

**JENSEN V. TOLOFSON AND THE REVOLUTION  
IN TORT CHOICE OF LAW**

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*Jensen v. Tolofson*, a 1994 decision of the Supreme Court of Canada, radically changes the law in Canada concerning choice of law in tort. The pre-eminence of the law of the forum, established by *Phillips v. Eyre* as interpreted in *McLean v. Pettigrew*, has been abolished. In its place is a new rule that the law of the place of the tort applies without exception.

*Jensen v. Tolofson* stands apart from other approaches to tort choice of law in Canada, England, and Australia. Its focus on articulated principle, on consistency of approach to choice of law, and on certainty of the rules demonstrates a concern with the rule of rational law that other courts law reformers have not demonstrated.

The author concludes, however, that although the rule of the case (as a *prima facie* rule), is right, the principle on which it is based, namely comity, is wrong. He suggests that justice to the parties is the primary concern of a court in tort choice of law. This principle requires that the *lex loci* be displaced as the governing law where the expectations of the parties require it.

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*Jensen v. Tolofson*, un arrêt de la Cour suprême du Canada de 1994, transforme radicalement le droit canadien en ce qui concerne la détermination du droit applicable en matière de délits. La prééminence de la loi du for, établie par *Phillips c. Eyre* tel qu'interprété par *McLean c. Pettigrew*, a été abolie. Elle a été remplacée par une nouvelle règle suivant laquelle le droit du lieu du délit s'applique sans exception.

*Jensen c. Tolofson* se démarque des autres approches de la détermination du droit applicable en matière délictuelle au Canada, en Grande Bretagne et en Australie. Son approche, centrée sur des principes clairement exprimés, sur la constance dans la détermination du droit applicable et sur la certitude du droit, démontre une préoccupation pour la rationalité qu'on ne retrouve pas dans d'autres réformes du droit jurisprudentiel.

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*Pourtant, l'auteur conclut que, même si la règle de cet arrêt est bonne (comme règle prima facie), le principe sur lequel elle est basée, c'est-à-dire la courtoisie, est mauvais. Il suggère que, dans la détermination du droit applicable en matière délictuelle, le premier souci du tribunal est de rendre justice aux parties. Ce principe exige que lex loci soit écartée dans les cas où les attentes des parties l'exigent.*

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### *Introduction*

*Jensen v. Tolofson*<sup>1</sup> is a bold and radical case in the development of tort choice of law. This is a period of unprecedented willingness by judges and law reformers in certain Commonwealth countries to challenge and change the rules concerning whether a court should apply its own law or some other law to resolving a tort dispute before it. *Jensen* is arguably the most important case since *Phillips v. Eyre*.<sup>2</sup>

There are three features of the case that make it important. First, it establishes a new tort choice of law rule: the *lex loci* governs. By adopting the new rule, the Supreme Court of Canada has broken with the various offspring of *Phillips v. Eyre*, including *McLean v. Pettigrew*<sup>3</sup> which it overrules, and *Boys v. Chaplin*.<sup>4</sup> The role of the *lex fori* in deciding a foreign tort has been abandoned.

The second feature of the case is that it rejects the idea of a flexible exception to the general rule. The modern genesis of the idea of a flexible exception is Lord Wilberforce's speech in *Boys v. Chaplin*.

The third feature of *Jensen* is that it represents an unusual attempt to develop and apply a theory of tort choice of law. La Forest J. seems to think it important to provide an answer to the question *why* a given law should be applied to resolve a tort dispute.

In this article I will offer a critique of these features in light of my own views on tort choice of law theory<sup>5</sup> and in light of developments in the law, actual and proposed, in England and Australia.

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<sup>1</sup> [1994] 3 S.C.R. 1022, [1995] 1 W.W.R. 609 (all references to W.W.R.); see E. Edinger, "The Constitutionalization of the Conflict of Laws" (1995) 25 Can. Bus. L.J. 38 and compare P. Sheppard, "Choice of Law in Tort: A Missed Opportunity" (1995) 44 I.C.L.Q. 650.

<sup>2</sup> (1870), L.R. 6 Q.B. 1.

<sup>3</sup> [1945] S.C.R. 62.

<sup>4</sup> [1971] A.C. 356 (H.L.).

<sup>5</sup> See P. Kincaid "Justice in Tort Choice of Law" (forthcoming).

*Jensen v. Tolofson* concerned a car accident in Saskatchewan and court action in British Columbia. The plaintiff, Kim Tolofson, and his father, Roger Tolofson, lived in British Columbia. They were in Saskatchewan in their British Columbia - registered car when it collided with a car driven by Leroy Jensen. Jensen lived in Saskatchewan and his car was registered there. The plaintiff sued his father (who was driving the British Columbia car) and Jensen in British Columbia. Choice of law was an issue for two reasons. First, under Saskatchewan law the plaintiff was out of time because he had not brought the action within twelve months of the accident, but he was in time by British Columbia law. Second, Saskatchewan then had a "guest" statute that prevented a gratuitous passenger from suing the driver unless the driver was guilty of "wilful or wanton misconduct". There was no such rule in British Columbia. If Saskatchewan law were to apply (either alone or as a defence to the law of the British Columbia forum) the plaintiff would not succeed. If British Columbia law applied, he could.

In the result, the Supreme Court of Canada<sup>6</sup> applied the law of Saskatchewan, so the plaintiff failed. This result could not have been achieved without a change in Canadian law. Although the law in England, Canada, and Australia had all been derived from *Phillips v. Eyre*,<sup>7</sup> the three countries had arrived at different versions of the rule. Willes J.'s well-known rule in *Phillips v. Eyre* required that for an action to succeed in England on a tort committed in another country, "the wrong must be of such a character that it would have been actionable if committed in England" and "the act must not have been justifiable by the law of the place where it was done".<sup>8</sup> Whatever one might think Willes J. originally meant by his formula, it was interpreted in *Machado v. Fontes*<sup>9</sup> to mean in effect that the law governing a foreign tort was the law of the forum, subject only to the proviso that the act must not be utterly innocent by the law of the place where it was done. The second leg of *Phillips v. Eyre* was satisfied if the act was a potential crime, even if it had no civil consequence according to the *lex loci*. In England *Machado* was overruled by the House of Lords in *Boys v. Chaplin*. This lead was followed in Australia.<sup>10</sup> In both countries, a rule of double liability (or as I would prefer, coincident liability) was adopted instead. The result in those countries was that the defendant's liability was limited to the area where the law of the forum and the law of the place of the accident coincided. This meant that defences from either system of law were available to the defendant.<sup>11</sup> On the facts of *Jensen v. Tolofson*, this rule would have enabled the defendant to plead the Saskatchewan statute of limitations and the Saskatchewan guest statute.

<sup>6</sup> La Forest J. (Gonthier, Cory, McLachlin, and Iacobucci JJ. concurring).

<sup>7</sup> *Supra* footnote 2.

<sup>8</sup> *Ibid.* at 28-29.

<sup>9</sup> [1897] 2 Q.B. 231.

<sup>10</sup> *McKain v. R.W. Miller and Co (S.A.) Pty. Ltd.* (1991), 174 C.L.R. 1 (H.C.A.).

<sup>11</sup> G.C. Cheshire and P.M. North, *Private International Law* 12th ed. (London: Butterworths, 1992) at 543.

In Canada, however, *Machado v. Fontes* had been followed by the Supreme Court of Canada in *McLean v. Pettigrew*.<sup>12</sup> The fact that by the *lex loci*, Ontario, there could be no civil cause of action did not prevent the plaintiff from succeeding in Québec. This was because the defendant's behaviour raised the possibility of a criminal prosecution under the law of Ontario. The second leg of *Phillips v. Eyre* was satisfied and the law of the Québec forum applied. If this rule had been applied in *Jensen v. Tolofson*, the civil defences of Saskatchewan would not have been available before the British Columbia court. The Supreme Court of Canada, however, overruled<sup>13</sup> *McLean v. Pettigrew* and applied the law of Saskatchewan. It could have achieved this result by replacing *McLean* with the double liability rule of *Boys v. Chaplin*. This it refused to do.<sup>14</sup> Instead it adopted a new rule which not only overruled *McLean* but completely reversed its philosophy. Whereas by *McLean* the *lex fori* governed, subject to *Machado's* enfeebled second leg of *Phillips v. Eyre*, by the new rule in *Jensen*, the *lex loci* governs alone.<sup>15</sup>

### I. A Principled Approach

A striking feature of La Forest J.'s judgment, and one that distinguishes it from most judgments concerning choice of law, is that he bases his new rule on a solid theoretical foundation. He thinks it worthwhile to state clearly the value which it is the purpose of a tort choice of law rule to advance. In choosing that value he also sets out what he sees as the purpose of choice of law rules generally. His decision in the case itself is presented as a logical application of his new rule and its rationale.

La Forest J. criticises judicial development since *Phillips v. Eyre* for, in effect, failing to identify what tort choice of law rules are trying to achieve. The rules have developed in a haphazard way born of impressionistic<sup>16</sup> or sloppy thinking. Vague or meaningless phrases have been used to disguise a lack of analysis.

At times, he says, the rules "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." Such an unanalytical approach "without engaging in further probing about what [is meant by fairness or party expectations],

<sup>12</sup> *Supra* footnote 3.

<sup>13</sup> *Supra* footnote 1 at 630.

<sup>14</sup> *Ibid.* at 630.

<sup>15</sup> *Ibid.* at 627.

<sup>16</sup> Such an approach has on occasion openly been supported: O. Kahn-Freund "Delictual Liability and the Conflict of Laws" [1968] II *Recueil des Cours* 1 at 36.

<sup>17</sup> *Supra* footnote 1 at 625. Is a concern with "coherence and rational intelligibility" old-fashioned? See I. Englard, *The Philosophy of Tort Law* (Aldershot, England: Dartmouth, 1993) at 52.

does not bear the hallmarks of a rational system of law."<sup>17</sup>

The broad purpose of choice of law rules he sees to be to respond to "the underlying reality in which they operate".<sup>18</sup> The rules should be formulated after identifying the "general principles that should apply in responding to that reality."<sup>19</sup>

La Forest J. identifies the "underlying reality" which must drive the formulation of tort choice of law rules. It is "the territorial limits of law under the international legal order".<sup>20</sup> Territorial sovereignty is a fact produced by public international law, and it is this fact which private international law rules must address.

The principle which should govern us in our response to the reality of territorial sovereignty is comity.<sup>21</sup> Territorial sovereignty means that "each state has jurisdiction to make and apply law within its territorial limit".<sup>22</sup> The principle of comity means that "other states ... will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits".<sup>23</sup>

From the fact of territorial sovereignty and the principle of comity, La Forest J. concludes that it is "axiomatic" that "the law to be applied in torts is the law of

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at 627. American courts are steadily moving the other way as they abandon the First Restatement (*lex loci*) for the Second (proper law). A recent example is the shift of Tennessee in *Hataway v. McKinley*, 830 S.W. 2d 53 (S.C. Tenn., 1992), where the *lex loci* was described as outmoded, based on vested rights and territorial sovereignty, and irrelevant in a modern society with a mobile population (p. 57). See P.J. Borchers "Choice of Law in the American Courts in 1992" (1994) 42 Am. J. Comp. L. 125 at 129.

The focus of this article is on the legal tort choice of law principles of *Jensen v. Tofofon* which might be applied by the courts of other Common Law countries as well as by the civilian and common law courts of Canada. It is not principally concerned with any constitutional justifications for the decision, on which I am not qualified to speak (but see Edinger, *supra* footnote 1). These matters were subsidiary to the central reason for the rule — namely international comity. La Forest J. presents his rule as applicable to foreign torts as well as to interprovincial torts or delicts. As to the constitutional significance of the case, however, *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 restated the rules for the recognition of interprovincial judgments in accord with a discovered principle of full faith and credit within the Canadian constitutional framework. Because of this principle, a Canadian court must recognise the judgment of a court in a sister jurisdiction if there is a real and substantial connection between the subject matter and that other province. The definition of the "jurisdiction" of the other court is altered by this case.

In *Jensen* La Forest J. speculated that the *Morguard* principle might mean that "it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities" (at 639). This reasoning seems to blur the distinction between jurisdiction and recognition on the one hand and choice of law on the other. The constitutional power of another court to take recognisable jurisdiction over a

the place where the activity occurred".<sup>24</sup>

La Forest J.'s principled, analytical, and rational approach to the formulation of choice of law rules is, in my view, to be welcomed. It will serve as an important example to judges seeking to adhere to the rule of law in the development and application of principles of law.<sup>25</sup> I also think that he is right in identifying territorial sovereignty as the relevant underlying reality, and that his new rule, that the *lex loci* governs, is right as a general rule. However, I do not think that comity is the correct principle with which to develop a response to that reality.

Comity means a respect for other nations. There are two distinct possible reasons for according such respect. The first is that the court is required to by some external rule, perhaps a rule of public international law (whether a treaty or a customary rule) or in a federal system a constitutional rule. The second possible reason for according respect to the laws and acts of foreign countries is that, rather than responding to a legal requirement, the forum voluntarily accords that respect because it is in its interests to do so. The fact that territorial sovereignty is a *product* of public international law does not necessarily mean that public international law requires comity. It is in a state's interests to maintain good relations with other states. It might voluntarily decide to apply their laws because it thinks it will offend the foreign state if it does not do so.

How does La Forest J. view comity — as compulsory or voluntary?<sup>26</sup> He says that states will "ordinarily" respect other states' laws and that they are "hesitant" to interfere.<sup>27</sup> Both expressions suggest voluntariness. However, he uses the language of the vested rights theory, which suggests an obligation to give effect to foreign laws.<sup>28</sup> A clear example is his reference to the "jurisdiction where the right arose".<sup>29</sup> Another is his adoption of Willes J.'s statement in *Phillips v.*

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matter is for the forum court a question distinct from whether or not, if the forum court itself has jurisdiction, it should apply the law of the other province. As *Morguard's* constitutional limitations concern jurisdiction, it is at least arguable that they do not touch the choice of law rule in *Jensen*. (In *McKain v. R.W. Miller Co. (S.A.) Pty. Ltd.*, *supra* footnote 10 the High Court of Australia concluded that the explicit full faith and credit provisions of the Australian Constitution did not affect the choice of law rules).

A further issue beyond the scope of this article is the relevance of the rule in *Jensen* to the civil law of Québec where new rules of private international law have been codified in Title Three of the new Civil Code. It would appear to be irrelevant if the rule in *Jensen* is not constitutionally-based.

I am indebted to Geneviève Saumier whose views are expressed in her paper "Judicial Jurisdiction in International Cases: The Supreme Court's Unfinished Business" as yet unpublished.

<sup>25</sup> See Kincaid, *supra* footnote 5.

<sup>26</sup> In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1096 he cites with approval a passage from an American judgment which describes comity as "neither a matter of absolute obligation ... nor of mere courtesy and good will".

<sup>27</sup> *Supra* footnote 1 at 625.

<sup>28</sup> See Australian Law Reform Commission, Discussion Paper No. 44, 1990, *Choice of Law Rules*, para. 5.1.

<sup>29</sup> *Supra* footnote 1 at 627.

*Eyre* that "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law".<sup>30</sup> This is clearly the language of vested rights.<sup>31</sup>

Judicial practice and opinion have discredited the vested rights theory. The practice of the Canadian courts in applying the *lex fori* as required by *McLean v. Pettigrew* contradicts the idea that they have a duty to apply the law of another country. If they had such a duty, they clearly did not obey it. In any case, the explanation (made famous by Holmes J.)<sup>32</sup> that in applying a foreign law a court is giving effect to a right created by that law has been replaced by another explanation. That is that a court always in essence applies its own law,<sup>33</sup> although the content of the law may be drawn from a foreign system.<sup>34</sup> A court applies a foreign rule not out of deference to the legal creations of a foreign state, but as a way of realising its own policies. Another way of putting it is to say that a court only applies a foreign law if it is in its own interest to do so.<sup>35</sup>

Comity understood as a legal requirement thus does not provide a convincing reason for applying the *lex loci* to a tort. What about comity as an expression of the forum's self-interest? Such a view would see comity as part of the public policy of the forum. According to this view, a foreign state will be offended if its law is not applied by the forum to a tort occurring in the foreign state. Assuming for a moment that a foreign state has an interest in seeing its law applied in a tort dispute, there are a number of problems with using the assumption as the basis for applying the *lex loci*. First, it assumes that the interest of a foreign state will only be aroused by the occurrence of the tort within the state's borders. Is it not as plausible that its interest could be aroused if both the parties live there, or are nationals of the state, even though the tort occurred in the forum or in a third state?<sup>36</sup> And what if the act occurs in state A, but the injury is suffered in state B? The interest of each state in seeing its law applied may be aroused.<sup>37</sup> If the forum applies the law of one, as an act of comity, it will risk incurring the wrath of the other. To rely on comity in the sense of forum public policy to justify the application of the *lex loci* also raises the problem of

<sup>30</sup> *Supra* footnote 2 at 28, quoted by La Forest J. in *Jensen v. Tolofson*, *supra* footnote 1 at 628.

<sup>31</sup> *Breavington v. Godleman* (1988), 169 C.L.R. 41 at 90 (H.C.A.) Wilson and Gaudron JJ.

<sup>32</sup> *Western Union Telegraph v. Brown* (1913); 234 U.S. 542 at 547 (1913), Holmes J. A right vests in the plaintiff by the law of the place of the tort "and that is not only the ground but also the measure of maximum recovery". See P.B. Carter "Torts in English Private International Law" (1981) 52 B.Y.I.L. 9 at 15.

<sup>33</sup> *Guinness v. Miller*, 291 F. 769 at 770 (1923), per Learned Hand J.; *Red Sea Insurance Co Ltd. v. Bouygues S.A.*, [1995] 1 A.C. 190 at 199.

<sup>34</sup> *Breavington v. Godleman*, *supra* footnote 31.

<sup>35</sup> Carter, *supra* footnote 32 at 16.

<sup>36</sup> See *supra* footnote 1 at 632 where La Forest J. adverts to this possibility, with respect to the interests of the forum.

<sup>37</sup> See a remark quoted by La Forest J. in *Morguard Investments Ltd. v. De Savoye*, *supra* footnote 26 at ¶106.

renvoi. If we are concerned not to offend the sovereignty of B by applying a law other than the one which under the law of B would govern, then logically we should look to B's choice of law rules, not just apply B law. Otherwise we may end up applying B law even though a B court would not. Current law is that renvoi plays no part in tort choice of law.<sup>38</sup> La Forest J. does not suggest that it be introduced.

So even assuming that states may be offended by the non-application of their law, there are considerable difficulties in assuming that the doing of a private act within a state's territory necessarily raises that state's interest in seeing its law applied.

But is it realistic to think that states have any interest in seeing their law applied to a given tort case?<sup>39</sup> The answer depends to a degree on how one sees the nature of tort law and tort choice of law rules. One might think, as I do, that private law like tort should primarily be about balancing the interests of the parties themselves according to some criterion of justice.<sup>40</sup> Or one might think that they are primarily about giving effect to the public interests of the forum.<sup>41</sup> Those public interests include the interests of the state in such matters as comity with other states, and the interests of the community as a whole in such matters as a fair or expedient distribution of wealth and risk.<sup>42</sup>

In our common law system I think tort is seen primarily as a matter of doing justice between the parties. If choice of law rules are a matter of forum policy, rather than imposed law, then tort choice of law rules are part of the tort adjudication rules. It follows that private interests should be paramount in formulating choice of law rules, as in formulating tort rules themselves. In any case, however great a role public interests may play in the *formulation* of tort rules, their application in a particular private dispute is a matter to which the state is indifferent.<sup>43</sup> At the level of adjudication of a tort dispute, it is hard to

<sup>38</sup> Cheshire and North, *supra* footnote 11 at 540. The English Law Commission (Law Com 193 "Private International Law: Choice of Law in Tort and Delict" (1990) para. 3.56), the Australian Law Reform Commission (Report No. 58, 1992, *Choice of Law*, Draft Bill, cl. 5), and the Private International Law (Miscellaneous Provisions) Act 1995, passed on 31-10-95 but not yet in force, s.9(4); all reject renvoi.

<sup>39</sup> La Forest J., *supra* footnote 1 at 622 thought that the application of English law in *Machado v. Fontes* constituted "an intrusion in Brazilian affairs" by the English court.

<sup>40</sup> Carter, *supra* footnote 32 at 16-17; A.J.E. Jaffey "Choice of Law in Tort: a Justice-Based Approach" (1982) 2 L.S. 98 at 99.

<sup>41</sup> This evidently is the view that La Forest J. takes *supra* footnote 1 at 614-615. He defines a choice of law rule as one that determines "which law should govern in cases involving the interests of more than one jurisdiction".

<sup>42</sup> J.H.C. Morris "The Proper Law of a Tort" (1951) 64 Harv. L. Rev. 881 at 885; Kahn-Freund, *supra* footnote 16 at 24. The distinction is between corrective and distributive justice. Englard, *supra* footnote 17 at 2-11.

<sup>43</sup> J.A. Clarence Smith "Torts and the Conflict of Laws" (1957) 20 M.L.R., 447 at 455.

<sup>44</sup> *Ibid.* at 455-456; Scottish Law Commission, Law Commission Working Paper No. 87 Private International Law: Choice of Law in Tort and Delict (1984), para. 4.38.

see how the forum or any foreign state is anxious to see its own law applied.<sup>44</sup> If this is right, then the whole assumption on which comity is based, that is that a foreign court will be offended if its law is not applied, dissolves.<sup>45</sup>

La Forest J. applies to choice of law the considerations of comity present in recognition of foreign judgments.<sup>46</sup> He quotes his own judgment for the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*<sup>47</sup> where he spoke of comity as the "respect due by other states to the actions of a state legitimately taken within its territory".<sup>48</sup> Foreign judgments are an exercise of sovereignty by the foreign state. The likelihood of the foreign state being offended by non-recognition of its sovereign action is surely infinitely greater than by the non-application of its law where the state has done nothing.<sup>49</sup> The significance of sovereign actions in questions of comity was mentioned by Sopinka J. in a later case in the Supreme Court of Canada.<sup>50</sup> In an action to stay a suit in British Columbia, the issue of comity was raised only because an action had already been started in Texas. Sopinka J. said the British Columbia court "as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction".<sup>51</sup>

To summarise, issues of comity are not realistically raised by choice of law questions. Even if they were, it is not right to assume that it is the occurrence of the tort in the state's territory, and only the occurrence, that raises those issues.

Finally, the principle of proportionality in the doctrine of public policy should be mentioned. In private law matters, the interests of the parties should predominate unless, exceptionally, the damage to public interests in the particular circumstances of the case justifies putting public interests ahead of private

<sup>45</sup> Practice indicates courts are not very worried about comity in choice of law, because the parties can choose to have forum law apply simply by not pleading foreign law. Jaffey, *supra* footnote 40 at 115.

<sup>46</sup> *Supra* footnote 1 at 626.

<sup>47</sup> *Supra* footnote 26.

<sup>48</sup> *Ibid.* at 1095 (emphasis added).

<sup>49</sup> The theory that recognition of foreign judgments is based on comity is unconvincing when a court's recognition rules are narrower than its jurisdiction rules — the result produced by the refusal to apply the principle of reciprocity of *Travers v. Holley* [1953] 2 All E.R. 794 to judgments *in personam*. (*Re Trepca Mines Ltd.*, [1960] 1 W.L.R. 1273; *Henry v. Geoprosco International Ltd.* [1976] Q.B. 726 at 745 (C.A.)) The decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, *supra* footnote 26 to grant recognition when the foreign state has a real and substantial connection with the action makes the theory of comity more convincing in recognition cases — but makes it no more plausible in choice of law cases.

<sup>50</sup> *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897.

<sup>51</sup> *Ibid.* See E. Edinger, Comment (1993) 72 Can. Bar Rev. 366 at 370-371 and J.P. McEvoy, Choice of Law in Torts: The New Rule (1995), 44 U.N.B.L.J. 211.

<sup>52</sup> O. Kahn-Freund "Reflections on Public Policy in the English Conflict of Laws" (1953) 39 Trans. Grot. Soc. 39 at 58.

ones.<sup>52</sup> So if comity is seen as part of forum public policy, as I think it should be, then the application of a particular foreign law for reasons of comity should only be done if the real risk of damage, and the extent of potential damage, to the forum's relations with that country by not applying that law are great enough to warrant applying it instead of the law which the parties' interests would dictate.

If comity cannot serve as a plausible principle on which to base tort choice of law rules, what can? I have argued elsewhere<sup>53</sup> that it is party expectations. The forum's own dispositive tort rules reflect its own society's values. Those rules are for the forum the most just formula for balancing the interests of the parties. It will only apply the formula of another country to the dispute if some other requirement of justice to the parties (its primary concern) suggests that it should. If the circumstances are such that the parties may be supposed before the tort to have governed themselves by the expectation that they should obey and were protected by a particular law, then it is unjust for the forum to apply some other law to them.<sup>54</sup>

It is here that I think La Forest J.'s principle of territorial sovereignty is and should be relevant. He is quite right to say that "the relevant underlying reality is the territorial limits of law under the international legal order".<sup>55</sup> Moreover, most people are aware of this reality,<sup>56</sup> as is reflected in the popular maxim, "when in Rome do as the Romans do". People generally do expect that they are governed by the social and legal standards of the physical territory they are in.<sup>57</sup> Usually, then, applying the *lex loci* will reflect the expectations of the parties. In other words, La Forest J. has chosen the right rule but for the wrong reasons. As I said at the outset, however, he has set an important example in offering a coherent theory for adopting a particular tort choice of law rule. Let me compare La Forest J.'s approach to that of other law-makers.

Willes J. in *Phillips v. Eyre* adopted the principled approach that inspired La Forest J. and came to the same conclusion: the *lex loci* governed.<sup>58</sup> Willes J.'s central principle was vested rights. His exceptions to its application are equally principled. The second may be seen as merely an extension of the main principle: if the *lex loci* governs when the right vests, then a subsequent change

<sup>53</sup> Kincaid, *supra* footnote 5.

<sup>54</sup> *Metall & Rohstoff A.G. v. Donaldson, Lufkin, & Jenrette Inc.*, [1990] 1 Q.B. 391 at 445-446 (C.A.).

<sup>55</sup> *Supra* footnote 1 at 625.

<sup>56</sup> Law Com 193 (1990), *supra* footnote 38 at para. 3.17; Clarence Smith, *supra* footnote 43 at 460; Carter, *supra* footnote 32 at 16.

<sup>57</sup> Clarence Smith, *ibid.* at 462-463. La Forest J. acknowledges this: *supra* footnote 1 at 624 and 628.

<sup>58</sup> This was the interpretation put by La Forest J. on Willes J.'s judgment: *ibid.* at 621, and by Diplock L.J. in *Boys v. Chaplin*, [1968] 2 Q.B. 1 at 38 (C.A.). It has not been generally accepted. *Boys v. Chaplin*, *supra* footnote 4 at 385; Law Com 193 *supra* footnote 38 at para. 2.6 and 2.7. See Clarence Smith *supra* footnote 43 at 452. Dawson J. in *Breavington v. Godleman*, *supra* footnote 31 at 143 acknowledged this, but was otherwise attracted to Diplock L.J.'s analysis.

<sup>59</sup> *Boys v. Chaplin* (C.A.), *supra* footnote 58 at 39.

to the *lex loci* which makes the act justifiable should likewise be given effect.<sup>59</sup> The first leg can be seen as a "jurisdictional" limit, similar to that on foreign land, imposed by the public policy of the forum.<sup>60</sup> *The Halley*,<sup>61</sup> on which the first leg is based<sup>62</sup> can be seen as having been decided on public policy grounds.<sup>63</sup> According to this view, the Belgian law which made the shipowner vicariously liable for the negligence of a pilot he was forced to have was offensive to English notions of justice.<sup>64</sup>

Lord Wilberforce's judgment in *Boys v. Chaplin* has been accepted as the ratio of the case.<sup>65</sup> His tort choice of law rule required double liability by the *lex fori* and the *lex loci*, subject to a flexible exception. His new rule reflects his view that the *lex loci* should play a greater role,<sup>66</sup> although it should not become the basic rule.<sup>67</sup> Unlike La Forest J. and Willes J., he gives no reason for this view. He is equally vague about the principles governing his flexible exception. He is clearly attracted to the "most significant relationship" concept of the proper law of the tort applied in the United States in the Second Restatement.<sup>68</sup> However, he would not apply it in its pure form because it is too uncertain. Hence he insists on a *prima facie* rule. In applying the flexible exception, he said, "Nothing suggests that the Maltese state has any interest in applying this rule to persons outside it, or in denying the application of the English rule to these parties".<sup>69</sup> It thus appears that Lord Wilberforce has adopted some of the American governmental interest analysis.<sup>70</sup> He gives no reason why the interests of the Maltese state should be relevant to an English court in deciding whether or not to apply Maltese law to a suit in tort before it. He does not seem

<sup>60</sup> *Supra* footnote 2 at 28.

<sup>61</sup> (1868), L.R. 2 P.C. 193.

<sup>62</sup> *Supra* footnote 2 at 29.

<sup>63</sup> See *The Halley*, *supra* footnote 61 at 204 where the phrase "manifestly contrary to public justice" was used. See Dicey and Morris, *The Conflict of Laws*, 12th ed. (London: Sweet and Maxwell, 1993) at 1490; Kahn-Freund *supra* footnote 52 at 51; Cheshire and North, *supra* footnote 11 at 536. Authority before *Jensen* treats *The Halley* as making the *lex fori* the governing law: *Boys v. Chaplin*, *supra* footnote 4 at 385-387. But see P.B. Carter "Choice of Law in Tort and Delict" (1991) 107 L.Q. R. 405 at 410.

<sup>64</sup> If so, the view later changed. The *Pilotage Act* 1913, s. 15 changed English law to make a shipowner liable for the negligence of a compulsory pilot. From *Machado v. Fontes* until *Jensen*, though, *Phillips v. Eyre* and *The Halley* were together taken to mean that the forum applied its own law in a tort case, the *lex loci* providing a mere jurisdictional limitation. See *Boys v. Chaplin*, *ibid.* at 385; *Koop v. Bebb* (1951), 84 C.L.R. 629 at 644; and *Anderson v. Eric Anderson Radio and TV Pty. Ltd.*, [1966] A.L.R. 423 at 437.

<sup>65</sup> A. Briggs "What did *Boys v. Chaplin* Decide?" (1983) 12 Anglo-Am. L. Rev. 237 at 246; *Coupland v. Arabian Gulf Petroleum Co.* [1983] 2 All E.R. 434 aff'd [1983] 3 All E.R. 226 (C.A.).

<sup>66</sup> *Supra* footnote 4 at 389.

<sup>67</sup> *Ibid.* at 390.

<sup>68</sup> *Ibid.* at 390-391; *Second Restatement of the Conflict of Laws*, s. 145.

<sup>69</sup> *Ibid.* at 392.

<sup>70</sup> *Ibid.* at 391. For a recent application, see *Johnson v. Coventry Churchill International Ltd.*, [1992] 3 All E.R. 14 at 24-25.

to have regarded it as very important that his "rule" be defensible as the application of coherent policies or principles of justice. In fact, his identification of the "interests" of the Maltese state and the policies of its law is so impressionistic that the flexible exception might be regarded as not really a rule at all, but only a vehicle for judicial discretion.<sup>71</sup> It appears that Lord Wilberforce agreed with Lord Hodson that it would be "unjust" in the circumstances for the plaintiff to be limited to the recovery allowed by Maltese law,<sup>72</sup> but neither thought it necessary to explain by what criteria it was unjust.

In *Red Sea Insurance Co. Ltd. v. Bouygues S.A.*<sup>73</sup> the Privy Council agreed with Dicey and Morris<sup>74</sup> that Lord Wilberforce's speech in *Boys v. Chaplin* should be taken to amount to an application of the proper law by way of exception.<sup>75</sup> That is, although double liability is the normal requirement, an issue or the whole case may be governed by the law which "has the most significant relationship with the occurrence and the parties".<sup>76</sup> Their Lordships in *Red Sea* applied this rule to allow the Saudi Arabian *lex loci* to displace the Hong Kong *lex fori* completely. The judgment of Lord Slynn for the Privy Council is virtually devoid of articulated principle. He followed the House of Lords in *Boys v. Chaplin* in regarding the exclusive adoption of the *lex loci* as "inappropriate".<sup>77</sup> But there is no clue as to what criterion of justice or policy makes the (usual) application of both the *lex loci* and the *lex fori* appropriate. When it comes to applying the exception, Lord Slynn adopts a contacts-counting approach without identifying any criteria which might indicate the relevance or weight of the contacts he lists with Saudi Arabia.<sup>78</sup> All he says is that "the exception can be applied in an appropriate case".<sup>79</sup> *Red Sea* thus achieves an important substantive development in the law, by allowing the *lex loci* to govern alone in some cases, without any attempt to develop a theory of tort choice of law. As La Forest J. says, such development, without articulation of the objectives and values of tort

<sup>71</sup> See J.J. Fawcett "Is American Government Interest Analysis the Solution to English Tort Choice of Law Problems?" (1982) 31 I.C.L.Q. 150 at 162. It is not obvious that Malta had no interest in applying its restrictive damages rule to foreigners: P.E. Nygh "Some Thoughts on the Proper Law of a Tort" (1977) 26 I.C.L.Q. 932 at 948.

<sup>72</sup> *Supra* footnote 4 at 379, Lord Hodson.

<sup>73</sup> *Supra* footnote 33. See P. Sheppard, "Choice of Law in Tort: A Missed Opportunity?" (1995) 44 I.C.L.Q. 650.

<sup>74</sup> *Supra* footnote 63, r. 203.

<sup>75</sup> *Supra* footnote 33 at 201. Lord Wilberforce himself said that *Red Sea* "swept away the whole of the law of the first part of *Phillips v. Eyre*." Private International Law (Miscellaneous Provisions) Bill (H.L. Bill 39), Second Reading, H.L. Weekly Hansard vol. 559 No. 11, 6-12-94, p 842. But surely the prima facie rule still operates unless the exception is warranted: *Red Sea Insurance Co. Ltd. v. Bouygues S.A.*, *supra* footnote 33 at 201, 206.

<sup>76</sup> Dicey and Morris, *supra* footnote 63, r. 203 at 1487-1488.

<sup>77</sup> *Supra* footnote 33 at 199.

<sup>78</sup> *Ibid.* at 207.

<sup>79</sup> *Ibid.* at 206.

<sup>80</sup> *Jensen v. Tolofson*, *supra* footnote 1 at 625.

choice of law, "does not bear the hallmarks of a rational system of law."<sup>80</sup>

The Law Commission proposals<sup>81</sup> in the United Kingdom represent a halfway house between *Boys v. Chaplin* and *Jensen v. Tolofson*. *Boys v. Chaplin* applies both the *lex fori* and the *lex loci* subject to a proper law exception. *Jensen* applies the *lex loci* with no exception. The Law Commission, and the Act<sup>82</sup> that it has fathered, apply the *lex loci* subject to a proper law exception.<sup>83</sup> The Law Commission cites practical reasons in support of the *lex loci*. They include certainty,<sup>84</sup> uniformity, and the prevention of forum shopping.<sup>85</sup> But those can only be secondary reasons. A choice of law rule that required that in all circumstances a tort should be decided by the law of Mongolia would be certain. If all countries adopted this rule, there would be uniformity of result as well as uniformity of rule,<sup>86</sup> and forum shopping would be prevented. The Law Commission is vague and inconclusive when it comes to the primary reasons for adopting the *lex loci*, that is, the identification of the "general principles" that should apply in responding to the "underlying reality" in which the choice of law rules are to operate. It does acknowledge that "To the extent that the parties have any expectations at all, a general rule based on the applicability of the *lex loci delicti* probably accords with them".<sup>87</sup> But it is not clear that the Commission justifies the primary rule by the principle of party expectations, although some support for this theory is given by its remark that the purpose of conflicts is to do justice between the parties.<sup>88</sup> The Commission in effect uses the *lex loci* as the *prima facie* applicable law in cases of personal injury, death, and damage to property.<sup>89</sup> In other torts, the applicable law is *prima facie* to be "the law of the country in which the most significant element or elements" occurred.<sup>90</sup> However, the *prima facie* applicable law can be displaced by another law if, after a comparison between the significance of the factors connecting it to the *prima facie* country and the other country, it appears that it is "substantially more appropriate" for the law of the other country to apply.<sup>91</sup> The only guidance to assessing significance or appropriateness is that factors relating to the parties or to the events, or to the circumstances or consequences, may be taken into account. This gives no clue to the principles or purposes underlying the choice of law exercise, unless one goes back to the Law Commission's reference to

<sup>81</sup> See Law Com Working Paper No. 87 (1984), *supra* footnote 44 and Law Com 193, *supra* footnote 38.

<sup>82</sup> *Private International Law (Miscellaneous Provisions) Act 1995*.

<sup>83</sup> *Ibid.* s. 12.

<sup>84</sup> *Supra* footnote 44 at para. 4.14.

<sup>85</sup> *Ibid.* at para. 4.59.

<sup>86</sup> It is true that one can have a uniform rule without uniform result. *Phillips v. Eyre* might be applied uniformly throughout the Commonwealth, but the role it allows for the *lex fori* means that the result will vary from one forum to the next.

<sup>87</sup> Law Com 193 (1990), *supra* footnote 38 at para. 3.2.

<sup>88</sup> *Ibid.* at para. 3.55.

<sup>89</sup> See summary of recommendations *ibid.* at para. 4.1.

<sup>90</sup> *Ibid.* at para. 4.1 and *Private International Law, (Miscellaneous Provisions) Act 1995*, s. 11(2)(c).

<sup>91</sup> *Ibid.* s. 12.

party expectations and justice to the parties.

In Australia the High Court in *Breavington v. Godleman*<sup>92</sup> seemed set, for reasons varying from one judge to another, to adopt the *lex loci* as the law governing torts, at least those occurring within Australia.<sup>93</sup> However, in a later case<sup>94</sup> the court adopted the dissenting judgment of Brennan J. in *Breavington*<sup>95</sup> as the rule. The formula now is a double choice of law rule requiring liability by both the *lex fori* and the *lex loci*.<sup>96</sup> The rule is thus that of *Boys v. Chaplin*, but without the flexible exception. In *Breavington* Mason C.J. rejects the vested rights theory, saying that a court in a conflicts matter applies the law of its own sovereign.<sup>97</sup> Like the English Law Commission, he notes that the *lex loci* will usually correspond to the reasonable expectations of the parties without actually adopting party expectations as the theoretical justification for the *lex loci*.<sup>98</sup> He does not analyse the idea of party expectations and does not make it clear whether he is talking about expectations before the tort or between the tort and the trial.<sup>99</sup> Like Lord Hodson in *Boys v. Chaplin*, he uses an undefined notion of "justice" to warrant flexibly departing from the *lex loci*, at least in international torts. It is hard to see how an application of party expectations before the accident as the principle could lead one to conclude as Mason C.J. does that "in *Chaplin v. Boys* it would have been unjust to have relegated the parties to a determination of their rights and liabilities according to the law of Malta."<sup>100</sup> What other law could the parties have imagined would govern their rights and duties if they were to have an accident in Malta? After all, they had no relationship until their fortuitous meeting on a Maltese road. This statement is hard to reconcile with his statement that "the interests of the parties themselves are likely to be more material in ascertaining whether another law has a closer connection with the parties and the occurrence with respect to the issue to be litigated. The justice of the case turns very largely on the need to give effect to

<sup>92</sup> *Supra* footnote 31.

<sup>93</sup> See La Forest J.'s remark to this effect *Jensen v. Tolofson*, *supra* footnote 1 at 629. Mason C.J. favoured the U.K. Law Commission's approach (*lex loci* subject to proper law exception) for torts outside Australia. *Supra* footnote 31 at 77.

<sup>94</sup> *McKain v. R.W. Miller and Co. (S.A.) Pty. Ltd.*, *supra* footnote 10.

<sup>95</sup> *Supra* footnote 31 at 110-111.

<sup>96</sup> *Stevens v. Head* (1993), 176 C.L.R. 433 at 441-442, 453 (H.C.A.). The defendant is liable only to the extent that the laws of the two systems coincide. The defendant can use defences from both systems. C. Molnar "The High Court: Choice of Law in Torts" (1994) 68 L.I.J. 395 at 396.

<sup>97</sup> *Supra* footnote 31 at 74. He cites Learned Hand J. in *Guinness v. Miller*, 291 F. 769 at 770 (1923).

<sup>98</sup> *Ibid.* at 75.

<sup>99</sup> I have argued elsewhere that it is only expectations before the tort that can serve as a criterion of justice influencing the content of choice of law rules. Expectations after the tort, as to choice of law rules themselves, would be satisfied whatever choice of law rule were adopted, as long as it was precise and predictable. Kincaid, *supra* footnote 5.

<sup>100</sup> *Supra* footnote 31 at 76.

<sup>101</sup> *Ibid.* at 77.

the legitimate or reasonable expectations of the parties".<sup>101</sup>

In *McKain v. R.W. Miller and Co. (S.A.) Pty. Ltd.*<sup>102</sup> the majority<sup>103</sup> adopt Brennan J.'s formulation from *Breavington* without discussion of principle.<sup>104</sup> The result is that, at least for Australian torts, the rule is double liability with no flexible exception — in other words, the *prima facie* rule from *Boys v. Chaplin*.

The Australian Law Reform Commission sees the main policy objectives of choice of law rules as being uniformity of result and predictability.<sup>105</sup> As I said above, those objectives can only be secondary to a criterion of justice of the sort La Forest J. seems to have had in mind when he identified comity as the governing principle. The Commission's philosophy of tort is unclear. In its preliminary report, it says the policy "is to compensate those who suffer injury or loss because of the wrongful conduct of another."<sup>106</sup> In its final report, it says "modern trends in tort law ... are more concerned with the distribution of loss risk than the allocation of responsibility."<sup>107</sup> As to tort choice of law, the Commission says "The objective of the exercise is to ensure that the most appropriate system of law applies",<sup>108</sup> but it continues to be vague as to the criteria that determine appropriateness. It notes that insurers are in favour of the *lex loci* because it would be certain and "would reflect and protect the reasonable expectations of the parties".<sup>109</sup> The tenor of the report is that party interests are important in tort choice of law,<sup>110</sup> but there is no clear identification of the guiding principle. In the result, the Commission recommends rules very similar to those recommended by the English Law Commission and substantially adopted in the Private International Law (Miscellaneous Provisions) Act 1995. Personal injury, death, damage to property, and interference with property rights are *prima facie* governed by the *lex loci*.<sup>111</sup> Other torts would be governed by the law of the place "where the most significant elements of the relevant events occurred".<sup>112</sup> In all cases the *prima facie* rule could be displaced if the court determines that the circumstances "have a substantially greater connection" with another place.<sup>113</sup> Just as the justification for the *lex loci* is left vague, so

<sup>102</sup> *Supra* footnote 10.

<sup>103</sup> Brennan, Dawson, Toohey, and McHugh JJ. (joint judgment).

<sup>104</sup> *Supra* footnote 10 at 39.

<sup>105</sup> Australian Law Reform Commission, Discussion Paper No. 44, 1990, *Choice of Law Rules*, para. 6.1.

<sup>106</sup> *Ibid.* at para. 8.22.

<sup>107</sup> Australian Law Reform Commission, Report No. 58, 1992, *Choice of Law*, para. 6.13.

<sup>108</sup> *Ibid.* at para. 6.59.

<sup>109</sup> *Ibid.* at para. 6.21.

<sup>110</sup> See, for example, *ibid.* at para. 6.32.

<sup>111</sup> Defined, as it is in the U.K. *Private International Law (Miscellaneous Provisions) Act 1995*, as the place of injury: Report No. 58, 1992, *supra* footnote 107 Draft Choice of Law Bill cl. 6. Defamation would be governed by the law of the plaintiff's residence.

<sup>112</sup> *Ibid.*, cl. 6(7).

<sup>113</sup> *Ibid.*, cl. 6(8).

the guidelines for application of the exception are vague. The only guidance to assessing the relevance and weight of connecting factors is a negative one.<sup>114</sup> Because the guiding principle is not identified, it would be difficult to predict how the exception would be applied.

This sketchy review of the approach of courts and law reformers in the United Kingdom and Australia indicates how different the approach of the Supreme Court of Canada is. Others seem content to adopt or propose tort choice of law rules without a clear identification of the principles, and hence policies, justifying those rules. They are also content in many cases to allow effectively unguided judicial discretion to apply a law other than the one or ones indicated by the main rule.

## II. *The Role of the lex fori*

Although *Jensen v. Tolofson* differs in method, there is an aspect of its result which is consistent with a trend in Australia and the United Kingdom: greater weight in tort choice of law should be given to the *lex loci*. This change must be at some cost to the *lex fori*. Let us compare *Jensen's* attitude to the *lex fori* with the attitudes of other courts and law reformers in light of the nature of choice of law.

A legal system could function perfectly well without choice of law rules. The tort rules of the *lex fori* are designed to resolve the dispute between the plaintiff and the defendant in the way that the forum thinks best. There is no inherent reason why the forum cannot resolve any dispute brought before it according to those rules, regardless of any foreign features the case may have. The existence of choice of law rules shows a willingness of the forum to abandon its own standards of dispositive justice in certain situations. I discussed above some of the reasons why a court might be willing to do this. The point here is that it *is* willing. The approach adopted in *Jensen* is consistent with this willingness. According to the rule in that case, if a tort has been committed outside the forum, the dispositive tort rules of the forum are irrelevant to resolution of the dispute. The matter is decided by the law of the place where the tort occurred. The attitude of the courts to tort choice of law in the cases in England, Australia, and Canada leading up to *Jensen* showed an ambivalence to the whole idea of choice of law. This ambivalence was reflected in an unjustifiably large role for the *lex fori*.

*Phillips v. Eyre* itself can be interpreted as requiring the court to apply the *lex loci*. The only exception is public policy: if some provision of the *lex loci* were repugnant to the forum's fundamental notions of justice,<sup>115</sup> or would conflict with some practical policy of the forum,<sup>116</sup> then that provision would not apply.

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<sup>114</sup> If both places are within Australia, the court in deciding whether to displace the *lex loci* is to consider, as well as connecting factors, the policies behind the laws in both places. *Ibid.* cl. 6(8)(b).) There is an implication that such policies are not relevant in an international tort.

<sup>115</sup> See discussion above.

<sup>116</sup> *Rousillon v. Rousillon* (1880), 14 Ch.D. 351 (restraint of trade) is an example of a practical forum policy in contract. It is not easy to think of one in tort.

But in *Machado v. Fontes*<sup>117</sup> the court seemed to have second thoughts about the whole idea of tort choice of law. *Phillips v. Eyre* (arguably) was turned on its head. The *lex fori* would govern subject to the minor proviso that the matter was not totally blameless by the *lex loci*.

Even though there has been a willingness to give increased importance to the *lex loci*, judges have continued to display a "homing instinct" in tort.<sup>118</sup> There is an assumption that the forum has an interest in seeing its law applied to torts decided before it. As an American judge said in a recent case, the trouble with the *lex loci* rule is that it ignores "the very substantial interests of the forum state in applying its own laws."<sup>119</sup> In the second-reading debate on the Private International Law (Miscellaneous Provisions) Bill, Lord Lester said, "this Bill proposes making the freedoms and standards of English and Scots law largely irrelevant when the tort occurred wholly or mainly overseas".<sup>120</sup> The objection denies the whole point of choice of law rules: they are about deciding when our standards *should* be irrelevant. In *Boys v. Chaplin* Lord Pearson objected to an increased role for the *lex loci*, saying that it would "prevent the English court from giving judgment in accordance with its own idea of justice."<sup>121</sup> In the same case in the Court of Appeal Lord Denning M.R. said that applying English law meant that the plaintiff got justice in that he got "fair compensation".<sup>122</sup> He is kicking against the idea of applying another system's ideas of fair compensation — surely the whole point of choice of law. It has been stated as an advantage of applying the *lex fori* that it is then unnecessary to find out what the provisions of foreign law are.<sup>123</sup> That reasoning, taken to its logical conclusion, would result in the total abandonment of choice of laws rules in favour of *lex fori*.

Further evidence of an unwillingness to surrender the role of the *lex fori* in tort disputes is seen in the Law Commission's attitude to torts committed in the United Kingdom. The Commission stated that the central thrust of its proposals was to reverse *The Halley*,<sup>124</sup> which had been interpreted as providing a dominant role for the *lex fori*.<sup>125</sup> The result was the recommendation that the *lex loci* should *prima facie* govern alone, leaving no role for the *lex fori* except through public policy intervention. However, it thought that it was not self-evidently desirable that a person who acts in England in accordance with the law of that country should be held liable there in accordance with a foreign law.<sup>126</sup>

<sup>117</sup> *Supra* footnote 9.

<sup>118</sup> P.B. Carter "Choice of Law in Tort: The Role of the *Lex Fori*", [1995] C.L.J. 38 at 41; Carter, *supra* footnote 63 at 409.

<sup>119</sup> *Hataway v. McKinley*, 830 S.W. 2d 53 at 56 (S.C. Tenn. 1992).

<sup>120</sup> H.L. Weekly Hansard vol. 559, No. 11, 6-12-94, 840.

<sup>121</sup> *Supra* footnote 4 at 405, Lord Pearson. See also Lord Wilberforce at 392.

<sup>122</sup> *Supra* footnote 58 at 24-25.

<sup>123</sup> A. Dickinson "Further Thoughts on Foreign Torts: *Boys v. Chaplin* Explained?" (Note) [1994] L.M.C.L.Q. 463 at 468.

<sup>124</sup> *Supra* footnote 61.

<sup>125</sup> Law Com 193 (1990), *supra* footnote 38 at para. 2.11.

<sup>126</sup> *Ibid.* at para. 3.16.

It recommended (seemingly inconsistently with the main recommendation) that "In respect of torts and delicts committed in the United Kingdom, the law of the relevant part of the United Kingdom applies."<sup>127</sup> An example of the consequence of the special United Kingdom-tort rule was given in the House of Lords debate.<sup>128</sup> A British power station produces emissions which cause acid rain in Norway, an act lawful by United Kingdom law but unlawful by Norwegian law. The normal rule is that the law of the place where the effect is felt governs.<sup>129</sup> But the United Kingdom exception causes United Kingdom law to apply if the conduct occurred in the United Kingdom, regardless of where the effect was felt.<sup>130</sup> The Norwegian plaintiff would have no cause of action in the United Kingdom. In the House of Lords debate on the bill to implement the Commission's proposals, it was pointed out that the United Kingdom exception would have reintroduced "the nationalistic attitude which the law commissions are otherwise seeking to obviate."<sup>131</sup> The exception was dropped. The Act expressly provides that its rules apply to torts committed abroad and within the United Kingdom alike.<sup>132</sup> This is a logical triumph for the idea of choice of law.

Having decided that tort choice of law should be governed by territoriality and the principle of comity, La Forest J. in *Jensen* firmly rejects any idea of reverting to the *lex fori* because of some idea of an interest of the forum in applying its own standards of justice. Such sentiments, he says, "simply mean that the court does not approve" of the foreign law.<sup>133</sup> Different ideas of a just solution to a tort dispute "are a concomitant of the territoriality principle".<sup>134</sup> It would not be consistent with the idea of choice of law to refuse to apply the indicated law merely because a court thinks its own is more just. A court presumably will always think its own law is most just — that is why it has been adopted as the forum's law.

Another indicator of the willingness to abandon the forum's ideas of dispositive justice as a corollary of having choice of law rules is the attitude to the distinction between procedure and substance. It is a well-known, and necessary, rule that although a court may apply the substantive law of another country, it must apply its own procedural law. Rules governing the actual conduct of the trial, including such matters as sitting times, filing of documents, and swearing of witnesses, could hardly be governed by foreign law. However, if the meaning of "procedure" is expanded to include matters other than the actual procedure of the trial, the scope of operation of the *lex causae* is reduced. One might say that the *lex loci* should be applied because of comity or because of party expectations. Whatever the rationale for the choice, it is undermined if significant parts of the *lex loci* are not applied because they are classified procedural.

<sup>127</sup> *Ibid.* at para. 4.1(6) and Draft Bill cl. 3.

<sup>128</sup> *Supra* footnote 120 at 838, Lord Lester.

<sup>129</sup> Draft Bill cl. 2(2). Law Com 193, *supra* footnote 38.

<sup>130</sup> The escape provision of cl. 2 would not have applied to U.K. torts.

<sup>131</sup> *Supra* footnote 120 at 833, Lord Mackay L.C.

<sup>132</sup> *Supra* footnote 38, s. 9(5).

<sup>133</sup> *Supra* footnote 1 at 633.

<sup>134</sup> *Ibid.* at 633.

Limitation statutes have traditionally been regarded as procedural. The result is that a time limitation on the right to sue imposed by the *lex causae* does not bar the plaintiff in the forum. But it is barred by any such provisions of the *lex fori*. In *Jensen La Forest J.* took the view that "all statutes of limitation destroy substantive rights".<sup>135</sup> Thus they should be included in the law chosen by the choice of law rule to govern substantive rights — in his scheme, the *lex loci delicti*.<sup>136</sup>

Along with an international trend to increase the role for the *lex loci*, there is a trend to restrict the definition of procedural matters, a role consistent with the nature of the choice of law process, as *La Forest J.* recognised. British legislation has abolished the common law rule that foreign limitation statutes are procedural.<sup>137</sup> Mason C.J. has mounted a strong campaign in the High Court of Australia to restrict "procedural" laws to those governing the actual conduct of the trial. He would reject the distinction between laws that bar the right and those that bar the remedy,<sup>138</sup> pointing out that barring the remedy affects the substantive outcome of the case as surely as barring the right. And all matters governing the substantive outcome should be decided by the law chosen by the choice of law rules. To do otherwise has the "undesirable consequence of frustrating the operation of choice of law rules".<sup>139</sup> Thus measure of damages should be considered substantive.<sup>140</sup> "The essence of what is procedural may be found in those rules which are directed to governing or regulating the mode or conduct of court proceedings."<sup>141</sup> He is supported by Deane J.<sup>142</sup> and by Gaudron J., who says that the expression "procedural laws" "must be confined to laws governing the institution and conduct of proceedings. ... A law as to damages, whether it is a law with respect to the heads of damages or as to the measure of damages, directly determines the legal consequences attaching to the act or event with which it is concerned and, on that account, it must be classified as substantive".<sup>143</sup>

The majority of the High Court of Australia, however, have adhered to the traditional distinction between substance and procedure. This is consistent with their reluctance to diminish the role of the *lex fori* in the choice of law rule itself. The result is that by Australian law limitation statutes barring the remedy<sup>144</sup> and laws to do with the quantification of damages<sup>145</sup> are procedural.

<sup>135</sup> *Ibid.* at 642.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Foreign Limitation Periods Act 1984*, c. 16. See *Jensen v. Tolofson*, *ibid.* at 643.

<sup>138</sup> *McKain v. R.W. Miller and Co. (S.A.) Pty. Ltd.*, *supra* footnote 10 at 22-27.

<sup>139</sup> *Ibid.* at 24.

<sup>140</sup> *Breavington v. Godleman*, *supra* footnote 31 at 79; *Stevens v. Head*, *supra* footnote 96 at 447-448.

<sup>141</sup> *McKain v. R.W. Miller and Co. (S.A.) Pty. Ltd.*, *supra* footnote 10 at 26-27.

<sup>142</sup> *McKain v. Miller*, *supra* footnote 10 at 48.

<sup>143</sup> *Stevens v. Head*, *supra* footnote 96 at 469.

<sup>144</sup> *McKain v. R.W. Miller and Co. (S.A.) Pty. Ltd.*, *supra* footnote 10 at 44.

<sup>145</sup> *Stevens v. Head*, *supra* footnote 96 at 459.

Although *Boys v. Chaplin* decided that heads of damage are a matter of substance,<sup>146</sup> the courts in England have not otherwise narrowed the field occupied by "procedure" and thus reserved to the *lex fori*.<sup>147</sup>

The law reformers in Australia and the U.K. are split on the matter of substance and procedure. The Australian Law Reform Commission is generally sympathetic to the approach of Mason C.J., now made law in Canada by *Jensen v. Tolofson*. It would treat limitation statutes as substantive.<sup>148</sup> In principle the Commission is in favour of Mason C.J.'s view that even quantification of damages should be substantive.<sup>149</sup> However, it sees practical problems in ascertaining and applying foreign rules of quantification, and so would distinguish between international and interstate torts on this matter. Heads of damages and ceilings on damages should be substantive in all cases, but quantification should be substantive in interstate matters, procedural in international ones.<sup>150</sup> This attitude of the Australian Law Reform Commission is generally consistent with its attitude to the role of the *lex fori*. It would *prima facie* make the *lex loci* alone govern. It is not in favour of the U.K. Law Commission's exception for torts committed in the forum, at least concerning interstate torts, but leaves open the question whether it should apply to international torts.<sup>151</sup>

The English Law Commission is content not to alter the rules concerning procedure and substance, including the rule that measure of damages is a question of procedure.<sup>152</sup> This willingness is inconsistent with its stated central aim, namely to abolish the rule in *The Halley* which gives the *lex fori* a prominent role.<sup>153</sup> It is also inconsistent with its central recommendation: the *lex loci* should *prima facie* govern alone. The Commission's attitude to the definition of procedure and its recommendation that the ordinary choice of law rules not apply to United Kingdom torts show an overall ambivalence to the very idea of choice of law, namely identifying criteria which will tell a court when it should abandon its own rules of decision and apply other ones. Although the Law Commission's recommendation concerning a special rule for United Kingdom torts was dropped by the Private International Law (Miscellaneous Provisions) Act,<sup>154</sup> the Act made no attempt to redefine procedure.

My comparison so far between *Jensen v. Tolofson* and legal developments in England and Australia shows that *Jensen* is unusual in its concern with principle in choice of law. It is also unusual from the point of view of another aspect of

<sup>146</sup> *Supra* footnote 4 at 379.

<sup>147</sup> *Coupland v. Arabian Gulf Petroleum Co.*, [1983] 2 All E.R. 434 at 446 (C.A.).

<sup>148</sup> Report No. 58, *supra* footnote 107, Draft Act cl. 14(b)(i).

<sup>149</sup> *Ibid.* at para. 10.45.

<sup>150</sup> *Ibid.* at para. 10.45.

<sup>151</sup> *Ibid.* at para. 6.47. The *Draft Act* does not distinguish between the law *prima facie* applicable to international torts and that applicable to interstate ones.

<sup>152</sup> Law Com. Working Paper No. 87 (1984), *supra* footnote 44 at para's 4.4 and 4.5.

<sup>153</sup> Law Com 193 (1990), *supra* footnote 38 at para. 2.11.

<sup>154</sup> *Private International Law (Miscellaneous Provisions) Act*, *supra* footnote 38, s. 9(5).

the rule of law: consistency. La Forest J. sees that the definition of procedure as opposed to substance is related to the overall attitude to the role of the *lex fori*. The removal of a role for the *lex fori*<sup>155</sup> in choice of law rules is consistent with his principle for tort choice of law, comity. It is also consistent with the idea of choice of law rules, a recognition that in some instances a court ought to decide a tort dispute by standards of justice other than its own.

### III. An Exception and its Flexibility

The other main feature of *Jensen* that I want to examine is its rejection of a flexible exception to the rule that the *lex loci* governs.<sup>156</sup> There are really two issues here. First, should there be any exceptions to the rule and second, if so, should they be flexible.

Whether there should be any exceptions to a rule itself depends on two matters. The first is whether the rule is capable of achieving its objective in all situations. The second is whether, if it is not capable of doing so, the benefits of certainty make its inefficiency in that respect acceptable.

The object of La Forest J.'s rule is comity, that is, paying respect to a state's sovereignty within its own territory by applying its law to a tort dispute where the tort occurred in the territory. La Forest J. assumes that a state will always have an interest in seeing its law apply to a tort occurring in its territory. I discussed earlier why I think that assumption is wrong, but given the judge's assumption, his decision to allow no exceptions to the rule is logical. The rule always applies the law of the place of the tort because it is always the sovereign of that place that wants its law applied.

Although I disagree with his assumption and principle, I agree with La Forest J.'s rule that the *lex loci* should govern. But in my view the controlling interests are private, not public. The chief objective should be justice to the parties, not foreign state interests as such, or the public interests of the forum. Justice to the parties is normally best served by the dispositive rules of the forum. It is only if the parties would have expected the standards of another system to govern their behaviour that it is more just to apply that system of law instead of the forum's. The principle of territoriality means that they will normally expect the standards of the place to govern, so to apply the *lex loci* usually reflects their expectations. But as I have explained elsewhere<sup>157</sup> a pre-existing relationship or physical or social isolation from the society of the territory will sometimes create an environment in which the parties will expect to be governed by other

<sup>155</sup> Except through public policy — discussed *infra*.

<sup>156</sup> La Forest J. would retain a narrow public policy discretion to apply the *lex fori* instead of the *lex loci* if warranted in an international case, *supra* footnote 1 at 630, but is sceptical of the idea in interprovincial cases at 633, 636. However, Sopinka and Major JJ. would retain the discretion in interprovincial cases as well at 648.

<sup>157</sup> Kincaid, *supra* footnote 5.

standards.<sup>158</sup> In such circumstances, the object of the choice of law rule, doing justice to the parties by giving effect to their expectations concerning governing standards, indicates that there should be exceptions to application of the *lex loci*.<sup>159</sup>

It is here that the familiar tension between justice<sup>160</sup> and certainty makes itself felt. The *lex loci* rule is precise<sup>161</sup> and reflects party expectations in, one imagines, the huge majority of cases. An exception might say, "unless it can be shown that in the circumstances the parties would not have expected [the *lex loci*] to apply". Some guidance can be given in identifying such circumstances but, because they will vary, the exception will inherently be less precise than the rule itself. The result will be less certain. Given his assumptions, La Forest J. did not have to deal with this problem. I have argued elsewhere that the circumstances where the *lex loci* will not reflect party expectations are too common to warrant ignoring them. I suggested combining the exception with an onus of proof and a further exception, so that the rule would read like this:

The law applicable to a tort is the law of the place where the tort is alleged to have occurred, unless it can be shown that in the circumstances the parties would not have expected that law to apply.

1. Circumstances which might show such a contrary expectation include the social environment in which the tort occurred and any relationship between the parties existing before the tort.
2. If the contrary intention points clearly to another law, then that law will apply. If the contrary intention points away from the law of the place of the tort, but does not point unequivocally to any other law, the law of the forum will apply.<sup>162</sup>

The certainty of the exceptions could be increased by identifying particular circumstances. For example, it might be provided that a tort between husband and wife is to be governed by the law of their residence. A tort within a tour bus, a ship, or an aeroplane, could be governed by the law of the registration. However, the variety of tort issues and of circumstances means that the notion of expectations will be forced into an unrealistic straitjacket.

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<sup>158</sup> Clarence Smith, *supra* footnote 43 at 460-461.

<sup>159</sup> Their expectations may vary from one issue, such as duty between wife and husband, to another, such as duty to other road users. But the application of choice of law rules to an issue does not necessarily require rule-selection, or an analysis of the policy of the rule. See *Boys v. Chaplin*, *supra* footnote 4 at 391. *Red Sea*, [1995] 1 A.C. 190 at 207 marks a shift away from the issue-by-issue approach. J. Blaikie "Foreign Torts and Choice of Law Flexibility" (1995) S.L.T. 23 at 25. Section 9 of the *Private International Law (Miscellaneous Provisions) Act*, *supra* footnote 38 does refer to the law for "determining issues".

<sup>160</sup> In the sense of ensuring that the result in the individual case achieves the objective of the rule. The English Law Commission calls this refinement. Law Com. Working Paper No. 87 (1984), *supra* footnote 44 at para. 4.18.

<sup>161</sup> Subject to the problem of working out where the tort occurs in cases where the act occurs in one state and the effect in another. See *infra*.

<sup>162</sup> The fall-back to the forum is because in such circumstances the only reason not to apply the dispositive rules of the forum, namely party expectations pointing to another law, is not present. See Kincaid, *supra* footnote 5.

Even if an exception is thus left flexible, it need not capitulate to total judicial discretion. There is a half-way house between a rigid, mechanically-applicable exception and unguided discretion. The exception, like any rule, can make clear its overall goal and policy, and thus enable a judge to use his or her discretion in a directed way so that the result is consistent with the purpose the law-maker had in mind. Complete certainty of application is not the only goal of the ideal of the rule of law. The ideal also requires that the result in an individual case can be seen to be the implementation of a known purpose. That suggests an exception that gives the judge the flexibility necessary to implement that purpose in a variety of circumstances (if they exist) but also one that gives the judge a clear idea of what the purpose is.

There are various attitudes to exceptions and their flexibility and degree of guidance in Australia and the United Kingdom.

The High Court of Australia is generally against exceptions. This is true of those judges who favour a rule like that in *Jensen* which applies the *lex loci* alone,<sup>163</sup> and the majority (representing the current law) who favour a rule of double liability.<sup>164</sup> The High Court cases where all this has been discussed concern torts within Australia. There is a feeling that a fixed rule without exceptions is more important within Australia than in international torts.<sup>165</sup> As Australia is one nation, uniformity of result is particularly important,<sup>166</sup> and in any case, law and custom do not vary fundamentally between states.<sup>167</sup> The uniformity argument obviously only carries weight with the minority, who favour the *lex loci* alone. Under the majority rule, the result will vary from forum to forum within Australia as the *lex fori* component varies. But certainty is thought to outweigh the need for flexibility. In any case, the lack of a clear rationale for the double liability rule would make it difficult to state the point of an exception.

This difficulty did not deter the courts in England from formulating an exception to the double-liability rule. The exception was originally formulated by Lord Wilberforce<sup>168</sup> to avoid the injustice resulting from the double actionability rule.<sup>169</sup> But the meaning of injustice was not defined. Dicey and Morris's interpretation of the exception<sup>170</sup> has been accepted.<sup>171</sup> It is that an issue will

<sup>163</sup> Mason C.J., Wilson and Gaudron JJ., and Deane J.

<sup>164</sup> *McKain v. R.W. Miller and Co. (S.A.) Pty. Ltd.*, *supra* footnote 10; *Breavington v. Godleman*, *supra* footnote 31 at 113, Brennan J. at 147, Dawson J. But Toohey J. does favour it, at 163.

<sup>165</sup> *McKain v. R.W. Miller and Co. (S.A.) Pty. Ltd.*, *ibid.* at 38. See B.R. Opeskin "Choice of Law in Torts and Limitation Statutes" (Note) (1992) 108 L.Q.R. 398 at 400.

<sup>166</sup> *Breavington v. Godleman*, *supra* footnote 31 at 88, Wilson and Gaudron JJ.

<sup>167</sup> *Ibid.* at 78-79, *per* Mason C.J.

<sup>168</sup> *Boys v. Chaplin*, *supra* footnote 4 at 391.

<sup>169</sup> Dickinson, *supra* footnote 123 at 468.

<sup>170</sup> *Supra* footnote 63, rule 203(2).

<sup>171</sup> *Red Sea Insurance Co. Ltd. v. Bouygues S.A.*, *supra* footnote 33 at 201; *Metall & Rohstoff A.G. v. Donaldson, Lufkin, & Jenrette Inc.*, *supra* footnote 54 at 440; Dickinson, *supra* footnote 123 at 465.

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", essentially the proper law by way of exception.<sup>172</sup> This is an example of an exception whose guidelines are so vague as to be meaningless. By what criteria is significance to be assessed? Is it the public policy of the forum in the shape of comity? Is it the interests of the parties, in the shape of expectations? Or is it the interests of foreign states? It was the latter which, for no clear reason, formed the ostensible basis of Lord Wilberforce's judgment. The Maltese state had no interest in the matter.<sup>173</sup> The relevance of that is not explained. Even if it were assumed, it is glib to assume further that the Maltese state has no concern with the civil consequences of accidents on its roads between foreigners.<sup>174</sup> That the exception has grown to a full, discretionary, proper law formula was confirmed by *Red Sea*.<sup>175</sup>

The law reform commissions in Australia and the United Kingdom are in agreement that the basic rule should be that the *lex loci* governs, and that there should be what is in essence a proper law exception to the general rule.<sup>176</sup> The Australian Law Reform Commission would allow departure from the *lex loci* where there is a "substantially greater connection" with another place.<sup>177</sup> The United Kingdom Law Commissions, and the Private International Law (Miscellaneous Provisions) Act, use the formula "substantially more appropriate".<sup>178</sup> In neither case are the rules or the exceptions formulated with a clear idea of the objective of the law. These rules fall short of the ideal of the rule of law in the two respects mentioned earlier. They are uncertain in that the result of their application cannot be predicted with any confidence.<sup>179</sup> If contacts are counted up, there is no guide to their relevance or weight. But worse, the meaninglessness of their formulas indicates no values or purposes of the law. The judge is left to apply his or her own.<sup>180</sup>

There are one or two other matters arising from *Jensen* that are worth mentioning. The first is the place of the tort. La Forest J. refers briefly to the problem of defining that place, and thus identifying the *lex loci*, where the act occurs in one place and the harm is suffered in another.<sup>181</sup> Which is to be considered the locus? The answer should depend, not on precedent, but upon what the principle of the rule is. Since La Forest J's principle is comity, the place of the tort should be the state which has an interest in seeing its law applied to the dispute. Is that

<sup>172</sup> A. Briggs "The Halley: Holed, but Still Afloat?" (Note) (1995) 111 L.Q.R. 18, 20.

<sup>173</sup> *Supra* footnote 4 at 392.

<sup>174</sup> Nygh, *supra* footnote 71 at 948.

<sup>175</sup> *Supra* footnote 33 at 201 and 206; see Dickinson, *supra* footnote 123 at 466.

<sup>176</sup> Blaikie, *supra* footnote 159 at 27.

<sup>177</sup> Report No. 58, *supra* footnote 107, Draft Bill cl. 6(8).

<sup>178</sup> Law Com 193 (1990), *supra* footnote 38, Draft Bill cl. 2(4); Act s. 12.

<sup>179</sup> See A.J.E. Jaffey "The Foundations of Rules for the Choice of Law" (1982) 2 Ox. J. Leg. Studs. 368, 388.

<sup>180</sup> Carter, *supra* footnote 32 at 19.

<sup>181</sup> *Supra* footnote 1 at 627-628.

the state of the act or the state of the injury? Without discussion or reason, he suggests it may be the state of injury.<sup>182</sup> This conclusion is only justified if the central concern of states is the compensation of plaintiffs. To the extent that state interest in the outcome of private tort disputes exists, it is as plausible to argue that their interest focuses on the defendant, either in protecting his freedom from unwarranted claims or in seeing that the notions of public order embodied in its tort law are applied to him.<sup>183</sup> In any case, it is not obviously warranted to assume that the attitudes of all countries will be the same. I have explained elsewhere<sup>184</sup> why I would define the place of the tort by adding the following paragraph to the rule set out above:

3. The place where a tort occurred is the place where the injury was suffered or the effect was felt, unless the defendant can demonstrate that in the circumstances he could not foresee his behaviour having an effect outside the country where it took place, in which case the tort is treated as having occurred there.

Another issue which deserves brief mention is that of characterisation. *La Forest J.*'s rule applies the *lex loci* to torts. *Jensen v. Tolofson* was in fact amalgamated with another case, *Lucas v. Gagnon*, concerning an accident in Québec between a Québec car and an Ontario car. The forum was Ontario. Part of the case concerned a suit by the Ontario driver against the Québec driver. Québec had a no-fault compensation scheme which abolished actions under the general law. This law was applied as the *lex loci*.<sup>185</sup> Tort choice of law rules, whatever form they take, are formulated with the idea in mind that particular choice of law criteria should apply to a particular class of actions. Tort choice of law rules are different from, say, contract choice of law rules. But "tort" and "contract" are not just words. They embody ideas (of the forum) as to certain sorts of relationships and legal problems. The object of the rules is not served if they are applied to a matter that was outside the concept of "tort" which was in mind when the rule was formulated. Are no-fault accident compensation schemes within the idea of tort? If not, it is not obvious that the same choice of law rule should be applied to *Lucas* as to *Jensen*. If tort is seen as a matter of distributive justice, that is of public interest, then it may be that no distinction needs to be made between no-fault schemes and laws based on fault. But if tort is thought of as a matter of corrective justice, that is of accommodating the private interests of the parties, then no-fault schemes would seem to lie outside that idea.<sup>186</sup> Thus tort choice of law rules that used the *lex loci* as the *prima facie*

<sup>182</sup> *Ibid.* at 627. This is the definition favoured by the Australian Law Reform Commission (Report No. 58, 1992, Draft Bill, cl. 6(3) and (4)) and the English Law Commission (Law Com 193 (1990), Draft Bill, cl. 2(1) and (2)).

<sup>183</sup> For jurisdictional purposes, a tort is treated as taking place where in substance it occurred, which usually means where the act complained of occurred. *Distillers Co. (Biochemicals) Ltd. v. Thompson*, [1971] A.C. 458. This rule was recently applied to choice of law in *Metall & Rohstoff A.G. v. Donaldson, Lufkin, & Jenrette Inc.*, *supra* footnote 54 at 446.

<sup>184</sup> Kincaid, *supra* footnote 5.

<sup>185</sup> The facts of *Breavington v. Godleman*, *supra* footnote 31 were similar and produced a similar result.

<sup>186</sup> Englard, *supra* footnote 17 at 13, citing Ernest Weinrib.

rule because it usually reflects party interests might well apply a different rule to an issue concerning the right to claim under a no-fault scheme.<sup>187</sup> The fact of insurance, even in fault-based systems, is seldom mentioned in tort choice of law. But arguably if both parties are insured, the philosophical idea of corrective justice is not applicable, and the matter should not be characterised as a tort.<sup>188</sup> The orthodox view is that the defendant's contract with an insurer has no bearing on his liability to the plaintiff.<sup>189</sup>

### *Conclusion*

*Jensen v. Tofofon* stands apart from other approaches to tort choice of law in Canada, England, and Australia. Its focus on articulated principle, on consistency of approach to choice of law, and on certainty of the rules demonstrates a concern with the rule of rational law that other courts and law reformers have not demonstrated.

In my view, however, the principle of the case is wrong. Choice of law rules exist to further forum policy, not to implement public international law. Forum policy in tort is primarily doing justice to the parties by balancing their interests. Public interests are secondary. They include comity, that is, good relations with other states. Demonstrated potential damage to forum public interests may occasionally warrant overriding private interests. But is implausible that the non-application of a state's tort law in a foreign court can affect international relations.

The principle on which tort choice of law rules should be based is party expectations as to the standards governing them before the tort. Usually their expectations will point to the *lex loci*, which should *prima facie* govern. For a different reason, *La Forest J.* arrived at the same conclusion. The principle of expectations, however, will require exceptions where the circumstances clearly show that the parties would have expected to be governed by other standards.

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<sup>187</sup> Of course in *Lucas v. Gagnon* the claim was in tort. The Québec no-fault scheme was used as a defence, not as a basis of compensation.

<sup>188</sup> England, *supra* footnote 17 at 52.

<sup>189</sup> *Boys v. Chaplin*, *supra* footnote 58 at 45, Diplock L.J.