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The Distant Shore: Discretion and the Extent of Judicial Jurisdiction

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A. Introduction

One of the finest analyses of Canadian conflict of laws questions is Professor Adrian Briggs' article 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments'.[1] It is remarkable for there to be such a depth of appreciation for the subtleties of the law in Canada in an article written by an English conflicts scholar, particularly when, in spite of a shared common law foundation, the rules of jurisdiction in England and Canada have evolved so differently. The question considered in this essay, like that considered in Professor Briggs' 'Crossing the River', is one that has caused conflicts scholars to pause and re-think some of the underlying approaches to established doctrines. Like fording a river, it calls for different techniques and resources from those that enable common lawyers to continue along the road in the ordinary course. As with a number of Professor Briggs' writings, this essay hopes to draw on comparisons between recent developments in two legal systems, in this case England and Canada, to shed light on challenges that they both face.

The question considered in this essay is 'What role is played by discretion in determining the extent of judicial jurisdiction?' This is different from the question of the role played by discretion in determining on a case-by-case basis which cases of those that are within the courts' jurisdiction they will decline to decide.[2] The inherent authority of common law courts to control their own process in particular cases to prevent abuse by exercising discretion to decline jurisdiction is well accepted. But that is a discretion to *decline* jurisdiction, and it is a discretion to be exercised, in *exceptional cases.* Is there also a role for discretion to play in determining the *extent* of jurisdiction as well, either in particular cases, or in particular classes of cases—or is the extent of jurisdiction a matter for legislators? This is a river that the common law in Canada and in England and Wales has

[1] Adrian Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 Singapore Yearbook of International Law 1.

[2] Which is discussed in Andrew Bell's essay in this collection (ch 1).

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been crossing in recent years. This essay hopes to mark some of the stones that might help to feel the way.

Section B documents the tendency of common law courts to insist that the extent of their jurisdiction is defined by the law and that their discretion is limited to determining which of the cases that are within their jurisdiction they will decide and which they will not decide. This tendency is surprising in light of the traditional common law approach to determining jurisdiction based on service and the court's assessment of whether it is a proper forum. Section C observes that in some situations, the certainty sought to be achieved by this seemingly errant approach may nonetheless be elusive or achieved only at the expense of access to justice. Section D describes the unfortunate consequences of the Canadian courts' attempts to grapple with this. Section E remarks on the extraordinary coincidence that this fundamental issue arises peculiarly from holiday torts, and suggests opportunities that this might provide for identifying new ways forward. Section F asks whether some of the bases of jurisdiction, or gateways, by their nature, are exceptional and, therefore, should be treated as discretionary. Section G suggests some of the implications for larger questions of comity of adopting an approach in which some gateways are treated as inherently a matter of discretion.

B. Dipping Our Toes in the Water

1. Jurisdiction and proper forum

In the English courts, the plaintiff requires leave to serve a defendant abroad with the notice of proceeding. This is different from some other common law jurisdictions, including in Canada, in which the rules of procedure identify a number of situations in which the suitability of service outside the forum is presumed.[3] The *ex parte* application in the English court practice requires the plaintiff to show that the claim falls within one of the 'gateways' listed in Practice Direction 6B, para 3.1 and, then: that England is the proper place in which to bring the claim; that it would not be unjust to require the defendant to defend in England; and that there is a serious issue to be tried on the merits.[4] This suggests that discretion is exercised in each case of service outside the forum to determine whether the court has jurisdiction. As Professor Briggs has observed, if reliance on the heads (or 'gateways')

[3] In the United States, where jurisdiction is subject to the due process standard of the Constitution, some of the State rules of procedure provide generally for service out, such as §410.10 of the California Code of Civil Procedure, which provides: 'A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States'; while other State rules of procedure provide lists of grounds on which service out is permitted, such as §302 of the New York Civil Practice Law and Rules: 'Personal jurisdiction by acts of non-domiciliaries'.

[4] Civil Procedure Rules (hereafter CPR), rr 6.36–6.37.

of jurisdiction is always subject to a determination that the English courts are the proper forum, what purpose is served by the heads? Isn't the extent of jurisdiction, as a question ultimately of *forum conveniens*, a matter of discretion?[5]

Despite his observation in *Abela v Baadarani*,[6] that jurisdiction established by service out was exorbitant, Lord Sumption disagreed strenuously in his judgment in *Four Seasons Holdings Incorporated v Brownlie* with the suggestion that the extent of jurisdiction was to be guided primarily by discretion:[7]

> The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to *forum conveniens* authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on *forum conveniens* grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways.

Despite the fact that the gateways are found, not in legislation or even in the CPR, but in Practice Direction, 6B, para 3.1,[8] and despite the fact that they have evolved over time,[9] the English courts, as illustrated in Lord Sumption's opinion above, regard them as setting the legal parameters for jurisdiction. It is only within those externally defined parameters that the courts may, in matters brought against defendants served abroad, exercise discretion to hear cases or not to hear them. The courts prefer to understand the gateways as fixed by a legislative or regulatory body, and to limit their task to interpreting the gateways and reserving the use of discretion for logistical considerations affecting the litigation of the instant case. In other words, the courts use their discretion to determine which of the cases that

[5] Adrian Briggs, 'Service Out in a Shrinking World' [2013] LMCLQ 415.

[6] *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043.

[7] *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 [31] (Lord Sumption SCJ) (hereafter *Brownlie I*).

[8] A point observed by Arnold LJ in *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996 [71] (hereafter *Brownlie II*): 'The gateways represent the considered judgment of the Civil Procedure Rules Committee as to the classes of case in which it may (but not necessarily will) be appropriate to bring a foreign defendant before the courts of England and Wales. (Although the gateways are contained in a Practice Direction rather than in a rule of the Civil Procedure Rules, which may be thought somewhat questionable from a constitutional perspective, they nevertheless need, and receive, the approval of the Committee.)' See *Brownlie II* [161] (Underhill LJ); also Andrew Dickinson, 'Faulty Powers—One Star Service in the English Courts' [2018] LMCLQ 189, 191–2 (hereafter Dickinson, 'Faulty Powers').

[9] As reviewed by McCombe LJ in *Brownlie II* (n 8) [24]–[26].

fall within their jurisdiction they will decide, and not which cases fall within their jurisdiction.[10]

The latter formulation, in which the courts determine the maximum extent of their jurisdiction across the range of cases on a case-by-case basis, seems to present an unwelcome indeterminacy. Concern about this indeterminacy has been evident in the decisions of Canadian judges as well. Even in developing elaborate and fluid tests for exercising jurisdiction over foreign defendants, Canadian courts have emphasized that these tests for jurisdiction in cases of service outside the forum[11] represent *legal* standards and are to be distinguished from the exercise of discretion in determining jurisdiction on grounds of *forum non conveniens*, which is limited to *declining* to exercise jurisdiction: [12]

> While the real and substantial connection test is a legal rule, the *forum non conveniens* test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant.

As discussed further below, the jurisdictional test enunciated in the case from which the passage above is excerpted provided for such an extensive exercise of discretion that it had to be revised. Nevertheless, the court emphasized that this test, as a test of jurisdiction *simpliciter*, was intended to be a legal test and to be distinguished from the test for *forum non conveniens* which was intended to be discretionary.

C. Jurisdiction and Service

This apparent inconsistency between what the courts seem to be doing and what they say they are doing bears a surprising relationship to another of Professor

[10] This point is emphasized in Dickinson, 'Faulty Powers' (n 8) 195 ('It is vital to isolate the factual basis for asserting adjudicatory jurisdiction from the factors affecting its exercise. Questions of the former kind should not be determined, or influenced, by such matters as access to documents or witnesses, the court's familiarity with the law to be applied, the court's expertise, the efficiency of the justice system (or the inefficiency of an alternative legal system), the availability of legal representation or the ease of enforcement of an eventual judgment.' (citations omitted).

[11] The 'real and substantial connection test' is the Canadian equivalent of the gateways.

[12] *Muscutt v Courcelles* (2002) 213 DLR (4th) 577 [43] (hereafter *Muscutt*); in the various jurisdictions in Canada, service out of the jurisdiction does not require leave and hence, an *ex parte* determination of *forum conveniens*, but leaves the question of proper forum to be raised on an *inter partes* basis by the defendant.

Briggs' astute observations on the recent confusion in the English jurisprudence between the approaches to jurisdiction in the common law and the civil law. He described one of the distinctions that has been confused as follows: [13]

> Common law: If service is made, there is jurisdiction—Regulation: If there is jurisdiction, service may be made.

This description of the operation of the 'common law'[14] clearly reflects the underlying logic of the Civil Procedure Rules. Why then would the English courts proclaim this approach while adopting the Regulation model? Why is the 'authority piling up' in which they do so, and will there come a day when it 'is going to have to be shovelled up and taken away'?[15] Why are the courts in England and, as will be seen, in Canada motivated to insist, regardless of the traditional method of ascertaining their jurisdiction as a function of service, that the outer contours of jurisdiction are defined by the law and not through the courts' own assessment of whether they are the proper forum?

The confusion of these approaches is all the more puzzling, as has been noted by Professor Briggs, because the common law and the Brussels I Regulation systems of jurisdiction are designed to serve different purposes. The systems are different from one another not merely because the majority of the member state courts for which the Brussels system was designed are civil law courts. The systems are different also because the Brussels system is designed to *allocate* jurisdiction among member state courts in a way that supports a regime that includes a fixed obligation of recognition and enforcement of the resulting judgments; whereas the common law system is designed to be guided, at best, by a much more vague and diffuse principle concerning the appropriate exercise of jurisdiction, one that has been described in Canada as 'comity'.[16] The question arises as to why common lawyers (at least in England and Canada) operating on the high seas of international litigation (ie, beyond the scope of a regional regime for jurisdiction and judgments) are inclined to confine every discretionary determination of their own jurisdiction within clearly defined limits that are prescribed by law.

If this tendency to drift from the traditional common law approach towards an approach more closely resembling the Brussels system—one in which jurisdiction is a fixed legal standard—is not a mere misstep or mistake, then surely it hints at a more profound issue of judicial jurisdiction. The emphasis on the certainty that

[13] Adrian Briggs, 'The Hidden Depths of the Law of Jurisdiction' [2016] LMCLQ 236, 237 (hereafter Briggs, 'Hidden Depths').

[14] ie under the CPR as opposed to the (formerly applicable) recast Brussels I Regulation (Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments ([2012] OJ L351/1) (hereafter Brussels I Regulation), rather than the statutory grounds of assumed jurisdiction as opposed to the traditional *common law* grounds: Andrew Dickinson, 'Keeping up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts' (2016) 86 BYBIL 6.

[15] Briggs, 'Hidden Depths' (n 13) 243.

[16] Adrian Briggs, 'The Principle of Comity in Private International Law' (2012) 354 *Recueil des Cours* 65.

might be gained through the acceptance of an externally defined scope of jurisdiction as occurs through a legal standard is perplexing when it fails to yield the desired result, and especially so when it threatens, as it has done in Canada, to prevent courts from exercising jurisdiction in particular situations where they are inclined to do so for the interests of justice. This is where the riverbed starts to drop away.

D. Up to Our Elbows: Eschewing Discretion Has Not Achieved Certainty

The failure of the application of a legal standard for jurisdiction to yield the desired result of greater certainty became evident in the English law of jurisdiction when, some ten years after the death of Sir Ian Brownlie in a road accident during an excursion in a chauffeur driven car provided by his hotel in Egypt, jurisdiction over the action brought by his widow in the English courts against the hotel has still to be determined.[17] From a distance, one might imagine that a straightforward and seemingly commonplace question such as this would have a clear and easily ascertained answer, but it does not.

The question of whether the facts of the case fit into the relevant gateway has been contested all the way to the Supreme Court,[18] and following a determination on other grounds that required an amendment to the claim, it has risen again to the level of the Court of Appeal with no clear resolution yet in sight. To underscore the point, the differences of opinion in the judgments do not relate to whether England is 'the proper forum' within the formulation of the Practice Direction, as a matter of the practical logistics of the litigation. The persistent differences of opinion relate to whether the facts of the case fall within the gateway described in Practice Direction 6B, para 3.1(9)(a) for 'a claim in tort where—(a) damage was sustained ... within the jurisdiction'.

On the one hand, some of the judges in the various courts have supported an expansive interpretation of 'damage sustained in the jurisdiction' because the common law has the 'valuable safety valve' of discretion. They say that this is a discretion that need not be limited to the *Spiliada* principles, but can concentrate on the real question of which is 'the proper place for the resolution of the dispute ... [and while] the claimant should not be in the position of choosing where to bring the claim ... the discretion should be robust enough to prevent that'.[19]

On the other hand, some of the judges have supported a narrower interpretation—one that was limited to 'direct'[20] damage because:[21]

[17] *Brownlie II* (n 8); Dickinson, 'Faulty Powers' (n 8) 196.
[18] *Brownlie I* (n 7).
[19] *Brownlie I* (n 7) [51], [54] (Lady Hale SCJ).
[20] cf *Brownlie II* (n 8) [53] (McCombe LJ).
[21] *Brownlie I* (n 7) [28] (Lord Sumption SCJ).

> [A] principle which located damage in the place where the pecuniary consequences of the accident were felt or where any continuing pain, suffering or loss of amenity were experienced would in the great majority of cases confer jurisdiction on the country of the claimant's residence. It would confer on the English courts what amounts to a universal jurisdiction to entertain claims by English residents for the more serious personal injuries suffered anywhere in the world.

In testing the practical implications of the second of these two approaches in the instant case, one judge remarked:[22]

> [T]here is certainly nothing remarkable in the Egyptian arm of the multinational organisation to which this defendant belongs, and which looks for customers from all over the world, being the potential subject of litigation in a country other than that of its incorporation.

However, a devil's advocate might counter this by saying that it could indeed seem remarkable, if this were a small Cairo hotel, with lodgings patronized almost exclusively by local persons, for it to find itself defending proceedings in London at the suit of a traveller simply because the traveller happened to be English. Are we to distinguish between foreign providers of goods and services on the basis of the size of the enterprise or the size of its web presence? Are hospitality venues meant to adjust their tariffs to accommodate the varying expense posed by the risk of having to defend or to compensate patrons based on their places of origin?

Accordingly, despite the apparent anomaly noted by Professor Briggs, after many years of litigation at all levels of the English courts in the *Brownlie* case, there seems to be a trend towards the view that jurisdiction is a fixed legal standard marking the scope of jurisdiction—one that is merely caveated by judicial discretion concerning the practicalities of litigation in the forum in particular cases. However, there is no clear answer, not even a prevailing view on whether one can sue in England for a tort that has occurred[23] abroad. Perhaps the best that can be said on this question is 'sometimes' or 'it depends'—but 'when' and 'on what basis' have yet to be articulated in any compelling way. Nevertheless, as demonstrated by the *Brownlie* litigation, the decision to treat jurisdiction as a legal standard and not a discretionary determination of proper forum has not produced the certainty desired; nor has it secured results that inspire confidence that they will be widely accepted.

Ironically, there may be some light to be shed on this issue by considering the plight of the plaintiffs in Canadian courts who seem to have found themselves in over their heads.

[22] *Brownlie II* (n 8) [51] (McCombe LJ).

[23] This term is not parsed here as it is in Adrian Briggs, 'Holiday Torts and Damage within the Jurisdiction' [2018] LMCLQ 196.

E. In Over Our Heads? Certainty and Denial of Justice

It became clear that the common law courts in Canada had been pushed into the water on the questions raised by the gateway 'damage sustained in the forum' when, in 2002, the Court of Appeal for Ontario issued a compendium of five related appeals on this gateway in one series of decisions. As the Court explained at the beginning of the lead decision in *Muscutt v Courcelles*,[24] '[t]his appeal, argued together with four other appeals, involves the important issue whether the Ontario courts should assume jurisdiction over out-of-province defendants in claims for damage sustained in Ontario as a result of a tort committed elsewhere'.[25]

At the time, the state of the law in Canada provided the courts with little choice but to confront the issue. About a decade earlier, the Supreme Court had held that the standards for direct and indirect jurisdiction[26] should be correlatives;[27] and that, in cases involving service outside the forum of defendants who had not consented to the court's jurisdiction, this, in effect, required courts to exercise jurisdiction only where there was a 'real and substantial connection' between the matter and the forum.[28] Although not argued in constitutional terms, the Court later confirmed that the 'principles of order and fairness' that dictated this result were constitutional principles.[29] Unfortunately, 'constitutional' was not generally taken to mean 'structural' or 'fundamental' but, rather, 'absolute' or 'overriding'. This suggested that a court accepting jurisdiction over a matter in a case of service out where the defendant had not consented and where there was no 'real and substantial connection' between the matter and the forum would be acting *ultra vires*. The further complicating factor was that in Ontario's equivalent to the gateways, the gateway for 'damage sustained in the forum' was a standalone gateway, distinct from the gateway for torts.

As a result, the jurisdictional objection to the gateway for 'damage sustained in the forum' was not directed at cases such as the negligent manufacture abroad of consumer products acquired and used in the forum. Those cases would be admitted through the tort gateway. Rather, the objection was directed specifically at

[24] *Muscutt* (n 12); *Leufkens v Alba Tours International Inc* (2002) 213 DLR (4th) 614 (hereafter *Leufkens*); *Lemmex v Sunflight Holidays Inc* (2002) 213 DLR (4th) 627 (hereafter *Lemmex*); *Sinclair v Cracker Barrel Old Country Store, Inc* (2002) 213 DLR (4th) 643 (hereafter *Sinclair*); *Gajraj v DeBernardo* (2002) 213 DLR (4th) 651 (hereafter *Gajraj*).

[25] *Muscutt* (n 12) [1]; Rules of Civil Procedure (Ontario) RRO 1990, Reg 194 (hereafter Ontario Rules), Rule 17.02(h).

[26] *Direct* jurisdiction refers to the jurisdictional standards of a court in deciding a case; *indirect* jurisdiction refers to the jurisdictional standards for courts that have issued judgments that the court is asked to recognize and enforce.

[27] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (SCC) (hereafter *Morguard*).

[28] The decision in *Morguard* (n 27), in fact, addressed the obligation to recognize and enforce judgments, but it was generally accepted to have implications for the standards for direct jurisdiction as well: Vaughan Black, 'The Other Side of *Morguard*: New Limits on Judicial Jurisdiction' (1993) Canadian Business LJ 4.

[29] *Hunt v T&N plc* [1993] 4 SCR 289.

claims like that brought in *Brownlie*, by the relatives of a person fatally injured while outside the forum or by persons injured abroad who had returned to the forum. The argument ran as follows: the Supreme Court of Canada had held that the exercise of jurisdiction must conform to the constitutional principles of order and fairness[30] and, beyond the traditional bases of jurisdiction over local defendants and those who submit, the requirements for service out are met only where there is a real and substantial connection between the matter and the forum; 'damage sustained in the forum' does not constitute a real and substantial connection and, accordingly, a Canadian court is constitutionally incapable of exercising jurisdiction in cases in which service is based on this ground.

The logic of this argument was difficult to gainsay. It placed the courts in a quandary. If they accepted it, they were bound to regard themselves as incapable of exercising jurisdiction in a case such as the *Brownlie* case even if they regarded it as just to do so. The challenge was to articulate a coherent legal standard that would distinguish the cases that fell within this gateway over which they would have jurisdiction from those over which they would not. Without this, in some cases, the constitutional principles of order (the certainty of the legal standards of jurisdiction) and fairness (the desire to exercise jurisdiction as the proper forum) arguably could be at odds with one another.

As mentioned, the Court of Appeal combined the jurisdictional challenge in the *Muscutt* appeal with four other appeals to undertake a broad-based review of the use of the 'damage sustained in' ground. Of the five cases, two dealt with excursion torts. In *Leufkens v Alba Tours International Inc*,[31] a man was badly injured while rappelling from a platform while on an excursion purchased during a package holiday in Costa Rica. In *Lemmex v Sunflight Holidays Inc*,[32] a man suffered carbon monoxide poisoning in a taxicab on a shore excursion on the Island of Grenada while on a Caribbean cruise. In both cases, the package tour operators from whom the plaintiffs had purchased the basic holiday had accepted jurisdiction, but the local tour operators in Costa Rica and Guyana from whom the plaintiffs had purchased the excursion during the holiday did not.[33] This focused the analysis of the 'damage sustained in' ground of jurisdiction on cases in which the injury had occurred in the provision of a service arranged while the plaintiff was away from the forum on vacation.

[30] *Morguard* (n 27).
[31] *Leufkens* (n 24).
[32] *Lemmex* (n 24).
[33] The other three cases did not deal with holiday excursion torts: *Muscutt* (n 12) involved a motor vehicle accident in another province (but the auto insurance arrangements in Canada provide for access to the courts of the place where the insured is located); *Sinclair* (n 24) involved a slip and fall in an American chain restaurant a short distance from the US–Canada border; and *Gajraj* (n 24) involved a car accident in the United States in which the Canadian insurer accepted jurisdiction, but the individual American drivers did not. Of the five cases, *Muscutt* was the only case in which jurisdiction was upheld in relation to the defendant challenging it, and arguably this was because the defendant in the case, an insurer, was bound to defend in the plaintiff's residence in any event.

The Court held that rules for service out of the province, such as 'damage sustained in the forum' were only a rough guide to the kinds of cases in which persons outside Ontario will be regarded as subject to the jurisdiction of the Ontario courts and that the decision about whether a court had jurisdiction, which was described as a question of law, not discretion, was, nonetheless, a question, that should be decided on the basis of a flexible, non-hierarchical examination of eight factors.[34]

This was an unfortunate result. This ostensibly legal test—the flexible, non-hierarchical examination of eight factors—produced considerable uncertainty. Although it was adopted throughout the common law provinces in jurisdictional determinations across the range of cases,[35] it soon became clear that such a multifactorial case-specific analysis would not produce certainty. The factors of 'unfairness to the defendant in accepting jurisdiction' and 'fairness to the plaintiff in denying jurisdiction' required an exercise of discretion as extensive as that involved in determining convenient forum.[36] Academics complained,[37] the courts struggled on and, in time, some provinces gave up and adopted a statute on jurisdiction to clarify the law.[38]

Under that statute—the Court Jurisdiction and Proceedings Transfer Act—the courts exercise jurisdiction where 'there is a real and substantial connection between [the enacting province] and the facts on which the proceeding against that

[34] The eight factors were: (1) the connection between the forum and the plaintiff's claim; (2) the connection between the forum and the defendant; (3) unfairness to the defendant in assuming jurisdiction; (4) unfairness to the plaintiff in not assuming jurisdiction; (5) the involvement of other parties to the suit; (6) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (7) whether the case is interprovincial or international in nature; and (8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[35] *Muscutt* (n 12) was cited (directly and indirectly) in more than 400 decisions across Canada in the years before the Supreme Court of Canada rendered its decision in *Club Resorts Ltd v Van Breda* (2012) SCC 17 (hereafter *Club Resorts*).

[36] Janet Walker, 'Beyond Real and Substantial Connection: The *Muscutt* Quintet' (2002) Annual Review of Civil Litigation 61 (hereafter Walker, 'Beyond').

[37] The Court of Appeal cited in its subsequent review of the law: Vaughan Black and Mat Brechtel, '*Muscutt v Courcelles* Revisited: The Court of Appeal for Ontario Takes Another Look' (2009) 36 The Advocates' Quarterly 35; Vaughan Black and Stephen GA Pitel, 'Reform of Ontario's Law on Jurisdiction' (2009) 47 Canadian Business LJ 469; Janet Walker, '*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada' (2009) 48 Canadian Business LJ 135; Jean-Gabriel Castel, 'The Uncertainty Factor in Canadian Private International Law' (2007) 52 McGill LJ 555; Tanya J Monestier, 'A "Real and Substantial" Mess: The Law of Jurisdiction in Canada' (2007) 33 Queen's LJ 179; Stephen GA Pitel and Cheryl D Dusten, 'Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction' (2006) 85 Can Bar Rev 61; Joost Blom QC and Elizabeth Edinger, 'The Chimera of the Real and Substantial Connection Test' (2005) 38 UBC L Rev 373; Cheryl D Dusten and Stephen GA Pitel, 'The Right Answers to Ontario's Jurisdictional Questions: Dismiss, Stay or Set Service Aside' (2005) 30 The Advocates' Quarterly 297; Elizabeth Edinger, '*Spar Aerospace*: A Reconciliation of *Morguard* with the Traditional Framework for Determining Jurisdiction' (2003) 61 The Advocate 511; Walker, 'Beyond' (n 36).

[38] Uniform Law Commission of Canada *Court Jurisdiction and Proceedings Transfer Act, Proceedings of the 1994 Annual Meeting* at 48 (hereafter *CJPTA*); Saskatchewan: *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 (in force 2004); British Columbia: *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; Nova Scotia: *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess), c 2; Prince Edward Island: *Court Jurisdiction and Proceedings Transfer Act* SPEI 1997, c 61.

person is based'. What constitutes a 'real and substantial connection' is elaborated in the statute through a list of bases that is similar to the gateways. Notably absent, though, are 'damage sustained in the province' and 'necessary and proper party'.

Eventually, following a discussion paper prepared in association with the Law Commission of Ontario on these issues,[39] the Court of Appeal resumed its efforts to clarify the law. This time, it combined two appeals that it had on reserve, and asked counsel to make submissions on the framework of the law.[40] The result of this combined appeal was reviewed by the Supreme Court of Canada, and the 2012 decision in *Club Resorts*[41] continues today as the leading decision on judicial jurisdiction in Canada.

Before considering that result and the way in which it might assist the analysis in this essay, it is helpful to provide a brief note on the follow-on developments in the common law provinces, as exemplified by Ontario. In 2014, the Ontario Rules Committee, whose amendments are promulgated without any formal notice and comment or regulatory impact statement, decided that it should tidy up the bases on which service out are permitted (ie the gateways) to reflect these jurisprudential developments. There had been widespread complaint that the term 'real and substantial connection' provided no clear indication of its application: What counts as a *real* connection? What makes that connection *substantial*? Drawing on some academic commentary suggesting that most of the gateways, such as 'tort occurring in the jurisdiction' and 'contract breached in the jurisdiction' referred roughly to events that occurred in the forum and that this was to be contrasted with 'damage sustained in the province' and 'necessary and proper party',[42] the Rules Committee simply omitted these gateways.

Comfort might have been taken in the jurisdictional savings provision found in another rule of procedure that permitted plaintiffs to seek leave where none of the named gateways applied.[43] Indeed, the statute that had been adopted by some of the provinces also included a provision similar in function to this.[44] It was inspired by a provision in the Swiss Private International Law Act[45] for the courts to have 'residual jurisdiction' to serve as a forum of necessity in order to prevent a denial of justice.

The unfortunate result in Ontario was that the Rules Committee eliminated the gateways for cases involving 'damage sustained in the province' and 'necessary and proper party', without indicating that jurisdiction on these grounds might still

[39] Janet Walker, 'Reforming the Law of Crossborder Litigation: Judicial Jurisdiction' (Consultation Paper, Law Commission of Ontario 2009) prepared in consultation with a number of leading scholars in the field, some of whom are participants in this symposium.

[40] Letter from the Court of Appeal for Ontario to Counsel in C49188—*Van Breda v Village Resorts Limited* and C49632—*Charron v Bel Air Travel Group Ltd* (6 June 2009).

[41] *Club Resorts* (n 35).

[42] Walker, 'Beyond' (n 36).

[43] Ontario Rules (n 25) rule 17.03.

[44] *CJPTA* (n 38) s 6.

[45] Federal Act on Private International Law of 18 December 1987 (Switzerland), Art 3.

be exercised on the residual discretionary basis with leave pursuant to the other rule. Since then, without legislative encouragement to do so, the courts have not reinvigorated this previously little used residual provision for granting leave. Certainty had been achieved, but at the demonstrable expense of fairness. The various occasions, rare though they may be, in which plaintiffs once would have relied on 'damage sustained in the forum' to enable them to gain access to the local courts, or 'necessary and proper party'[46] to enable them to avoid a multiplicity of actions, no longer had a gateway permitting suit in Ontario. The elimination of these bases might seem to have enabled the courts to keep their heads above water, but it has not brought the other shore any nearer.

F. Feeling the Stones

1. Holiday torts: A coincidence?

How can any of this help in giving guidance on the role of discretion in determining the extent of jurisdiction? One surprising feature of this debate might provide a clue. The jurisdictional challenges in England and Canada that have proved so difficult to resolve, and that have provoked a fundamental and protracted review of the approach to jurisdictional analysis have both arisen from the same narrow set of circumstances—those of holiday torts. In fact, like the cross-border car accidents that once dominated conflict of laws jurisprudence, it seems that holiday torts have been the subject of considerable interest in many common law systems,[47] without much attention being paid to the potential significance of the specificity of the pattern of events that they entail.

One possible conclusion that might be drawn from this recognition is that the jurisdictional issues that arise from holiday torts are in a category of their own—a mere anomaly that has beguiled the courts. If that were so, we might reassure ourselves that all is otherwise well in the law of jurisdiction, and it is not necessary or helpful to develop a solution to this challenge that seeks to have wider relevance. A rather different observation might be that, in the process of working out why this particular fact scenario has proved so difficult for common lawyers, we might be able to identify some subtle but significant refinements to our approach to jurisdiction that could assist more generally.

It is worth having a closer look at the two appeals that were decided by the Supreme Court of Canada. These appeals involved the same defendant, Club Resorts. In *Van Breda*, a woman was playing on the beach with her fiancé at a resort

[46] In 'Jurisdiction Over Defences and Connected Claims' [2006] LMCLQ 447, Adrian Briggs bemoans a similar development in the European jurisprudence on the related articles in the Brussels I Regulation.

[47] *Carnival Cruise Lines, Incorporated v Eulala Shute* 499 US 585; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216.

in Cuba when she did a chin-up on a metal structure that collapsed rendering her a paraplegic,[48] and in *Charron*, a man at a Cuban resort drowned while scuba diving.[49] Perhaps guided by its desire to accept jurisdiction in these cases and to design a simpler and more coherent jurisdictional test, the Supreme Court reduced the eight-factor test of the Court of Appeal for Ontario to four 'presumptive connecting factors'. These factors were: the defendant is domiciled or resident in the province; the defendant carries on business in the province; the tort was committed in the province; and a contract connected with the dispute was made in the province.

It is possible to see how these factors happened to exist in the instant cases. However, they bear little resemblance to any established doctrine relating to situations in which an injured plaintiff now in the jurisdiction seeks to sue a foreign plaintiff in connection with a harmful event that occurred in the foreign jurisdiction. The first two presumptive connecting factors[50]—that the defendant is based in the forum or operates in the forum—are not specific to holiday torts. They are factors that exist in most cases involving local service. The third factor—committing a tort in the forum—would not apply to torts that have occurred abroad, such as is the case with 'holiday torts'. The fourth factor—a contract connected with the dispute was made in the forum—is difficult to understand.[51] Conflicts scholars will know that the place where a contract is made was once presumed to indicate the proper law of the contract where none had been selected by the parties, but that presumption has long been abandoned as meaningless in a world where contracts are routinely concluded in counterpart via the internet, and that presumption had related to applicable law and not to jurisdiction. What relevance could there be for this fourth factor?

This is the point at which all else has failed, when we may need to think laterally about the problem. As common lawyers, one useful starting point may be to consider sample scenarios of holiday torts and to note the instinctive reaction that might be given to them. One scenario is suggested by the *Brownlie* case: persons who have arranged from their place of residence with a multinational hospitality provider for transportation and accommodations in another country and are injured in the course of their stay in that country. A second scenario is slightly different: persons spending extended periods of time travelling the world and

[48] *Club Resorts* (n 35) [4].

[49] Ibid [7].

[50] Although the Supreme Court of Canada acknowledged the possibility of recognizing other presumptive connecting factors and it provided a test for doing so: ibid [91], Canadian courts have been unwilling to do so: see *Cook v 1293037 Alberta Ltd (cob Traveller's Cloud 9)* 2016 ONCA 836; *Best v Palacios* 2016 NBCA 59. Although the Court specified that these factors were relevant only for claims in tort, they have been cited across the range of cases involving defendants served abroad: *Club Resorts* (n 35) [90].

[51] This factor has since been described in a Supreme Court of Canada judgment as: 'unprecedented': *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP* [2016] SCJ No 30, [2016] 1 SCR 851 [88] (Côté J, dissenting); and by at least one commentator as 'odd': Vaughan Black, 'Simplifying Court Jurisdiction in Canada' (2012) 8 J Priv Int L 411, 425, 426.

enjoying an authentic cultural experience by using the local transportation and accommodations that they find in the countries that they visit. A third scenario is different again: non-residents suffering loss or injury and then moving to the forum, settling in the forum and wishing to sue in the courts of the forum. Each scenario involves residents of the forum suing in the forum for injuries suffered abroad, but in each case the foreseeability for the defendant of the need to be accountable to the plaintiff in this forum is different. The *Club Resorts* and *Brownlie* cases suggest a strong inclination on the part of the courts to exercise jurisdiction in the first scenario, but there might be less confidence in doing so in the second scenario,[52] and there seems to be little if any justification for doing so in the third scenario.

If there is a meaningful distinction to be made between these scenarios, it has little to do with where the harm was suffered. The fact that the victims all suffered their injuries while away from the forum is a constant factor. Rather, the difference between the scenarios seems to relate to the dealings between the parties when they reached agreement on the services to be provided. It may also be helpful to consider the way in which our understanding of that relationship has changed in recent years. Clearly, tourism has increased rapidly (at least until the pandemic restricted it), but what else has changed? And how have these changes affected our approach to judicial jurisdiction? It could help to consider other situations in which changes in the world around us have prompted changes in our approach to jurisdiction to see if that provides any guidance.

2. Developments in other areas of consumer law

Half a century ago, there was a significant increase in international trade in consumer products, and with it issues of jurisdiction arose in respect of product liability arising from products that caused harm in the forum but had been manufactured abroad. In Canada, the leading case was an interprovincial case and it involved a spent lightbulb. When a widow in Saskatchewan, whose husband had been electrocuted removing a spent lightbulb, wanted to sue the Ontario manufacturer, the manufacturer challenged the jurisdiction of the Saskatchewan courts on the basis that the requirement for the gateway was not met because the tort was *committed* in Ontario.[53] The Supreme Court of Canada did not agree, instead adopting the view that a tort could be regarded 'as having occurred in any country

[52] In particular, the use of an online booking facility from the forum has been held not to constitute a contract made in the forum for this purpose because this would condone universal jurisdiction by virtue of online booking websites: *Colavecchia v Berkeley Hotel Ltd* [2012] OJ No 3952, 112 OR (3d) 287 (SCJ); *Brown v Mar Taino SA* [2015] NSJ No 516, 2015 NSSC 348; and the purchase at a concierge desk of an excursion in a hotel booked from the forum has also been held not to be a contract connected with the forum: *Wilson v Riu* [2012] OJ No 5679, 98 CCLT (3d) 337 (SCJ).

[53] *Moran v Pyle National (Canada) Ltd* [1975] 1 SCR 393 (hereafter *Moran*).

substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties'.[54]

Applying that principle to product liability, the Supreme Court held that a court has jurisdiction:[55]

> where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which ... he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it. This rule recognizes the important interest a state has in injuries suffered by persons within its territory.

Local recourse in cases of products negligently manufactured abroad seems obvious today and yet, at the time, it was not obvious that consumers should be permitted to sue foreign manufacturers of products in the courts where they had acquired and used the products. A similar threshold in jurisdictional approach was crossed in the Privy Council jurisprudence with *Distiller's Co (Biochemicals) Ltd v Thompson* concerning liability for harm to those in New South Wales prescribed a drug manufactured in the United Kingdom containing thalidomide.[56]

A comparable evolution of thought concerning consumer services occurred more recently in respect of the rights of consumers using social media. Two decades ago, the Ontario courts showed little sympathy for a group of consumers who paid to subscribe to a social media service called 'MSN Messenger' and who wished to challenge the enforceability of a jurisdiction agreement that prevented them from seeking recovery in the local courts for frequent outages and other deficiencies in the service provided.[57] The internet was in its infancy and the claimants were regarded as adventurous early adopters exploring a novel service. The forum selection clause in their click-wrap agreement that required them to sue in a foreign forum was accepted as valid and binding on them, and the court did not exercise jurisdiction. While there continue to be jurisdictional battles over local court access for consumers of internet services, such claimants are now widely regarded as consumers deserving of the protections afforded to them under the laws of their place of residence.[58]

The fundamental changes in the world that brought about the expectations that consumers should be able to rely upon the standards in their residence for products and services acquired and consumed there seems also to be at play in the jurisdictional issues posed by holiday torts. We are far less certain today than we might

[54] Ibid 409.
[55] Ibid.
[56] *Distiller's Co (Biochemicals) Ltd v Thompson* [1971] AC 458.
[57] *Rudder v Microsoft Corp* (1999) 40 CPC (4th) 394 (SCJ Ont).
[58] *Douez v Facebook Inc* (2017) SCC 33.

once have been that the courts should not grant access to plaintiffs in situations like that described in *Brownlie*. What has changed?

A clue to this might be found in the otherwise mysterious fourth presumptive connecting factor articulated by the Supreme Court of Canada in *Club Resorts*—that of 'a contract connected with the dispute was made in the forum'. Of course, as mentioned, it is far from obvious what kind of contract and what kind of connection is involved in this factor, and equally unclear what suffices to demonstrate the 'making of the contract *in* the forum', but the notion of contracting in the forum for a service that is ultimately provided during the holiday seems to resonate with the treatment of these cases as local consumer claims that are entitled to be heard by the courts of the consumers' residence.

In today's (pre-pandemic) world of package holidays and five-star resorts, many of the tourists are far more like travel *consumers* than they are seasoned adventurers. They thumb through glossy magazines at the travel agents' shop or click through online advertisements, and they imagine themselves whisked away to exotic destinations to enjoy exciting adventures and then transported home again magically without the need to assume any greater responsibility for the logistics or the safety of their travel than they would when boarding a ride at the local amusement park. The jurisdictional confusion arises not from the amenability of the package tour provider or cruise operator who has sold the package tour or vacation stay to the tourist before the holiday begins. They are likely to be subject to the jurisdiction of the courts of the tourist's residence.[59] Rather, the jurisdictional confusion concerns the ability to bring within the jurisdiction of the plaintiff's home forum the service providers at the holiday destination to whom the traveller has been referred while at that location.[60] Those defendants may regard themselves as providing a service to a person in that locale and not in the tourist's residence. However, it is also understandable how the tourist could be lulled into the false sense of security that these 'add-on' tours and excursions are being provided on the same basis as the main tour, particularly when the tourists have been directed to the excursions by the main tour provider.

In short, critical to the growth of the travel industry has been the transformation of international travel into a consumer product. Ordinary people now go regularly to places that they have scarcely heard of and do things that they would never otherwise do. It does not occur to them that, in the event of an accident on an excursion during their trip, they might need to seek recourse in the local courts there. Once home, apart from having visited the country in question, they would no more imagine having to rely on the courts in that distant place than they would

[59] Directive (EU) 2015/2302/EU on package travel and linked travel arrangements ([2015] OJ L326/1).

[60] See discussion of *Lemmex* and *Leufkens* at text to nn 31–32 above.

have to rely on the courts in the country of a foreign manufacturer for an injury suffered upon the breakdown of a household appliance in their residence.

G. Strange New Shores

1. The place of the tort or the relationship between the parties?

Where does this leave us? Some travellers, particularly those who are engaged in adventures of the more 'off road' variety, might be regarded as having the capacity to assess and voluntarily accept the responsibility of managing the risk of injury, whether through insurance, self-insurance or reliance on the local authorities in the place where they are injured.[61] Other travellers, whether it is because they have purchased an all-inclusive holiday marketed to them in the place of their residence, or have made the arrangements with a major hotel chain from their place of residence, may be less likely to be regarded as having accepted this responsibility. Some cases, like that of Lady Brownlie, may involve a more complex combination of events—a call from home in one's place of residence to the concierge of the hotel at the holiday destination based on a leaflet obtained in a previous visit. Similarly, some accommodations may be multinational enterprises that have structured their operations to cater to the needs of a particular kind of traveller in a particular country who is within their target market. This appears to have been the general tenor of the argument made in the *Brownlie* litigation about Fairmont Hotels and five-star travellers from Britain such as the Brownlies. Others, like the example considered by the Court of Appeal for Ontario, the local wilderness canoe rental operator, [62] are obviously incapable of assuming a similar level of responsibility to respond to claims brought by customers who have arrived from distant countries around the world.

Somewhere along this spectrum is a dividing line that indicates when it might be reasonable for a court to accept jurisdiction in the place of the plaintiff's residence and when it might be regarded as reasonable to decline jurisdiction. Furthermore, even if this premise is accepted in principle, the courts of one forum might be inclined to favour the interests of holiday makers in a given scenario where the courts of another forum are more inclined to favour the interests of hospitality providers.

[61] Although the European Union does not distinguish between sophisticated and non-sophisticated consumers. See, eg, Case C-208/18 *Jana Petruchová v FIBO Group Holdings Limited* ECLI:EU:C:2019:825.

[62] *Leufkens* (n 24) [33].

It might be argued that the logical consequence of assigning the risk to hospitality providers would be the need to price services according to the relative cost of defending in the various home jurisdictions of their patrons. This would militate in favour of assigning the risk to tourists and encouraging them to purchase insurance, as was the generally the arrangement that was adopted in respect of carriage of goods by sea[63] and air.[64] But even if this particular issue could be resolved through travel insurance, it stands as yet another instance when the courts have confronted questions of the extent of their own jurisdiction that required an exercise of judgement, one that they would not necessarily expect to accord with the judgement that might be exercised by a court in another forum. Would this be understood as a question of law, or of discretion and, if discretion, would that discretion be exercised on a category-by-category, or case-by-case basis?

It is worth returning to the passing observation of the Supreme Court of Canada some fifty years ago, as the Court broadened jurisdiction in product liability. The Court said that, for jurisdictional purposes, a tort could properly be regarded 'as having occurred in any country substantially affected by the defendant's activities or its consequences *and the law of which is likely to have been in the reasonable contemplation of the parties*'.[65] This observation highlights the nature of the relationship between the parties and the law that might reasonably have been in their contemplation when they entered into the agreement for the product or service. Without presuming to decide the question in any particular case,[66] one can imagine why, for example, Lady Brownlie, speaking on the telephone with a major hotel, might think that it was understood that she was arranging for services intended to have safety standards consistent with those she enjoyed in the United Kingdom, even if the hotel understood the situation differently. In contrast, it might be imagined that had she wandered down the street from the hotel in Cairo to hail a local cab, her understanding might have been otherwise. Of course, what happened in her case, as with what happens in many cases, might be more nuanced and must be considered on its own particular facts.

If, indeed, we are finally approaching the far shore, what a strange vista it presents. For this last observation relates not so much to the exercise of jurisdiction, but to applicable legal standards that the parties might have in mind. These are usually considered to be very different issues. Have we lost sight of

[63] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924) as amended by the protocol done at Brussels on 23 February 1968 (hereafter Hague-Visby Rules).

[64] Convention for the Unification of Certain Rules for International Carriage by Air (Warsaw, 12 October 1929) (hereafter Warsaw Convention).

[65] *Moran* (n 53) 409 (emphasis added).

[66] And acknowledging that 'the reasonable contemplation of the parties' may, in circular fashion, be driven by the law as it comes to be known.

the relevance of discretion in determining appropriate forum—or has it just become a question of a court exercising judgement in respect of particular facts?

To be clear, this is a different exercise of judgement from the role of discretion in determining *forum conveniens* in the English civil practice, which is usually concerned with the parties' logistical capacities to commence or defend the action in the forum of the opposing party. There is no doubt that once upon a time, logistical challenges were an important consideration. However, today, with the steady increase in the cost of litigation before the English and Canadian courts, and the transformative impact of modern communications, the difference in suing at home or abroad is likely to be relevant in far fewer cases. For example, in *Brownlie,* it is difficult to imagine how, if Lady Brownlie had accepted that she had to sue in Cairo, this would have resulted in litigation that was more expensive or more protracted than it proved to be by seeking to sue in London. This is not to suggest that someone in Lady Brownlie's position should be required to sue in Cairo. Rather it is to say, as has been said in other essays in this collection,[67] that logistical considerations are likely to be significant to questions of the proper forum only in exceptional cases; and it goes without saying, that where logistical considerations are relevant, they should inform the court's discretion to exercise or to decline jurisdiction, whether on a leave application or a stay application.

However, if the reason why Lady Brownlie and plaintiffs like her should be entitled to assert that the English courts are the proper forum is not logistical, does that mean that it is because she is entitled to the application of English law? Perhaps not, but even if Egyptian law governs, and the English courts are capable of applying it, and even if the quality of justice in the Egyptian courts is not to be impugned, there may still be a benefit sought by suing in London.

2. The comforts of (suing at) home

For those preparing and presenting cross-border claims there are myriad benefits, quite apart from the application of forum law to various aspects of the case, that make it attractive to sue at home. It is easy to see why a plaintiff such as Lady Brownlie might wish the triers of fact and law to be those who might more readily appreciate her situation and her perspective on the issues. Plaintiffs in that position naturally want to be seen as 'travel consumers' entitled to assurances of safety similar to consumers of products acquired in their country of residence. It is easy to see why they might be anxious about having the matter determined in a forum in which they might be seen as wealthy foreigners indulging in extravagant pastimes and expecting inappropriately high and reliable levels of service. Could courts that

[67] See Martin Davies' essay in this collection (ch 2), 38 ("The convenience of the parties is much less significant in the *forum non conveniens* inquiry than it used to be..."); and Andrew Bell's essay (ch 1).

sympathize with these concerns and consequently support the choice of forum of someone like Lady Brownlie, be said to be 'recogniz[ing] the important interest a state has in injuries suffered by persons within its territory',[68] albeit having suffered the injury while away on vacation? Could this be an expression of the 'public interest factors'[69] that Martin Davies, in his essay, says now carry most of the weight in the analysis of appropriate forum?[70]

Perhaps so. Although these situations may be distinguished as torts in which the harm has been *suffered*, but which did not *occur* in the forum,[71] the gateway for cases involving damage sustained in the forum following injury that has occurred abroad will need to be exercised with caution. It differs from most of the other gateways, which may be more easily fitted into a notional allocation of cases to fora based on the geographically located occurrence of a particular event. In this way, this particular gateway will necessarily entail exercising a jurisdiction that overlaps with that of the place in which the harmful event occurred. For this reason, it is possible that, unlike the other gateways, this gateway ought to be understood as inherently discretionary (or more accurately, 'exceptional', and warranting a careful exercise of judgement)—not merely as also subject to the usual determination of proper forum as a question of the balance of logistical convenience between the parties.

Strangely, this approach would echo the approach taken in choice of law in tort. In choice of law in tort in many places in the common law, and under the Rome II Regulation,[72] the courts generally apply the law of the place where the tort occurs unless the parties' relationship (either through a common habitual residence or a pre-existing legal relationship) suggests otherwise.[73] Under the approach to jurisdiction considered here for holiday torts, the court would ordinarily regard the place where the tort occurred as the proper forum unless the parties' relationship suggested otherwise. Could this have been the impetus for the Supreme Court of Canada to include the strange factor of 'a contract connected with the dispute having been made in the forum'?[74]

The resemblance between this formulation of the jurisdictional analysis and that of the traditional doctrine of the flexible exception in tort,[75] echoes the

[68] *Moran* (n 53) 409.

[69] *Gulf Oil v Gilbert* 330 US 501 (1947).

[70] Ch 2.

[71] To adopt the formulation used in interpreting Art 7.2 of the recast Brussels I Regulation (n 14).

[72] Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, Art 4 (hereafter Rome II Regulation).

[73] *Club Resorts* (n 36) [90].

[74] Or the thinking in *Boys v Chaplin* [1971] AC 356, as explained by the Privy Council in *Red Sea Insurance v Bouygues* SA [1995] 1 AC 190, or even *Johnston v Coventry Churchill* [1992] 3 All ER 14?

[75] And the further exceptions to the *lex loci damni* in the Rome II Regulation (n 72) found in Art 4.2, 4.3 for common habitual residence and pre-existing relationship between the parties, advocated for in Janet Walker, 'Are We There Yet: Towards a New Rule for Choice of Law in Tort' (2000) 38 Osgoode Hall LJ 331.

tendency of judges to combine (or confuse) analysis based on choice of law in tort with jurisdiction in cases of holiday torts. Perhaps it is time to consider the possibility that the traditional territorial structure of our field, one in which so much of the analysis of the physical location of relevant events and persons at particular moments, is giving way to a structure that is more conceptual. In a post-territorial world, in private law matters, parties may be less often understood as reasonably expecting questions of law and forum to be determined in accordance with the geographical location of physical events as much as they might reasonably expect those questions to be determined in accordance with the legal system with which their relationship is most closely connected. In the situation of a holiday tort, this might result in some cases being analysed as the provision of holiday services in the place of the tourist's residence notwithstanding that the services are performed—and the injuries suffered—at the travel destination.

This would not affect the confident exercise of jurisdiction permitted by gateways relating to torts where the harmful event has occurred in the forum, subject of course to the moderating influences of *forum conveniens* and *forum non conveniens* found in the determination of proper forum.[76] However, it would entail the recognition that jurisdiction founded on gateways involving events that occur abroad and persons based abroad, such as that arising from 'damage sustained in the forum' and 'necessary and proper party', are inherently exceptional. Where the majority of the gateways would be based on a legal presumption of jurisdiction that was subject to the court's discretion to decline where another forum was better placed logistically to hear the instant case, these exceptional gateways would not be presumed but would be available to be exercised only on a discretionary basis where the interests of justice so dictated. It does not fit neatly with the current analytic structure of the CPR to treat certain gateways differently from the others, but as an alternative to eliminating them, as has been done in Canada, or consigning cases involving them to decades of litigation over the question of jurisdiction, as has occurred with Lady Brownlie's case, it could provide a habitable resting place for this journey.

H. Settling In

To acknowledge that some jurisdictional bases, though exceptional, are defensible even if the presumption is against them is to accept that the extent of the court's jurisdiction must necessarily be fashioned in a way that does not match perfectly the contours of the jurisdiction of other courts. There will necessarily be areas of overlap with the potential for differences of view. These differences might result in

[76] Pursuant to leave sought under CPR rr 6.36–6.37.

parallel litigation; they might result in refusal on occasion to recognize a judgment. This is not an exercise in allocating jurisdiction—it is part of a maturing understanding of the scope of judicial jurisdiction in a more interconnected world.

These are the complexities of international jurisdiction that Canadian courts and court regulators are only now exploring.[77] It has taken some time for them to question the concern that fuelled the desire to eliminate gateways such as 'damage sustained in the forum' and 'necessary and proper party', which denied access to the courts in situations where it had traditionally been afforded and continued to be afforded in many other legal systems. Canadian courts have never operated within a system, like the European Union, in which jurisdiction is allocated among member state courts even if Canadian courts seemed driven to shape their jurisdiction as if it was part of some notional international double convention. The reciprocal benefits that might warrant restricting jurisdiction based upon exceptional gateways such as these do not exist internationally, absent a treaty. Where matters of pressing local importance for consumers, workers or other protected classes of persons are at stake, exercising jurisdiction may be necessary to ensure that local mandatory laws are not subordinated to the different interests of another forum. Such concerns appear to have prompted the inclusion of specific provisions in the Regulations adapting the law on jurisdiction in the United Kingdom following Brexit for consumer and employee protection, corresponding closely to those in the Brussels I regime.[78]

Accepting that the alignment between direct and indirect jurisdiction on the international plane is imperfect is part of a maturing understanding of international jurisdiction. Some gateways are 'entirely unobjectionable', and others might be described as 'exorbitant', as has been observed by Lord Collins.[79] The idea that not all gateways should be treated equally is reflected in the revised approach to the Hague Judgments Convention[80] in which the initial aim to develop a double convention[81] was amended to make possible a multilateral system for the recognition and enforcement of judgments.

One might wonder whether the requirement of a positive showing of proper forum in a leave application might be unnecessary for gateways that are entirely unobjectionable, with objections to the exercise of jurisdiction that relate to the convenience of the forum to be left to motions to stay on grounds of *forum non conveniens*. This could result in retaining a requirement of leave only

[77] *Teck Cominco Metals Ltd v Lloyd's Underwriters* [2009] 1 SCR 321; *Douez v Facebook Inc* (2017) SCC 33; *Google Inc v Equustek Solutions Inc* (2017) SCC 34.

[78] See SI 2019/479, reg 26 inserting new ss 15A–E in the Civil Jurisdiction and Judgments Act 1982.

[79] Lord Collins of Mapesbury, 'Sovereignty and Exorbitant Jurisdiction' (2014) 130 LQR 555.

[80] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2 July 2019).

[81] Peter Nygh and Fausto Pocar, *Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Hague Conference on Private International Law, Preliminary Document, No 11 of August 2000).

for gateways that have the potential to be regarded as exorbitant. The 'discretionary' feature of granting leave in respect of these gateways would not address only the balance of convenience between the parties to the instant case, but could include the larger questions that are captured by the concept of 'public interest factors' that have been part of the United States' jurisprudence on *forum conveniens*. Whether this analysis is described as exercising discretion, or exercising judgement, cases such as the holiday tort cases considered here highlight the critical importance, as the world changes around us, of the role of the courts. That role goes well beyond interpreting and applying the existing rules of jurisdiction to shaping jurisdiction to meet the needs of this changing world.