In its 1994 decision in Tolofson v. Jensen, the Supreme Court rejected the forum law bias inherent in the traditional common law approach to choice of law in tort. Under the new rule, the law of the place of the tort is paramount. Although nobody regrets the demise of the traditional rule, the new predominance of territorial contacts has attracted criticism as reminiscent of discredited 'vested rights' thinking. This article is a response to that criticism, and a defence of the emphasis on private and public international values implicit in a territorial theory of choice of law. The author begins by examining the changes in the substantive tort law environment that created pressures for reform at the choice of law level. She then considers developments in other common law jurisdictions, finding the Supreme Court's 'neo-territoriality' to be consonant with significant currents of reformist thinking in the United States and Australia. Finally, she analyses the implications of a territorial approach to choice of law in products liability claims. She concludes that the place where the defective product is distributed and causes injury has the predominant territorial nexus for choice of law purposes, and that that law should be applied even if the law of the place where the defective product was designed and manufactured is more favourable to recovery. Territorial analysis does not, however, foreclose a more open-ended choice of law resolution in cases where the place of injury or the residence of the victim do not coincide with the place of distribution of the product, and the victim had no direct or indirect relationship with the transaction through which the product entered the market.

Dans sa décision de 1994, dans Tolofson c. Jensen, la Cour suprême a rejeté le préjugé favorable à la loi du for qui était inhérent à l'approche traditionnelle de la common law sur les conflits de lois en responsabilité délictuelle. Selon la nouvelle règle, c'est la loi du lieu du délit qui est suprême. Bien que personne ne regrette la disparition de la règle traditionnelle, des critiques se sont fait entendre sur la nouvelle prédominance accordée au lien territorial, vu comme une réminiscence d'une philosophie de «droits acquis», maintenant discréditée. Cet article répond à ces critiques; il défend l'accent mis sur les valeurs du droit international privé et public qui sont implicites dans une théorie des conflits de lois axée sur la territorialité.

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D'abord l'auteure examine les changements survenus dans l'environnement du droit matériel de la responsabilité délictuelle, qui ont fait pression pour une réforme au niveau de la règle de conflit de lois. Elle considère ensuite les développements survenus dans d'autres pays de common law et elle observe que la «néo-territorialité» de la Cour suprême du Canada est en harmonie avec des tendances significatives dans la façon de penser existant aux États-Unis et en Australie. Enfin, elle analyse les implications d'une approche territoriale dans les conflits de lois en matière de responsabilité du fait des produits.

L'auteure conclut que le lieu où le produit défectueux est distribué et où il cause un préjudice possède le lien territorial prépondérant pour les fins du choix de la loi applicable, et que c'est la loi de ce lieu qui devrait s'appliquer même si le droit du lieu où le produit a été conçu et fabriqué est plus favorable à l'indemnisation de la victime. Toutefois, l'analyse territoriale n'exclut pas une certaine souplesse dans la détermination de la loi applicable dans le cas où le lieu de survenance du préjudice ou de résidence de la victime ne coïncide pas avec le lieu de distribution du produit, ainsi que dans le cas où la victime n'avait pas de lien direct ou indirect avec la transaction qui a permis au produit d'entrer sur le marché.

Introduction .................................................................................................. 93
I. The Resurgence of Territorial Analysis in Choice of Law in Tort .......................................................... 100
(a) Explaining the tenacity of the traditional lex fori rule .......................................................... 100
(b) Pressures for reform ............................................................................................................. 102
(c) Territoriality, federalism and concepts of state sovereignty .................................................. 103
(d) The resurgence of territoriality in choice of law in tort ......................................................... 108
(e) The common residence exception and localizing ‘relational’ torts ........................................ 111
II. Choice of Law in Products Liability Claims .................................................................................. 114
(a) Localizing the tort in products liability claims: place of distribution of the product and resulting injury .............................................................................................................. 114
(b) An alternative reference to the manufacturer’s home law? .................................................... 117
(c) A public policy exception for dangerously defective products? .............................................. 123
(d) Choice of law in geographically-dispersed fact patterns: contact-counting, plaintiff-choice or ‘real and substantial connection’? ........................................................................ 125

Conclusion .......................................................................................................................... 129

"[T]he common idea that the local law should be preferred in cases of doubt, is essentially a corollary of the local policy doctrine; it is evidently a counsel of despair, which should be ignored in formulating the policies of conflicts law... [The local law theory]... lends comfort to the narrow minded, who may be inclined to deprecate the practical and equitable consequences that should control the adjudication of conflicts cases in favour of exaggerated local policy
on the ground that they and the sovereign which they represent can do as they please. This view... is at the end a shallow and even brutal philosophy, namely, that law is power.¹

Introduction

Canadian news continues to be much preoccupied with the Helms-Burton Act² signed into law by United States President Clinton on 12 March 1996. Entitled the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995, the aim of the legislation is to force political and economic change in Cuba by penalizing foreign nationals who do business in that country.³ Under Title III, United States nationals whose Cuban properties were confiscated by the Castro government in 1959 are authorized to bring suit for compensation against any third party national who “traffics” in those properties.⁴ Under Title IV, the State Department is empowered to bar “traffickers” from entry into the United States, with “trafficker” defined broadly to include senior corporate executives, controlling shareholders and their spouses and minor dependents.⁵

Reaction to the United States initiative has been sharply critical from the outset. The Act is seen as an excessive extraterritorial assertion of United States domestic policy, antithetical to customary international law and violative of the

⁴ Title III was to have taken effect on 1 Aug 1996, but the Act authorizes the United States President to suspend its effectiveness for successive periods of up to six months by certifying to Congress that the suspension is in the national interest and will expedite a “transition to democracy” in Cuba. President Clinton exercised his suspension power on 16 July 1996 and again on 3 Jan 1997 for successive six month periods. See “Clinton’s Cuba move criticized as both too harsh and too soft” CP-AP, Ottawa (4 Jan 1997).
⁵ Title IV is in effect. Thusfar, executives (and their families) of only one Canadian company (Sherritt International) have been advised that they are barred from entry to the United States. A Mexican holding company also has been targeted. See V. Lawton, “Sherritt insists it’s taking moral high road in Cuba” CP, Toronto (24 Feb 1997); L. Eggertson, “Sherritt releases names of VPs that U.S. to ban” The [Toronto] Globe and Mail (18 March 1997).
United States commitment to its trading partners. Canada has been a particularly outspoken opponent, retaliating with "blocking legislation" barring the enforcement of Helms-Burton judgments in Canada, and "claw-back legislation" entitling Canadians to claim amounts recovered against them under Helms Burton in the United States in proceedings in Canada against the local subsidiaries of United States companies.

The Helms-Burton controversy affords a dramatic example of an issue germane to this paper: the appropriate allocation of law-making authority among sovereign states. The resolution of that problem is a function of time and context. But the strong condemnation of Helms-Burton suggests that there continues to be little tolerance in today's world for the aggressive extraterritorial assertion of domestic policy. With global economic integration proceeding apace, such opposition may seem paradoxical. After all, economic integration is thought to be transforming classical notions of the inviolability of state sovereignty and territorial jurisdiction. But the modern pooling and transfer of sovereign power has occurred volitionally, through the conclusion of rules-based bilateral and multilateral conventions. Because the unilateral assertion of extraterritorial authority threatens to undermine confidence in the always fragile process of consensus-building, it must attract opposition.

The Supreme Court's recent revolutionary jurisprudence in the private international law field reflects a like commitment to traditional principles of

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6 The Inter-American Juridical Committee has concluded, not unexpectedly, that the Helms-Burton Act "does not conform to international law." See (1996) 35 International Legal Materials 1322. See also Lowenfield supra footnote 3 at 430-432. The United States government's official justification for Title III, as stated in the Helms-Burton Act itself, rests on a combination of the controversial "effects" and "passive personality" bases of international prescriptive jurisdiction: "Sec. 301 (9). International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory. (10) the United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies."

7 Mexico and the European Community also expressed strong opposition to the Helms-Burton legislation, with the latter having initially asked the World Trade Organization (WTO) to rule that the measure violates international trade rules. But in April 1997 the EU and the United States agreed to suspend some provisions of Helms-Burton in exchange for the EU withdrawing its WTO complaint. See Robert Russo, "Sign anti-Cuba agreement or else, U.S. official warns Canada" CP, Washington (16 April 1997).


sovereign equality and territorially-restrained jurisdiction. The Court’s reform initiatives began with a liberalization of the protectionist nineteenth century common law rules on the recognition of extra-provincial judgments. Writing for the Court in *Morguard Investments Ltd. v. De Savoye* and *Hunt v. T&N P1c*, La Forest G. ruled that Canadian courts were obligated constitutionally to give “full faith and credit” to sister province default judgments where there is a “real and substantial connection” between the subject matter of the litigation and the judgment forum. At the international level, comity compelled a similar expansion, albeit as a matter of common law doctrine rather than constitutional imperative.

10 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T & N P1c*, [1993] 4 S.C.R. 289; *Tolofson v. Jensen, Gagnon v. Lucas*, [1994] 3 S.C.R. 1022. The themes developed in these three cases were presaged by the Court’s earlier decision in *R. v. Libman*, [1985] 2 S.C.R. 178 on the territorial limits of Canadian criminal law jurisdiction. All four decisions were the product of one justice, La Forest G., and some question the stability of a line of Supreme Court jurisprudence uttered in so singular a voice. Certainly, Sopinka J.’s reasoning on behalf of the Court in *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897 does not fit comfortably within the *Morguard/Hunt/Tolofson* trilogy. In that case, Sopinka J. addressed the availability of anti-suit injunctions to restrain litigation abroad, and the relationship between the exercise of that power and the doctrine of *forum non conveniens*. In relation to the latter doctrine, Sopinka J. used the terminology of “real and substantial connection,” the test adopted by La Forest G. in *Morguard* to delineate the territorial basis of subject matter jurisdiction over a foreign defendant. In so doing, he may have contributed to the continuing doctrinal confusion seen in some of the lower court decisions (infra footnote 17) between the question of whether jurisdiction is available in the first instance, and the second-level question of whether, if jurisdiction exists, the court should exercise its discretion to decline jurisdiction on the basis of *forum non conveniens*.

11 English common law accepts only two bases of ‘international’ jurisdiction for the purposes of enforcing a foreign judgment: (1) residence and possibly physical presence of the defendant within the territorial limits of the foreign jurisdiction at the time process is served; (2) the defendant’s consent or submission to the exercise of jurisdiction by the foreign court. See P.M. North and J.J. Fawcett, *Cheshire and North’s Private International Law*, 12th ed. (London: Butterworths, 1992) at 348 ff. Prior to *Morguard and Hunt*, supra footnote 10, these rules were applied by the courts in common law Canada to both sister province and foreign country judgments.

12 *Supra* footnote 10.

13 The use of the term “full faith and credit” in this context will be familiar to Australian and United States lawyers whose Constitutions contain an express full faith and credit clause. See s. 118 of the Australian Constitution and art. IV. s. 1 of the United States Constitution. But Canadian constitutional documents lack any comparable written directive. This did not deter La Forest G. He regarded the obligation as inherent in the very nature of Canadian federalism, in the intention to create a national market for the free flow of persons, goods, and by implication, judgments. On the origin of the term “real and substantial connection,” see infra footnote 17.

The Court's decisions in Morguard and Hunt are equally significant for the territorial limits they recognize on the adjudicatory jurisdiction of Canadian courts. Over the last several decades, the statutory service *ex juris* rules in the common law provinces have been expanded to the point where no connection with the forum, or only the most tenuous connection, is sufficient. In Morguard and Hunt, La Forest G. confirmed that the exercise of 'long-arm jurisdiction' under these rules is subject to the territorial limits imposed on provincial legislative authority by the Canadian Constitution. Although there had been some prior recognition of this, no general standard for territorially-competent adjudicatory jurisdiction had been articulated. In the wake of Morguard and Hunt, it is clear that "[i]n Canada, a court may exercise jurisdiction only if it has a 'real and substantial connection' (a term not yet fully defined) with the subject matter of the litigation." The territorial limits of domestic and foreign court jurisdiction, in other words, are now seen as coterminous.

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15 For instance, the Rules of Court in several provinces authorize service *ex juris* in the case of a claim for damage sustained in the province arising from a tort "wherever committed" (e.g., Ontario Rule 17.02(h), New Brunswick Rule 19.01(i), Manitoba Rule 17(02)(h)). This wording has been interpreted to support the exercise of jurisdiction by the courts in the plaintiff's home province over an out-of-province defendant in respect of an out-of-province accident on the theory that an accident victim continues to suffer pain, suffering and fiscal loss on returning home. The seminal decision in this unhappy line of authority is *Vile v. Von Wendt* (1979), 103 D.L.R. (3d) 356 (Ont. Div. Ct.). This is equivalent to saying that the plaintiff's residence in the forum is a sufficient basis for the exercise of jurisdiction over a foreign defendant, a proposition that cannot stand in the wake of Morguard and Hunt: see further infra footnote 17.

16 The territorial limit on the reach of provincial legislative power over property and civil rights is reflected in the use of the attenuating words "in the Province" in s. 92(13) of *The Constitution Act, 1867*. See P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 13-14: "[I]n a federal system it is obvious that a province, whose government is elected by and responsible to only those people with its territory, should not have extensive powers outside its territory where other provincial governments have a better claim to govern. It is not surprising to find, therefore, that the Constitution Act, 1867 couches provincial legislative power in terms which rather plainly impose a territorial limitation on the scope of the power."

In its 1994 decision in *Tolofson v. Jensen*, the Court turned its attention to the controversial question of choice of law in tort, the focus of this article. The prevailing doctrine in common law Canada rested on what easily qualifies as the most criticized choice of law rule ever to have been devised in private international law. Under the rule in *Phillips v. Eyre*, formulated by Willes J. in England in 1870, the substantive law to be applied was the *lex fori* provided that the defendant's act was non-justifiable where it was done.

In *Tolofson*, the Court decisively rejected the *lex fori* orientation of the traditional approach, replacing it with a forum-neutral choice of law rule in which territorial contacts dominate. Indeed, in the interprovincial context, the law of the place of the tort now applies exclusively. And while some room was conceded for the operation of a public policy exception to the *lex loci delicti* rule at the international level, it was thought that such cases would be rare.

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18 *Supra* footnote 10.


20 (1870), L.R. 6 Q.B. 1. Until the recent enactment of a new civil code, the rule in *Phillips v. Eyre* also formed part of Quebec civil law: McLean v. Pettigrew, [1945] S.C.R. 62. See now, Art. 3126 C.C.Q. adopting the *lex loci delicti* as the general choice of law rule, subject to exceptions, including a common residence exception (proviso to art. 3126, *infra* footnote 90) and an alternative reference rule in products liability claims (art. 3128, *infra* footnote 119).

21 Under the first part of the rule, in order to sue for a tort committed abroad, the plaintiff had to show that the “wrong” was “of such a character that it would have been actionable if committed” within the forum. *Phillips v. Eyre*, *supra* footnote 20 at 28-29. Under the second part of the rule, the law of the place where the defendant acted also had a role to play: the defendant’s “act must not have been justifiable where it was done.” *Ibid.* However, that role was interpreted so as to make the *lex fori* the governing law once non-justifiability under the place of acting was shown: McLean v. Pettigrew, *supra* footnote 20 (adapting the reasoning in Machado v. Fontes, [1897] 2 W.B. 231 (C.A.)). The facts of *McLean v. Pettigrew* demonstrate the ease with which the requirement for non-justifiability under the *lex delicti* could be satisfied in motor vehicle accident claims. A Quebec plaintiff sued a Quebec defendant in the Quebec courts for personal injury suffered in an accident that occurred in Ontario. The plaintiff had been riding as a gratuitous passenger in the defendant’s vehicle at the time of the accident and Ontario’s notorious ‘guest-host’ statute barred recovery. However, under the Ontario *Highway Traffic Act*, RSO 1937, c. 288, s. 47, careless driving constituted a punishable offence. For the Supreme Court, this was enough to say that the defendant’s conduct was non-justifiable under the *lex delicti* notwithstanding that the defendant had been charged and acquitted of an offence under the Ontario Act.

As in *Morguard* and *Hunt*, traditional public and private international law values dominated La Forest G.'s reasoning.\(^{23}\) In resolving choice of law problems, he stressed, a court is not concerned with "interest balancing" in the substantive tort law sense, but with the "structural problem" of allocating law making authority among territorially-defined sovereigns.\(^{24}\) From the general international law principle that a state has exclusive law making authority within its own territory, La Forest G. regarded it as axiomatic "that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti.*"\(^{25}\) The theoretical arguments favouring a territorial principle also responded to traditional conflicts values ("certainty," "predictability," interjurisdictional "harmony" of result, the facilitation of transnational commerce, respect for "well grounded legal expectations"), values which he thought should be given primary emphasis in a global economic order if chaos were to be avoided.\(^{26}\) Within the Canadian federal system, La Forest G. thought that much the same approach should apply with one significant caveat. In the case of an interprovincial tort claim, "constitutional imperatives and other structural elements" made interjurisdictional harmony of result more desirable and more feasible so as to justify an exclusive *lex loci delicti* rule.\(^{27}\)

Although no one questions that reform was overdue, the general reaction of Canadian commentators to the new centrality of territorial connections in choice of law for tort has been largely critical.\(^{28}\) The focus of the criticism is La Forest G.'s methodology, his avowed preference for classic 'one-law-selecting' choice of law rules directed at the identification of a single comprehensive governing law and premised on a philosophy of co-equal territorial sovereignty.\(^{29}\)

\(^{23}\) The connection to the Court's prior jurisprudence was acknowledged by La Forest G.: "All of this is simply an application to 'choice of law' of the principles enunciated in relation to recognition and enforcement of judgments in *Morguard...*" (Tolofson, supra footnote 10 at 1048).

\(^{24}\) *Ibid.* at 1046-47.


\(^{26}\) *Ibid.* at 1050-51. And see *infra* footnote 29.

\(^{27}\) *Ibid.* at 1048. And see *supra* footnote 22.


\(^{29}\) By a "one-law-selecting" choice of law rule, I mean a classic multilateral choice of law rule that seeks to identify one particular set of provincial or state laws to apply to an actor's conduct. Westbrook uses the term "one-law" values to denote the values that traditional conflicts doctrine, by generating rules that create a reliable expectation about the applicable law, seeks to vindicate: (1) fairness to regulatees who might otherwise feel required to conform their conduct to more than one set of possibly inconsistent laws; (2) the production of conduct that is lawful by the laws of at least one state; (3) the facilitation of transnational commerce and enterprise and the lowering of the transactions costs of such activities. See J. Westbrook, "Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business" (1990) 25 Texas Int'l L. J. 72 at 79-81.
For his critics, La Forest G.'s approach is reminiscent of mechanical "vested rights" thinking, long ago discredited by "local law" theorists in favour of a unilateralist perspective in which the overriding goal is the achievement of substantive tort justice between the litigants, not the abstract allocation of law-making power among sovereigns.30

A related line of criticism accepts the Court's premise that choice of law engages issues of state sovereignty as well as private justice. But it is argued that state sovereignty requires tolerance for diversity as much in conflicts cases as in wholly domestic cases and as much within federations as internationally. From this perspective, La Forest G.'s emphasis on forum-neutral adjudication and deference to foreign territorial sovereignty is seen as negating the values of pluralism and diversity on which sovereignty is premised.

Conflicts theories are essentially cyclical31 and the fact that a once pervasive way of thinking has lost intellectual currency over time is not enough to condemn its revival. It may simply signal the end of one era and the beginning of another with the bright line distinctions that typify such transition points. Tolofson represents precisely such a transition point,32 and it is the thesis of this article that it is a welcome one.

Part I begins with a review of the reasons for the extraordinary tenacity of the traditional lex fori rule in Canadian law and the changes in the surrounding tort law environment that eventually created pressure for reform. I then analyse

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30 The vested rights theorists believed that a legal right 'vests' when and where the last event necessary to create the right occurs. In Tolofson, La Forest G. endorsed a passage from Phillips v. Eyre (supra footnote 20) that has always been accepted as a classic expression of the vested rights theory: "[C]ivil liability arising out of the wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law." La Forest then went on to say: "In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences." (supra footnote 10 at 1050). Such is the thoroughness with which the territorial principle that underpinned vested rights thinking is thought to have been discredited over the last sixty years that critics of Tolofson regard its territorial approach as a sufficient ground of criticism in itself. The point is captured in John Swan's comment: "A judgment written in 1994 that adopts so unequivocally the vested rights theory of conflict is so unexpected that one could not be more surprised than if we had come across a practising alchemist: What can one possibly say?" (supra footnote 28 at 948). Legal realism is widely acknowledged to be the impetus behind the rejection of vested rights theory in favour of a result-oriented jurisprudence under which the advancement of local policies and local concepts of justice guides choice of law adjudication in the same way as it does other categories of domestic adjudication. For a recent re-evaluation of the logical entailments of the realist vision for choice of law, see M.S. Green, "Legal Realism, Lex Fori and the Choice-of-Law Revolution" (1995) 104 Yale L.J. 967.


32 The reader will be appreciative that I have avoided the term "paradigm shift" (although this is in fact what Tolofson represents).
the criticisms advanced against Tolofson in light of developments in other common law jurisdictions, concluding that the Supreme Court’s territorial orientation is consonant with significant currents of reformist thinking in the United States and Australia. Part II takes the analysis to a more concrete level and examines the implications of the Court’s *lex loci delicti* rule in products liability claims, a particularly fertile source of choice of law problems.\textsuperscript{33}

I. The Resurgence of Territorial Analysis in Choice of Law in Tort

(a) Explaining the tenacity of the traditional *lex fori* rule

A choice of law rule that directs the court to apply its own law is a choice of law rule in name only. Therein lies the principal source of the criticisms of *Phillips v. Eyre*.\textsuperscript{34} In giving a controlling effect to the *lex fori*, the rule not only reflected a parochial attitude, it abdicated the choice of law decision to the plaintiff with whom the choice of forum rests.

Legal rules that lack widespread respect rarely survive long. How then did *Phillips v. Eyre* endure so long in Canadian law? A large part of the reason must be attributed to the fact that most of the torts cases in which the potential for choice of law issues arose involved personal injury claims arising out of motor vehicle accidents. This is an area in which, until recently, the legal regimes governing liability and compensation were largely uniform throughout Canada and, indeed, North America. Where substantive differences existed, the conflict typically involved an ‘anachronistic’ rule, e.g., a drastically attenuated limitations period or a statute barring recovery or raising the standard of care in actions by a gratuitous passenger against the ‘host’ driver. In a climate in which the compensation and loss-distribution functions of tort law increasingly dominated, the pro-plaintiff pro-recovery bias inherent in the traditional choice of law rule was consonant with prevailing standards of substantive tort justice. The ‘better’ more ‘progressive’ law could be applied.

Insurance considerations also played a significant role. The defendant’s fiscal interests were protected by the near universal enactment of compulsory liability insurance laws covering automobile accidents anywhere in the United States or Canada. The pro-recovery bias inherent in the application of the *lex fori* thus also served to further the loss-distribution objectives of compulsory insurance without inflicting any practical hardship on the defendant against whose interests it operated.

\textsuperscript{33} Substantial variations in theories of enterprise liability in tort and delict from one state to the next have prevented the emergence of international or even national agreement on the optimal products liability regime. Notable exceptions are the *European Directive on Products Liability* (Strasbourg, 1973) and the federal products liability regime recently incorporated into Australian law as Part VA (ss. 75AA-75AS) of the *Trade Practices Act* 1974 (Cth.) (commenced 9 July 1992). Even in these two cases, however, member state variations have not been eliminated entirely.

\textsuperscript{34} *Supra* footnote 20.
No doubt for these same ultimately pragmatic reasons, the *lex fori* orientation of the traditional Canadian rule was also compatible with the results reached under the 'modern' conflicts theories in ascendance in the United States. True, the United States courts had early on rejected the rule in *Phillips v. Eyre* as parochial in the extreme, replacing it with a strict *lex loci delicti* rule. But the vested rights theory on which the *lex loci delicti* rule was based eventually gave way in the scholarship, and then in the decisional law of the leading states, to a variety of realist-inspired result-sensitive approaches in which traditional conflicts values were subordinated to the forum policy of compensation for injury. While the new theories varied in their intellectual orientation, the results achieved reflected the same 'homeward trend' as the *Phillips v. Eyre* formula.

Indeed, one might argue that the "mechanical jurisprudence" produced by the Canadian courts under *Phillips v. Eyre* was to be preferred for its efficiency advantages. The new United States approaches shared a common antipathy to broad brush "one-law-selecting" choice of law rules and a common preference for open-ended instrumentalist analysis. As such, they tended to be labour-intensive, requiring detailed *ad hoc* issue-by-issue justification for the choice of law resolution in each case.

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35 E.g., *Alabama Great Southern Railroad v. Carroll*, 97 Ala. 126, 11 So. 803 (1892). The *lex loci delicti* rule was incorporated into §378 of the (first) *Restatement of the Law of Conflicts of Laws* (1934).

36 E.g. Westbrook, *supra* footnote 29 at 78. And see *supra* footnote 30. For two highly readable and comprehensive accounts of the United States 'conflicts revolution' against the perceived rigidity and injustice of vested rights thinking, see the recent monographs by Brilmayer and Juenger *supra* footnote 31.

37 See, e.g., F.K. Juengi, "An International Transaction in the American Conflict of Laws" (1992) 7 Fla. J. Int'l L. 383 at 396-7 (footnotes omitted): "[T]he large majority [of state supreme courts have] adopted one of three modern methodologies, or a mixture thereof: 1. Interest analysis; 2. The Second Restatement; 3. Leflar's choice influencing considerations. As a statistical analysis has demonstrated, in practised application the differences between these approaches are not great. All three of them favour application of the *lex fori*, and since counsel who charge contingent fees rarely sue in a jurisdiction whose law is unfavourable to their clients' causes, the plaintiff tends to win. In a few instances when courts do apply foreign law, they usually opt for a sounder sister state rule in preference to a substandard *lex fori*. Since most of the substantive rules that used to cause conflicts problems — guest statutes, intrafamily immunities and arbitrary monetary ceilings on wrongful death recovery — were substandard, the better foreign rule, again, usually favoured the victim."

38 This term is defined *supra* footnote 29.

39 *Ad hoc* result-oriented analysis, by its very nature, is also particularly resistant to accommodating concerns with 'comity.' See J.P. Trachtman, "Reflections on the Nature of the State: Sovereignty, Power and Responsibility" (1994) 20 Canada–United States L.J. 399 at 410-11 (arguing that if the rules allocating prescriptive jurisdiction are predictable, transparent and easily administered, they minimize transactions costs by facilitating "market agreements" that reallocate authority to another state, with "market agreements" conceived to include other-sensitive practices such as "comity"; conversely, unpredictable, result-oriented rules, or those that depend on an analysis of forum policy that has not yet been undertaken, by reducing the ability of states to predict what other states will do, also reduce the ability of states to arrive at such "exchanges".)
(b) *Pressures for reform*

The substantial uniformity in tort legal policy among the Canadian provinces on which the stability of the traditional *lex fori* rule was premised changed radically with the emergence of statutory no-fault compensation regimes for personal injury suffered in automobile accidents. In most provinces, these took the form of "partial" or "add-on" schemes in which first party insurance benefits were made available to accident victims complementary to the tort liability 'system.' But in 1978, the province of Quebec instituted a 'pure' no-fault regime displacing civil recovery and liability altogether for accidents occurring within the province.40 Visitors and residents alike were instead limited to a tariff of statutorily-prescribed benefits. The level of compensation available was more limited than what would be recoverable in an action in tort, particularly in the realms of general damages for pain and suffering and pecuniary damages for future loss of wages. Quebec motorists were still required to carry liability coverage for out-of-province travel and could sue and be sued before the courts in the jurisdiction where the accident occurred. But within Quebec 'first party' insurance principles prevailed.

In this new climate, it was no longer possible for the courts to maintain a plaintiff and forum bias in choice of law in tort.41 Two different reparations philosophies were now potentially in direct conflict and one could not be said to constitute the 'better,' more 'progressive' law. Minimally, this required the exercise of greater self-restraint in the application of the *lex fori* and a correspondingly more respectful stance towards territorial connections.

40 *Automobile Insurance Act*, S.Q. 1977, c. 68, R.S.Q. 1977, c. A-25. For a review and analysis of the conflicts features and implications of the Quebec plan, see C. Walsh, "A Stranger in the Promised Land: The Non-Resident Accident Victim and the Quebec No-Fault Plan" (1988) 37 U.N.B.L.J. 173. The Ontario legislature subsequently introduced a modified no-fault insurance plan, under which insured victims lost their right to sue civilly for personal injury suffered in an automobile accident in exchange for first party benefits from their own insurers regardless of fault unless their injuries surpassed the statutory threshold established by the Act. See *Insurance Act* R.S.O. 1990, c. I.8, s. 266. Pure no-fault regimes were introduced in Manitoba and Saskatchewan effective March 1, 1994. All other Canadian jurisdictions, with the exception of Alberta, one or two Atlantic provinces and the Territories, are expected to implement no-fault in the near future or already have enacted significant tort reforms. See Barry L. Gorlick, "No-Fault Insurance Update" (1997) 13.2 Solicitor's Journal 21. For a post-*Tolofson* judicial analysis of the conflicts features of the Ontario plan, see *Hurst v. Leimer* (1995), 26 O.R. (3d) 760 (Gen.Div.) (s. 266 should not be interpreted to bar a tort claim under the *lex loci delicti* for injuries suffered in an accident outside Ontario where the Ontario victim is not within the scope of coverage of the Ontario no-fault plan in the particular circumstances); *Orfanakos v. Ingoglia* (1995), 22 O.R. (3d) 167 (Gen. Div.) (where s. 266 limits the insured to a no-fault claim, the insured cannot claim tort damages from its own insurer under the uninsured motorist endorsement just because the accident occurred in a tort liability jurisdiction).

41 As La Forest G. observed in *Tolofson* (supra footnote 10 at 1044), the "fundamental weaknesses" in the *Phillips v. Eyre* formula, began to be revealed in a series of Ontario cases beginning in the 1980s in which the victims of Quebec accidents attempted to 'top up' their 'no-fault' benefits by bringing a tort action in Ontario.
Territoriality, federalism and concepts of state sovereignty

In speculating about the outcome in Tolofson, some Canadian conflicts scholars predicted that the law of the place of the tort would play a larger role, indeed that it might become the general rule if only "to retain at least the appearance of reasonable predictability." What nobody anticipated was that the new predominance of territorial over personal contacts would not be tempered by some sort of "flexible exception." Thus, there was wide-spread surprise, even shock, when the Court ruled that the lex loci delicti governed exclusively in the case of interprovincial torts.

La Forest G. justified an unqualified lex loci delicti rule for interprovincial conflicts on the heightened significance within federal systems of the classic conflicts values of certainty and interjurisdictional harmony of result:

The nature of our constitutional arrangements — a single country with different provinces exercising territorial jurisdiction — would seem to me to support a rule that is certain and that ensures that an act committed in one part of the country will be given the same legal effect throughout the country. This militates strongly in favour of the lex loci delicti rule.

A territorial approach to choice of law in tort also had the advantage of "unquestionable conformity" with the territorial limits on provincial legislative power over property and civil rights imposed by the Canadian Constitution. Assuming that the constitution limits the extraterritorial application of forum

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42 Tolofson v. Jensen, Lucas v. Gagnon, supra footnote 10. Tolofson involved an action in British Columbia arising out of a two-vehicle accident in Saskatchewan. The plaintiff was a resident of British Columbia. So was the first defendant, his father, the driver of the vehicle in which the plaintiff was a passenger when injured. The second defendant, the driver of the other vehicle, was from Saskatchewan. Saskatchewan tort law imposed two limits on recovery: (1) in guest-host situations, the passenger had to establish "wilful or wanton negligence" on the part of the driver; (2) a one year limitation period for motor vehicle accidents. Lucas raised a more 'modern' conflicts dilemma. An Ontario passenger sued his driver, also an Ontario resident, for injuries sustained in an accident in Quebec. The Ontario defendant cross-claimed for contribution and indemnity against the Quebec driver of the other vehicle involved in the accident. At issue was whether Quebec's no-fault law (supra footnote 40) precluded recovery by the plaintiff against the defendant, and by the Ontario defendant against the Quebec respondent on the cross-claim, under Ontario tort and contribution principles respectively.


44 Ibid. (Blom).

45 supra footnote 22.

46 Tolofson, supra footnote 10 at 1064.

47 Ibid. at 1065.

48 On the constitutional basis for the territorial limits on provincial legislative authority, see supra footnote 16.
law via forum choice of law rules, it followed that an attempt by the courts in one province to impose liability under forum tort law in relation to activities taking place wholly in another province and involving out-of-province parties would give rise to "serious constitutional concerns." A \textit{lex fori} exception to the application of the \textit{lex loci delicti} premised on the common residence of the parties within the forum had some "promise" of constitutional validity. However, if both the \textit{lex loci delicti} and the law of the common residence of the parties were capable as a constitutional matter of applying in such cases, this would "open the possibility of conflicting rules in respect of the same incident." In the result, La Forest G. thought it best not to devise a judicial rule that might raise "intractable constitutional problems" and to leave any exceptions to the application of the \textit{lex loci delicti} to the legislatures to articulate.

La Forest G. regarded a territorially-based approach to choice of law as equally applicable in the international context. However, deference to a foreign country's territorial sovereignty is premised on "comity," not "constitutional imperatives" and other federal "structural elements." This difference allowed for greater discretion in the operation of the territoriality principle, a discretion which La Forest G. conceded might be needed to "to avoid injustice" in cases where the substantive content of a foreign \textit{lex loci delicti} was so radically at odds with the \textit{lex fori} as to implicate fundamental forum public policy. Consequently,

\begin{footnotesize}
\begin{enumerate}
\item La Forest G. was clearly sympathetic to the proposition that the constitution imposes territorial limits on the authority of Canadian courts to select forum law as the \textit{lex causae} under forum choice of law rules. In their prior writings, Swan and Castel have expressed agreement with that proposition, notwithstanding their criticisms of La Forest G.'s territorial analysis in Tolofson (\textit{supra} footnote 28). See J. Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 Can. Bar Rev. 271 at 313; J.-G. Castel, \textit{Canadian Conflict of Laws}, 3rd ed. (Markham: Butterworths, 1994) at 6-7: "[T]he Judicial Committee of the Privy Council and the Supreme Court of Canada have interpreted the Constitution Act so as to strike down unreasonable attempts by one province to disregard the interests of other provinces or the general interests of Canada at the international level... Since Canadian provinces lack the power to legislate extraterritorially, territoriality can be used as an instrument of constitutional control over provincial conflict of laws rules."
\item Tolofson, \textit{supra} footnote 10 at 1065-66.
\item \textit{Ibid.} at 1066. The Quebec legislature enacted a common residence exception in its new Civil Code (art. 3126, \textit{infra} footnote 89), a fact noted by La Forest G. in Tolofson. The common residence exception is discussed \textit{infra} part I(e) of this article.
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.} at 1048.
\end{enumerate}
\end{footnotesize}
he was prepared to retain a discretion in the court to apply forum law in the international context though he thought that the occasions where this would become necessary would be rare.56

La Forest G.'s willingness to infuse federal and public international law values into his choice of law analysis contrasts sharply with the prevailing judicial doctrine in the United States and Australia. In both countries, the starting point in analysing the relationship between federalism and choice of law is the full faith and credit clause in their respective constitutions.57 That clause obligates each state to give full faith and credit to the laws, as well as the judgments, of sister states. Taken literally, the clause sets up an infeasible task. "To simultaneously apply the conflicting laws of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the Clause."58 The full faith and credit clause thus makes sense only on the assumption that there exist choice of law rules to identify when sister state law applies and when it does not. But while the clause "assumes the existence of choice-of-law rules, it does not specify what those rules are."59 Does this mean that states are obligated to apply sister state law only when directed to do so by their own choice of law rules? Or does the full faith and credit obligation assume the influence of constitutional values on the development of state choice of law rules in the first instance?60

56 Ibid. (Tolofson) at 1054-55.
57 Supra footnote 13.
58 Laycock, supra footnote 55 at 297.
59 Ibid.
60 In Canada, the Supreme Court's decision in Hunt v. T & N plc, supra footnote 10 supports the latter approach in the context of the implied 'full faith and credit' obligation in the Canadian constitution. At issue in that case was whether the Quebec corporate defendants in a British Columbia tort action were required to comply with a demand for discovery of certain corporate documents which they had been prohibited from removing from the province of Quebec by the order of a judge of the Quebec Provincial Court issued under that province's Business Concerns Record Act. The British Columbia courts were thus faced with a 'full faith and credit' dilemma: should they compel production pursuant to forum law or yield to the laws of a sister province? On the assumption that the Quebec Act was constitutionally valid, the British Columbia courts yielded: "interprovincial comity" compelled "the recognition of, and deference to the validly enacted legislation of a province by the courts of another province." Hunt v. T&N Plc (1991), 81 D.L.R. (4th) 763 at 767 (B.C.C.A.). Writing for the Supreme Court, La Forest G. ruled that the Quebec courts were obligated by the full faith and credit doctrine to respect pre-judgment discovery orders issued by the British Columbia courts. The contrary rule would allow the courts in one province to engage in a "preemptive strike" against the constitutionally competent exercise of jurisdiction by the courts in another province. In the course of his reasoning, La Forest G. confirmed a significant additional point: that full faith and credit does not require a court in one province to yield to sister province laws which purport to extend their spatial reach to cover the same ground as forum law. Rather, the provincially-constituted courts have full authority to rule on the constitutionality of legislation of a province that has extraprovincial effects in the forum. With this statement, Hunt laid the seeds for a transplantation of a full faith and credit doctrine premised on the territoriality principle to the choice of law context.
In Australia, the problem has been the subject of conflicting majority decisions in the High Court in recent years. In 1988, in *Breavington v. Godlenian*, a bare majority of the Court endorsed an unqualified *lex loci delicti* rule for interstate torts. Deane J.'s territorial analysis bears a marked similarity to that of La Forest G. His starting point was not the full faith and credit clause as such. Rather he saw that clause as reflecting a more general feature of Australian federalism: the idea that the same legal consequences should attach to an act or omission occurring anywhere within the Australian national territory regardless of where within that territory the matter was litigated. To achieve interstate decisional harmony, it was necessary that the same connecting factor — predominant territorial connection — operate both to identify the applicable sister state law in conflicts cases and to limit state legislative authority vis à vis other states.

In an Australian constitutional context, however, there is a serious obstacle to Deane J.’s operative assumption that state legislative competence is subject to significant territorial constraints. Under the prevailing doctrine, the states are free to extend the reach of their legislation to interstate activities and conduct even if the subject-matter nexus is a "remote and general" one and even if the result is to subject persons to the conflicting laws of more than one state. If territoriality does not significantly limit the exercise of state legislative power vis à vis other states, it is difficult to see on what constitutional basis the courts are compelled to adopt a territorial approach to choice of law for interstate torts.

It is this reasoning that persuaded a differently-constituted majority of the High Court to later abandon the *lex loci delicti* rule. In *McKain v. Miller*, decided just three years after *Breavington*, the Court reinstated the Phillips v. Eyre formula for interstate torts (it had never abandoned it at the international level), and along the way rejected any role for s. 118 of the Constitution in

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63 *Ibid.* at 121.

64 *Ibid.* at 129-30: “[T]he constitutional solution of competition and inconsistency between purported laws of different states as part of a national law must, where the necessary nexus for prima facie validity exists, be found either in the territorial confinement of their application or, in the case of multi-state circumstances, in the determination of predominant territorial nexus.”


66 Gummow, supra footnote 61 at 1013.

67 *McKain v. R.W. Miller & Co. (South Australia) Pty. Ltd.* 174 C.L.R. 1 (1991). The majority in *Breavington* was composed of Mason C.J., Dean, Wilson and Gaudron JJ. The minority comprised Brennan, Dawson and Toohey JJ. In the interval between *Breavington* and *McKain*, Justice Wilson retired and was replaced by McHugh J. In *Tolofson*, La Forest G. cited the majority position in *Breavington* as reflecting the Australian position even though *McKain* had been decided by the time *Tolofson* was argued.
limiting choice of law. Rather, s. 118 enters the picture only after the common law choice of law rules point to the application of the law of a sister state, and those choice of law rules are not themselves required to conform to the Constitution. As Deane J. later commented, the approach adopted by the current majority "goes a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws imposing different legal consequences in respect of a single occurrence." 69

The United States Supreme Court has arrived at much the same position as its Australian counterpart. Although initially sympathetic to the idea that the full faith and credit clause obligates the states to apply one and only one state law in conflicts cases, 70 the United States Supreme Court has since all but reversed its position. Today, a state is free to apply its own law even if this conflicts with the law of a sister state so long as some factual connection exists with the forum, and even if that connection does not relate to the subject matter of the litigation. The high point of this reasoning came in 1988 in Allstate Insurance v. Hague. 71 Justice Brennan conceded that, in theory, full faith and credit requires each state "when acting as a forum for litigation having multi state aspects or implications, [to] respect the legitimate interests of the other states and avoid infringement upon their sovereignty." 72 In practice, however, the clause was interpreted so as to make the forum state’s interest in the fiscal welfare of its residents qua plaintiffs a sufficient nexus to justify recovery under forum law in relation to out-of-state activity involving only out-of-state parties. The decision was widely interpreted as signalling the end of any meaningful limits on the right of state courts to prefer local law and local plaintiffs in conflicts cases. 73

68 Ibid. at 36-37: "The laws of the States, though recognized throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws and prescribes a uniform legal consequence. This may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union. Far from eliminating the differential operation of State laws, section 118 commands that all the laws of all the states be given full faith and credit: the laws of the forum are to be recognized as fully as the law of the place where the set of facts occurred. Section 118 would not be obeyed by refusing recognition to the laws of a forum State and by applying only the laws of the part of Australia to which the facts occurred. A disparity in legal consequences attached to a set of facts cannot be eliminated by refusing recognition to laws of the forum which create the disparity. In our respectful opinion, section 118 does not prescribe the selection of the lex loci delicti or other extraterritorial body of law as the exclusive body of law governing liability for extraterritorial torts. The selection of the applicable rules governing liability is the function of the common law; section 118 provides for recognition by the courts of the forum of the rules so selected." For a detailed critique of this passage, see Gummow (recently appointed to the High Court) supra footnote 61 at 1002-1005.


70 It has been argued that this was the original intent of the drafters: W. Crosskey, Politics and the Constitution in the History of the United States 553-55 (1953).


72 Ibid. at 640.

The very different position taken by the Supreme Court of Canada in Tolofson from its Australian and United States counterparts reflects their fundamentally different concepts of the implications of state sovereignty. For 'territorialists' like La Forest G., the stability of a federal and international legal order premised on a system of territorially-defined sovereign provinces and states requires that greater weight be given to private and public international law values than local substantive legal policy in the choice of law equation. For extraterritorial ‘regulators’ like the majority in McKain and the justices who decided Hague, sovereignty implicates the value of diversity and the correlative right of states to extend their local policy to interstate and international conduct that has effects within their territorial boundaries even if this conflicts with the territorially-competent laws of other sovereigns. The only constraints are pragmatic: self-interest and practical enforceability.

(d) The resurgence of territoriality in choice of law in tort

The primary weight placed by the extraterritorial ‘regulators’ on the advancement of local policy can obscure their common ground with the territorialists. Local policy need not be conceived purely in terms of local concepts of substantive justice. It can also encompass communitarian values associated with the federal and international legal order, including the avoidance of conflict with other states, the promotion of reciprocity and the facilitation of transjurisdictional economic and other activities. There is, in fact, increasing recognition of the importance of these values in the contemporary scholarship and reformist literature in the United States and Australia.

In a study published in 1992, the Australian Law Reform Commission endorsed the majority’s premise in Breavington that within the interstate context the same conduct or activities should carry the same legal consequences regardless of the forum of litigation. To that end, the Commission recommended the enactment by all states of uniform forum-neutral choice of law rules, including a lex loci delicti rule for interstate tort claims. Of course, uniformity at the choice of law level does not ensure interstate decisional harmony if the forum is free to interpret local legislative policy so as to give it a wide

\[\text{footnote 29 at 89.}\]

In discussing the differences between “territorialists” and extraterritorial “regulators,” Westbrook (a confessed ‘regulator’) writes: “[T]erritorialists give much greater weight to the traditional international values and much less weight to local policies. That explains why the two views are so far apart, even though both of them purport to rest upon a respect for sovereignty. The territorialists’ view is based on a greater commitment to the system of sovereign states, and the deference that system requires, while the regulators’ opposing view emphasizes the rights of each individual sovereign considered as such” (supra footnote 29 at 89).

\[\text{Ibid. at 91-92.}\]

\[\text{Ibid. at 81.}\]

\[\text{Australian Law Reform Commission, Choice of Law, Report No. 58, March 1992.}\]

\[\text{Supra footnote 62.}\]
extraterritorial scope. Consequently, the Commission also recommended the enactment of a presumption making the territorial scope of state legislation co-extensive with the connecting factor for choice of law in the relevant substantive area in the absence of an express indication of a contrary intent.

In the United States, the conflicts scholarship evidences renewed support for the infusion of constitutional considerations into interstate choice of law analysis. The recommendations range from the imposition of more potent limits on the extraterritorial application of forum law in interstate settings to the creation on the Tolofson model of territorially-oriented choice of law rules premised on the values of co-equal state sovereignty.

The developments on the constitutional front reflect a more general "counterrevolution" (or at least a "resistance movement") against the 'modern' consequentialist choice of law approaches that replaced the territorial orientation of the vested rights theorists. There is a growing consensus that the abandonment of territorial constraints on choice of law, whether constitutionally or common law ordained, rather than heralding a brave new world of communitarian values, has resulted only in a parochial and unjust emphasis on local law and the interests of local litigants. A territorial choice of law is no longer seen as

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82 For the insight that territorial choice of law methodologies are linked to the values of liberalism, and personal law methodologies to a more communitarian philosophy, see L. Brilmayer, “Liberalism, Community and State Borders” (1991) 41 Duke L.J. 1 at 3. In a somewhat similar vein, Westbrook views the attitude of deference to foreign territorial sovereignty associated with the territorialists as indicative of a laissez-faire attitude to the regulation of transnational economic activity (supra footnote 29 at 93-94). But, as Westbrook acknowledges, these arguments can be turned on their head. Thus, it can be argued that the territoriality principle in choice of law advances communitarian values because it pays maximum respect to the principle of self-determination that underpins the division of states into territorially-defined units. Similarly, adherence to the principle of co-equal territorial sovereignty can be said to maximize the effectiveness of transnational regulation because it better ensures that other states will respect the regulatory efforts of the state having the predominant territorial connection with the particular subject matter.
inherently incompatible with the achievement of substantive justice in conflicts cases. On the contrary, because it is a forum neutral connecting factor, it contains the promise of more even-handed justice for both parties. Globalization has also influenced the change in thinking. In an age of high personal and professional mobility, the significance attached to the concept of the personal law is in decline; activity-related connections are increasingly thought to offer a more stable and predictable criterion for choice of law.

Even those who remain committed to interest analysis or advocate new alternative methodologies no longer urge the automatic application of the *lex fori* or the equally subjective ‘better law’ in cases where more than one state is found to have an ‘interest’ in having its laws applied. The focus is now on achieving a maximum accommodation of the purposes or policies underlying the laws of all the implicated states with any policy clashes to be resolved in a manner that “a neutral observer will regard as fair and reasonable.” 83 Although there “has not been a wholesale return to the old rules, there has been increased emphasis on the territorial principles that underlie the old rules.” 84 After all, whatever its other deficiencies, it is generally acknowledged that vested rights theory at least tended to avoid the parochialism and systematic unfairness to defendants associated with classic interest analysis in the United States. 85

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84 Brilmayer, supra footnote 81 at 1. According to one recent analysis, the *lex loci delicti* is the presumptive choice of law rule in a majority of the United States today: S.C. Symeonides, “Choice of Law in the American Courts in 1993 (and in the Six Previous Years)” (1994) 42 Am J.Comp. L. 599 at 608. David Cavers was an early advocate of recourse to a territorial principle to resolve the ‘true conflicts’ revealed by interest analysis. See his “Principles of Preference” in *The Choice of Law Process* (1965); and see D. Cavers, “Cipolla and Conflicts Justice” (1961) 9 Duq. L. Rev. 360. See also A. Twerski, “A Sheep in Wolf’s Clothing: Territorialism in the Guise of Interest Analysis in *Cooney v. Osgood Machinery*” (1994) 59 Brooklyn L. Rev. 1351 at 1361, commenting as follows on the choice of law rules articulated by the New York Court of Appeals in *Neumeier v. Kuehner*, 31 N.Y. 2d 121 (1972): “Although *Neumeier* was developed through interest analysis reasoning, in practice it represents a territorial approach. Except where both parties are from the same state (Rule 1), every conflicts case is resolved by applying the law of the place of injury, unless the difficult out-clause of Rule 3 is met. [i.e., unless application of a different law ‘will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for citizens’]. See also T.M. Rearley and J.W. Weselich, “An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases” (1992) 71 Texas L. Rev. 1 at 43 (proposing “a strict place-of-injury rule for single accident mass-tort cases because it best fosters uniformity, neutrality, determinacy and efficiency in the resolution of these difficulties”).

85 P.M. North and J.J Fawcett, *Cheshire and North’s Private International Law*, 12th ed. (Butterworths: London, 1992) at 29-30: “[The vested rights] theory stresses one of the primary objectives of private international law. It serves to emphasize the need to find solutions with international flavour. The notion that a foreign right is vested and as such requires respect, although analytically a fiction, tends to introduce the correct psychological background for the formulation of choice of law rules. The fiction of vested rights is a fiction inimical to insular prejudices.”
The United States is not the only common law jurisdiction to have retreated from excessive *lex fori* ism. In its 1969 decision in *Chaplin v. Boys*, the House of Lords recast the *Phillips v. Eyre* formula to require civil actionability of the defendant’s conduct under both the *lex fori* and the *lex loci delicti*. The enlarged role of the *lex loci delicti* under the new rule was subject to a “flexible” exception allowing the exclusive application of forum law in relation to particular issues in the interests of “justice” to the parties. However, a recent Privy Council decision gives increased prominence to both the *lex loci delicti* and classic choice of law methodologies. It is now clear that the “flexible exception” supports the exclusive application of the *lex loci delicti*, not just the *lex fori*. Moreover, the exception can operate as a “one-law-selecting” choice of law rule, that is, a rule allowing the whole cause of action, not just particular issues, to be governed by the *lex loci delicti* (or the *lex fori* as the case may be). More recently again, the whole area has been overtaken by statutory reform endorsing the *lex loci delicti* as the general rule for choice of law in tort.

**(e) The common residence exception and localizing ‘relational’ torts**

Today, there is really only one situation in which there exists significant support for applying the parties’ personal law in preference to the law of the place of tort in motor vehicle accident claims. This is where the parties are both residents or nationals of the forum (or are both resident in a jurisdiction with

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87 *Red Sea Insurance Co. Ltd. v. Bouygues S.A.*, [1995] 1 A.C. 190, noted by A. Dickinson, “Further Thoughts on Foreign Torts: Boys v. Chaplin Explained?” [1994] L.M.C.L.Q. 463. In the wake of *Red Sea Insurance*, Dickinson questions the logic of retaining the requirement for actionability by the *lex fori*. As he points out, the only justifications for the requirement are certainty, simplicity, and predictability, *i.e.* the requirement acts as a filter to keep out controversial torts not recognized by English law. The admission of an exception effectively eliminates those justifications.

88 This term is defined *supra* footnote 29.
89 *Private International Law (Miscellaneous Provisions) Act*, 1995, c. 42. Part III of the Act replaces the common law rules applicable to choice of law in tort (with the exception of defamation which continues to be governed by the common law). The new statutory rules give dominant effect to the law of the place where the events constituting the tort or delict occur, subject to a ‘proper law’ exception. Where the events constituting the tort occur in different countries, the place of the tort is defined to mean: (1) in claims for personal injury or property damage, the place where the individual or property was located when the injury or damage was sustained; (2) otherwise, the place where the most significant elements of the events constituting the tort occurred. The proper law exception can be invoked whenever it would be “substantially more appropriate” for the issues or a single issue to be resolved by another law. The Act originated in an English Law Commission report (*Private International Law: Choice of Law in Tort and Delict*, Law Comm. No. 193, 1990) but departs sufficiently from the Commission’s model to make the Report of “limited use as an aid to interpretation.” See A. Briggs, “Choice of Law in Tort and Delict” [1995] L.M.C.L.Q. 519 at 520. Briggs is highly critical of the new statutory regime as unnecessarily complex and too ‘open-ended’ in its language to be of much concrete guidance to courts.
substantially identical tort law policies). Even here, however, the appropriateness of an exception has not gone unchallenged. In Tolofson, La Forest G. joined the ranks of the sceptics.

First, a common residence exception is typically rationalized on the basis that it is somehow ‘unjust’ to the accident victim to apply the lower liability or compensation standards of the lex loci delicti in cases where the common personal law of both parties supports recovery. Viewed from a larger loss distribution perspective, however, where is the ‘justice’ in a choice of law rule under which the compensation rights of forum residents injured in an out-of-province accident turn on whether or not they have the ‘good fortune’ to be injured by a fellow resident.

Second, the arguments in favour of the exception rest on a simple two party litigation model. In multi-party actions, however, a personal law exception can raise intractable problems of contribution and indemnity. Indeed, as La Forest G. observed in Tolofson, a common residence exception is apt to exacerbate these problems by encouraging frivolous cross-claims and joinders.

Perhaps most significantly, the common residence exception was developed in an era when the tort system comprised the main compensatory vehicle for personal injury inflicted in motor vehicle accidents. The emergence of statutory no-fault insurance regimes puts into question the ubiquity of liability insurance on which the common residence rule is premised. Under these new regimes first

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90 S.C. Symeonides, “Louisiana’s New Law of Choice of Law for Tort Conflicts: An Exegesis” 66 Tul. L. Rev. 677 at 716. The existence of judicial and legislative support for a common residence exception was acknowledged by La Forest G. in Tolofson, supra footnote 10 at 1052 and 1057 ff. He listed the following well-known examples: in the United States, Babcock v. Jackson (1963), 12 N.Y.2d 473 and Neumeier v. Kuehner, supra footnote 84; in England, Chaplin v. Boys, supra footnote 86; and in Quebec, article 3126 of the new Civil Code of Quebec supra footnote 20, which reads: “The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred... [But i]n any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.” (This exception does not apply to motor vehicle accidents because of Quebec’s adoption of a no-fault system supra footnote 40.) As La Forest G. also observed, the Court’s own decision in McLean v. Pettigrew, supra footnote 20, overruled in Tolofson, itself lends support to the common residence exception in its factual result though not of course in its reasoning.

91 Twerski, supra footnote 84 especially at 1359 ff; Martin, supra footnote 79 at 144-46.

92 Tolofson, supra footnote 10 at 1058.

93 For a post-Tolofson case emphasizing this point, see Stewart v. Stewart Estate, supra footnote 22 at para. 43. A strict lex loci delicti rule will not, however, necessarily solve all the choice of law difficulties presented by contribution claims in multi-party tort cases. See Silberman (1994), supra footnote 79.

94 Supra footnote 10 at 1061: “If it is known that the lex fori will apply, when residents of the forum are the only parties involved in an accident, but that the lex loci delicti will apply the moment any non-forum natural or legal person is joined to the action, are we not encouraging those who wish to be governed by the latter rule to dig up third parties from the locus delicti?”
party, not third party, insurance principles prevail.\textsuperscript{95} With the liability insurance factor removed, it is no longer so obvious that there is no unfair surprise to the parties, specifically the defendant, in applying the personal law of the parties in preference to the law of the place where all elements of the tortious conduct and its consequences are centred, especially if the parties are strangers meeting for the first time on foreign soil.\textsuperscript{96}

The insurance backdrop to the resolution of interprovincial motor vehicle accident claims figured prominently in La Forest G.’s reasoning in Tolofson. On the international plane, he was prepared to concede some room for a common residence exception if only because the law suit was likely to take place in the parties’ home jurisdiction, and there was some merit, in the interests of efficiency and administrative convenience, to allowing the forum court to apply its own law.\textsuperscript{97} However, he cautioned that, unless “narrowed to situations that involve some timely and close relationship between the parties, an exception could lead to injustice” to a defendant who had insured his or her vehicle on the basis of the liability laws of the \textit{loci delicti}.\textsuperscript{98}

Insurance considerations also explain why La Forest G. rejected a judicially created common residence exception in the interprovincial context.\textsuperscript{99} As he observed, the “biggest difference between provinces now is in insurance schemes, and this creates problems of quantum, not of liability.”\textsuperscript{100} Loss-distribution inequities generated by conflicts in insurance structures are capable of being resolved efficiently and fairly only through legislative intervention.\textsuperscript{101} In this connection, it is important to stress again that La Forest G. did \textit{not} establish it constitutionally-mandated \textit{lex loci delicti} choice of law rule for torts. Rather, he cited concerns with unconstitutional overreaching by the \textit{lex fori} as a reason to adopt a cautious territorially-based choice of law methodology. In other words, constitutional concerns informed the choice of law exercise, but they did not dictate the resulting rule.

Outside the motor vehicle accident context, a common residence exception is unlikely to be needed. The desired flexibility may be found

\textsuperscript{95} \textit{Supra} footnote 40.

\textsuperscript{96} \textit{Supra} footnotes 91, 92. The \textit{Hague Convention on the Law Applicable to Traffic Accidents} links the availability of its exception to the exclusive application of the \textit{lex loci delicti} to the presumed availability of liability insurance: under art. 4, the \textit{lex loci delicti} is displaced, not in favour of the common residence of the parties at large, but in favour of the law of the state of the registration of the vehicle in the case of a one-vehicle accident, or where both vehicles are registered in the same state, or where a defendant from outside the vehicle is habitually resident in the state of registration.

\textsuperscript{97} \textit{Tolofson, supra} footnote 10 at 1060.

\textsuperscript{98} \textit{Ibid.} at 1062.

\textsuperscript{99} \textit{Ibid.} at 1062.

\textsuperscript{100} \textit{Ibid.} at 1059.

\textsuperscript{101} For a detailed discussion of the superiority of a legislated solution in the context of no-fault, see \textit{Walsh, supra} footnote 40.
instead within the concept of the *loci delicti* itself, a solution that preserves the public and private international law values implicit in a territorial choice of law approach. As a prominent United States ‘territorialist’ has observed, a “sophisticated territorialism would often recognize that the law’s purpose is to regulate a relationship between a group of people,” in which event it may be perfectly sound to “reify the relationship” for the purposes of localizing the tort.  

Reasoning along these lines has appeared already in the post-*Tolofson* jurisprudence relating to liability for negligent misrepresentation between parties in a quasi-contractual relationship.

II. Choice of Law in Products Liability Claims

(a) Localizing the tort in products liability claims: place of distribution of the product and resulting injury

In motor vehicle accident cases, determining the place of the tort for purposes of choice of law is straightforward: both the wrongful act and the immediate injury are readily localized within the territorial borders of a single province or state. But in other fact patterns, the relevant connections may be more geographically dispersed. La Forest G.’s reasoning in *Tolofson* indicates that he was alert to the potential difficulties with applying the *lex loci delicti* rule in such cases. Where a tort claim arises out of some truly transnational or interprovincial activity, he stated, “territorial considerations may become muted” and “other considerations may play a determining role.”  

The post-*Tolofson* jurisprudence indicates that territorial analysis in such cases is effectively synonymous with a flexible “real and substantial connection” analysis, a point presaged by the 1985 decision of the Court in *R. v. Libman* in which La Forest G. endorsed precisely this approach in determining

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102 Laycock, *supra* footnote 55 at 323.


104 *Supra* footnote 10 at 1050. For an example of the kind of multi-jurisdictional fact situation in which a strong case can be made for displacement of a strict territorial approach to choice of law in tort, see L.J. Silberman (1994), *Supra* footnote 79. As she concludes: “[The vested rights] orthodoxy of Joseph Beale came undone for quite good reasons the first time around; attempts to resurrect similar presumptive rules for particular kinds of cases ... are helpful but do not fit all cases. Concerns for expectations and fairness to define the legitimate reach of legislative authority must also play a role.”

105 For a recent judicial endorsement of this interpretation, see *National Bank of Canada v. Chance*, *supra* footnote 103.

106 *Supra* footnote 10.
the locus of a crime for the purposes of delineating the territorial reach of Canadian criminal law.\footnote{107}

Even in less territorially diverse fact patterns, localizing the tort can present "thorny" problems.\footnote{108} Where the place of the defendant’s wrongful activity and the place of its injurious consequences do not coincide, La Forest G. indicated that "it may well be that the consequences would be held to constitute the wrong."\footnote{109} In making this statement, he no doubt had in mind the Court’s prior decision in \textit{Moran v. Pyle National (Canada) Ltd.},\footnote{110} the leading Canadian authority on localizing a tort in products liability claims.

\textit{Moran} involved a wrongful death action under the Saskatchewan \textit{Fatal Accidents Act}\footnote{111} by the widow and children of an electrician employed by a Saskatchewan company who was fatally electrocuted in Saskatchewan in the course of removing a spent light bulb. His family alleged negligence on the part of the manufacturer of the bulb. The defendant’s manufacturing operations were located in Ontario and the United States and it had no business presence in Saskatchewan, marketing its products there through distributors. The assertion of jurisdiction by the Saskatchewan courts over the Ontario manufacturer therefore depended on whether the tort had been committed in Ontario, where the manufacturer had "acted," or Saskatchewan, where the defective product was distributed and the injurious consequences of the defendant’s actions were experienced.\footnote{112}

\footnote{107} In \textit{Libman v. The Queen}, \textit{supra} footnote 10 La Forest G. endorsed a jurisdictional rule that gives Canadian courts authority under s. 5(2) of the \textit{Criminal Code} over any crime that bears a “real and substantial connection” to this country, regardless of whether territorial jurisdiction is also available in another state. Since jurisdiction and choice of law are synonymous in the criminal area, his reasoning has obvious application to private law choice of law analysis: “I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a ‘real and substantial link’ between an offence and this country, a test well known in public and private international law. [T]his does not require legislation. It was the courts after all that defined the manner in which the doctrine of territoriality applied, and the test proposed simply amounts to a revival of the earlier way of formulating the principle. It is in fact the test that best reconciles all the cases.”

\footnote{108} Tolofson, \textit{supra} footnote 10 at 1050.

\footnote{109} Ibid. And see also at 1042 where La Forest G. indicated that the same approach might be appropriate in defamation cases.

\footnote{110} [1975] I S.C.R. 393.

\footnote{111} R.S.S. 1965, c. 109.

\footnote{112} In Dickson J.’s view, localizing the tort within Saskatchewan was necessary to found jurisdiction for two reasons. First, while the presence of the defendant within the forum was normally required for \textit{in personam} jurisdiction, the occurrence of a tort within the territorial limits of the court’s jurisdiction constituted a well-established exception to that requirement, as recognized in the Saskatchewan rules governing service \textit{ex juris}. Second, it followed from the territorial limits on provincial legislative authority that the \textit{Fatal Accidents Act} should be interpreted as limited to actions arising out of a wrong occurring within the province. The latter point lends support to La Forest G.’s equation of the territorial limits on provincial legislative authority with the territorial location of a tort for choice of law purposes, \textit{supra} text at footnotes 47-50. On the impact of the Court’s recent conflicts jurisprudence on the \textit{in personam} jurisdiction of Canadian courts, see \textit{supra} text at footnotes 15-17.
Canadian (and English) authority was divided on the question. Some cases favoured the place of acting, others the place of injury. Dickson J. concluded that the place of acting had little to commend it. The production of a defective product does not in itself constitute a wrong. It is the act of distributing that defective product into the marketplace and the resulting harm to users that engages tort liability. Nonetheless, Dickson J. was unwilling to accept injury per se as a sufficient localizing event. To do so might lead to fortuitous or arbitrary results. What was needed was a test that would reflect the significant interest of the jurisdiction where the consequences of the manufacturer’s activities were experienced and the law of which was likely to have been in the reasonable contemplation of both parties. Thus, he formulated the following test:

[W]here a foreign manufacturer carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and 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, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over the foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market price directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have in his contemplation when he tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.113

Dickson J.’s reasoning demonstrates that territorial analysis does not necessarily lead to the mechanical jurisprudence associated with ‘vested rights’ thinking. As incorporated in the first Restatement in the United States, the vested rights theory required application of the lex injurii as the law of the place where the “last event” necessary to vest liability occurred.114 But standing alone, the occurrence of injury within a jurisdiction, essentially a plaintiff nexus, does not seem to be a sufficient choice of law connection from the standpoint of the ‘coerced’ foreign manufacturer.115 In contrast, the Moran test requires

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113 Supra footnote 110 at 408-09. As Swan has observed, the language of Dickson J.’s test almost exactly parallels that used by the United States Supreme Court in World-Wide Volkswagen Corp. v. Woodson, 444 United States 286 (1980): Swan, supra footnote 28 at 930.

114 Restatement of the Law of Conflict of Laws (1934) §377. The Restatement (Second) Conflict of Laws (1969) does not completely dispense with vested rights thinking in products liability actions. While §145 employs a “most significant relationship” test as the general rule for choice of law in tort, §146 creates a presumption in actions for personal injury that this is law of the place where the injury occurred.

115 See Brilmayer, supra footnote 82 at 23-24: “Where the parties to a dispute are from different communities, it does not seem fair to resolve the controversy solely according to the norms of one community or the other. The defendant should not be subject to state authority without a showing that he or she has somehow assented to state power.”
substantial connections between the defendant's activities and the place of injury. That approach respects both territorial and fairness concerns. If the place of injury is a jurisdiction in which the manufacturer's products are purposefully or foreseeably distributed, the foreign manufacturer in effect has assented to be regulated according to that jurisdiction’s standards of liability and compensation. After all, if manufacturers want to participate in global trade, they must be willing to operate in the target markets on equal terms with local firms. The contrary rule would effectively license the manufacturer's home jurisdiction to set the global liability standard for injury caused abroad by products exported beyond its borders.116

(b) An alternative reference to the manufacturer's home law?

Although Moran was concerned with localizing the tort for the purposes only of establishing jurisdiction, choice of law tests similar to that articulated by Dickson J. in Moran have strong scholarly and legislative support.117 His reasoning, in other words, is readily translatable to the choice of law context, a point confirmed in the post-Tolofson caselaw.118 But what if the law of the jurisdiction where the product is distributed and causes injury limits or even precludes recovery? Should the victim then be able to invoke the manufacturers’ home law to support recovery? In fact, while the details vary considerably, there is a surprising level of support for this idea in

116 See, e.g., M.H. Gottesman, “Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes” (1991) 80 Geo. L.J. 1 at 35: “A rule that declared that the actionability of conduct is to be judged by the law of the state where the conduct occurs would stimulate a ‘race to the bottom,’ in which states courted manufacturers by proffering ever narrowing theories of liability for product defect.” And see S. Dutson, “International Product Liability Litigation: The Territorial Application of Part VA of the Trade Practices Act 1974 (Cth) and Part 1 of the Consumer Protection Act (1987) (U.K.)” (1996) 22 Monash U. L.Rev. 244, concluding that the strict products liability regime in Part VA of the Australian Trade Practices Act, supra footnote 33, applies to foreign manufacturers whose products are imported into Australia and cause injury or damage there, notwithstanding that the Act directly implicates only the importer. As Dutson observes, the contrary rule would permit manufacturers to deliberately evade the Australian regime simply by removing their operations to a jurisdiction with less stringent standards and then exporting to Australia through a subsidiary importer with nominal capital and no assets. For a Canadian example of an explicit statutory directive bringing out-of-province manufacturers within the scope of application of a strict products liability regime where the forum is the target market and injury occurs there, see s. 27 of the New Brunswick Consumer Product Warranty and Liability Act, SNB 1978, c. C-18.1, as amended 1980, c. 12.

117 All recent scholarly and legislative proposals tend to require substantial affiliations between both parties or their activities and the applicable lex causae. Plaintiff-related connections (habitual residence, place of injury) standing alone, even if cumulated, are insufficient. See Kozyris, supra footnote 81 at 497-8.

contemporary codifications and in the scholarship. I say 'surprising' because a choice of law rule that systematically advantages plaintiffs and systematically burdens defendants prima facie raises problems of fairness. After all, nobody advocates giving primacy to the manufacturer's home law (whether defined as the place of manufacture/design of the relevant product or the place where the manufacturer has its principal establishment) in cases where that law imposes a lower standard of liability or recovery than the law of the place where the product was distributed and caused injury. It is only where application of the manufacturer's home law advantages the plaintiff that it is accepted as relevant in the choice of law balance.

In questioning the legitimacy of a plaintiff-favouring alternative reference to the manufacturer's home law, I do not mean to say that a state is precluded in international law from unilaterally imposing the burden of its laws on its citizens or residents, including local manufacturers, even when the harmful consequences of their misconduct or negligence are wholly extraterritorial. A jurisdiction may wish to do this because it abhors the particular misconduct or it wants to lend its aid to a global attack on the problem or it is concerned with the potential injury to its international reputation from a failure to regulate. A topical example is the increasing tendency of states to extend the reach of their domestic criminal laws governing sexual misconduct with minors to its citizens

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119 See, e.g., art. 3128 C.C.Q., supra footnote 20: "The liability of the manufacturer of a movable, whatever the source thereof, is governed, at the choice of the victim, (1) by the law of the country where the manufacturer has his establishment or, failing that, his residence, or (2) by the law of the country where the movable was acquired." This approach is nearly identical to that adopted in Swiss law, on which the Quebec rule is likely modelled. On the Swiss rule, see Kozyris, supra footnote 81 at 492, note 36. The plaintiff's choice is more limited under the Hague Convention on the Law Applicable to Products Liability 11 F.L.M 1283 (1972). Under art. 6, the plaintiff can elect between application of the law of the manufacturer's place of business or the law of the place of injury only if neither place coincides with the victim's habitual residence or the place where the product was acquired.

120 Extrapolating from his theory of "principles of preference," David Cavers would allow the plaintiff to choose the most favourable among the law of the place of manufacture or design of the defective product, the law of the place where the product was acquired and caused injury, or the law of the victim's habitual residence. In all three cases, choice is conditioned on the requirement that defendant "reasonably have foreseen the presence in that [s]tate of the product." See D. Cavers, "The Proper Law of Producer's Liability" (1977) 26 Int'l & Comp. L.Q. 703. Applying a 'functional' interest analysis approach, Weintraub advocates application of the plaintiff-favouring law of the defendant's state where it is desirable to punish and deter the defendant's conduct. See Weintraub (1990), supra footnote 83 at 229-30. He would also allow the plaintiff to choose either the law of the place of manufacture/design of the product or the law of the manufacturer's principal place of business as the default law in cases where the law of the plaintiff's habitual residence is not applicable under his general rule (viz., because the defective product or similar products was not distributed there). See R.J. Weintraub, "Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation" (1989) U. Ill. L. Rev. 129.

121 Supra footnote 116, 117.

122 See, e.g. Restatement (Revised) of Foreign Relations Law §402: "...a state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status, or relations of its nationals outside as well within its territory."
even when they travel outside the country and even when the victim of the crime is a foreign citizen.

The exercise of this form of regulatory authority, however, is grounded in a personal, not a territorial, theory of international prescriptive (i.e., law-making) jurisdiction. As such, it is an appropriate connecting factor for the purposes of a unilateral choice of law rule articulated by the manufacturer’s home state, as the only state possessing ‘personal jurisdiction’ over the extraterritorial conduct of the manufacturer. But the alternative reference rule typically is cast in the form of a multilateral choice of law rule, i.e., one equally capable of being invoked in any forum, including the state where the product is distributed and causes injury. But that state has neither personal prescriptive jurisdiction over the defendant nor a territorial nexus to the defendant’s activities. Although the defendant’s activities have created a risk of harm within the forum’s territory, that fact gives the forum a sufficient territorial nexus to apply its own products liability laws to determine liability for the resulting injury, not to prescribe application of the manufacturer’s home law via its choice of law rules. Indeed, imposing the burden of their more onerous home laws on foreign manufacturers is suspect on equal protection as well as

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124 However, if the domestic products liability law is silent on its territorial scope, the presumption against extraterritoriality militates against its application to domestic manufacturers in relation to exported products that inflict injury abroad. In the United States, the argument that domestic products liability laws do not apply extraterritorially is typically advanced at the jurisdictional stage, in the context of an application by a United States manufacturer to dismiss an action by a foreign plaintiff for harm caused abroad by a defective product on the basis of forum non conveniens. In this context, the federal courts and the majority of state courts have decided that it is the country where the product is distributed and causes injury, not the state where the product is manufactured, that has the greatest interest in setting the appropriate standard of enterprise liability. See S.W. Birnbaum and D.W. Dunham, “Foreign Plaintiffs and Forum Non Conveniens” (1990) 16 Brooklyn J. Int’l L. 241; L.J. Silberman, “Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard” (1993) 28 Texas Int’l L.J. 501. The United States courts traditionally have been attractive to foreign plaintiffs owing to a combination of plaintiff-generous products liability laws, procedural advantages and the lex fori bias in choice of law. It is this state of affairs that prompted Lord Denning’s famous dictum: “As a moth is drawn to the light so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.” Smith Kline & French Laboratories Ltd. v. Bloch, [1983] 1 W.L.R. 730 at 733-34 (C.A.). However, the attractiveness of United States products liability laws is being steadily diminished by the state legislature-driven ‘tort reform’ movement aimed at lessening ‘enterprise liability’ through such measures as: shorter time limitations on suit, statutory caps on damages, installment in lieu of lump sum damage awards; stricter judicial scrutiny of the quantum of awards; sanctions on frivolous litigation; reduction of awards through apportionment, contribution and changes in the relevance of collateral sources of compensation; limitations on contingency agreements. See e.g. Weintraub, supra footnote 83 at 225, note 6.

125 E.g., art. 3128 C.C.Q., supra footnote 119.
territorial grounds since it amounts to imposing a tariff on foreign manufacturers competing in the local market with local manufacturers.\textsuperscript{126}

Not surprisingly, those who advocate the application of the manufacturer's home law where it imposes a stricter standard of liability or a more generous level of compensation do not base themselves on a territorial theory of choice of law but on substantive tort considerations, that that approach better advances the compensation and deterrence goals underpinning products liability regimes at large. This was the reasoning in \textit{Kozowy v. Massey-Ferguson, Inc.}\textsuperscript{127} An Alberta farmer suffered extensive injuries in the course of operating a hay baler on his family's farm in Alberta. The baler had been manufactured for the defendant in Iowa on order by its Canadian subsidiary and shipped directly to an Alberta dealership for sale in Alberta where it was purchased by the victim's father. The farmer brought suit in the United States District Court in Denver against the United States manufacturer.\textsuperscript{128} Purporting to apply the "most significant relationships test in the \textit{Second Restatement},\textsuperscript{129} the Court resolved the choice of law issue in favour of the law of the 'place of acting,' the law of Iowa, where the implement had been manufactured and where the defendant had its principal place of business.

In concluding that Iowa law had the most significant relationship with the litigation, the court focussed on Iowa's policy, reflected primarily in the availability of unlimited punitive and exemplary damages, "to deter, punish and make an example of certain dangerous corporate conduct."\textsuperscript{130} The court conceded that Alberta also had an interest in "regulating conduct and commerce

\textsuperscript{126} \textit{Infra} footnote 138.

\textsuperscript{127} 722 F. Supp. 641 (D. Colo. 1989), criticized extensively by M.B. Rockwell, "Choice of Law in International Products Liability: Internationalizing the Choice" (1992) 16 Suffolk Transnat'l L. Rev. 69. It was through his article that this case came to my attention.

\textsuperscript{128} Technically, the manufacturer was Vermeer Manufacturing Company which produced farm implements for the defendant Massey-Ferguson, with both companies having their principal place of business in Iowa. \textit{ibid. (Kozowy)} at 642.

\textsuperscript{129} Since federal jurisdiction was based on diversity of citizenship, the applicable choice of law rules were those of Colorado, the state in which the District Court was sitting. And since the Supreme Court of that state applies the choice of law rules in the \textit{Restatement (Second) of the Conflict of Laws} (1969) §145, the "most significant relationship" approach governed choice of law. Colorado case law also requires application of the Restatement's rules governing specific torts; consequently the presumption in section 146 in favour of the place of injury in personal injury actions was applicable. However, the Colorado Supreme Court had never adopted a choice of law rule for personal injury claims of the particular type in issue. Consequently, the District Court was not bound by prior Colorado precedent to apply the place of harm theory if, as it considered to be the case, the presumption was rebutted by the existence of a more significant relationship to Iowa law (\textit{ibid.} at 642-44).

\textsuperscript{130} \textit{Ibid.} at 644. In cases where the exported product is also sold at home, it is sometimes argued that the application of the products liability laws of the forum will incrementally enhance domestic deterrence goals. In the United States, the "incremental deterrence" argument has been rejected in the decisional law as factually questionable. See \textit{Piper Aircraft v. Reyno}, 454 United States 235 at 260 (1981). And see Birnbaum and Dunham, \textit{supra} footnote 124 at 248.
within its territory to see that its citizens are fully compensated for their injuries."131 However, Alberta’s tort-recovery laws were more restrictive than those of Iowa.132 Consequently, “Canada’s interest in protecting its citizens in the position of this plaintiff would be better served by applying Iowa law.”133 Further, since Iowa law was more favourable to recovery, “Canada can complain of no harm if its citizen’s claim is tried under Iowa law.”134

This is boot-strap reasoning. It is self-contradictory to decide that the importing jurisdiction has a legitimate interest in regulating the misconduct of foreign manufacturers that causes injury within its borders and then to conclude that that interest is better served by applying the law of the defendant’s home state. Moreover, the implicit arrogance is startling. While Alberta is not about to claim a violation of its sovereign integrity because its residents are able to forum shop to personal advantage in the United States, it might justifiably take issue with the court’s assumption that Iowa rather than Alberta law represents the optimal tort regime applicable to defective products that are distributed and cause injury within Alberta’s territorial limits.135 Although all tort regimes may share a common concern with compensation, deterrence and corrective justice, the relative importance attached to these elements turns on the level of enterprise liability each jurisdiction considers appropriate in light of its own political, economic and moral values. Concepts of substantive tort justice, in other words, are time and context sensitive.136

131 Ibid. at 644.
132 Ibid. The Court identified three points of difference: (1) while Alberta law required proof of negligence in products liability actions, Iowa law provided for strict liability; (2) while both laws allowed recovery of punitive and exemplary damages, Alberta had a cap on such damages; and (3) while Alberta recognized assumption of risk as an absolute defence to tort liability, Iowa law regarded it merely as an element to be weighed in the comparative fault equation. In support of the second proposition, the Court referred to a 1978 trilogy of Supreme Court of Canada decisions, the main objective of which was to impose a cap on compensatory damages for non-economic losses, not exemplary and punitive damages. This minor point aside, it is undoubtedly the case that punitive damages are less widely available and lower in quantum in Canadian law. In relation to the third proposition, it bears noting that Canadian courts rarely allow the assumption of risk defence and products liability actions do not typically engage the defence. Moreover, in Canadian law, both common and civil, causal fault reduces the plaintiff’s recovery proportionate to fault whereas Iowa law, as the court acknowledged (ibid. at 643), bars recovery if the plaintiff’s proportionate fault exceeds 50%.
133 Ibid.
134 Ibid.
135 Compare Harrison v. Wyeth Lab., 510 F. Supp. 1, 5 (E.D. Pa. 1980), aff’d 676 F. 2d 685 (3d Cir. 1982): “It is manifestly unfair to the defendant, as well as an inappropriate usurpation of a foreign court’s proper authority to decide a matter of local interest, for a court in this country to set a higher standard of care than is required by the government of the country in which the product is sold and used.”
136 See, e.g., Kramer, supra footnote 81 at 339-40 (footnotes omitted): “[S]tates are co-equal sovereigns, entitled to make their own value judgments. Each state is free to define its own version of the ‘just’ result, and it is axiomatic that there is no perspective from which to judge one version ‘better’ or more ‘just.’ True conflicts present competing but equal versions of what is just in a particular case.”
The court’s reasoning also fails to appreciate that substantive tort justice include substantive justice for defendants as well as plaintiffs. The extraterritorial extension of domestic products liability laws to domestic manufacturers operating in foreign markets imposes a competitive disadvantage on them relative to local manufacturers in the target markets. As such, the rule also undermines the classic conflicts values associated with ‘one-law-selecting’ choice of law rules, particularly the promotion of reliable expectations about the applicable law in the interests of facilitating transnational commerce and lowering transaction costs.

An Ontario judge got it right in a recent post-Tolofson Ontario case. A Pennsylvania resident alleged that she had suffered injuries when the chair in which she was sitting in the course of her work at a Pennsylvania hospital tipped

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137 Supra footnote 135. And see S.A. Rosenfeld, “Conflicts of Law in Products Liability Suits: Joint Maximization of States’ Interests” (1986) 15 Hofstra L. Rev. 139 at 157 (footnotes omitted): “The thesis of the pro-plaintiff approach [to choice of law] does not comport with the present state of product liability law. When the courts first shifted from negligence to strict liability, the policy underlying product liability rules was pro-plaintiff. Today, however, courts handling product liability issues are more concerned with the limits to which they will stretch strict liability... As a result, many legislators [in the United States] have already passed new product liability rules designed to limit the liability of manufacturers. The basic flaw in... [the approach taken by] proponents of pro-plaintiff [choice of law] rules is that manufacturer protection can no longer be considered a secondary concern. Today, an equal concern exists for both manufacturer and consumer protection, necessitating choice of law rules that further both policies.”

138 See, e.g., R.J. Weintraub, “Choosing Law with an Eye on the Prize” (1994) 15 Mich. J. Int’l L. 705 at 720 (footnotes omitted): “It may make... sense to give each user the protection of his or her own home state law, such as it is, if this is fair to the manufacturer because the product is distributed there. If the user’s law is favourable to consumers, fine. If not, some courts have placed their own manufacturers at a worldwide competitive disadvantage by applying law more favourable to the consumer than the consumer’s own law, but most courts have had better sense.” Competitive disadvantage was among the concerns that motivated a Committee of the Australian Senate to reject a proposal to extend the strict products liability regime in the federal Trade Practices Act (supra footnote 33) to expressly cover non-residents injured abroad by Australian-manufactured defective products. See Australian Parliament Standing Committee on Legal and Constitutional Affairs, “Product Liability: Where Should the Loss Fall?” (the “Cooney Report”) (Australian Government Publishing Service: Canberra, 1992). The Report was tabled in the Senate on 4 May 1993. The Government Response, accepting the Committee’s recommendations was tabled in the Senate on 1 June 1994. I do not, however, want to overemphasize the competitive disadvantage argument. Rather, I agree with Professor Silberman that even if the argument has validity, the real issue here is one of international (and intranational) relations, the appropriate allocation of each country (and province’s) substantive regulatory authority within the international (and federal) order, a consideration that independently favours the application of the law of the place where the product was distributed and caused injury. See L.J. Silberman, “Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard” (1993) 28 Texas Int’l L. J. 501 at 526.

139 On ‘one-law-selecting’ choice of law values, see Westbrook, supra footnote 29.

140 Ostroski v. Global Upholstery Co., supra footnote 118.
forward causing her to fall. The limitations period for suit in Pennsylvania having expired, the plaintiff brought a tort action in Ontario against the Ontario manufacturer of the chair and its Pennsylvania distributor. The court had no difficulty in dismissing the action. Applying the localizing test in Moran v. Pyle, Pennsylvania was found to be the loci delicti; consequently the suit was statute-barred. In light of the Supreme Court's emphasis on the value of certainty in Tolofson, the courts could no longer, as they might once have done, apply the lex fori to get around any "perceived injustice or unfairness" under the lex loci delicti. In any event there was nothing "inherently unfair" about the result since it was brought about by "the application of the law in which the plaintiff resides, in which she sustained injury and suffered the financial consequences of the injury."

(c) A public policy exception for dangerously defective products?

Is there room for a public policy based exception "when the defendant manufacturer has acted outrageously by, for example, exporting a dangerously defective product to the victim's state, the use of which is banned in the manufacturer's state." Weintraub regards this as an "easy case" for recognizing an exception. Since "both the manufacturer's and the victim's state would wish to punish and deter this kind of conduct," applying the enterprise liability law of the defendant's state "advances the policies of both states" and consequently is the "preferred result."

Weintraub's assumptions are inherently problematic. If the manufacturer's home state authorizes the domestic production for export of banned products, how can the defendant's conduct be said to be contrary to that state's policy? Equally, if the victim's home state allows the import and sale of defective products without sanction, how can it be said that it wishes to punish and deter the manufacturer's conduct?

Those who advocate the extraterritorial application of domestic products liability laws to cover injuries caused abroad by exported products sometimes base themselves on justice considerations, specifically that it is wrong to apply a lower standard of liability and compensation to foreign plaintiffs relative to

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141 Supra footnote 110.
142 In Tolofson, supra footnote 10, the Supreme Court reversed the long-established common law rule that limitation periods are procedural and therefore governed by the lex fori rather than the otherwise applicable substantive lex causae.
143 Supra footnote 140 at para. 12.
144 Ibid. para. 15.
145 Weintraub (1990), supra footnote 83 at 230. And see infra footnote 150.
146 Weintraub does not favour giving the plaintiff the option to claim under the manufacturer's home law as a general rule: supra footnote 120.
147 Supra footnote 145.
citizens of the manufacturer's home state. However, unjustifiable discrimination exists only when there is differential treatment of persons who are similarly situated. To equate the position of domestic plaintiffs injured within the forum and foreign plaintiffs injured abroad ignores the plenary territorial authority of the state of distribution and injury of the product to regulate the defendant's conduct. If the victim has cause for complaint, the complaint is with his or her home law.

To challenge the logic in recognizing a public policy exception here is not to defend the practice of dumping hazardous products in investment-hungry developing countries or to underestimate the obstacles they face in implementing a more rigorous regulatory regime. But the problem is not created by and cannot be resolved by a wave of the judicial choice of law wand. If the manufacturer's home jurisdiction wishes to regulate and deter extraterritorial 'misconduct,' it has the legislative power to do so (although this might more effectively be expressed in the form of restrictions on export than through the

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148 Arguments along these lines have typically been raised at the jurisdictional level in the context of applications by United States manufacturers to dismiss tort actions brought against them in the United States by foreign plaintiffs for personal injury suffered abroad on the basis of forum non conveniens. Most courts have concluded that they do not have a significant interest in regulating the sale of products beyond their borders and the general tenor of current judicial opinion is against opening the doors to such suits. For a comprehensive review of the issues and cases, see Birnbaum and Dunham supra footnote 124.

149 Supra footnotes 116, 117.

150 See Dow Chemical Co. v. Castro Alfaro, 786 SW 2d 674 (Tex. 1990), cert. denied 498 U.S. 1024, in which a divided (5/4) Texas Supreme Court upheld the Texas appeal court which had reversed the trial court's decision to dismiss for forum non conveniens. That case involved an action in Texas by a group of Costa Rican plantation workers who alleged that they were sterilized as a result of their exposure to pesticide. The workers were employed by the Standard Fruit Company, a United States subsidiary of the Dole Fresh Fruit Company. Standard was supplied with the pesticide by Dow Chemical Company and Shell Oil Company which manufactured and shipped it even though it had been banned by the United States Environmental Protection Agency for use in the United States. In his concurring majority opinion, Justice Doggatt regarded the extraterritorial application of United States tort law as necessary to impose an effective restraint on multinational corporate misbehaviour because the "tort laws of many developing countries are not yet developed" (at 688-89). But see: Birnbaum and Dunham, supra footnote 124 at 261-62 (arguing that to allow foreign plaintiffs to sue United States manufacturers in the United States for product injury inflicted abroad impedes the opportunity for other states to develop domestic solutions); P.J. Carney, "International Forum Non Conveniens: 'Section 1404.5' - A Proposal in the Interests of Sovereignty, Comity and Individual Justice" (1995) 45 Am. U. L. Rev. 415, (can and should the United States be courtroom and legislator for the world?); W.L. Reynolds, "The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts" (1992) 70 Texas L. Rev. 1663 at 1708 (arguing that the imposition of United States liability and compensation standards for injury abroad is disruptive of the policies of developing countries who have presumably decided that the risk of injury is an acceptable price to pay for stimulating investment). And see Silberman, supra footnote 124 at 524.

151 Supra text at footnote 122.

152 Kozyris, supra footnote 81 at 501.
extraterritorial application of domestic products liability laws). In the absence of an express legislative directive to this effect, there is no ground to assume a public will to regulate.

(d) **Choice of law in geographically-dispersed fact patterns: contact-counting, plaintiff-choice or ‘real and substantial connection’?**

In the cases examined so far, there was a coincidence of the place of injury, the habitual residence of the victim and the place of the initial acquisition of the product. If it is accepted that the manufacturer’s nationality or residence standing alone is insufficient as a choice of law connection, then these types of cases are not really conflicts cases at all. They are essentially domestic cases within the natural territorial scope of application of the products liability laws of the state of distribution and injury.153

In cases involving more dispersed factual connections, is it still possible to identify a predominant territorial nexus for the purposes of choice of law? Is it even possible to analyse choice of law according to a territorial methodology? Or is this the type of situation which La Forest G. had in mind when he stated in *Tolofson* that in cases arising out of truly transnational or interprovincial activities and events, territorial considerations may become muted and other considerations may have to take centre stage?154

Some analysts would have us altogether abandon a conventional choice of law approach in multi-jurisdictional products liability cases. The court should instead take into account the substantive laws of all of the places to which the events and the parties are connected — the place of injury, the place where the negligent conduct causing the injury occurred, the place where the product was acquired, and the home states of the parties (residence, place of incorporation or principal place of business). As to each issue, the court should then select

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153 *Supra* footnote 116.
154 *Supra* footnote 104. In class action product liability claims involving widely dispersed injuries, victims, and defendants, it has been suggested that the exclusive application of the forum’s substantive law would ease judicial administration of the claims. This kind of artificial simplification of the choice of law process has been rejected in the United States as contrary to the constitutional requirement that a state have a significant contact or aggregate of contacts to apply its own substantive law: Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1995). And see L.S. Mullinex, “Mass Tort Litigation and the Dilemma of Federalization” (1995) 44 DePaul L. Rev. 755 at 788. In Canada, as well, the courts have not seen the administrative complexities posed by class actions as justification for by-passing the normal choice of law rules. However, they have been prepared to be flexible at the jurisdictional level. Thus, the existence of a common factual basis for all claims has been held to constitute a sufficiently ‘real and substantial connection’ to found jurisdiction, notwithstanding that the claims of some members of the class, if assessed independently, would be outside the court’s jurisdiction. See Harrington v. Dow Corning Corp., [1997] B.C.J. 400 (Q.L.), applying Nantais v. Teleelectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552 (Ont. Gen. Div.).
from the laws of these jurisdictions "the rule of decision which most closely accords with modern products liability standards."155

This kind of ad hoc anational methodology suffers from the deficiencies of any substantive tort choice of law rule. Concepts of tort justice are time and place sensitive. There is no such thing as an optimal tort regime in the abstract.156 Lacking an ideal standard, the forum is likely to turn to the law "that most closely resembles its own unless the forum considers its own law to be outmoded or inferior, an unlikely outcome."157 Even if a more neutral stance is attempted, the outcome is still unpredictable since the choice of the substantive law to govern each issue is premised on each forum's necessarily subjective ideas about the best approach to products liability.158

In any event, those who urge the abandonment of a classic choice of law approach in geographically-dispersed products liability cases may be overestimating the difficulties. Once the manufacturer's home law is removed from the equation, there is a surprising level of common ground among commentators and legislators on the appropriate choice of law resolution. The debate is then centred principally between the place of acquisition of the product159 and the habitual residence of the victim160 with the place of injury given second level significance as a default connection to habitual residence.161

The rationale for placing the emphasis on the habitual residence of the victim (or the place of injury in default) is plaintiff-oriented: it is that jurisdiction which will "experience consequences its laws is designed to prevent if what the residence considers proper compensation is not available."162 The rationale for focussing on the place of distribution of the product is defendant and territorially oriented. As we have seen, marketing a product within a state's boundaries gives that state a sufficient territorial nexus with the defendant's conduct and its consequences to support the application of its substantive products liability laws.163


156 Kramer, supra footnote 136; Rosenfeld, supra footnote 137.

157 Rockwell, supra footnote 127 at 84.

158 Ibid. and supra footnote 156.

159 Kozyris, supra footnote 81 at 501 ff.

160 The Hague Convention favours application of the law of the habitual residence of the victim if it coincides with any one of three factors: place of injury, the place the product was acquired or the place of the defendant's principal place of business: supra footnote 119 art. 4, 5. Otherwise, the law of the place of injury applies if it coincides with either the defendant's place of business or the place the product was acquired.

161 Ibid.

162 Weintraub, supra footnote 83 at 228-29. For this reason, he argues that the fact that the injury happened abroad, e.g., while travelling, should not displace the law of the habitual residence of the victim: ibid. at 229.

163 Supra footnotes 116, 117.
The ground of difference between the two solutions is not as large as might be thought. Those who advocate giving primary emphasis to the habitual residence of the victim nonetheless concede that it is an insufficient connection standing alone to justify the application of that law. There must also exist a volitional nexus between the defendant's marketing activities and the applicable law. It is argued, however, that this should not limit the choice to the law of the place where the actual defective product was acquired. It is enough if the "same or similar products" are distributed by the relevant manufacturer in the victim's home market through "ordinary commercial channels." In these circumstances, it is not "unfair" to subject the defendant to the victim's home law since "it is fortuitous if a product that the victim might have purchased at home is in fact purchased elsewhere." Some would even liberalize the defendant nexus requirement to the point that "foreseeability "of use or consumption of the product in the place of habitual residence or injury would be enough even if neither the particular product nor products of that type were marketed there in the ordinary channels of trade.

The considerations that favour application of the law of the place where the product was initially distributed respond to many of the classic conflicts values emphasized by La Forest G. in Tolofson, including decisional uniformity, forum-neutrality and facilitation of interprovincial and international commerce. Predictability would be enhanced because the rule avoids the uncertainties that would inevitably be encountered in interpreting more open-ended defendant nexus tests ("same or similar products," "ordinary commercial channels" and the notoriously slippery "foreseeability" of consumption or use). National legislatures would have a greater incentive to create an optimal torts liability regime directed at local market goals, while manufacturers would be

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164 In Weintraub's proposal, a sufficient nexus exists "if the defendant should have foreseen that the product that caused the harm or the defendant's products of the same type would be available in the victim's habitual residence through commercial channels." Ibid. at 228. The test under the Hague Convention is very similar: the law of the habitual residence of the victim or the place of injury, as the case may be, is inapplicable if the defendant "could not reasonably have foreseen that the product or [its] own products of the same type would be made available in that state through commercial channels." Supra footnote 119 art. 7. Cavers goes even further. He advocates application of the law of any state, at the plaintiff's option, where the defendant's products might foreseeably be present regardless of whether they are distributed in that market. Supra footnote 120.

165 Weintraub, ibid. at 229.

166 Cavers, supra footnote 164. Dickson J.'s language in Moran v. Pyle, supra footnote 113, is arguably open to this interpretation.

167 Supra footnotes 29, 26.

168 Generally, see Kozyris, supra footnote 81 at 501-507. As he notes, "the centrality of the state of distribution in the products liability context is beginning also to attract the attention of conflicts commentators." For a collection of relevant quotes, see supra footnote 56 at 504-505.
better placed to incorporate their potential products liability exposure into their pricing for particular markets.169

How well does the suggested rule — the presumptive application of the law of the place of distribution of the product — respond to territoriality and justice principles? The defendant cannot claim unfair surprise in being subjected to the products liability regime in force in the law of the state in which it has placed its products into circulation. If the plaintiff is the initial consumer or user of the product, application of the law of the place of acquisition reflects normal consumer expectations. The same is true if the plaintiff is connected directly or indirectly with the transaction under which the product was acquired (e.g., through a family or employment relationship). In both cases, the transactional or relational connections between the plaintiff and the manufacturer's marketing activities can be seen as sufficiently localizing the issues within the state where the product was acquired to support the application of its laws to risks of harm arising out of the consumption of use of the product even if those risks happen to materialize beyond its borders.170

However, the victim of the product defect may be an “innocent bystander” with no a priori relational connection to the transaction in which the product was acquired.171 In this instance, the relational theory is unavailable to 'reify' the tort so as to localize it within the jurisdiction where the product was acquired.172 Other jurisdictions may have an equally significant territorial connection to the parties or the activities. In such cases, two choice of law approaches are possible. One is to establish a set of a priori rules covering the choice of law resolution for each possible combination of relevant connections.173 Such proposals, however, reflect a mechanical contact-counting approach to choice of law. Because the connections have presumptive equal weight, there is no obvious default rule available in the event that they are widely dispersed. One is driven to plaintiff choice as the tie breaker174 with the uncertainties and potential unfairness to the defendant inherent in any pro-plaintiff alternative reference rule.

The second possibility is to apply an open-ended “real and substantial connection” analysis 175 in which the identification of the relevant lex loci delicti would depend on how the aggregation of relevant connections came together in each particular case tested against the principles and values identified

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170 Kozyris, supra footnote 81, and see text at footnotes 102, 103.

171 Kozyris, ibid. at 506.

172 Supra footnote 102.

173 Supra footnotes 119, 120, 160, 164.

174 Supra footnotes 119, 120, 164.

175 On the idea that territorial analysis is synonymous with a real and substantial connection test in choice of law cases arising out of truly interprovincial or transnational activities, see supra text at footnote 105.
by Dickson J. in Moran v. Pyle.\textsuperscript{176} This solution is the more responsive of the two to territorial and justice principles. ‘One-law selecting’ conflicts values are preserved.\textsuperscript{177} There is no plaintiff or defendant bias inherent in the test. And because the element of plaintiff choice is eliminated, there is greater certainty and predictability despite the open ended language of the test.

**Conclusion**

At the close of the last century, territorial analysis dominated conflict of laws thinking. Private international law was seen as a branch of public international law, sharing a common concern with the values of comity and a common commitment to preserving the co-equal territorial sovereignty of countries and states. In the intervening years, this way of thinking has fallen into decline in common law jurisdictions. There is no ‘superlaw’ vesting exclusive prescriptive authority in particular states over particular classes of interjurisdictional activities or events. Choice of law decisions are merely another form of expression of local policy and local standards of justice, unconstrained by external limits.

Today, territorial analysis is once again in ascendance in the area of choice of law in tort. Driven by a sense of dismay at the excessive bias towards local law solutions favouring local interests reflected in common law thinking everywhere, scholars, courts and legislators are once again looking outward for external limits on the territorial reach of local law, finding potential for them within federal systems in the constitution, and in the international realm in the old idea of comity as an expression of the principle of co-equal territorial sovereignty.

This “neo-territorialism” differs, however, from the territorial approach to choice of law associated with traditional vested rights thinking. Rather than commanding immutable and mechanistic solutions to choice of law problems, territorial values inform the choice of law process, acting as an outer limit on the assertion of domestic legal policy and providing a more solid foundation for the development of choice-of-law rules that strive for greater neutrality in balancing the interests of the parties and connected states.

In the area of products liability, territorial analysis succeeds in eliminating the single most complicating element from the choice of law equation — the reference to the manufacturer’s home law — without impinging on substantive justice principles. The remaining choice of law issues are identifiable and finite and for that reason manageable, even if there may remain room for reasonable disagreement in the details of their resolution. The fact that some areas of uncertainty necessarily remain should not lead us to reject the methodology. Instead we should see it as evidence of the flexibility of the new territorialism. After all, with global economic integration proceeding apace, manageable uncertainty is surely preferable to the anarchy inherent in the old \textit{lex fori} rule.

\textsuperscript{176} Supra part II(a) of this article.

\textsuperscript{177} This term is defined supra footnote 29.