CHOICE OF LAW IN TORT: THE SUPREME COURT OF CANADA ENTERS THE FRAY

THE Supreme Court of Canada has sought to end 50 years of uncertainty in choice of law in tort with its decision in *Tolofson v. Jensen*; *Lucas v. Gagnon* (1995) 120 D.L.R. (4th) 289. The plaintiffs in these companion cases were passengers in cars that travelled to neighbouring provinces and collided there with cars driven by local residents. In *Tolofson v. Jensen*, young Kim Tolofson sued both drivers (his father and Jensen) in British Columbia, where he lived, and not in Saskatchewan, where the accident occurred, partly because he thought his claim time-barred in Saskatchewan. Similarly, in *Lucas v. Gagnon*, Mrs Gagnon and her children, Tina Lucas and Justin Gagnon, sued both drivers (her husband and Lavoie) in Ontario, where she lived, and not in Quebec, where the accident occurred, because Quebec legislation governing the no-fault insurance scheme operating there prohibited suit. She discontinued the action against Lavoie when the Ontario Court of Appeal held in *Grimes v. Cloutier* (1989) 69 O.R. (2d.) 641 that Quebec law applied to prevent suit in Ontario. However, Mr Gagnon's cross-claim against Lavoie remained. Since drivers from both jurisdictions were named as defendants, the actions joined claims between forum residents, which are generally governed by the *lex fori*, with claims against residents of the place where the accidents occurred, which are generally governed by the *lex loci*. The decisions in the courts below in these companion cases reflected both the difficulty of reconciling these choice of law rules and the confusion in this area since the Supreme Court of Canada's last pronouncement in *McLean v. Pettigrew* [1945] S.C.R. 62 in which it applied the *lex fori* to a Quebec action between Quebec residents over a single car collision in Ontario. The courts below in these cases applied the *lex fori* and upheld the actions except Mr Lucas's cross-claim against Lavoie which was dismissed.

The Supreme Court unanimously allowed the appeals by applying the *lex loci* and dismissing the claims. For a majority of five, La Forest J. said this accorded with the territorial principle of international law and the practical concerns of certainty, ease of application and the expectations of ordinary people and the majority of other states. He said *lex fori* application yielded different legal consequences for a single act and invited forum shopping. In his "critique and reformulation" of the rule in *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, he said it had been applied mechanistically and "with insufficient reference to the underlying reality in which it operated". He characterized the first limb, involving reference to the *lex fori*, as a jurisdictional anachronism hailing from a time when British "dominance probably led to

the temptation, not always resisted, that British laws were superior to those of other lands". Jurisdictional control, he reasoned, is maintained in Canada by requiring a " 'real and substantial connection' (a term not yet fully defined) with the subject matter of the litigation" and by the doctrines of *forum non conveniens* and public policy. In applying the *lex loci* to the specifics of each case, the *Tolofson* appeal was allowed by finding (in accord with the Foreign Limitation Periods Act 1984 (U.K.)) that the Saskatchewan limitation period was substantive and, therefore, applicable; and the *Lucas* appeal was allowed because the Quebec no-fault insurance legislation prohibiting civil suit was found to apply to all litigants involved in Quebec traffic accidents regardless of domicil.

Jurisdictional or not, the first limb of *Phillips v. Eyre*, derived from *The Halley* (1868) L.R. 2 P.C. 193, is a form of forum control like the flexible exception to apply the *lex fori* enunciated in *Boys v. Chaplin* [1971] A.C. 356 and employed in *McLean v. Pettigrew*. Thus, having eliminated routine reference to the *lex fori* for foreign torts, La Forest J. was required in reaching these results to consider the fate of the flexible exception. He acknowledged its merit in rare occasions of international claims but he observed that "there is little to gain and much to lose in creating an exception to the *lex loci* in relation to domestic legislation" and he explicitly overruled the Canadian precedent for doing so in *McLean v. Pettigrew*. In his view, "while . . . the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice".

The combined elimination of these two devices of forum control is novel to the common law. The High Court of Australia has wavered between the two but consistently retained one: it jettisoned the *lex fori* portion of double actionability and preserved the flexible exception in *Breavington v. Godleman* (1988) 169 C.L.R. 41 (noted, (1989) 105 L.Q.R. 359) but later rejected the flexible exception and confirmed an Australian rendering of double actionability in *McKain v. R. W. Miller & Co. (S.A.) Pty Ltd* (1991) 174 C.L.R. 1 (noted, (1992) 108 L.Q.R. 398) and *Stevens v. Head* (1993) 176 C.L.R. 43 (noted, (1993) 109 L.Q.R. 533). The Privy Council engaged both devices in a Hong Kong case, *Red Sea Insurance Co. Ltd v. Bouygues SA* [1995] 1 A.C. 190 (noted, (1995) 111 L.Q.R. 18) finding that the flexible exception could apply in reverse to permit the *lex loci* to save a claim doomed by the *lex fori*. Finally, while United Kingdom legislators ruminate over *lex fori* elimination in the Private International Law (Miscellaneous Provisions) Bill, the flexible exception to apply it survives intact. That the Supreme Court of Canada's majority has taken a radical step in eliminating both devices is evident in the decision of Sopinka and Major JJ. to write a concurring judgment preserving the

ability of parties to chose the *lex fori* and the discretion of courts to apply it where to do otherwise would work an injustice.

Is this radical step warranted? This depends on the scope of the new regime. In musings begun in *Morguard Investments Ltd v. De Savoye* [1990] 3 S.C.R. 1077, La Forest J. continued to wonder about the existence of constitutional imperatives and the possibility of different rules for interprovincial and international torts. Once again, he declined to reach conclusions because the jurisprudence had not considered the Constitution, it was not argued in these cases, and the Attorneys-General were not present, but he opined that the *lex loci* would be "clearly constitutionally acceptable" while the *lex fori* might raise "intractable constitutional problems". The promotion of order in interprovincial tort law has merit but the judgment itself noted the trend towards harmonisation in Canadian traffic accident law that would obviate choice of law analysis in this area. This begs the question in other areas of tort law.

The elusive "real and substantial connection test" may be workable mechanism for forum control in traffic accidents and in torts readily located but it is less so in genuinely multi-jurisdictional torts arising from inter-jurisdictional transactions. Moreover, the interprovincial product liability case that introduced it (*Moran v. Pyle National Canada Ltd* [1975] 1 S.C.R. 393) concerned the *jurisdictional* question of whether a plaintiff widow could sue where the product killed her husband instead of where it was manufactured—not choice of law. *Forum non conveniens* may also prove an awkward response to exotic tort claims arising in distant lands when the dispute is between local residents and the court is the most convenient forum; and motions courts may hesitate to invoke public policy to decline jurisdiction over a wrong they simply feel unable to appreciate. Courts may, therefore, be driven to develop a doctrine of *lex non conveniens* to deal with such problems. Regarding the interprovincial/international distinction, the question remains whether this have-suit-will-travel approach may extend to international torts? Post-*Morguard* jurisprudence suggests that expansive Supreme Court musings often translate into hard law down the road.

Order has come first; but will justice follow? It may in interprovincial traffic accident claims where it will promote efficiency in insurance schemes; but it is unlikely to do so in other areas of tort law as complex factors accumulate. Exotic torts from distant lands, substance/procedure questions in damage awards, and multi-jurisdictional and non-locational torts all promise to challenge the courts to respond with greater flexibility and sophistication to the interests of those before them. Indeed, order may be frustrated by courts seeking to avoid the injustice of rigid rules in varied circumstances. There is

no doubt that Canadian choice of law in tort required the Supreme Court's emergency assistance, but it cannot be restored to health without more regular attention.

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