behind it. They chose the first route, and applied the *lex fori* (the law of the forum). Although the implications of both routes will be considered in this article, I will pursue the other route first. This begins in Part III with an effort to place *Tolofson* in its historical context. The brief history of choice of law in tort is described as a widespread shift in recent decades away from the practice of applying the *lex fori* to the practice, generally, of applying the *lex loci* and, occasionally, of applying the personal law of the parties.

In Part IV, I return to the present and comment on the current practice of applying a combination of a rule and an exception, and the persistent uncertainty over when each of these alternatives (*i.e.*, the rule and the exception) should be invoked. This uncertainty suggests the need for a better understanding of the rationale underlying the choice of law rule, in other words, a unifying theory that would explain why the rule or the exception was appropriate in any given case.

The Supreme Court of Canada advanced a theory of choice of law in tort in *Tolofson* but, as I suggest in Parts V and VI, the particular theory proposed in *Tolofson*—one that promotes application of the *lex loci*—is ultimately unsuccessful in securing the certainty sought by the Supreme Court. I argue that the *Tolofson* theory has not helped the courts to understand why the *lex loci* is appropriate in the cases in which courts sense that it should be applied; nor has this theory permitted the courts to apply a law indicated by some other connecting factor when the courts have sensed that this is appropriate. In Part VII, I explore an alternative theory to that proposed in *Tolofson* and, in Part VIII, I suggest a theory and, with reference to some of the European codifications, I formulate a new rule from that theory. Finally, in Part IX, I revisit the *Hanlan* case to examine the implications of the distinction between interprovincial cases and international cases in choice of law in tort, and I reconsider the constitutional imperatives in

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<sup>1</sup> *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 [hereinafter *Tolofson* cited to S.C.R.].

<sup>2</sup> *Hanlan v. Sernesky* (1997), 35 O.R. (3d) 603 (Ont. Gen. Div.) [hereinafter *Hanlan* (*Gen. Div.*), *aff'd* (1998) 38 O.R. (3d) 479 (C.A.)] [hereinafter *Hanlan* (*C.A.*)].

this area that were addressed in *Tolofson*.

## II. A CRITICAL JUNCTURE

Some would say that the suggestion that a rule for choice of law in tort still needs to be formulated is sheer pretence. Choice of law rules for tort cases abound of late. Complete with Latin names<sup>3</sup> and rich doctrinal histories,<sup>4</sup> and supported by profound theories based on lofty principles of international law, they represent such a wealth of discussion on the subject that, arguably, the last thing needed just now is more discussion and another rule. Some would say this is particularly so in Canada where, after half a century of discontent with the previous rule,<sup>5</sup> the Supreme Court of Canada recently gave choice of law in tort an overhaul, and where the new rule it pronounced in *Tolofson*,<sup>6</sup> supported by a detailed reformulation of the underlying principles, is only a few years old. Still, in those few years, Canadian courts, such as the Ontario courts in *Hanlan*, have moved swiftly to take maximum advantage of a narrow exception speculated upon in *obiter* in *Tolofson*.

Before examining the rulings in *Hanlan*, a brief word is in order about the circumstances in which the conflict of laws question arose—but only a brief word is required as the case was of the sort that has become the darling of conflicts lawyers: the cross-border traffic accident. Two Ontario residents, Hanlan and Sernesky, went riding on Sernesky's motorcycle, which was registered and insured in Ontario. They collided with a car in Minnesota and the passenger, Hanlan, was injured. Claims were brought against Sernesky both by Hanlan and by members of Hanlan's family under the *Family Law Act*.<sup>7</sup>

Following the release of the decision by the Supreme Court of

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<sup>3</sup> For example, *lex loci delicti commissi*, or *lex loci* for short. See discussion below in Parts III and IV.

<sup>4</sup> Such as that of the rule in *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 [hereinafter *Phillips*] which is described in *Boys v. Chaplin*, [1971] A.C. 356, [1969] 2 All E.R. 1085 (H.L.) [hereinafter *Boys*]; and *Tolofson*, *supra* note 1.

<sup>5</sup> This discontent was prompted by the decision in *McLean v. Pettigrew*, [1945] S.C.R. 62.

<sup>6</sup> *Tolofson*, *supra* note 1.

<sup>7</sup> The *Family Law Act*, R.S.O. 1990, c. F-3, s. 61 provides for derivative claims for the family members of injured persons who have suffered the loss of the injured person's economic or emotional support.

Canada in *Tolofson*,<sup>8</sup> Sernesky brought a motion to dismiss the derivative claims of Hanlan's family. Sernesky argued that the law of the place where the tort occurred (*i.e.*, Minnesota) should govern the matter. Since claims of this sort were unknown to the law of Minnesota, it followed that such claims should not be permitted to proceed in this case even though the parties were from Ontario and the matter was being heard in an Ontario court. There seemed to be strong support for this argument in the lead judgment of La Forest J. in *Tolofson*. Nevertheless, the Ontario Court (General Division) held that it was entitled to depart from the requirement of applying the *lex loci* where the circumstances were such that "the operation of the *lex loci* rule would work an injustice."<sup>9</sup> The court invoked what has been termed in the English jurisprudence "the flexible exception,"<sup>10</sup> and it applied the law of Ontario, thereby permitting the derivative claims to proceed.

To achieve this result, the court relied upon the suggestion in *Tolofson* that an exception might be permitted in international cases, despite the fact that the configuration of contacts with various legal systems in the *Hanlan* case was not particularly remarkable, and the majority in *Tolofson* seemed dubious about the merits of such an

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<sup>8</sup> In *Tolofson*, *supra* note 1, and its companion case, *Lucas v. Gagnon*, [1994] 3 S.C.R. 1022 [hereinafter *Lucas*] it will be recalled that the Supreme Court was asked to consider cases in which passengers injured in motor vehicle accidents were suing both the drivers of the cars in which they were riding and the drivers of the cars with which they collided. In both cases, the passengers were suing in courts of their home provinces (which were also the home provinces of the drivers of the cars in which they were riding) and not in the courts of the provinces where the accidents occurred. The plaintiffs were seeking to have the laws of their home provinces apply so that they could avoid provisions of the laws of the places where the accidents occurred. In *Tolofson*, the plaintiff wanted to avoid the application of a limitation period and the need to show wilful or wanton negligence. In *Lucas*, the plaintiffs wanted to avoid the restrictions on tort recovery contained in the no-fault system of the place where the accident occurred. In both cases, the Supreme Court ruled that the law of the place where the accident occurred should govern.

<sup>9</sup> *Hanlan (Gen. Div.)*, *supra* note 2 at 610-11.

<sup>10</sup> The flexible exception to the common law tort choice of law rule is described in recent editions of L. Collins, ed. *Dicey & Morris: The Conflict of Laws* (London: Stevens & Sons, 1987) [hereinafter *Dicey & Morris*]. The version of the rule considered in *Tolofson* is Rule 205(1) and (2) of the 11th edition, published in 1987, which reads as follows:

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.

exception.<sup>11</sup> Still, the court in *Hanlan* rejected rigid adherence to the strict rule and, in a brief *per curiam* judgment, the Court of Appeal for Ontario affirmed this result.<sup>12</sup> The courts seemed indifferent as to whether this would further the lofty principles enunciated by the Supreme Court of Canada. They seemed, on the one hand, confident that the application of Ontario law in this case would produce a just result for the parties and, on the other hand, content that their approach was not prohibited by the *Tolofson* authority.

The Ontario courts in *Hanlan* applied Professor Castel's "one-size-fits-all" choice of law rule—the "law most substantially connected." They did so in spite of the Supreme Court's apparent effort in *Tolofson* to entrench the *lex loci* rule, because, as Professor Castel also suggested, they simply sensed that this was the right thing to do to produce a just result. While this explanation could be entirely correct (as will be explored in greater detail below), it would not promote doctrinal clarity. Indeed, if we agree with the result in *Hanlan* (a result which does not appear to have been criticized), we find ourselves at a critical juncture. Either we must accept that there is a meaningful distinction between international and interprovincial cases that would warrant the availability of the flexible exception in one and not the other, or we must question the elimination of the flexible exception in interprovincial cases directly. Freed of the dictates of *stare decisis* and the pressure to decide

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<sup>11</sup> See, for example, J.-G. Castel, "Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall L.J. 35. Support for this interpretation arguably could be found in the fact that Major and Sopinka JJ. were prompted to join in the only secondary judgment to be issued in any of the four leading conflict of laws decisions by the Supreme Court of Canada released in the 1990s in order to opine that the exception should not be eliminated entirely. See also J. Swan, "Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada" (1995) 46 South Carolina L.R. 923.

<sup>12</sup> The *Hanlan* (CA) judgment, *supra* note 2 in its entirety, reads:

In accordance with *Tolofson v. Jensen* [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, we are satisfied that the motions judge had a discretion to apply the *lex fori* in circumstances where the *lex loci delicti* rule would work an injustice. Justice Platana purported to exercise that discretion and ruled that in the particular circumstances before him, the operation of the *lex loci* rule would work an injustice. In coming to this conclusion, it is apparent that Mr. Justice Platana considered the following factors: 1. that the parties were both resident in Ontario; 2. that the contract of insurance was issued in Ontario; 3. that there was no connection with the State of Minnesota other than that it was the place of the accident; 4. that although the accident occurred in Minnesota, the consequences to members of the injured plaintiff's family were directly felt in Ontario; and 5. that the uncontradicted evidence before him was that claims of this nature are not permitted under Minnesota law.

We are not persuaded that Mr. Justice Platana erred in exercising his discretion as he did. Accordingly, the appeal is dismissed with costs.

particular cases, I propose to follow the second route on the basis that it holds the promise of improving the state of the law. To reconsider the ruling in *Tolofson*, however, it is first necessary to appreciate its historical context.

### III. A BRIEF HISTORY

If, by “choice of law rule,” we mean a rule that calls for the application of foreign law in tort cases involving certain legally relevant foreign elements, then the rule has a very short history in the common law—scarcely more than a few decades. In Canada, this history began with the *Tolofson* decision.<sup>13</sup> Before *Tolofson* and similar developments elsewhere, the prevailing so-called “choice of law” rule effectively directed the courts to apply their own law to determine the rights and obligations of parties to all torts.<sup>14</sup> The only caveat was that no liability would exist if the tort had occurred abroad and the conduct complained of was justifiable by the law of the place where the defendant had engaged in it. In other words, until quite recently, common law courts always applied their own law—the *lex fori*—to tort claims regardless of the connections that might exist between the parties or the events and other legal systems. Foreign law (generally, the law of the place where the tort occurred—the *lex loci delicti commissi* or *lex loci*) was relevant only as a possible defence.<sup>15</sup> Thus, the *lex fori* dominated “choice of law”

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<sup>13</sup> It is still the case today that courts generally consider applying foreign law only in cases where the tort has occurred abroad. Although it is argued later in this article that torts occurring within the jurisdiction of the forum should be governed by a foreign law where the relationship between the parties indicates that a foreign law should govern the relationship. See U.K., Law Commission/Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, (Law Com No 193/Scot Law Com 129) (London: Her Majesty's Stationery Office, 1990) where, at paras. 3.15-3.19 the Commission considered and rejected the possibility of including in the legislation “A Proviso for Torts and Delicts Occurring within the United Kingdom,” concluding that “the potential injustice in the application of our law in respect of torts and delicts committed in the United Kingdom is not obvious.”

<sup>14</sup> As Catherine Walsh astutely observed, “A choice of law rule that directs the court to apply its own law is a choice of law rule in name only”: see C. Walsh, “Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims” (1997) 76 Can. Bar Rev. 91 at 100.

<sup>15</sup> Although this kind of reference to the *lex loci* is commonly attributed to the 1870 decision of the Privy Council in *Phillips*, *supra* note 4, Christopher Morse traced such reasoning to a Privy Council decision two centuries earlier in *Blad's case* (1674), 3 Swan 603. In that decision, some English traders sued a Dane, Blad, for seizing their property in Iceland. Blad asked the Privy Council to stay the proceeding because the seizure was authorized by a monopoly he held on the fishing trade in Iceland. The Privy Council said it was unnecessary to grant a stay of proceedings

in tort for some three centuries.<sup>16</sup> It was so controlling that no liability could be found for conduct that was wrongful in the place abroad where it occurred if the conduct was not also wrongful under the law of the forum.<sup>17</sup>

In recent decades, preoccupation with the *lex fori* came to be denounced as excessively parochial. It was thought that the *lex loci* should play a larger role in determining tort liability than simply forming the basis for a defence. It was argued that routine application of the *lex fori* has very little to do with the just resolution of tort claims that were principally connected to other legal systems. Application of the *lex fori* could only be justified on the basis of a court's obligation to promote local standards and this was not essential to the adjudication of tort claims. As La Forest J. observed in *Tolofson*, "The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."<sup>18</sup>

This shift in approach to choice of law in tort was the result of an evolution in tort law. As the Scottish and English Law Commissioners explained in their report, the old choice of law rule was the product of a previous era in which "the law of tort and delict was formerly seen, much more than it is today, as having a punitive rather than a compensatory function. As such it was more closely allied to criminal law, an area of law where there is no question of a court in this country applying anything other than the domestic law of England or Scotland."<sup>19</sup> Criminal laws, like other public laws that are seen to be the emanation of the sovereign will, are not migratory and there is no scope for choice of law analysis. Generally, only the courts of the place in which a crime is committed have jurisdiction and they invariably apply their own law. If the defendant is arrested abroad, the matter does not proceed where the defendant is found with those courts applying the law of the place where

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because the court hearing the case would consider the defence available to Blad under the *lex loci* as an effective defence to the claim brought against him in the English court: see C.G.J. Morse, *Torts in Private International Law*, vol. 2 (Oxford: North-Holland, 1978) at 25.

<sup>16</sup> There was debate over whether a lack of civil liability under the *lex loci* would suffice as a defence or whether a complete lack of legal liability was required: *Machado v. Fontes*, [1897] 2 L.R.Q.B. 231; and *McLean v. Pettigrew*, *supra* note 5, and whether a limitation on recovery found in the *lex loci* would apply even if the parties had close ties to the forum: *Boys*, *supra* note 4.

<sup>17</sup> *The Halley* (1868), L.R. 2 P.C. 193.

<sup>18</sup> *Tolofson*, *supra* note 1 at 1070. Except, of course, where mandatory laws and public policy interrupt the normal choice of law process.

<sup>19</sup> U.K. Law Commission & Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, (Law Com No 193/Scot Law Com 129) (London: Her Majesty's Stationery Office, 1990) at para. 2.6.



the crime was said to occur. Rather, the defendant is extradited so that the courts of the place where the crime was said to occur are able to proceed.

The adjudication of tort matters once served a similar public purpose except that the element of party prosecution somehow entitled victims to pursue defendants in fora other than those in the place where the tort occurred. Still, in adjudicating the claim, the courts were conceived of as serving a local public purpose akin to a criminal prosecution and, therefore, would be obliged to apply local law. Tort law is now generally recognized to be substantially different from criminal law and, therefore, truly a form of "private" law. The public continues to have an interest in the standards of conduct established in tort cases but the resolution of any given dispute is mainly intended to do justice between the parties. Primarily concerned with dispute resolution, the courts are not obligated to reiterate, refine or advance local standards of conduct, but to apply the most appropriate standards to the conduct complained of in the action.<sup>20</sup>

This evolution in tort law produced a groundswell of change in the approach taken to choice of law rules, shifting emphasis from the application of the *lex fori* to the application of other laws, often the *lex loci*. The shift away from the *lex fori* occurred through a variety of means. In 1989, the High Court of Australia found its mandate for this in the Australian Constitution.<sup>21</sup> In 1993, the Privy Council managed to apply the *lex loci* instead of the *lex fori* through clever manipulation of existing doctrine in *Red Sea Insurance*.<sup>22</sup> In 1995, courts in the United Kingdom were directed by legislation generally to apply the *lex loci* subject to a flexible exception.<sup>23</sup> This groundswell of change brought common law courts into line with the well-established practice of civil law courts.<sup>24</sup>

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<sup>20</sup> It is worth digressing briefly to note again the logical corollary to this, which has yet to be explored in detail in the case law. That is, that our courts should be prepared to extend choice of law analysis to torts that occur locally where close connections to other legal systems make it suitable to apply the standards of conduct of those other legal systems to the conduct in question. See note 13, *supra*.

<sup>21</sup> *Breavington v. Godleman* (1988), 169 C.L.R. 41 [hereinafter *Breavington*], 80 A.L.R. 362 (H.C.); but see *McKain v. Miller* (1991), 174 C.L.R. 1, (1992) 104 A.L.R. 257 [hereinafter *McKain*]; *Stevens v. Head* (1993), 176 C.L.R. 433 [hereinafter *Stevens*]; and see *John Pfeiffer Pty Limited v. Rogerson* (2000), 74 A.J.L.R. 1109 (Aus. H.C.) [hereinafter *Pfeiffer*].

<sup>22</sup> *Red Sea Insurance Co Ltd v. Bouygues SA*, [1994] 3 W.L.R. 926.

<sup>23</sup> *Private International Law (Miscellaneous Provisions) Act*, (U.K.) 1995 [hereinafter *PIL*].

<sup>24</sup> Relevant statutory provisions cited with reference in M. Reimann, *Conflict of Laws in Western Europe: A Guide Through the Jungle* (New York: Transnational Publishers Inc., 1995) [hereinafter *Conflict of Laws*] include: Austrian Federal Law, art. 48, s. 1: see E. Palmer, "The

There is now a widespread consensus that it is not appropriate to apply the *lex fori*, and that it is appropriate in most cases to apply the *lex loci*.

#### IV. THE RULE AND THE EXCEPTION

The widespread trend away from application of the *lex fori*, and generally toward application of the *lex loci*, has been embraced as producing a just result in most cases. However, it sheds little light on the result in cases like *Hanlan*. In *Hanlan*, it will be recalled, the Ontario courts were determined to apply Ontario law—not the *lex loci*. This was not because the courts doubted the appropriateness of applying the *lex loci* in most cases. The fact that the matter was being adjudicated in Ontario was not the reason why the Ontario Courts wished to revert to the application of the *lex fori*. Rather, it was because the courts sensed that the *Hanlan* case fit the requirements of a well-defined class of exceptional cases in which justice required the court to disregard the law of the place in which the tort occurred in favour of some other law. In *Hanlan*, this other law was the personal law of the parties. The Court of Appeal regarded *Hanlan* as fitting within this well-defined class of exceptional cases for two reasons: the parties were both residents of a place other than the place where the accident occurred; and there was no connection with the place where the accident occurred other than the fact that it was the place of the accident.

An exception favouring the personal law of the parties is so well established as to be a regular feature of almost every conflict of laws regime that generally requires application of the *lex loci*. For example, the second paragraph of article 3126 of the Quebec Civil Code<sup>25</sup>

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Austrian Codification of Conflict of Laws" (1980) 28 Am. J. Comp. L. 197; Greek Civil Code, art 26; Italian Law No. 218 of May 31, 1995, art. 62, s. 1: see A. Montanari and V. Narcisi, *Conflict of Laws in Italy* (Boston: Kluwer Law International, 1997) at 59; Spanish Civil Code, art. 10, s. 9; Portuguese Civil Code, art 45, s. 1. Relevant rules developed by courts and scholars cited by Reiman include: France—H. Batiffol & P. Lagarde, *Droit International Privé*, 8th ed., vol 2, (Paris, Librairie générale de droit et de jurisprudence, 1993) at 237-239; Germany—G. Kegel, *Internationales Privatrecht*, 6th ed. (München: C.H. Beck, 1987) at 403 and German Draft Code, art. 40, s. 1, see Gildegggen and Langkeit, "The New Conflict of Laws Code Provisions of the Federal Republic of Germany: Introductory Comment and Translation" (1986) 17 Ga. J. Int'l & Comp. L. 229; Netherlands—M. Das, "Conflict of Laws," in S.R. Schuit *et al.*, *Dutch Business Law*, (Boston: Kluwer Law and Taxation Publishers, 1989) at 4-49 – 4-51, and Th. de Boer & R. Kottling, "Private International Law" in J.M.J. Chorus *et al.* ed., *Introduction to Dutch Law for Foreign Lawyers*, 2nd ed. (Boston, Kluwer Law and Taxation Publishers, 1993) at 234; Denmark—A. Philip, "Private International Law" in A. Gammelthoff-Jansen, B. Gomard and A. Philip, eds. *Danish Law: a general survey* (Copenhagen: Gads, 1982) at 346; and Finland—H.T. Klami, *Private International Law in Finland* (Turku: University of Turku, Faculty of Law, 1986) at 38.

<sup>25</sup> Art. 1260 C.C.Q.

provides, by way of exception to the general rules laid down in the first paragraph, that "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." Similar exceptions can be found in the codes of many other civil law countries.<sup>26</sup>

This exception is not part of a "homeward trend"<sup>27</sup> in which courts are tempted to apply their own law in spite of strong connections to another place. It is likely that in cases where the parties' domiciles coincide in some place other than the place of tort, their place of domicile will also be the most convenient place in which to resolve the dispute. In these cases the personal law of the parties will also happen to be the *lex fori*. Still, the court applies its own law because it is the personal law of the parties, not because it is the *lex fori*. This suggests that where the parties' personal law is neither that of the forum nor that of the place of tort, courts should be prepared to consider applying the law of that third place. It also suggests that courts should be prepared to apply a foreign law in certain cases concerning torts that have occurred locally.

Despite the broad consensus regarding the need for a flexible exception to do justice to these kinds of cases, there has been lingering uncertainty about when it should be invoked. If, while in Ontario, one foreigner harms another from the same country, should we apply our law or theirs to the claim? If a person from Ontario injures a stranger in another country and it turns out that the stranger is also from Ontario should we apply Ontario law to the claim? Such questions have plagued decisionmaking in this area, creating uncertainty and maintaining considerable scope for manipulative lawyering. Under these circumstances, courts have yearned for more complete guidance in the form of a rationale or a theory that would explain the operation of the rules and thereby provide direction for their proper application. This is

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<sup>26</sup> Rules noted in *Conflict of Laws*, *supra* note 24 also include: Austrian Federal Law, art. 48, s. 1; Portuguese Civil Code, art. 45, s. 3; Italian Law No. 218 of May 31, 1995, art. 62, s. 2; and the German Draft Code, art. 40, s. 2 and art. 41.

<sup>27</sup> Although the confusion over this appears to linger in the English academic commentary. See, for example, in *Johnson v Coventry Churchill*, [1992] 3 All E.R. 14, when an English carpenter hired by an English employment agency to work in Germany was injured on the job where in that case, the court held in an action against his English employer that he could rely on the obligation under English law of his employer to provide a safe workplace even though the absence of wilfulness in the employer's conduct would have absolved it of liability under German law. Peter North comments on this result as follows: "Although this decision provides a further example of a homeward trend to the law of the forum, it does so in circumstances where the result seems quite acceptable": P.M. North, *Essays in Private International Law*, (Oxford: Clarendon Press, 1993) at 69-70.

where the contribution of the Supreme Court of Canada promised to be most helpful.

## V. *TOLOFSON* AND THE SEARCH FOR A UNIFYING THEORY

Like the other three leading Supreme Court of Canada decisions of the last decade that sought to provide a theoretical framework for the main areas of conflict of laws,<sup>28</sup> the *Tolofson* decision is likely to be remembered for its extraordinary commitment to the project of developing a principled approach to choice of law in tort—an approach based on a sound theoretical foundation and responsive to the underlying reality in which tort choice of law rules operate.

What is this underlying reality? For *La Forest J.* it is the “territorial limits of law under the international legal order.” These limits are derived from public international law and they are expressed in terms of sovereignty and comity. Rules operating under the auspices of sovereignty and comity acknowledge the rights of governments to make and apply laws within their own territorial limits, and the obligation of courts to respect those rights by refraining from imposing local laws on cases arising in other jurisdictions.

This is an attractive theory for choice of law analysis. The conflict of laws has often times seemed a subject that is betwixt and between the main legal disciplines. Not quite private law, or procedure, or international law, it has tended to operate in the shadows of these subjects as a strange admixture of discrete doctrines and “general considerations.” The thought that choice of law rules could now be deduced from the established principles of public international law seemed a welcome development to many. No doubt such a theory would promise to soothe many a conflicts brow.

Unfortunately, the conflicts brow phenomenon has not been confined to the classroom but has, on occasion, found its way into the courtroom; and this is perhaps where the true test of a good legal theory occurs. For a good theory will provide both a compelling explanation for the correctness of a ruling that we sense is just and a basis for anticipating the appropriate or just result in a range of circumstances that raise similar or related questions. A good theory is more than a

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<sup>28</sup> *Morguard Investments Ltd v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *Morguard* cited to S.C.R.]; *Amchem v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96; and *Hunt v. T&N Plc.*, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16.

useful rule. Since a rule merely identifies a reliable correlation (in this case between the facts and the applicable law), it can be useful even when it admits of an exception. But a good theory—one that explains the underlying legal principle—should account for the proper application of both the rule and the exception.

We know that courts are generally inclined these days to apply the law of the place where a tort occurs. If the theory put forward in *Tolofson* was a good one then, in a case in which a court was inclined to apply the law of the place where the tort occurred, the *Tolofson* theory would assist in providing compelling reasons for doing so. What compelling reasons does *Tolofson* provide? According to the theory in that case, courts apply foreign law for reasons of comity. But in pouring over the *Tolofson* judgment in search of guidance, a motions court judge might well wonder what comity has to do with whether she should, for example, disregard the guest statute in the place where the accident occurred.<sup>29</sup> Similarly, another court might wonder what guidance comity would provide with respect to whether, for example, he should dismiss a derivative claim founded on the parties' personal law on the basis that it would be unknown to the law of the place where the accident occurred?

Even if these courts regularly addressed conflict of laws questions, they would be no further ahead in making the connection between the dictates of comity and the justice of applying a guest statute or permitting a derivative claim. This is because it is far from clear that there is any meaningful connection between comity and choice of law analysis. Common law courts engage in choice of law analysis only when one of the parties considers it potentially advantageous to his or her case to have the law of some other place applied to the matter. Surely, if the application of foreign law was a matter of comity, it would be in the hands of the court and it would not be subject to party prosecution.<sup>30</sup> Further, the application of foreign law is subject to party prosecution not only with respect to the desire of one of the parties to have the foreign law applied but also with respect to the proof of the foreign law. Thus, despite their recognition of the obligation, following *Tolofson*, to apply the *lex loci*, some courts have declined to do so on the basis that the *lex*

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<sup>29</sup> For more extensive discussions of the question of the relevance of comity to choice of law in tort see P. Kincaid, "*Jensen v. Tolofson* and the Revolution in Tort Choice of Law" (1995) 74 Can. Bar Rev. 537 at 540-546; and R.M. Junger, "Case Comment: *Tolofson v Jensen*" (1996) 23 Man. L.J. 689.

<sup>30</sup> See R. Fentiman, *Foreign Law in English Courts*, (Oxford: Oxford University Press, 1998) and *Petkus v. Becker*, [1980] 2 S.C.R. 834 per Dickson C.J.C.

*loci* was not adequately proved by the party seeking to have it applied.<sup>31</sup> Finally, the obligation of another court to enforce a judgment generally will not be affected by the way the issuing court treated the law of the enforcing court's jurisdiction in the course of adjudicating the dispute.<sup>32</sup> The failure to apply the law of the enforcing court's jurisdiction or the failure to apply it properly does not appear to violate comity or even to diminish the obligation to enforce the judgment.

Perhaps, at bottom, basing the *lex loci* rule on comity confuses the ideas of public and private law and it overlooks the principles of party autonomy and party prosecution that are fundamental to private law adjudication. Clearly, states have an interest in seeing certain laws applied in some adjudicative settings. Such laws are public laws—criminal and regulatory laws—and the state is directly involved in identifying and prosecuting violations of such laws in criminal and administrative law adjudicative settings. Under traditional notions of private law adjudication, however, the state is indifferent to whether individual claims are pursued. Parties to such disputes are free to agree to compromise and to settle the matter between themselves. They are free to have the matter decided by some body other than a court and, in so doing, to choose their own adjudicator. They are free to resolve the matter in accordance with whatever rules they choose. Thus, although a state has an interest in the maintenance of the standards of conduct that are endorsed by courts in adjudicating tort claims, it has no overriding or pre-emptive interest in ensuring the application of these standards in particular cases. All in all, it seems clear that comity is not the guiding principle for choice of law in general and the operation of the *lex loci* rule in particular.<sup>33</sup>

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<sup>31</sup> See, for example, *Nystrom v. Tamava* (1996), 44 Alta. L.R. 355 (Q.B.).

<sup>32</sup> See *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155.

<sup>33</sup> Peter Nygh offered the following observations concerning the objectives of choice of law rules:

Choice of law rules seek to meet a number of objectives. Generally speaking, they are not concerned with the protection or application of governmental interests. Exceptions exist where a governmental interest is directly involved as in state immunity, or where a statute expressly or by necessary implication asserts a governmental interest, as will be discussed further below. But primarily the conflict of laws is concerned with the reconciliation of private interests and expectations.

(P. Nygh, *Conflict of Laws in Australia*, 6 ed. (Sydney: Butterworths, 1995) at 33). The argument in the foregoing paragraphs in the text (*i.e.*, that the principles of public international law are largely irrelevant to choice of law analysis) should be qualified. It is based upon the traditional approach to these principles, apparent in *Tolofson*, which treats them as consisting largely in respect for the rights of sovereign states to define local standards (such as those for tort) autonomously. Clearly, it is possible to conceive of international law differently. To the extent that the availability of a

Still, whether the reasoning in *Tolofson* can account for the *lex loci* rule might not be the best measure of it. If, as an authority, the *Tolofson* decision permits the courts to do what they sense is right, they will probably not trouble themselves too much with the theory behind it. A better test of the *Tolofson* theory, then, might be whether it supports the varied results that courts sense are warranted in varying circumstances. Rather than asking whether the *Tolofson* theory accounts for the application of the *lex loci* in cases where this seems appropriate, it might be better to ask whether the *Tolofson* theory permits the courts to apply some law other than the *lex loci* when they are inclined to do so. In other words, does the *Tolofson* theory support the use of the flexible exception? Unfortunately, it does not. A commitment to the territorial principle in international law as the “underlying reality” that supports the application of the *lex loci* in most situations, would seem to require that the flexible exception be relegated to responding to a competing interest of less importance. Thus, the Supreme Court described the competing interests in choice of law rules as those of “order” and “fairness.” As the court in *Tolofson* said, “the underlying principles of private international law are order and fairness, order must come first. Order is a pre-condition to justice.”<sup>34</sup>

The notion that fairness in individual cases should be sacrificed for the sake of order in the law seems to accord more with a civil law approach than a common law approach. As one European conflict of laws scholar, Mathias Reimann, observed, “As a general matter, European conflicts law is marked by a comparatively greater preference for certainty, logical consistency, and stability of rules, and for predictability of results over justice in the individual case.”<sup>35</sup> He went on to explain, “... blackletter rules are, in principle, desirable, not deplorable. The clearer rules cut, the better. The underlying assumption is that if a rule incorporates the appropriate policies and interests and is well-drafted, its blackletter character will not lead to unjust results, except in extreme, and thus rare, cases.”

Common law courts of first instance, engaged in private law adjudication, tend to resist treating a fair outcome as merely one of several possible objectives. The threat posed by the flexible exception to the doctrinal coherence of the theory in *Tolofson* seems less troubling to

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“flexible exception” in favour of the application of some law other than the *lex loci* is so widespread as to establish a consistent state practice integral to providing a just result in a civil claim, a rigid requirement that the courts apply the *lex loci* to every case could be seen as denying the basic entitlement to a fair adjudication of a civil claim, and, in this way, violating an international norm.

<sup>34</sup> *Tolofson*, *supra* note 1 at 1058.

<sup>35</sup> *Conflict of Laws*, *supra* note 24 at 13.

common law courts than compromising the fairness of the outcome in the case before them. Such courts are not readily persuaded that the result in any given case does not matter because it would “come out in the wash.”<sup>36</sup> While the differences between the tort laws of the Canadian provinces tend to be subtle and few, it is only when these differences loom large (in the sense that they are likely to have a substantial if not dispositive effect on the outcome) that they give rise to disputes over the applicable law. Reasoning from the case to the rule (rather than the other way around as is done in the civil law), common law courts begin with the intuition that a particular result in a particular case is right and then seek to articulate the correlation between the facts and the result to form a rule to provide guidance in similar cases. Where the application of this rule in some cases proves regularly to produce an unjust result, an exception emerges and this can sometimes be articulated with sufficient precision to form a subsidiary part of the rule. For direction on whether the rule or the exception applies, it is sometimes necessary to refer to a guiding principle. However, this is always subject to review based on a court’s intuition about the justice of the result produced by the rule it supports in a the case before it.

## VI. HARD CASES AND THE NEED FOR A BETTER RULE

This is where the dialogue between the Supreme Court of Canada and the lower courts comes into play. The theory in *Tolofson* would be more helpful if, in addition to supporting the application of the *lex loci* where that seemed appropriate, it also supported the courts’ desire to apply some law other than the *lex loci* where they sensed that this was clearly the right thing to do. It would also be helpful if it gave the courts guidance in situations of uncertainty as to when they should apply the rule and when they should apply the exception. Unfortunately it does not. The Ontario courts read *Tolofson* as advancing an underlying theory for choice of law in tort that inevitably gave rise to a strict application of the *lex loci* and left room only for exceptions based on public policy or on the fact that the laws of potential application were those of different countries. They did not explain why the distinction between interprovincial and international conflicts of laws mattered. They did not seem particularly interested in the theory underlying such a distinction. Apparently, they saw their role as confined to doing justice in the case before them and complying, as much as possible, with binding

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<sup>36</sup> *Tolofson*, *supra* note 1 at 1059.



precedent.

In fact, this is where it pinches. All the eloquent arguments in favour of certainty and the need to apply a simple hard and fast rule equally to all cases mean little to litigants and their counsel when the rules seem to produce unjust results in their cases. What matters to litigants and their counsel is their case. Moreover, while it may seem persuasive to say that cases that raise conflict of laws questions are relatively rare, that those that warrant an exception to a general rule are rarer still, and that the time and trouble to provide special accommodation in the law for such a small percentage of cases is not warranted, it misses the point to do so. A court presented with a well argued case demonstrating that an exception to the application of the *lex fori* is warranted is not deciding every tort case; nor is it deciding every choice of law in tort case. The court does not regard itself as engaged in deciding a small percentage of the possible cases. It is engaged first and foremost in deciding the case before it. To the extent that courts cannot be persuaded to be stoical in imposing a rigid rule, the arguments favouring a rigid rule for the sake of certainty are misplaced because they will only produce a jurisprudence of decisions distinguishing the precedent on ill-conceived grounds.<sup>37</sup>

So we find ourselves back at the starting point. Perhaps we are further ahead, though, in that we might now pursue a slightly different course—one that follows a method inspired by the common law but that also makes use of current civil law codifications of the rules. To re-state the question posed by cases like *Hanlan*: is it possible to discern in the decisions of courts and academic statements of the law regarding the flexible exception some regularity or uniformity that could be articulated as a rule? One promising place to start would be with a typical civil code formulation such as that found in the Quebec Civil Code. Article 3126 provides in part that “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.” Could we say that a coincidence of the parties’ domicile or residence warrants application of the parties’ personal law rather than the *lex loci*?

In many cases in which the parties’ domiciles or residences coincide, it is appropriate to apply their personal law, but this is not

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<sup>37</sup> Thus, it is with a certain irony that we look back on *Tolofson*’s accolades such as the following: “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 and promote efficiencies within the legal system”: J.P. McEvoy, “Choice of Law in Torts: The New Rule” (1995) 44 U.N.B.L.J. 211 at 224.

always so. Justice La Forest considered this problem in *Tolofson*. He rightly criticized the mechanical application of the personal law of the parties as capable of producing anomalous results. He asked, "Why should we allow an exception at all where two residents of the forum *fortuitously happen to meet each other head-on on the road? Should luck be on your side because you happen to crash into another Ontario resident while driving in Quebec, instead of crashing into a Quebecer?*"<sup>38</sup> There seems little doubt that results based on fortuitous factors are arbitrary and unjust. This is so whether these factors point to the application of the *lex loci* or to the personal law of the parties. Results based on fortuitous factors produce a windfall for a plaintiff at an undeserved expense to the defendant. We sometimes tolerate some arbitrariness in the relationship between fault and compensation in tort cases in the determination of damages (for example, that sometimes a small degree of carelessness can produce significant harm and, therefore, a large award in damages). However, we are less prepared to tolerate arbitrariness in the standards applied to determine the basic entitlement to recovery. After all, when we invoke the personal law of the parties as an exception to the *lex loci*, we do so because the place of the tort in the context of the case as a whole seems merely fortuitous and therefore an arbitrary basis for applying the *lex loci*. It hardly seems right, then, to apply the personal law of the parties when the coincidence of their personal laws is itself fortuitous.

Rigid demarcation of the scope of an exception to the *lex loci* through reference to mechanical factors like the personal law of one or both of the parties, then, can also work an injustice.<sup>39</sup> Perhaps we need a better formulated rule—one that does not rely on mechanical factors to determine when to apply the *lex loci* and when to apply the exception. This was the course pursued by the English law. Like our courts, the English courts have generally been content to work with rules in choice of law in tort. They have not been very interested in theory. They have tended to deal in rules and to leave the theorizing to their Law Commission. When their old rule (the rule in *Philips v. Eyre*) became outdated, the English and Scottish Law Commissions suggested revisions and Parliament passed legislation. Now they apply the new law. It contains a general rule and an exception which the courts apply based on their own discretion exercised in accordance with the guidance provided

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<sup>38</sup> *Tolofson*, *supra* note 1 at 1058 [emphasis added].

<sup>39</sup> Moreover, as La Forest J. noted, mechanical application of this exception is even more troublesome than the rigid application of the *lex loci* in that it is subject to manipulation by counsel through contrivances such as artificial joinder. See *Tolofson*, *supra* note 1 at 1061.

by the legislation. The English courts seem more or less content. One day, when they sense that they can no longer do justice to the cases before them through a sensitive interpretation of the legislation, further revision will be required. In the meantime, their legislative provision for the exception seems to describe generally what our courts seem inclined to do when faced with a case that warrants an application of the exception to the rule. It provides:

- 12(1) If it appears, in all the circumstances, from a comparison of -
- (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
  - (b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
- (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.<sup>40</sup>

Are we there yet? Again, with the greatest of respect to the U.K. legislators, it would seem that we have still some distance to go. Although this provision seems to describe well what the courts do when they make sound choice of law rulings in the exceptional tort cases being considered, it has little predictive or prescriptive value. The provision *in précis* seems to do no more than to invite courts to consider all the relevant factors and to use their good judgement. While it identifies the kinds of factors that are relevant and invites the courts to weigh their relative significance, it does not advert to any unifying theory or underlying purpose that would be decisive in the exercise of the court's judgement. In failing to account for the exercise of discretion, it does little more than to recommend that the courts apply "the law most substantially connected."<sup>41</sup>

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<sup>40</sup> PIL, *supra* note 23, Part III—Choice of Law in Tort and Delict. Interestingly, although this provision initially appears to be a reformulation of Rule 205 in *Dacey and Morris*, *supra* note 10, the flexible exception which operated then to avoid the double actionability requirement now operates to avoid the requirement to apply the *lex loci*.

<sup>41</sup> For more incisive and extensive criticism, see A. Briggs, "Choice of Law in Tort and Delict" (1995) L.M.C.L.Q. 519.

## VII. A "NEW" THEORY

It would seem, then, that the Supreme Court of Canada's pursuit of a unifying theory in *Tolofson* was unavoidable.<sup>42</sup> We need a theory of choice of law in tort that accounts for the operation of the rule and the exception and guides the courts in situations of uncertainty. Where should we look for it? One clue may be found in the confidence with which the courts decide some cases despite the absence of authoritative guidance. Another may be in the striking unanimity, noted earlier, with which common law courts in the commonwealth abandoned reference to the *lex fori* despite the lack of coherence in the explanations offered for this move. The sheer determination of the Ontario courts to retain the benefit of the opportunity enjoyed by other commonwealth courts to invoke the flexible exception similarly suggests that the courts are confident that they know exactly what they are doing without the benefit of any theory. How could this be? The courts must be testing the rules set down by precedent or legislation against some strong intuition about the just result or some notion of an organizing principle. What could the source of it be?

Perhaps we have not yet identified a suitable reference point for a unifying theory because we have been looking in the wrong direction. The *Tolofson* decision exhorted us to look *above* and *beyond* local law to the lofty principles traditionally associated with public international law: sovereignty, comity and territoriality. In choice of law analysis, the courts consider the way in which applying the law of the forum might fail to produce a just result in the case and they consider whether to apply some other law. It seems logical, then, that the authority for this analysis would be above and beyond local law. As a result, there has been a tendency to search for an *external* principle, a *higher* authority. In *Tolofson*, this search yielded the territorial principle of public international law and comity, which, as we saw, was not very helpful.

Perhaps though, instead of looking upwards or outwards to principles of public international law, we should be looking "inwards" or "downwards" to the nature of the adjudication sought to be made—in other words, we should be looking to tort law and its internal logic for guiding principles. After all, when a court is presented with a claim, for example, for compensation for personal injury arising out of a car accident, the court's main reference points are those of the tradition of

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<sup>42</sup> And not isolated. See, for example, the chapter entitled "The Foundations of Choice of Law Rules" in A.J.E. Jaffey, *Topics in Choice of Law*, (London: British Institute of International and Comparative Law, 1996).

tort law, such as deterrence, loss spreading and corrective justice, not sovereignty, or comity. The court's instinct is to do justice between the parties based on that tradition. When the court is asked to have regard to the fact that the accident occurred in another country or to consider whether the law of another place should apply for some other reason, the court adjusts its determinations to accord with the applicable law. This does not alter the fundamental nature of the adjudication. The court might rise above the particular allocations of rights and obligations between the parties described in the local law, but it still regards itself in some fundamental way as resolving a claim for compensation for personal injury (or for whatever compensable wrong is at issue in the matter before it). The court does not regard its adjudicative purpose as suddenly shifting away from personal injury compensation—it does not suddenly regard itself as having been transformed into a tool of international relations.<sup>43</sup> Choice of law issues do not seek to interrupt the adjudicative process or the effort to reach a fair disposition of the claim, but rather to enhance the justice of the result by enabling the court to give effect to an important feature of the context in which the cause of action arose.

In domestic tort law determinations we routinely take into account features of the relationship between the parties in question in understanding the context of rights and obligations between them that shapes the potential for recovery. For example, if someone intentionally cuts me with a knife I might be entitled to compensation unless, of course, she and I are patient and doctor and the cut is a competently executed surgical incision. Indeed, we rarely conceive of liability in the abstract, that is, as arising between complete strangers in a completely neutral setting. Therefore, if a relationship between the parties indicates the relevance of the law of some other place to a determination of their rights and obligations, then this is simply another feature of the legal context in which the harm occurred. The potential legal relevance of the parties' relationship as two persons from a particular foreign country, then, is no different from the potential legal relevance of, for example, the relationship between a patient and a doctor. In this regard, the reasonable expectations that would arise in the context of the parties' relationship, are neither irrelevant nor incidental to a good rule for

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<sup>43</sup> This approach may be contrasted with the approach taken in the adjudication of a claim for state immunity, in which the court must consider whether the requirements of international relations operate as an external intervention depriving it of jurisdiction by overriding its mandate to adjudicate a private claim.

choice of law in tort—they are essential to it.<sup>44</sup>

If we treat applicable foreign law<sup>45</sup> as a relevant feature of the relationship between the parties only where the foreign law establishes the contours of the rights and obligations between them, it becomes clear that the coincidence of the parties personal law is only relevant where it is more than merely a coincidence that comes to light after the liability has arisen. The personal law of the parties is relevant only when it gives rise to the reasonable expectations either (a) that the defendant should have taken a particular degree of care not to harm the plaintiff, or (b) that the plaintiff would be entitled to particular standards of recovery if so harmed. Accordingly, for example, if two vehicles collide on a road in Country A, the drivers would ordinarily expect to have their respective fault and recovery determined in accordance with the law of that country. If, in the course of resolving their dispute, they discover

<sup>44</sup> Justice La Forest seemed ambivalent in *Tolofson*, *supra* note 1 at 1046 about the role of the reasonable expectations standard. He begins his “Critique and Reformulation” by expressing suspicion about the standard as follows:

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. Often the rules are mechanically applied. *At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of “fairness” about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law.* [emphasis added]

However, later on in the judgment, at 1050, *ibid.*, La Forest J. appeared to test the operation of the territorial theory against the expectations of the parties as follows:

I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. *Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly.* The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability of transactions and *well grounded legal expectations* must be respected. [emphasis added]

Others express unequivocal support for the standard. For example, Peter Nygh states that “the first objective of a choice of law rule should be to meet the reasonable expectations of the party or parties to the transaction”: Nygh, *supra* note 33 at 22.

<sup>45</sup> “Foreign law” as used here is meant to include the law of another province or state within a federation.

that they are both from Country B, this is merely coincidental and not legally relevant. It had no bearing on their relationship when the harmful event occurred and should not meaningfully affect the legal standards governing liability or recovery.<sup>46</sup> However, if for example, it is a passenger from Country B seeking recovery from the driver from Country B, their relationship when the harmful event occurred might make the legal standards of Country B relevant even though the collision occurred in Country A.<sup>47</sup>

Treating applicable foreign law as a relevant feature of the relationship between the parties that can affect the legal standards governing the claim also helps to clarify the approach that should be taken in situations in which an act in one country causes harm in another. As suggested by familiar reasoning regarding product liability, it is reasonable to expect that products intended to be used or consumed by a particular group of consumers will conform to the consumer protection standards established for that group. Where that group is defined as a group of consumers in a particular country, it is reasonable to assume that the products must conform to the consumer protection standards of that country (regardless of where the products originate). If the products fail to meet those standards and cause harm to a consumer in that country the recovery standards of that country will apply. However, where a consumer obtains a product in one country and is harmed by it in a country in which the producer would not reasonably expect the product to have been used or consumed, it is unjust to apply the standards of the country in which the harm was actually suffered.

Finally, treating applicable foreign law as a relevant feature of the relationship between the parties that affects the legal standards governing the claim also assists in the analysis of claims involving multiple plaintiffs or multiple defendants where, for example, some of the plaintiffs or defendants have the same personal law. It is commonly accepted that in a negligence claim, say, against the providers of medical care, different standards could apply to different defendants based on their different roles and responsibilities. In respect of a single instance of negligence, it is conceivable that the different standards of care might be applied to the head surgeon, the resident, and the nurse. It is surprising,

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<sup>46</sup> In just such a case in *Boys*, *supra* note 4, the House of Lords applied the personal law of the parties. Peter Nygh questioned this result asking, "Are we not replacing one fortuitous circumstance with another?": Nygh, *supra* note 33 at 341. Although this article advances reasoning that would support Nygh's doubts, it is acknowledged that the view expressed by the Law Commission and referred to in note 13, *supra*, would support the result in *Boys*.

<sup>47</sup> As was determined to be the case, *inter alia*, in *Babcock v. Jackson* (1963), 12 N.Y. (2d) 473.

then, in claims brought by passengers in cars visiting from other countries, to see courts hesitate to distinguish between the liability standards for the driver of the car in which the passenger was riding from the driver of the car with which they collided. It would seem that, where appropriate, it should be open to the court to apply the personal law of the parties to the claim by the injured passenger against the driver of that car and yet to apply the *lex loci* to the claim by the injured passenger against the driver of the other car. Surely, too, a similar distinction between applicable laws should be available where the local driver has also been injured and joins the injured passenger in claiming against the foreign driver of the car in which the passenger was riding (*i.e.*, the *lex loci* would apply to the claim by the local driver) even where the personal law of the parties applied to the claim by the passenger. There is no doubt that the possibility of applying more than one law in a case involving multiple parties adds to the complexity of the determination and would, at some point, defeat the benefits of joinder. However, this problem is not unique to situations involving the potential application of foreign law. It is a regular feature of determinations of the proper size and scope of group claims and class proceedings, and it should not serve to preclude precision in the application of foreign law where this would enhance the justice of the result in a claim in which it is appropriate to apply more than one law.

A hypothetical situation might help to illustrate these points: in publishing an article in this journal, it is generally hoped that it will be read by persons who are interested in the legal issues it addresses. It is possible that the interests of some of those persons could arise from their direct participation in a particular legal dispute. It is further possible that some of those persons could choose to treat the article as legal advice. If they based a submission to a court on the reasoning contained in the article and it was rejected, they could regard themselves as having been harmed by reading the article. But we might say that it was not reasonable for them to treat the article as legal advice because the author is an academic and articles published in legal periodicals are not intended to be taken as advice in particular cases—they are intended to be considered as an occasion to reflect on the state of the law. In this context it would not be within the reasonable expectations of the parties for the reader to obtain recovery from the author for having been negligent in providing legal advice.

What if it happened that the author was licensed to practise law or was a member of the bar? Would that change the reasonable expectations of the parties? No, we would probably say that it would not because the context (*i.e.*, the publication of the article in a scholarly



journal) would not have changed. In this sense the author's qualifications regarding the practice of law would be a matter of happenstance and legally irrelevant. Accordingly, even if it was the case that the person had read the article to obtain legal advice and the author was someone who was licensed to provide legal advice—in other words, that the parties independently had the status of client and solicitor, respectively—we would still not find the author liable for having failed to meet the standards for providing legal advice.

What if the person who took the article to be legal advice lived in a community in which there was no meaningful distinction between academics and practising lawyers and journal articles were routinely treated as a basis for ordering one's legal affairs? Again, we would probably say that the reasonable expectations of the parties would not be affected. It would not be reasonable to expect that an author in this journal would anticipate the effect of the article upon a readership that would treat it as legal advice. However, it would be reasonable to expect that a reader in a community that treated journal articles as legal advice would take the initiative to become acquainted with the standards for legal academic publishing that would apply to this journal.

What if the journal in which this article appeared was based in a community in which journal articles were routinely treated as legal advice and the author was aware of this? Then, and only then, are we likely to regard it as reasonable to expect the author to act in accordance with the possibility that the article might cause harm to persons who treated it as providing legal advice.

There is nothing particularly remarkable about the foregoing analysis. It is simply a function of the application of standard tort law reasoning to choice of law analysis. In this regard, reasonable expectations arising from the relationship between the parties are not merely of dubious relevance to choice of law in tort in this example, they are the key principle underlying the choice of law analysis.

In sum, as a unifying theory, I suggest that choice of law in tort should be guided by the underlying principles of tort law itself and that foreign law should apply where the relationship between the parties at the time the harmful event occurs gives rise to the reasonable expectation that the standards of another legal system should determine the parties' rights and obligations. While there may be nothing "new" about seeking guidance in the reasonable expectations of the parties, it

seems to be a principle worth reconsidering.<sup>48</sup>

### VIII. A NEW RULE FROM THE OLD EXCEPTION

If meeting the reasonable expectations of the parties based on the underlying principles of tort law can serve as a general guide or fundamental rationale for choice of law analysis in tort, it may be helpful at a theoretical level. However, as the judgments of Canadian courts considering such questions after *Tolofson* suggest, courts are likely to benefit from the detail and specificity found in well formulated rules founded on these underlying principles. How might such rules be articulated?

We have suggested that the broad consensus regarding choice of law in tort that has resulted in a convergence of judicial practice is the product not of shared appreciation of the rationale for *choice of law analysis* so much as it is the product of shared appreciation of the rationale for *tort law*. To the extent that this is true, it would seem that we might sensibly refer to rules that have been formulated by those whose expertise is, perhaps, greatest in the art of formulating private law rules: the drafters of civil codes. As was noted earlier, the European codifications of choice of law in tort frequently begin with the general application of the *lex loci*. Then, in a range of exceptions that are difficult to categorize, they seek to accommodate situations such as those in which the tort has involved wrongful conduct in one place and harm in another, and those in which there is a stronger relationship to a place other than that in which the tort occurred.<sup>49</sup> Although these various exceptions seem likely to improve the fairness of the result in more cases, their sheer variety and evident lack of flexibility reduce the likelihood that they will assist in this inquiry.

However, in one particularly interesting formulation, that found in the Swiss Code on Conflict of Laws,<sup>50</sup> the rule and the exception are reversed. Article 133 of that statute provides:

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<sup>48</sup> While this article advocates the reconsideration of an approach that has been superceded in other contexts in the conflict of laws, it does not intend to promote the view that "conflicts theories are essentially cyclical": see C. Walsh, *supra* note 14 at 99. While precedents can be found for most ideas in the conflict of laws, and they are not "new" in that sense, I find it difficult to accept that the law is just "going around in circles."

<sup>49</sup> See *Conflict of Laws*, *supra* note 24 at 134-37.

<sup>50</sup> P.A. Karrer & K.W. Arnold, *Switzerland's Private International Law Statute of December 18, 1987, The Swiss Code on Conflict of Laws and Related Legislation*, (Boston: Kluwer Law and Taxation Publishers, 1989).

1. If the damaging and the damaged parties have their habitual residences in the same country, claims based on unlawful acts are governed by the law of that country.
2. If the damaging and the damaged parties do not have their habitual residences in the same country, the law of the country where the unlawful act was committed is applicable. If the effect did not occur in the country where the unlawful act was committed, the law of the country where the effect occurred is applicable if the damaging party should have expected the effect to occur in that country.
3. Notwithstanding subsections 1 and 2, claims based on an unlawful act violating an existing legal relationship between the damaging and the damaged party are governed by the law that applies to the pre-existing legal relationship.

As mentioned above, the striking feature of this formulation is that the positions of the standard rule and exception have been reversed. In other words, what amounts to the general rule is found in the first part of the second rule (*i.e.*, “If the damaging and the damaged parties do not have their habitual residences in the same country, the law of the country where the unlawful act was committed is applicable,”) and the typical exception for foreigners who have the same personal laws is found in the first part (*i.e.*, “If the damaging and the damaged parties have their habitual residences in the same country, claims based on unlawful acts are governed by the law of that country.”)

Careful reflection on this produces an interesting insight into our own approach to tort liability. We tend to base our abstract formulation of tort liability on situations in which the parties have no relationship with one another: we begin with situations in which, all things being equal, the rights and obligations of persons are conceived of as between perfect strangers. But things are seldom equal. In tort law, we rapidly progress from this abstract construct to the reality of the rich array of relationships in our society that dictate the rights and obligations of the parties: doctor and patient, manufacturer and consumer, employer and employee, etc. It soon becomes apparent that tort liability rarely arises between “perfect strangers”—*i.e.*, those who have no definable relationship to one another—and the notion of liability as between perfect strangers is, therefore, a rarely invoked, default concept.

Upon further reflection, it occurs that most situations in which persons have discernible rights and obligations to one another can be described in terms of one sort of relationship or another. This relationship forms the focus of the determination of liability when a right has been infringed or an obligation has not been met. Accordingly, the third provision in Article 133 (*i.e.*, “claims based on an unlawful act violating an existing legal relationship between the damaging and the damaged party are governed by the law that applies to the pre-existing legal relationship”) seems to best articulate the tort analysis that is so common place to us as to be readily overlooked. Only in the absence of

such a relationship do we need to resort to the standards that apply generally in society in respect of “perfect strangers”—*i.e.*, to the “When in Rome...” concept. One stopping point before reaching this default point occurs with the situation in which the parties have no defined relationship of rights and obligations but for their relationship to one another as persons from the same foreign country. The extent that their common background is relevant to their mutual rights and obligations should be taken into account in determining tort liability. Returning to the new general rule—that based on the parties’ relationship—it also seems clear that to the extent that this relationship is guided by standards of another legal system, it is appropriate to take those standards into account.

Accordingly, I suggest that, in choice of law in tort, it would be more helpful to stop treating the *social* context in which a tort occurs as competing with its *geographical* context,<sup>51</sup> *i.e.*, as an alternative basis for the legal standards that should be applied to determine liability. Rather, we should treat the social context as the general rule and the geographical context as an alternative in default of a legally relevant relationship between the parties. This analysis can be summarized in the following two rules:

1. Where the relationship between the parties makes it reasonable for liability and recovery to be governed by the standards of a particular legal system, those standards should apply to claims between them in tort.
2. Where no such relationship exists, the law of the place where the tort occurs should ordinarily apply.

Is it necessary to formulate a further rule for crossborder torts, *i.e.*, those in which wrongful conduct causes harm in another place? It would seem not because the result in those cases would seem to follow from the first rule and would depend on the nature of the relationship. For example, in consumer matters we generally permit consumers to rely on producers or manufacturers to meet the standards set for consumers’ protection and would, therefore, tend to permit consumers to rely on the rights they enjoy in the place where they obtain and use products. However, where persons assume responsibility, in one way or another, for ensuring that the products are suitable for their needs, we tend to

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<sup>51</sup> The distinction between social and geographical context is used to explain the theory of the “proper law of the tort” in *Cheshire & North*. See P.M. North and J.J. Fawcett, *Cheshire & North’s Private International Law*, 12 ed (London: Butterworths, 1992) at 530.

permit the producers or manufacturers greater latitude to rely on the standards they would expect to govern them. We would therefore, tend to permit manufacturers to rely on the standards they would expect in the place of production or, at least on the standards they would expect to be required to meet in the place where they reasonably expect the product to be used.

## IX. FEDERALISM: INTERPROVINCIAL AND INTERNATIONAL CASES

Even if we have identified an appropriate guiding principle and fashioned from it a rule that meets the decisionmaking needs of our courts, our journey is not yet over. Earlier on, at the “critical juncture,” I proposed not to affirm the distinction between interprovincial and international cases in choice of law analysis but, instead, to question the apparent elimination of the flexible exception by the *Tolofson* authority. It is now worth returning to that juncture to consider the implications of the distinction between interprovincial and international cases.<sup>52</sup>

Do the principles governing choice of law in international cases differ from those governing choice of law in interprovincial cases? It was suggested in *Tolofson* that choice of law rules are rooted in traditional principles of public international law—sovereignty, territoriality and comity—but La Forest J. formulated from them a choice of law rule for interprovincial torts. He seemed less determined to insist on rigid adherence to the *lex loci* in international cases than he did in interprovincial cases and he confined his criticism of the flexible exception to interprovincial cases. Does this suggest that the balance of “order” and “fairness” in international cases, as distinguished from interprovincial cases, might favour fairness to individual litigants at the expense of order? Alternatively, if choice of law in tort rules are grounded in tort principles and if comity is no less offended by the failure to apply the personal law of the parties when appropriate than by the failure to apply the *lex loci* when appropriate, the relationship

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<sup>52</sup> For the purposes of this article, “interprovincial” cases differ from “international” cases as follows: a case that contains elements that lead to the possibility of applying the law of another country is an international case and a case that contains elements that lead to the possibility of applying the law of another province is an interprovincial case. This distinction has troubled some. See, for example, V. Black, “Crash: The Ontario Court of Appeal Bumps into *Tolofson*” (1998) 41 C.C.L.T. (2d) 170. Following the reasoning above suggesting that courts should be able to apply more than one law to a claim to the extent that this is feasible, claims could be both interprovincial and international where they included elements that gave rise to the possibility of applying either (or both) the laws of another province and the laws of another country.

between legal systems on the international plane would appear not to give rise to any particular requirements at all. To return to the analysis of *Hanlan*,<sup>53</sup> the questions would simply be whether persons in Hanlan's family's position would reasonably expect a different result to arise from the fact of his having crossed, say, the Manitoba border rather than the Minnesota border. That is, would it be reasonable to expect Hanlan's and Sernesky's rights and obligations *inter se* to be governed by Ontario law wherever they go when they travel in other countries but not when they travel in other provinces? Would this distinction not seem fortuitous?

The distinction would indeed seem fortuitous based only upon reference to the principles of international law and the principles of tort law. Is it possible, though, that there could be a need to make such a distinction for the purposes of Canadian federalism? That is, could Canadian conflict of laws rules, based on a system devised to address conflict of laws on the international plane, need modification to meet the special requirements of the relations between the legal systems within the Canadian federation—requirements grounded in the *Constitution Act, 1867*?<sup>54</sup> Indeed, La Forest, J. seemed particularly determined to ensure that the rules were applied consistently in interprovincial cases. But what are the “constitutional imperatives and other structural elements”<sup>55</sup> that shape Canadian choice of law analysis? Although he declined to pronounce at length on the constitutional issues (because they were presented merely as a backdrop to the other issues in the case), La Forest J. described them as follows:

Unless the courts' power to create law in this area exists independently of provincial power ... then the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures. 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.<sup>56</sup>

As an integral part of the adjudication of a private dispute, it is not obvious how choice of law comes to be regulated by a constitutional provision for legislative authority. To be sure, provincial legislators must comply with the restrictions placed on the scope of their authority by section 92 of the *Constitution Act, 1867* and make laws to govern matters

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<sup>53</sup> *Supra* note 2.

<sup>54</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>55</sup> *Tolofson*, *supra* note 1 at 1048.

<sup>56</sup> *Ibid.* at 1065.

of private law within the province. However, the courts are not constrained to devote themselves solely to the task of implementing provincial legislation in matters arising in the province. They are engaged in dispute resolution. The disputes they resolve might have arisen, partly or entirely, outside the province and they might involve persons, some or all of whom, might come from outside the province. Choice of law analysis itself relies upon the courts' capacity to apply the law of another place to a dispute before them. In doing so, it is not clear why courts should be constrained to apply the law of the place where the tort occurred regardless of other potentially relevant elements. After all, as La Forest J. himself observed in *Tolofson*, "The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order."<sup>57</sup> In short, although the subject matter of choice of law analysis is prescriptive in nature and, therefore, governed by section 92 of the *Constitution Act, 1867*, the process of deciding which law should apply is adjudicative in nature and the authority for it is therefore found in section 129—not section 92.

What does seem clear, though, is that we are dealing with what La Forest J. described as a "structural" problem. As he explained, "The nature of our constitutional arrangements—a single country with different provinces exercising territorial legislative jurisdiction—would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country."<sup>58</sup> Accordingly, it might be suggested that one constitutional imperative for choice of law rules is that they produce decisional harmony—outcomes that do not vary with the forum determining the matter.

The reasons for this imperative are rooted in the developments that began with the Supreme Court of Canada decision in *Morguard*. As a result of *Morguard*, it is no longer necessary to secure a defendant's consent to be sued in a forum in a province other than one in which the defendant can be served. La Forest J. explained in *Morguard* that this newly found freedom of forum selection should not create a risk of prejudice to defendants and it should not create an opportunity for

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<sup>57</sup> *Ibid.* at 1070.

<sup>58</sup> *Ibid.* at 1064. This was the view taken by Wilson and Gaudron JJ. of the High Court of Australia in *Breavington*, *supra* note 21 at 98 although the subsequent majority decisions of that court in *McKain*, *supra* note 21 and *Stevens*, *supra* note 21, did not seek to ground choice of law rules in the Australian Constitution. *Commonwealth of Australia Constitution Act, 1900* (U.K.), 63 & 64 Vict., c. 12. For recent considerations of these issues, see *Pfeiffer*, *supra* note 21.

abuse by plaintiffs.<sup>59</sup> The potential for prejudice and abuse is minimal because judicial processes are fairly uniform across Canada and the standards for the administration of justice in the superior courts of the provinces provide a uniform basis for confidence in the administration of justice regardless of where a matter is tried.

However, there remains an opportunity for abuse of this freedom of forum selection if it brings with it the potential to manipulate the governing law. If, by choosing a particular forum, a plaintiff can secure or avoid the application of a particular provision of one province's laws, and thereby affect the outcome of the litigation, then the incentive to engage in forum shopping will remain. Accordingly, it is imperative in interprovincial cases that Canadian courts apply uniform, forum-neutral choice of law rules (*i.e.*, those that produce the same result regardless of which court applies them). This will foster the necessary decisional harmony in choice of law analysis to reduce the occasions in which there is an incentive to engage in forum shopping.<sup>60</sup> In this regard, it could be suggested that this "structural problem" might best be resolved through a clear assertion on the part of the Supreme Court that the constitutional imperatives include the requirement that there be one national set of choice of law rules. Unlike substantive rules of private law which, under the Canadian Constitution, can vary from province to province, such variation in choice of law rules could give rise to forum shopping which would be unacceptable in Canada.

It is not clear, however, how this "structural problem," which gives rise to the need for "order" in choice of law, militates strongly in favour of the *lex loci delicti* rule.<sup>61</sup> Restricting resort to a flexible exception could only be justified as a way of preventing undue application of local law. It is true that a flexible exception, on occasion, would result in the application of local law but there is no reason in

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<sup>59</sup> This fact is made clear in *Tolofson*, *supra* note 1 at 1099-1103.

<sup>60</sup> This has been regarded as a constitutional requirement of Australian federalism as well, although there has been considerable controversy on the matter. See generally *Breavington*, *supra* note 21 and, in particular, the judgment of Deane J. at 121, and note his tenacity in *Stevens*, *supra* note 21 when, despite the revival of the old common law choice of law rule in the intervening decision in *McKain*, *supra* note 21, he remained adamant that the Australian Constitution required that reference to the *lex fori* should be limited so as to discourage forum shopping. The Australian Law Reform Commission, in its report entitled *Choice of Law*, Report No. 58 (1992) suggests that cross-vesting legislation such as the *Jurisdiction of Courts (Cross-Vesting) Act, 1987*, which had a similarly liberating effect on interstate litigation in Australia as the *Morguard* decision had on interprovincial litigation in Canada, made similarly urgent the establishment of decisional harmony in choice of law rules.

<sup>61</sup> *Tolofson*, *supra* note 1 at 1064.



principle why it might not also form the basis for the application of some other law to events that occurred locally. As was pointed out earlier, local law would not be applied because it was the law of the forum but because it was connected to the matter in some other way, for example, as the personal law of the parties. The only bases for concern about undue use of the flexible exception, then, could be a lack of confidence in the courts' competence to assess the relevant factors consistently and reliably, or a suspicion that courts would invoke the exception out of undue sympathy to the plaintiff and indifference to the importance of forum-neutral choice of law analysis. There is good reason to regard both these bases for concern as unfounded. Canadian courts have demonstrated considerable evenhandedness in the adjudication of forum disputes; it will be recalled that it was the dissatisfaction of lower courts with the prevailing forum-centred choice of law rule in tort that ultimately brought about the reconsideration of the law in *Tolofson*.<sup>62</sup> In one recent example, a British Columbia court applied its own law in a claim between two local residents to the determination of damages despite the fact that the injury had occurred in California, demonstrating that courts do not apply the parties' personal law only when it coincides with the *lex loci* and secures more favourable recovery for the plaintiff.<sup>63</sup>

Decisional harmony can be achieved through the application of uniform, forum-neutral choice of law rules. It is not necessary to require courts to apply the *lex loci* to every tort case with connections to more than one province. The "order" that is the "precondition to justice" need not come at the expense of "fairness" in the individual case. Decisional harmony would prevail as long as the choice between the *lex loci* and the other potentially applicable law was made through application of the same rule to the facts of the case (for example, whether a relationship between the parties indicated that it would be reasonable for their dispute to be governed by another potentially applicable law). "Order" is undermined only by the application of arbitrary choice of law rules that produce predictably inconsistent results. As has been observed, rules that arbitrarily dictate application of the *lex fori* exemplify this and they encourage manipulative tactics. Further, to achieve order it is not necessary to guarantee that every Canadian court decides the choice of law question in precisely the same way in any given case. No such certainty exists with respect to determinations in domestic cases. Rather, it is necessary only to establish a basis for confidence that the potential

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<sup>62</sup> For example in *Grimes v. Cloutier* (1989), 69 O.R. (2d) 641 (C.A.).

<sup>63</sup> *Wong v. Wei* (1999), 45 C.C.L.T. (2d) 105 (B.C. S.C.).

for variation is the same between courts within one province as it is between courts in different provinces.

How does the desire for decisional harmony distinguish interprovincial from international cases? Perhaps it does not. Although there remains some controversy,<sup>64</sup> the prevailing Canadian approach to conflict of laws favours decisional harmony both in interprovincial cases and in international cases. While decisional harmony might be regarded as desirable in international cases, it occurs only if the choice of law rules of the two countries happen to coincide. It is regarded as particularly important in interprovincial cases, however, because the *Morguard* principles create such freedom in forum selection that the potential for abusive forum shopping can be held in check only by eliminating the root incentive to engage in it.<sup>65</sup> Fortunately, decisional harmony, can be secured in Canada through the authoritative harmonization of conflict of laws rules such as occurred in *Tolofson*.<sup>66</sup> However, it would appear desirable, to the extent that it is possible, to converge on a rule that has the more widespread support than does the rule requiring strict adherence to the *lex loci*. This approach would seem to favour a rule such as that suggested in this article as it seems more consistent with the rules applied elsewhere.

## X. CONCLUSION?

We have arrived at a convenient point to pause and reflect on the journey so far. We began by observing that there is widespread consensus that it was no longer appropriate to apply the *lex fori* in tort cases with strong connections to other legal systems. This consensus trend away from the *lex fori* marked more than just a milestone in the development of the choice of law rule, it marked the beginning of this

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<sup>64</sup> According to John Swan, "federalism is based on the right of each of the component parts of a federation to differ on how various legal problems should be resolved. This right extends to the decisions of provincial courts to differ in their decisions, even when they differ in the results reached in identical cases": Swan, *supra* note 11 at 937. This appears to be a minority view.

<sup>65</sup> As long as Canadian courts continue to apply *Morguard* principles to international cases, the question arises whether they do so unaware of the lack of ability to secure decisional harmony, *inter alia*, through uniform choice of law rules, and the resulting persistence of opportunities for forum shopping on the international plane. It is unfortunate that the Court did not take the opportunity in the course of its reasons in *Tolofson* to comment on this application of *Morguard* in the course of the analysis of the inherent "structural problem" involved.

<sup>66</sup> This was the conclusion reached in Australian Law Reform Commission, *Report No. 58: Choice of Law* (Sydney: The Law Reform Commission, 1992) at 11-15.

development. This trend emerged because tort law itself had evolved. It had ceased to be a form of quasi-public law in which the courts were obliged to promote local standards of conduct, and it had become more genuinely a form of private law in which the courts could focus on achieving the right result between the parties, free of this obligation. Although the courts have been virtually unanimous in concluding that the *lex fori* should not be applied to resolve tort claims, they have wavered between applying the *lex loci* and, by way of exception, some other law more closely connected to the case, usually the personal law of the parties.

Although there is also fairly widespread consensus that it is appropriate to apply a rule favouring the *lex loci* and some form of exception (generally one involving the personal law of the parties), there continues to be some controversy and uncertainty about the nature and scope of the exception and when it should apply. In *Tolofson*, the Supreme Court of Canada addressed this uncertainty by advancing a theory of choice of law in tort based on the public international law principles of sovereignty, territoriality and comity which favoured application of the *lex loci* and expressed doubt about the merit of an exception. Laudable though the effort was to construct a unifying theory, the theory failed to provide a cogent explanation for the courts' desire to apply the *lex loci* when they sensed that this was appropriate, and it failed to permit the courts to apply the exception to the *lex loci* when they sensed that this was appropriate.

Turning to the possibility that an underlying rationale could be discerned in a rule that accurately reflected the tendencies of the courts as indicated in their rulings, we examined the provision in the 1995 United Kingdom legislation.<sup>67</sup> Accurate and clear though this provision was, it failed to provide insight into how and when a court would determine that some factor other than the location of the tort would be significant enough to warrant the displacement of the *lex loci* by a more appropriate applicable law. The puzzle remained as to how some courts could have such a clear and compelling sense of which law should govern, even in the face of potentially contrary authority, when neither appellate courts, nor law reform commissioners, nor legislators, nor academics had been able to articulate the rule or identify the underlying rationale.

This puzzle was solved with the realization that courts' context for the choice of law question was not the traditional public international law principles of sovereignty, territoriality and comity, but the private

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<sup>67</sup> PIL, *supra* note 23.

law principles of the particular area of law in which the question arose. Thus, in deciding a question of choice of law in tort, courts would tend to be guided by the underlying principles of tort law, with which they felt quite familiar. In this sense, just as Professor Castel suggested, they would readily apply the “law most substantially connected” to the case, as directed by ordinary tort principles. Should existing conflict of laws doctrine appear to dictate a result inconsistent with the far more familiar and compelling requirements of tort law, again, as Professor Castel suggested, the courts would manipulate the choice of law rules to produce a result consistent with tort principles, confident that this would produce a just outcome in the case as they saw it.

If the underlying rationale for the choice of law rule in tort is based on tort principles, then it might be described as seeking to meet reasonable expectations based on the relationship between the parties. While this is not the first occasion in which this rationale has been put forward, it deserves reconsideration as a foundational principle on the basis that the objectives of rules for choice of law in tort are to support the underlying principles of tort law. Courts deciding questions of choice of law in tort do so in the context of tort claims in which they seek to do justice between the parties in terms of tort principles.

According to basic tort principles, the standards for recovery are generally adjusted and refined through reference to the particular nature of the relationship between the parties (*i.e.*, the social context). It is only when the parties have no relationship to shape their expectations (regarding the need to take care not to harm one another, or the kind of compensation that would be owed in the event of harm) that we resort to default standards appropriate, for example, to situations involving strangers in the street (*i.e.*, the geographical context). Thus, in a case involving foreign elements, the *lex loci* is not the main standard but one that operates merely in default of any relationship between the parties that would support a more meaningful determination of the parties' rights and obligations. Where the parties have some definable relationship when the tort occurs (even if it is only a shared common foreign background) which would indicate the reasonableness of the expectation that tort recovery between them would be governed by a foreign law, it might seem obvious to a court adjudicating a tort claim that this law should apply. In this sense, it makes more sense to treat this situation not as an exception but as the general rule. Then we would resort to the *lex loci* only when, in the absence of a relationship between the parties at the time of the tort, they would reasonably expect to be governed by the law prevailing in the place where the tort occurred. By reversing the roles of what have been described as the rule (which refers

to the geographical context) and the exception (which refers to the social context), we are reminded of the underlying rationale for referring to them, *i.e.*, the “theory” explaining this choice of law analysis in tort.

And so we have it: a newly formulated rule based on a newly revived theory. No doubt others will refine and rebut them. In time, further evolution in tort law itself will necessitate revision of the choice of law rules. (Indeed, the increasing prevalence of no-fault based compensation schemes may already be rendering these choice of law rules obsolete.) But perhaps we now have a better idea why, as Professor Castel observed, some courts seem able to forge ahead with confidence, in the face of conflicting rules and theories, to produce results that seem perfectly sound to them and to us.

Are we there yet? No, Jean, but thanks to these and other remarkable insights of yours we are well on our way.