

ASSESSING TORT DAMAGES IN THE CONFLICT OF LAWS: *LOCI, FORI, ILLOGICAL*

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The task of determining which law to apply when quantifying a damages award in tort cases involving more than one jurisdiction is not an easy one. As multinational litigation becomes more common, choice of law principles are required to evolve in order to ensure that plaintiffs are properly compensated, and defendants protected from excessive damages awards. This paper considers the history of choice of law in tort with respect to the assessment of damages and recent developments in common law and civil law jurisdictions, and suggests a new framework with respect to the assessment of pecuniary, non-pecuniary, and punitive damages in Canada where a conflict of laws situation arises.

La tâche consistant à déterminer la loi applicable lors de la quantification des dommages-intérêts dans les actions en responsabilité délictuelle impliquant plusieurs pays n'est pas du tout facile. Comme les litiges internationaux sont de plus en plus courants, les principes du choix de la législation applicable sont appelés à évoluer pour veiller à ce que les plaignants reçoivent l'indemnité appropriée, et que les défendeurs soient protégés contre des condamnations trop lourdes. Le présent article examine l'historique des règles du choix de la loi applicable en matière délictuelle en ce qui concerne la détermination des dommages-intérêts et les récents développements dans les pays de common law et de droit civil, et propose d'établir un nouveau cadre régissant la détermination des dommages-intérêts pécuniaires ou non pécuniaires et les dommages-intérêts punitifs au Canada en cas de conflit de loi.

1. Introduction

In the conflict of laws the issue of damages has taken a backseat to commonsense and logic. Indeed, it has been observed that the conflict of

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laws has long struggled with the topic of damages.¹ Traditionally, the question of which law should be applied to resolve conflict of laws issues has been resolved by resort to the distinction between substantive and procedural issues. In Canada, it is trite that issues of substance are to be governed by the law applicable to the tort or the *lex loci*, with matters of procedure to be governed by the law of the forum or the *lex fori*.² Issues relating to the quantification of damages are labeled as procedural and are governed by the court in which the action is brought. Whatever may be the justification for this current rule, its application has given rise to much difficulty, which has led to the great debate as to whether the quantification of damages constitutes an issue of substance or procedure.³ As it stands, the current rule encourages plaintiffs to commence their action in the forum that applies the law most favourable to them – in terms of the scale of damages available for recovery – which results in forum shopping.⁴

At the end of the day, the amount of damages that a plaintiff could potentially recover is what really matters to him or her. As one author has stated, damages “are the bottom line – what all the fuss and fury of trial are about.”⁵ Thus, the uncertainty and inconsistency involved in the current approach to quantifying damages justifies a fuller examination of this issue, especially in light of the increasing number of private international cases making their way into Canadian courts. The goals of this article are (1) to investigate the question of how Canadian damages principles are to be given effect in torts cases involving foreign parties; and (2) to construct a

¹ Russell J Weintraub, “Admiralty Choice-of-Law Rules for Damages” (1997) 28 J Mar L & Com 237 at 237 [Weintraub, “Choice-of-Law Rules for Damages”]. See also Richard Garnett, *Substance and Procedure in Private International Law* (United Kingdom: Oxford University Press, 2012) at 326: “The issue of quantification is arguably the most contentious and uncertain in the whole topic of damages.”

² *Tolofson v Jensen; Lucas (Litigation guardian of) v Gagnon*, [1994] 3 SCR 1022, 100 BCLR (2d) 1 (WL), [*Tolofson*].

³ Janeen M Carruthers, “Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages” (2004) 53 ICLQ 691 at 694 [Carruthers, “Continuing Debate in Relation to Damages”].

⁴ “Forum shopping” is the name given to the practice adopted by some litigants to get their case heard in the court most likely to provide a favourable/lucrative damages award. Some states in the US have, for example, become notorious as plaintiff-friendly jurisdictions and so have become litigation magnets even though there is little or no connection between the legal issues and the jurisdiction in which they are to be litigated; see Russell J Weintraub, “When and How to Demagnetise Magnet Forums” (2001) 12 KCLJ 195 [Weintraub, “Magnet Forums”].

⁵ Weintraub, “Choice-of-Law Rules for Damages,” *supra* note 1 at 237. See also Garnett, *supra* note 1 at 334, noting that civil liability has little value unless it also embraces quantum of damages, especially in personal injury cases where damages is the gist of the action.

principled approach to quantifying damages that focuses on consequences, uniformity, and predictability.

Part 2 provides background to the reasons why courts apply a certain law to an issue in a case and critiques the current rule in Canada. In doing so, the purpose of damages generally is considered followed by a description of the current position with respect to damages issues in selected jurisdictions. I commence with an examination of the approaches used by Canadian, Australian, and English courts, both past and present, in determining the applicable law, both generally and in relation to damages. This involves a consideration of the jurisprudence and theory that comprise the current substance versus procedure debate,⁶ which will provide the foundation from which to consider and measure the potential of a proposed principled approach.

Part 3 attempts to formulate choice of law rules for quantifying damages in Canada. In doing so, different heads of damages will be considered. It is not possible to examine all of the different types of damages whose classification as substantive or procedural raises difficulties so this article will limit its focus to three specific areas, which often arise in tort cases. The first area pertains to compensatory or general damages, which deals with the issue of how to put the person who has been injured in the same position as he or she would have been in had the tort not occurred. The second area focuses on non-pecuniary damages, which are intended to provide a measure of consolation for intangible losses, such as pain and suffering and loss of enjoyment of life. The final area that will be examined is that of punitive or exemplary damages, which act as a deterrent and are used to punish the tortfeasor. Courts always, however, retain an inherent power to refuse to apply a foreign law or recognize a foreign judgment on the grounds of inconsistency with public policy. Accordingly, the area of public policy is also examined, which can be used as a “check” on the appropriateness of the applicable law chosen.

These issues are significant because Canada is in need of a framework that balances respect for comity while providing necessary protection for the domestic defendant(s) in a globally integrating world. The jurisprudence discussed below illustrates the injustice that can be caused by rules that are not specifically adjusted to respond to the particular

⁶ The majority of cases cited and considered throughout this paper are personal injury cases, which is not purposely intended. There is very little jurisprudence with respect to determining the appropriate law in order to assess damages in conflicts cases, and within that small group of cases lies mostly personal injury decisions. However, there is no reason why the same principles suggested in this paper could not apply to assessing damages in other torts cases, such as product liability and property damage cases.

fairness issues arising from international litigation. It is my position that the increasing magnitude of cases involving aspects of conflict of laws necessitates appropriate procedural safeguards to protect the interests of parties involved in litigation under the jurisdiction of Canadian courts.

2. Re-characterizing the Assessment of Damages from Procedural to Substantive Law

A) The Purpose of Damages Generally

The purpose of an award of damages is to put the injured party back in the position that he or she would have been in had the wrong never occurred. The Supreme Court of Canada neatly summarized this principle in *Ratych v Bloomer*:

... the purpose of awarding damages in tort is to put the injured person in the same position as he or she would have been in had the tort not been committed, in so far as money can do so. The plaintiff is to be given damages for the full measure of his loss as best that can be calculated. But he is not entitled to turn an injury into a windfall. In each case, the task of the Court is to determine as nearly as possible the plaintiff's actual loss. With respect to non-pecuniary damages, the task is necessarily imprecise, and resort must often be had to conventional figures. But where pecuniary damages are at issue, it is the actual pecuniary loss sustained by the plaintiff which governs the amount of the award.⁷

Damages have been distinguished among four types: those designed to protect the "reliance interest," the "restitution interest," the "expectation interest" and the "retribution interest."⁸ Each type protects a different interest and promotes a different form of justice. This paper concerns itself only with those types of damages that fall under the categories of reliance interest and retribution interest.

Damages measured by the reliance interest are most common in tort cases and aim to restore to the plaintiff any losses suffered as a result of the defendant's breach of duty. These damages are measured by an amount that will put the plaintiff in the position she would have been in had the tort not been committed. Reliance damages may also include compensation for lost future opportunities. Damages under this category are divided into two types of compensation: pecuniary and non-pecuniary loss. In theory, it is

⁷ [1990] 1 SCR 940 at 962-63, 73 OR (2d) 448 [*Ratych*].

⁸ See Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2d ed (Toronto: Irwin Law Inc, 2008) at 6.

said that perfect compensation is obtainable in respect of pecuniary loss.⁹ Practically speaking, however, compensation can never be “complete” or “perfect.”¹⁰ The question, therefore, that must be asked in a conflict of laws analysis is: in what legal system will the claimant’s loss be made whole?

Damages based on retribution have nothing to do with compensation to the plaintiff. Rather, they are damages whose goal is to punish the defendant or to deter certain conduct. Otherwise known as punitive damages,¹¹ they are based not only on the private interest of the wronged plaintiff, but more importantly, on the public interest in deterring and punishing unacceptable behaviour within a certain community.

Remedial selection and the measurement of damages are highly discretionary in nature. An appreciation of the principles governing the methods of damages quantification provides critical insights into specific legal rules and arrangements, as well as into the nature of the common law process generally. It has been stated that from a pragmatic point of view, the issue of remedies is of utmost importance in civil litigation since a right has practical value only to the extent that it is vindicated by an adequate remedy.¹² From a theoretical point of view, the law of remedies is also of primary significance because the remedies the courts choose to make available to vindicate a right reveal much about the nature, purpose and scope of that right. Despite their vital importance, however, the issue of quantification of damages in the conflict of laws has never thoroughly been considered by a Canadian court. In light of the increasing number of Canadian cases involving foreign litigants, issues relating to quantifying damages should no longer be treated as an afterthought. Thus, the time is ripe to re-assess and reform the current rule.

⁹ Both the Supreme Court of Canada and the House of Lords have held that in respect of pecuniary losses the plaintiff can, in principle, recover full compensation; see *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 241-42, 8 AR 182 [*Andrews*]; and *Pickett v British Rail Engineering Ltd* (1978), [1980] AC 136 at 168 (HL).

¹⁰ One kind of difficulty arises from the need to estimate the probability of uncertain future events. For example, future changes in the plaintiff’s medical condition, the effect on the plaintiff’s expectation of life, the cost of future care, and the salary the plaintiff would have earned if not injured, are all matters that the court must estimate; see *Andrews*, *ibid* at 236-37.

¹¹ Such awards are also called exemplary, vindictive, penal, aggravated, treble and retributory and are used interchangeably in this paper.

¹² Cassels and Adjin-Tettey, *supra* note 8 at 1.

B) Choice of Law for Assessing Tort Damages

1) Choice of Law in Canada Generally

Canada's modern choice of law history begins with the 1994 Supreme Court of Canada decision in *Tolofson v Jensen*.¹³ Since the decision is of central importance in Canada, the facts bear noting. In *Tolofson*, a young passenger in a car owned and driven by his father was seriously injured when the car collided with a vehicle driven by the defendant Jensen in Saskatchewan. The Tolofsons were residents of British Columbia where the automobile was registered and insured. The defendant Jensen, was a resident of Saskatchewan and his vehicle was registered and insured in that province. The plaintiff brought an action in British Columbia against both his father and Jensen seeking damages for his injuries. At the time of the accident, Saskatchewan law, unlike British Columbia law, did not permit a gratuitous passenger to recover, absent willful or wanton misconduct of the driver of the car in which he or she was travelling. Furthermore, the action was barred in Saskatchewan under that province's statute of limitations but was not barred in British Columbia. The plaintiff sought to avoid the Saskatchewan limitation period by bringing his action in British Columbia, a province that was free of these restrictions. Thus, it was necessary for the court to decide which law should be applied to determine the liability of the defendant driver.

Historically, the law of the forum would apply to tortious issues. After reviewing the development of the Anglo-Canadian choice of law rules in tort, however, La Forest J, speaking on behalf of the majority, observed that the rules appear to have been applied "with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality."¹⁴ He recognized that the major issue in these types of choice of law cases is to determine what law should apply after a court has properly taken jurisdiction. La Forest J determined that, as a general rule, the law to be applied in torts is the law of the place where the activity occurred (the *lex loci delicti*). He then went on to consider whether there should be an exception to this general rule within Canada and concluded that there need not be in cases that are interprovincial in nature. One of the main goals of any conflict of laws rule is to create certainty in the law, and any exception adds an element of uncertainty. La Forest J did recognize, however, that there are situations, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the question of where the tort takes place itself would

¹³ *Supra* note 2.

¹⁴ *Ibid* at 1046.

give rise to “thorny issues.”¹⁵ In such a case, he held that it may well be that the consequences would be held to constitute the wrong. Thus, he maintained a very narrow exception to the general rule for tortious activity outside Canada:

... because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances.¹⁶

In that context, he considered whether there was room for an exception in the case of inter-provincial torts where the parties were residents of the forum in which the action is brought, not of the province where the tort took place. Ultimately, he rejected as unsound the assumptions and arguments in favour of this exception. First, he disagreed with the assumption that it is within the reasonable expectations of the parties that their home law would apply to an action between them. In his view, it was reasonable for parties to expect to be governed by the law of the state where they were at the time of the wrong. He also rejected the “public policy” argument that it would be unjust and unfair to apply the law of another state if some aspect of that law was considered contrary to the public policy of the forum as reflected in its own law. In the result, *La Forest J* applied the *lex loci delicti* rule in spite of the fact that by applying Saskatchewan law, the plaintiff’s claim was barred by a limitation period and by a bar on claims by gratuitous passengers, whereas the law of the forum, British Columbia, would have allowed the plaintiff’s claim to proceed.

Thus, the fifty-year-old English rule directing courts to apply the law of the forum to issues arising from tort actions was rejected¹⁷ on the basis that applying the law of the tort to substantive issues has the advantage of certainty, ease of application and predictability.¹⁸ As a result, the law of the forum would only be applied to matters pertaining to procedure, for which

¹⁵ *Ibid* at 1050.

¹⁶ *Ibid* at 1054.

¹⁷ For decades, the prevailing choice of law rule came from England and effectively directed the courts to apply their own law (the law of the forum) to determine the rights and obligations of parties to all torts, regardless of the connections that might exist between the parties or the events and other legal systems. The only exception was that no liability would exist if the tort had occurred abroad and the conduct complained of was justifiable by the law of the place where the tort occurred.

¹⁸ *Tolofson*, *supra* note 2 at 1050-51. According to *La Forest J*, people expect their activities to be governed by the law of the place where they happen to be and expect that legal benefits and responsibilities will be defined accordingly. Thus, the majority could find no compelling reason for applying the law of the forum to issues characterized as “substantive.”

a narrow definition was given. La Forest J confined procedural issues to those that exist for the convenience of the court, administering the court's "machinery as distinguished from its product."¹⁹

Although the Supreme Court's decision in *Tolofson* essentially reformed choice of law rules in Canada, one thing remained constant – the fact that a distinction still has to be made between matters of substance and procedure in order to determine which law will apply to a certain issue. The task of designating a particular issue as substantive or procedural has been likened to an exercise of positioning an issue on one side, or the other, of a fixed line.²⁰ By contrast, it has been argued that the task of characterizing an issue as substantive or procedural is more subtle than the analogy suggests; the so-called "line" is not fixed, but varies according to context, purpose, and stage of development of conflict rules.²¹ Indeed, others have taken the position that there is no clear line of demarcation between the two.²²

Unfortunately, many courts have proceeded as if there were a clear line of demarcation between the two in relation to the issue of damages. The most blatant example is the House of Lords decision in *Harding v Wealands*,²³ where it was concluded that quantification of damages in a tort action was a matter for the law of the forum, even after acknowledging that the rule was based on parliamentary error. Similarly, the majority of the High Court of Australia in *Stevens v Head* gave an expansive interpretation to the meaning of procedure, holding that in relation to the quantification of damages anything beyond the ascertainment of heads of

¹⁹ *Ibid* at 1067.

²⁰ See Carruthers, "Continuing Debate in Relation to Damages," *supra* note 3.

²¹ *Ibid* at 696, citing Walter Wheeler Cook "'Substance' and 'Procedure' in the Conflict of Laws" (1932-1933) 42 Yale LJ 333: "[N]o intelligent conclusion can be reached in any particular case until the fundamental purpose for which the classification is being made is taken into consideration." See also La Forest J's reasons in *Tolofson*, *supra* note 2 at 1067, where he stated that "differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward."

²² Anthony Gray, "Loss Distribution Issues in Multinational Tort Claims: Giving Substance to Substance" (2008) 4:2 J P Int'l L 279 at 280 [Gray, "Loss Distribution Issues"]. See also Mason CJ's judgment in *McKain v RW Miller* (1991), 174 CLR 1 at 18 (HCA) [*McKain*], where he stated that the dividing line is "artificial and contrary to common sense." See also *Harding v Wealands*, [2004] EWCA Civ 1735 (BAILII) at para 51 [*Harding CA*]: "In my judgment, the speeches of the members of the House of Lords in *Boys v Chaplin*, [[1971] AC 356 (HL)][*Boys*] show clearly that there is no bright line between questions of procedure and questions of substance in relation to damages."

²³ [2006] UKHL 32 (available on BAILII) at para 51 [*Harding HL*].

damages was procedural.²⁴ Such decisions have allowed plaintiffs to bypass provisions in the law of the place of the tort, which may limit the amount for which he or she could recover, by commencing the action in another jurisdiction where no such limits apply.²⁵ It is indeed arguable, and is demonstrated in more detail below, that the current state of the law in Canada promotes forum shopping.

2) *The Distinction between Substance and Procedure*

The distinction between substance and procedure is central to conflict of laws methodology.²⁶ It cannot be determined what law governs a particular issue until that issue has been characterized as substantive or procedural. The Ontario Court of Appeal has described issues of substantive law as those which create rights and obligations.²⁷ Substantive law is concerned with the ends which the administration of justice seeks to attain and determines the parties' conduct and relations in respect of the matters litigated. Procedural law, however, is the vehicle providing the means and instruments by which those ends are attained and regulates the conduct of courts and litigants in respect of the litigation itself. It has been described as the mode of proceeding by which a legal right is enforced, as distinguished from the law that gives or defines the right.²⁸ With this distinction in mind, I turn to the existing practices in selected jurisdictions and the ongoing debate currently taking place.

²⁴ (1993) 176 CLR 433 at 457-60 (HCA) [*Stevens*].

²⁵ See, for example, the recent decision of the Ontario Superior Court in *Barrick Gold Corp v Goldcorp Inc*, 2011 ONSC 3725, (2012), 99 BLR (4th) 1. Although a breach of contract case, it nevertheless illustrates this point. Among the issues was which law applied to determine the nature of the remedy (specific performance) sought by the plaintiff. The contract at issue was governed by Chilean law. The judge held that absent express agreement by the parties that Chilean law would apply to procedural matters, the availability of specific performance was a procedural matter that was to be governed by the *lex fori* (Ontario law), notwithstanding the merits of the proceeding was governed by Chilean law. Under Chilean law, the remedy of specific performance was not available to the plaintiff, whereas under Ontario law it was (as long as the plaintiff was able to meet the appropriate test). Such a result is a ringing endorsement for forum shopping.

²⁶ Carruthers, "Continuing Debate in Relation to Damages," *supra* note 3.

²⁷ *Sutt v Sutt*, [1969] 1 OR 169, 2 DLR (3d) 33 (CA).

²⁸ Janet Walker, "Conflict of Laws" in *Halsbury's Laws of Canada* vol 2R, 1st ed (Toronto: LexisNexis, 2011) at HCF-115.

C) *Current Position in Australia and England*

1) *Australia*

Different views have been expressed by the High Court of Australia in regard to the question of the proper law to apply to the quantification of damages. There is, however, support for the proposition that questions affecting the quantification of damages are a matter of substance, not procedure. In *Breavington v Godleman*,²⁹ an action was commenced in Victoria for a motor vehicle accident that occurred in the Northern Territory, which is also where the plaintiff resided. At issue was whether damages should be assessed under the law of Victoria, the *lex fori*, or the law of the Northern Territory, the *lex loci*. Although this case was intra-provincial, Mason CJ considered conflicts cases as they arise in relation to foreign torts committed outside of Australia. In his opinion, he preferred to apply the *lex loci* when assessing damages, subject to an exception involving the application of the law of the country with which the parties had, at the time of the occurrence, the closest and most real connection.³⁰ In applying this rule he held that the Victoria court should apply the law of the Northern Territory in determining the plaintiff's entitlement to damages, as a substantial connection existed between the plaintiff and the Northern Territory:

In reaching the conclusion that, as a matter of conflicts of law, the law of the Northern Territory is to be applied, I reject the notion that the principles according to which damages for personal injury are to be assessed is a matter of procedure. It would be artificial to regard that question as one of adjectival or procedural law. The measure of damages is plainly a question of substantive law.³¹

This issue was re-visited in a subsequent decision of the High Court in *Stevens*.³² In that case, the plaintiff, who was a resident of New Zealand,

²⁹ (1988), 169 CLR 41 [*Breavington*].

³⁰ *Ibid* at 76-77. Mason CJ stated that this approach avoids the shortcomings of the application of the *lex fori*, particularly with respect to the problem of forum shopping. However, he further stated that this rule should be subject to a flexible application in the modern age of travel when the place of the accident may be fortuitous, as it is in the case of an aircraft accident, and the parties may have no substantial connection with the law of that place or with that place at all.

³¹ *Ibid* at 73. This was consistent with his view in the subsequent decision in *McKain*, *supra* note 22. In that case, Mason CJ reiterated that his preferred view was that the measure of damages is a question of substantive law. In his opinion, law that places a limit on the amount of damages recoverable is not regarded simply as a matter concerning quantification of damage, "but rather as an express limitation on substantive liability" (at para 25).

³² *Supra* note 24.

was injured in a motor vehicle accident in New South Wales, but commenced the action in Queensland. The only question before the High Court was whether damages should be calculated in accordance with the law of New South Wales, or of the law in Queensland. There was legislation in New South Wales that restricted the amount that a plaintiff could recover for non-economic loss suffered as a result of a motor vehicle accident, but there was no such restriction applicable in Queensland. The majority concluded that quantification of damages was a matter of procedure for the forum, essentially overruling its earlier decision in *Breavington*. In rejecting the proposition that quantification of damages issues are matters of substance, the majority held that the quantification of damages is a matter distinct from the kind of civil liability in respect of which damages are to be quantified.³³ Mason CJ provided dissenting reasons, which confirmed his earlier position that the measure of damages should be a question of substantive law, and not procedure.³⁴ In his opinion, where courts are presented with conflicts situations, choice of law rules should operate to fulfill foreign rights.³⁵

Subsequently, in *John Pfeiffer Pty Ltd. v Rogerson*,³⁶ the plaintiff, a resident of the Australian Capital Territory (ACT), was injured while carrying out his employment duties at a location in New South Wales. He sued his employer in the Supreme Court of the ACT, framing his action in

³³ *Stevens*, *supra* note 24 at 459.

³⁴ *Ibid* at 461. In discussing statutory limits, in particular, Mason CJ asserted that “the size of a right is a part of the right.” See also Gray, “Loss Distribution Issues,” *supra* note 22 at 302-303. Gray supports the Chief Justice’s dissent and opines that it is artificial and arbitrary to draw a line between the right and the remedy. Further, he argues that forum shopping is a major reason in favour of a more restrictive definition of what is procedural:

[A]s is obvious, the narrower the definition, the less scope there is for an opportunistic plaintiff to forum shop in order to find a forum most advantageous to his case. One cannot blame parties in litigation for so doing, but the law should surely not encourage a person injured in one jurisdiction to sue in another, and by doing so avoid inconvenient damages limitations or time bars.

Dicey, Morris and Collins have also questioned whether the approach adopted by the majority in *Stevens* is either desirable in terms of policy or entirely consistent with the authorities. In keeping with La Forest J’s reasoning in *Tolofson*, the authors state that the primary purpose of classifying a rule as substantive or procedural is to determine which rules will make the machinery of the forum court run smoothly, as distinguished from those determinative of the rights of the parties; see Lawrence Collins *et al*, *Dicey, Morris, Collins, The Conflict of Laws*, 14th ed (London: Sweet & Maxwell, 2006) at 194 [*Dicey*].

³⁵ *Stevens*, *supra* note 24 at 451.

³⁶ [2000] HCA 36, 203 CLR 503 (available on AustLII) [*Pfeiffer*].

tort. Since relatively different laws applied in each jurisdiction,³⁷ the need arose to determine which law would apply to govern the plaintiff's right to compensation for his injuries. The High Court confined the role of the *lex fori* to procedure in the narrow sense of the rules governing or regulating the mode or conduct of court proceedings. This interpretation is also consistent with La Forest J's reasons in *Tolofson*, which was referred to by the High Court. In *Pfeiffer*, this change was said to be required by constitutional imperatives of the Australian federalism:

It may be reasonable to recognise the right of a litigant to choose different courts in the one nation by reason of their advantageous procedures, better facilities or greater expedition. However, it is not reasonable that such a choice, made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the disadvantage of its opponents. If this could be done, the law would no longer provide a certain and predictable norm, neutrally applied as between the parties. Instead, it would afford a variable rule which particular parties could manipulate to their own advantage. Such a possibility would be obstructive to the integrity of a federal nation, the reasonable expectations of those living within it and the free mobility of people, goods and services within its borders upon the assumption that such movement would not give rise to a significant alteration of accrued legal rights.³⁸

Thus, the *lex fori* no longer applies to the assessment of damages in intra-national tort cases in Australia. Instead, all questions about the kinds of damages, or amount of damages that may be recovered are treated as substantive issues.³⁹ In a later decision, the High Court left open the question of whether this rule would apply to foreign torts.⁴⁰ Some suggest

³⁷ If ACT law applied, damages would be assessed in accordance with common law principles in the sum of \$30,000. However, if New South Wales law applied, the assessment of damages would be lower as a result of legislative restrictions in that state.

³⁸ *Pfeiffer*, *supra* note 36 at para 129. It is arguable that this statement expresses, not some peculiar aspect of Australian federalism, but sound general choice-of-law principles; see Russell J Weintraub, "Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse," (2006) 42 *Tex Int'l LJ* 311 at 316.

³⁹ *Pfeiffer*, *supra* note 36 at para 100.

⁴⁰ See *Régie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, 210 CLR 491 at para 76:

In *Pfeiffer*, reference is made to the difficulty in identifying a unifying principle which assists in making the distinction, in this universe of discourse, between questions of substance and those of procedure. The conclusion was reached that the application of limitation periods should continue to be governed by the *lex loci delicti* and, secondly, that *all* questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*.

that there should be no difference in the approach to interprovincial and international conflicts.⁴¹ No reason was provided for reserving this question for a future occasion, however, and thus, the current position in Australia on issues regarding the quantification of damage in international cases remains unclear.

2) England

The traditional view in England has always been that the issue of heads of damages available to a successful plaintiff is a matter of substance, while the issue of quantification of damages is a matter of procedure for the law of the forum.⁴² Over the last few decades, however, there have been differences of opinion on this issue. For example, the current view expressed in Dicey is that the practice of giving a broad scope to the classification of a matter as procedural has fallen into disfavour because of the tendency to frustrate the purposes of choice of law rules.⁴³

Nonetheless, this substance-procedure distinction was preserved in the statutory regime put in place by the *Private International Law (Miscellaneous Provisions) Act 1995 (PIL Act)*.⁴⁴ Part III of the *PIL Act* consists of sections 9-16 and deals with choice of law in tort and delict. The rules essentially provide that the law applicable to a tort is the law of the country in which the events constituting the tort occur.⁴⁵ Although the

We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort.[emphasis in original]

⁴¹ See Jean-Gabriel Castel, "Back to the Future! Is the 'New' Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 *Osgoode Hall LJ* 35 at 37-38: "In today's world, there is no valid justification for or advantage in treating interprovincial and international conflicts differently." See also reasons of Sir William Aldous in the Court of Appeal's decision in *Harding CA*, *supra* note 22 at para 94, where he held that it would be illogical to apply a different rule for international torts than for interprovincial torts.

⁴² See e.g. *Boys*, *supra* note 22 where Lord Pearson at 394 stated that forum law must govern remedies "to some extent;" and Lord Donovan stated at 383 that the forum court "should award its own remedies."

⁴³ *Dicey*, *supra* note 34 at 177. Compare this to Dicey's view over a century ago that English lawyers should give "the widest possible extension to the meaning of the term procedure;" see Dicey and Morris, *A Digest of the Law of England with Reference to the Conflict of Laws*, 1st ed (London: Sweet & Maxwell, 1896) at 712.

⁴⁴ *Private International Law (Miscellaneous Provisions) Act 1995* (UK), c 42 [*PIL Act*].

⁴⁵ *Ibid*, s 11(1). This general rule may be subject to an exception where, in the light of a comparison between the significance of the factors connecting the tort with the country whose law is applicable under the general rule, and the significance of the factors connecting the tort with another country, it appears substantially more appropriate for the applicable law to be the law of that other country; see *PIL Act*, s 12(1).

PIL Act has since been somewhat superseded by the European Union's new Regulation on the law applicable to non-contractual obligations (Rome II), which is discussed in more detail below, certain provisions of the *PIL Act* are important for discussion purposes here.

Section 14 of the *PIL Act* was reviewed by the House of Lords in *Harding*.⁴⁶ That decision has allowed further consideration to be given to the debate between substance and procedure in the conflict of laws, and its relevance to the assessment of damages in tort. Section 14(3)(b) deals with questions of procedure and provides that such issues are to be determined in accordance with the law of the forum.⁴⁷ The issue was whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Part III of the *PIL Act* or whether it is a question of procedure that falls to be determined in accordance with English law. It is noteworthy that both parties to the action (the driver and the passenger) resided in England. Under the law of New South Wales, a statute placed limits on compensation for various types of damages and restricted recovery to approximately thirty percent less than under English law. The decision in *Harding* has been hotly contested and has received much criticism within the academic sphere.

In keeping with traditional English views, the trial court held that the *lex fori* determined quantification issues.⁴⁸ The Court of Appeal, however, allowed the appeal and held that issues of quantifying damages are substantive.⁴⁹ On behalf of the majority, Arden LJ agreed that there is no "bright line" between questions of substance and procedure.⁵⁰ She concluded that the damages principle is one of uncertain meaning and application and cautioned against examining concepts "simply through the prism of heads and measurement of damages."⁵¹ She considered the meaning of the word "procedure" in section 14(3)(b) of the *PIL Act* and held that in the context of damages in tort, the law of the forum should only

⁴⁶ *Supra* note 23. In that case, both parties resided in England, but were in a single vehicle accident in New South Wales. The plaintiff, who was the passenger in the car, commenced an action in London. The potentially applicable laws were the law of New South Wales, being the law of the place in which events constituting the tort occurred, and English law, being the law of the forum and the law of the parties' residence.

⁴⁷ *PIL Act*, *supra* note 44. Section 14(3)(b) provides that "nothing in the Act affects any rules of evidence, pleading or practice or authorizes questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum."

⁴⁸ *Harding v Wealands*, [2004] EWHC 1957 (BAILII) (QB).

⁴⁹ *Harding CA*, *supra* note 22.

⁵⁰ *Ibid* at 51.

⁵¹ *Ibid*.

operate in an exceptional case to displace application of the otherwise generally applicable proper law. In her opinion, application of the *lex fori* must only supply any gap created by “impossible” or “unjust” rules of the otherwise applicable law.⁵² This reasoning appears to be consistent with La Forest J’s reasons in *Tolofson*, where he held that the purpose of applying the procedural rules of the *lex fori* are solely for pragmatic and administrative efficiency of the courts.

Unfortunately, this new rule did not last very long as the Court of Appeal’s decision in *Harding* was overturned by a unanimous decision of the House of Lords on the ground that quantification of damages is procedural.⁵³ Lord Hoffman found no ambiguity in the meaning of “procedure” as used in section 14(3)(b) of the *PIL Act* and held that procedure in English private international law had always included all issues relating to the quantification of damages, which are governed by the *lex fori*.⁵⁴ His main reason was because this was the rule which Parliament intended to preserve:

Even if there appeared to be more logic in the principle enunciated in *Pfeiffer’s* case (and *Dicey and Morris*, 13th ed (2000), p 172,⁵⁵ supports Arden LJ on this point) *the question is not what the law should be but what Parliament thought it was in 1995*. As Lord Lloyd of Berwick said of a provision in the Limitation Act 1980 in *Lowsley v Forbes (trading as L E Design Services)* [1999] 1 AC 329, 342:

It is Parliament’s understanding of the existing law when enacting the Limitation Amendment Act 1980 that matters, not what the law is subsequently shown to have been. ... Once it is accepted that the purpose of ascertainment of the antecedent defect in the law is to interpret Parliament’s intention, it must follow

⁵² For further consideration of Arden LJ’s reasons see Janeen M Carruthers, “Damages in the Conflict of Laws – The Substance and Procedure Spectrum: *Harding v Wealands*” (2005) 1 J P Int’l L 323 [Carruthers, “Damages in the Conflict of Laws”]. Carruthers welcomes Arden LJ’s proposed new rule calling it both sensible and appropriate.

⁵³ *Harding HL*, *supra* note 23 at para 92.

⁵⁴ In doing so, he relied on the Report of the Law Commission and the Scottish Law Commission on which Part III was based, which confirmed that the *lex loci delicti* determined the question of the availability of particular heads of damages whereas the quantification of damages under those heads is governed by the *lex fori*; see *ibid* at paras 32-38. He also referred to the statement made by Lord Mackay on March 27, 1995, at the Hansard debate during the reporting stage in the House of Lords, which reiterated this same point.

⁵⁵ *Dicey and Morris*, *supra* note 43, state that the primary purpose of classifying a rule as substantive or procedural is “to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of the parties.” From this perspective provisions or rules dealing with the measure of damages should not be seen as procedural in nature.

that it is Parliament's understanding of that law as evincing such a defect which is relevant, not what the law is subsequently declared to be. *If common error can make the law, so can parliamentary error.*⁵⁶

Essentially, the House of Lords chose to confirm the traditional rule, despite accepting that the decision was wrong in principle and in logic, relying on the fact that Parliament made the law, notwithstanding that it was likely wrong.⁵⁷

Subsequent to the decision in *Harding*, Rome II was adopted and came into effect on January 11, 2009. At the first reading of the bill, Parliament originally approved the insertion of the following exception to the general *lex loci* rule:

In the case of personal injuries arising out of traffic accidents, ... the court seized ... should, for the purposes of determining the type of claim for damages and calculating the quantum of the claim, apply the rules of the individual victim's place of habitual residence unless it would be inequitable to the victim to do so.⁵⁸

The European Commission rejected this provision, and instead Article 15(c) was inserted, which provides that the applicable law governs "the existence, nature and assessment of damage or the remedy claimed." In addition, Recital 33 was added to the final text of the Preamble as a compromise between Parliament and the Commission, which states:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the *victim the court seized should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.*⁵⁹

⁵⁶ *Harding HL*, *supra* note 23 at para 51 [emphasis added].

⁵⁷ Although I do not necessarily disagree with the end result – that damages were to be assessed in accordance with English law, which is where the plaintiff resided and suffered the loss – I do not agree with the Court's classification of damages as procedural. It just so happened that the law of the forum was the same place as where the plaintiff suffered his loss and was the most substantially connected.

⁵⁸ Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), First Reading, 26 July 2005, Article 4(2).

⁵⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Recital 33 [emphasis added].

Besides the fact that a recital does not bear the same weight as a rule contained in the Regulation, the recital does not authorize an alternative choice of law rule, which would authorize the application of the victim's habitual residence.⁶⁰ Rather, it has been likened to "an invitation" for the court to take into account additional facts, such as the cost of medical care in the victim's residence in fixing the final amount of recoverable compensation."⁶¹ Moreover, Recital 33 is relevant only to motor vehicle accident cases. What about product liability cases? Or what about personal injury cases that are not as a result of a motor vehicle accident? Consider what would happen in the case where a tourist visiting from Ethiopia for the 2012 Summer Olympic Games slipped and fell at a hotel in London and claims to have suffered substantial injuries. Surely, the tourist would choose to commence his or her action in the UK because doing so would ensure a damages award in accordance with English standards, which would likely over-compensate him or her. This encourages forum shopping, and thus, we are no better off than we were before.

4) Issues Relating to the Assessment of Damages Should be Characterized as Substantive

The purpose of a forum's procedural rules was defined by La Forest J in *Tolofson* as "for the convenience of the court" and to "aid the forum court to 'administer [its] machinery as distinguished from its product.'"⁶² Some of the different aspects of a lawsuit that have been considered as procedural in Canada include:

- evidentiary matters, such as admissibility, the requirements of written evidence, the competency or compellability of witnesses, the burden of proof;⁶³

⁶⁰ Symeon C Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" (2008) 56 Am J Comp L 173 at 205 [Symeonides, "A Missed Opportunity"].

⁶¹ *Ibid.* See also *Garnett*, *supra* note 1 at 351:

Specifically, the recital does not go so far as to propose an alternative choice of law rule which would refer questions of quantification to the law of the victim's habitual residence but, at most, allows a forum court to take into account the factual circumstances confronting the victim in an attempt to ensure that such person is adequately compensated.

⁶² *Supra* note 2 at 1067.

⁶³ *243930 Alberta Ltd v Wickham* (1990), 75 OR (2d) 289 at para 41, 73 DLR (4th) 474, (CA), leave to appeal to SCC refused, [1990] SCCA No 486 [*Wickham*]. Lacourciere JA, in a concurring, not a majority, judgment endorsed the following approach at para 9: "As a matter of policy it would seem desirable to restrict the scope of the procedural definition so as not to frustrate the fundamental purposes of conflicts of laws. The test should be: 'is the foreign rule too inconvenient to apply?' If the answer is negative the foreign rule is substantive."

- laws governing who are the proper parties to a lawsuit;⁶⁴
- laws governing how a judgment may be executed;⁶⁵ and
- limitation periods included in the various rules of court, such as those for the filing of pleadings.⁶⁶

The following have also been suggested as matters of procedure to be governed by the *lex fori*:

- how the matter gets to court – the pleadings, directions hearings, discovery;
- rules of evidence;
- issues of standing;
- which court in the jurisdiction can hear the matter;
- whether the matter is heard by a judge or jury;
- whether damages are assessed on a once and for all basis or not;
- whether any damages awarded must be paid as a lump sum or can be paid periodically;
- time periods for filing documents (other than initiating process);
- dismissal for want of prosecution;
- avenues for appeal.⁶⁷

Issues affecting the quantification of damages are properly excluded, in my opinion, from both of these lists. Remedies are not rules governing or regulating the mode of conduct of the court's proceedings; rather, they are issues that affect the existence, extent and enforceability of the rights or duties of the parties and should thus, be characterized as substantive. This view was taken by the English Court in *Phrantzes v Argenti*, which held that, for the purpose of private international law, the remedy is an inseparable component of the right or obligation.⁶⁸ It is arguable that such an approach was also endorsed by La Forest J in *Tolofson*, who stated:

So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field ...⁶⁹

Continuing to characterize damages assessments as procedural results simply in the application of the *lex fori*, which generates forum shopping.

⁶⁴ *Ibid* at 41.

⁶⁵ *Ibid*.

⁶⁶ *Tolofson*, *supra* note 2 at 1073.

⁶⁷ Gray, "Loss Distribution Issues," *supra* note 22 at 307.

⁶⁸ [1960] 2 QB 19.

⁶⁹ *Tolofson*, *supra* note 2 at 1071.

It does not address the goals of substantive tort law, which conflicts law should seek to advance: compensation, regulation of conduct, and foreseeability. Moreover, the results that applying the *lex fori* generally produce are not consistent with the underlying purpose of the law of damages. Accordingly, issues relating to the quantification of damages should be characterized as substantive.

The next logical question then is which substantive law should apply? Part 3 focuses on how best to determine questions relating to quantification of damages in relation to (1) compensatory damages; (2) non-pecuniary damages; and (3) punitive damages. Accordingly, issues relating to the quantification of damages should be characterized as substantive.

3. Formulating Preferred Choice of Law Rule for Quantifying Torts Damages in Canada

Under the law applicable to the assessment of damages, one should keep the assessment of compensatory damages entirely separate from punitive considerations because one jurisdiction may be more suitable to determine compensation for the plaintiff, while another may be more appropriate to determine the extent to which the defendant's conduct should be deterred and punished. It has been suggested that this approach requires an assessment of compensatory damages, entirely free of punitive considerations and then an enquiry into whether and to what extent additional punishment may be required.⁷⁰ In order to ensure enforcement of the foreign judgment, the judgment granting court must be cognizant of whether their choice of law will result in a damages award that will actually be recoverable in the enforcing jurisdiction. Otherwise, if the judgment is not enforceable, all will be for nothing.

This issue-specific approach is akin to “*dépeçage*,” which recognizes that in a single action different countries may have different degrees of interests with respect to different operative facts and elements of a claim or defence.⁷¹ *Dépeçage* occurs when the rules of one legal system are applied to regulate certain issues, while those of another system regulate

⁷⁰ Stephen Waddams, “The Price of Excessive Damage Awards” (2005) 27 *Sydney L Rev* 543 at 554. In Waddams’ opinion, this process is impossible if punitive and compensatory considerations are intermixed.

⁷¹ O Furtak, “Application of Foreign Law to Determine Punitive Damages: A Recent U.S. Court Contribution to Choice-of-Law Evolution” at 275, in Eckart Gottschalk *et al*, *Conflict of Laws in a Globalized World* (New York: Cambridge University Press, 2007).

the other issues.⁷² In my view, this issue-specific approach is justified on the basis of a principled analysis that maintains consistency with the underlying principles and goals of the law of damages.⁷³

A) *Compensatory Damages*

1) *Background*

The fundamental principle of compensation in Canada is *restitutio in integrum*: restoration of the plaintiff to her pre-accident situation, at least so far as the losses suffered can be repaired by a monetary award.⁷⁴ Most European countries also abide by this rule, as does Australia. Although the principle of full compensation is the unanimously accepted starting point, it is subject to different restrictions, such as maximum limits as to the amount of compensation in the form of statutory caps on damages, or restrictions in recoverability. In terms of quantifying or assessing the value of damage, it is the economic value of the damaged position that has to be made good by the damages award. This value is regularly represented by the market value of the position or by the costs of restoring the prior state. Although most jurisdictions agree that the plaintiff should be adequately compensated, different solutions exist as to actual methods of calculating damages.⁷⁵

Up until now, the focus has been wrong. The automatic reversion to forum law with respect to assessing damages is difficult to justify for any reason except for the need for courts to be run by their own rules. In *Tolofson*, when speaking about choice of law rules to assess liability, although *La Forest J* held that the law of the place of the tort would govern,

⁷² See Arthur Taylor von Mehren “Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology” (1974) 88:2 *Harv L Rev* 347 at n 24.

⁷³ It has been suggested that Rome II does not, because it cannot, entirely avoid an issue-by-issue analysis, and thus the possibility of *dépeçage* emerges; see Symeonides, “A Missed Opportunity” *supra* note 60 at 186.

⁷⁴ Cassels, *supra* note 8 at 111. See also *Ratych*, *supra* note 6 at 23, where *McLachlin J* stated that “the award is justified, not because it is appropriate to punish the defendant or enrich the plaintiff, but because it will serve the purpose or function of restoring the plaintiff as nearly as possible to his pre-accident state or alternatively, where this cannot be done, providing substitutes for what he has lost.”

⁷⁵ For example, different solutions exist as to the correct date of the calculation: some courts use the date when the wrong was committed, whereas other courts use the date when the damages are to be assessed. English law seems to prefer a more actual date than the “damage day.” South African law favours the date of the commission of the tort, whereas Belgian law takes the time of judgment as decisive; see Ulrich Magnus, *Unification of Tort Law: Damages* (The Hague: Kluwer Law International, 2001) at 197.

he left open the possibility of an exception in circumstances where application of the general rule would give rise to injustice. I suggest that this notion of “injustice” should also play a factor in quantifying damages. It is certainly arguable that if the purpose of general damages is *restitutio in integrum*, anything less than what is required to fully compensate the plaintiff could constitute an “injustice.” By contrast, overcompensation could constitute an injustice to the defendant. Accordingly, the issue is not whether we should apply the *lex fori* to the assessment of damages because that is the way it has always been. Rather, the pivotal question in determining a choice of law question in relation to the quantification of general damages is: with respect to what legal system will the plaintiff be made whole so as to not constitute an injustice?

2) *Development of a New Rule*

There is virtually no authority on this issue in Canada; however, an approach other than simply applying the *lex fori* was taken by Borins JA in dissent in the Ontario Court of Appeal decision in *Wong v Lee*.⁷⁶ In that case, the parties, all of whom were Ontario residents, were involved in a motor vehicle accident in New York. All of the cars involved in the accident were insured under Ontario policies. Under Ontario law, the plaintiff could not claim for pecuniary losses; instead, his non-pecuniary losses would have to meet the threshold as provided for under the *Insurance Act*⁷⁷ and recovery was subject to the statutory deductible. Under New York law, however, the plaintiff could recover for pecuniary loss and there was no deductible.

The majority of the Court of Appeal did not adjudicate on the law applicable to assessing damages, although it commented that a defendant cannot rely on a mere difference in law in the assessment of damages to demonstrate an injustice.⁷⁸ This issue was, however, considered in the dissenting reasons of Borins JA, who held that Ontario had a greater interest in compensating an Ontario resident. In his opinion, to insist on application of the *lex loci delicti* would preclude an Ontario court from awarding damages in accordance with the Ontario statutory no-fault compensation regime for personal injuries sustained in a motor vehicle accident. Accordingly, he found it appropriate that an Ontario resident injured in a foreign state by the negligence of another Ontario resident,

⁷⁶ (2002), 58 OR (3d) 398, 211 DLR (4th) 69 (CA) [*Wong*].

⁷⁷ RSO 1990, c I-8.

⁷⁸ *Wong*, *supra* note 76 at para 17. In the majority’s opinion, this articulation of injustice appeared to be merely another way of applying the public policy of Ontario as defined in its law, and effectively treating the fact that all of the parties were from the forum jurisdiction as in itself creating an injustice.

each of whom was insured in Ontario by an Ontario insurer, should be compensated under the Ontario statutory no-fault compensation regime for personal injuries sustained in a motor vehicle accident.⁷⁹

Although the plaintiff in *Wong* was domiciled in the forum court's jurisdiction, thus resulting in the application of the *lex fori* in any event, what would happen if the plaintiff lived somewhere else? Consider a situation where a foreign plaintiff sues in the jurisdiction where the tort occurred, which, if successful, would invariably give rise to compensation way beyond the plaintiff's cost of living in his or her home jurisdiction. If courts automatically apply the *lex fori* to assess damages, or even the law of the jurisdiction where the tort occurred, this could result in overcompensation or a "windfall"⁸⁰ to the plaintiff, which runs contrary to the underlying purpose of damages. The problem is that an amount a judge or jury may find appropriate to compensate for an injury may, when converted into a foreign plaintiff's own currency, have an economic impact far greater than the domestic judge or jury had in mind. Although it is important to compensate a plaintiff, issues of fairness to the defendant must also be considered. This was the exact issue before the Fifth Circuit in *In re Air Crash Disaster Near New Orleans*.⁸¹ In that case, Pan American World Airways Flight 759 crashed on takeoff, killing all passengers on board on July 9, 1982. Among the victims was a Uruguayan woman whose son, also a citizen of Uruguay, commenced an action in a federal district court in Louisiana for wrongful death. Using the *lex fori* to assess damages, the jury awarded the plaintiff \$250,000, which was subsequently affirmed by a majority panel on appeal. In dissent, Judge Gee objected that the plaintiff had "obtained a bounteous – indeed, an all but ludicrous – windfall under Uruguayan standards."⁸² According to Judge Gee's research, the highest comparable Uruguayan award ever made was in 1982, for a total of approximately \$17,000.⁸³ The majority disagreed, noting that a plaintiff who has shown a right to sue in the United States is

⁷⁹ Although Borins JA's analysis may be problematic in that it is akin to the interest-based regime used in the US, a regime that was effectively rejected by La Forest J in *Tolofson*, it is nevertheless instructive, as it demonstrates the court's ability to focus on the proper compensation of the plaintiff. Perhaps, instead of focusing on the jurisdiction with the greater interest, an alternative approach might be that of Mason CJ's in *Breavington*; in particular, focusing on the law with the closest and most real connection to the plaintiff. The result would have been the same as Ontario law would have still applied.

⁸⁰ Ruth Downes, "The Windfall Effect: Damages and the Foreign Plaintiff" (1990) 9 Rev Litig 267.

⁸¹ 821 F (2d) 1147 (5th Cir 1987) [*Disaster Near New Orleans*].

⁸² *Ibid* at 1179.

⁸³ *Ibid*.

entitled to the full benefits of that forum.⁸⁴ The Court did not explain, however, why damage awards that over-compensate the plaintiff should be a benefit of litigating in American courts.

Had the same set of facts been before a Canadian court, the same result would have ensued since damages are assessed by the *lex fori*. I am not saying that the monetary award would have been the same, but it is highly likely that the award would have been higher than what the plaintiff would have been entitled to under Uruguayan standards, which is where the plaintiff suffered the loss.⁸⁵ Instead of returning the foreign party to his former position, the award based on Canadians' cost of living could give the foreign plaintiff a degree of wealth in her own country that greatly exceeds what the judge or jury thought necessary to compensate him. Judge Gee's approach, on the other hand, suggests that damages awards should be lower when a lower cost of living in the plaintiff's home forum will result in the plaintiff being overcompensated. By contrast, often times the place of the tort is fortuitous,⁸⁶ and its interest to compensate plaintiffs for damages is lower than that of the plaintiffs' domicile, resulting in under-compensation. Thus, a further concern is the extent to which a society's interest in permitting the over-compensatory award should outweigh any perceived unfairness in requiring the defendant to pay it. Judge Gee's position is compelling as it is based on the premise that tort damages are compensatory. Although on its face, this view may appear to be harsh, it accords best with underlying damages principles – that the plaintiff be returned to his original position, no matter where the tort took place.

Taking all of these considerations into account I suggest, as a general rule, that the law of the plaintiff's domicile should govern the quantification

⁸⁴ *Ibid* at 1170.

⁸⁵ In Canada, recovery for wrongful death is for pecuniary or financial loss only. Unlike the personal injury action, the damages are intended to compensate the survivors for their personal losses, not for the losses of the deceased (whose losses are compensated, to a limited extent, by a survival action by the estate). The focus is upon the economic contribution that the deceased would have made to the individual family members but for the tort.

⁸⁶ For example, aviation crash locations are generally deemed to be fortuitous when the accident could have occurred in any jurisdiction: see Furtak, *supra* note 71 at 267, citing *Pescatore v Pan Am World Airways Inc*, 97 F3d 1, “in a disaster befalling a plane aloft, the place of the crash is often random.” See also Lord Wilberforce in *Boys*, *supra* note 22, where he noted the character of the majority of foreign torts, which usually involves personal injury or death sustained by travelers away from their place of residence in which the place of the occurrence of the wrong is often fortuitous. He concluded at 388 that “[t]o fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary, accidental and perhaps unintended presence, may lead to an unjust result.”

of general damages. This method will likely ensure that the plaintiff is adequately compensated, as it takes into account the economic and social considerations involved. Applying some other law may serve to overcompensate, or even under-compensate the plaintiff, which would undermine the principles of damages law, causing injustice to either party. In most cases, applying the law where the plaintiff is domiciled may result in application of the *lex fori* in any event.⁸⁷

In light of increased mobility, the easing of border controls, and large-scale immigration, it has been suggested that domicile might no longer be the most effective way of identifying an individual's personal law, and residence is now the preferred concept to use.⁸⁸ However, this view is taken in the context where the court is called upon to consider the *situs* of a debt, the proper law of a contract, the formal validity of a will, the court's jurisdiction, the jurisdiction of a foreign court for the purpose of recognition and enforcement of its judgments, and some procedural matters such as security for costs and fiscal liability.⁸⁹ Where the court is called upon to identify the proper law to resolve a dispute (i.e. the choice of law), a unitary answer is required – something domicile, but not residence, provides.⁹⁰ Therefore, until a court in Canada determines that domicile is to be replaced by residence or habitual residence in all contexts, or there is some sort of legislative reform, for choice of law purposes domicile is still the appropriate concept to use. In order to simplify the analysis to determine a person's proper domicile a suggestion has been to adopt the simple rule that “[t]he domicile of an individual at a particular time is in the legal unit with which he or she is most really or substantially connected”⁹¹ A determination of the domicile of the plaintiff under this

⁸⁷ In *Breavington supra* note 29, Mason CJ made an interesting observation on the House of Lords decision in *Boys, supra* note 22. In *Boys*, the plaintiff, an English resident, was injured in an accident while temporarily stationed in Malta. The action was commenced in England, and damages were assessed under the *lex fori*. In the Chief Justice's opinion, English law was the proper law to quantify damages in that case; not because it was merely the *lex fori*, but because the plaintiff would bear the impact of his serious disabilities in England, including economic loss and loss of amenities of life. Since the plaintiff was ordinarily resident in England, it was appropriate that the plaintiff should recover, and that the defendant should pay damages assessed in accordance with English law. Application of any other law, in Mason CJ's opinion, would have amounted to an injustice.

⁸⁸ Stephen GA Pitel and Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 20.

⁸⁹ See *Halsbury's Laws of Canada, supra* note 28 at HCF-108.

⁹⁰ Pitel and Rafferty, *supra* note 88 at 26.

⁹¹ See e.g. Janet Walker, *Castel and Walker: Canadian Conflict of Laws*, loose-leaf (consulted on 20 October 2012), 6th ed (Toronto: Butterworths, 2005) at 4-18: “The purpose of an enquiry as to where an individual was domiciled at a particular time is to

approach is much simpler as it would not depend upon the result of an historical or chronological investigation as is presently undertaken by the courts.⁹²

Alternatively, if the courts are not inclined to characterize the assessment of damages as substantive and prefer to proceed as it always has, under the *lex fori*, then courts should take into account the specific facts and circumstances of the claimant's domicile during the process of assessment in the law of the forum. Given, however, that such facts would require foreign evidence in any event, determining choice of law under the principled approach is preferred.

B) *Non-Pecuniary Damages*

1) *Background*

Non-pecuniary damages are awarded for intangible losses, such as pain and suffering, loss of amenities, and loss of enjoyment of life. These types of damages are not really "compensatory" as no money can provide true restitution. Rather, such damages should be viewed as simply providing additional money to make life more endurable for the plaintiff.⁹³ Canadian courts have determined that damage awards for non-pecuniary losses should be held within reasonable limits. Indeed, in three Supreme Court of Canada decisions decided in 1978 (the "Trilogy"),⁹⁴ each involving catastrophically injured youths, the court set out the law regarding non-pecuniary damages. The Court took the view that however seriously injured the plaintiff may be, it cannot be in the public interest to overcompensate him or her at the defendant's expense. In *Arnold v Teno*, Spence J held that exorbitant damages awards "fail to accord with the requirement of reasonableness, a proper gauge for all damages."⁹⁵ Accordingly, the Supreme Court placed a ceiling of \$100,000 on non-pecuniary damages. It justified this ceiling by noting that with the attempt to provide full compensation for all pecuniary losses the award for non-

identify the legal unit with which he or she was then mostly substantially connected." This view is also consistent with Mason CJ's conclusion in *Breavington*, *supra* note 29, where he held that the law of the Northern Territory applied in assessing the plaintiff's damages on the basis that it had the most substantial connection to the plaintiff (i.e. it was the place where he resided at the time and where he suffered his injuries).

⁹² *Castel and Walker*, *ibid*. Throughout the remaining part of this paper, "domicile" and "the place with which the individual is most substantially connected" are used interchangeably.

⁹³ *Lindal v Lindal*, [1981] 2 SCR 629.

⁹⁴ *Andrews*, *supra* note 9; *Arnold v Teno*, [1978] 2 SCR 287 [*Arnold*]; *Thornton v Prince George School District No 57*, [1978] 2 SCR 267.

⁹⁵ *Arnold*, *ibid* at 332.

pecuniary loss could be made less central to the overall compensation goal. This limitation imposed in the trilogy has been lifted by subsequent courts to take account of inflation and is now in the neighborhood of \$310,000.⁹⁶

Most European laws recognize that non-pecuniary damage should be compensated in the case of tortious injuries; however, each jurisdiction uses its own method to assess such damages. In England, for example, the English Court of Appeal has provided a figure of €200,000 in respect of the most serious injuries.⁹⁷ In France, there is no specific rule governing the assessment of non-pecuniary losses other than that there should be some “rationalization,” although several publications of tariffs are available to the courts.⁹⁸ In Germany, damages for pain and suffering are awarded and are assessed by taking into account all relevant circumstances of the case. The highest sum the courts have awarded has been in the range of 500,000 DEM (approximately €255,000) for quadriplegry.⁹⁹

In the United States, the traditional common law practice of assessing damages for non-pecuniary loss is that the jury determines pain and suffering damages without much by way of guidance from the court. In recent decades, some states have adopted caps on pain and suffering damages,¹⁰⁰ although there are still many states in which there are no caps.¹⁰¹

⁹⁶ *Somers v Fournier* (2002), 60 OR (3d) 225 at para 48, 214 DLR (4th) 611: “Adjusted for inflation, the amount of the cap is now almost three times the sum set by the Trilogy.” See also Cassels, *supra* note 8 at 170.

⁹⁷ *Heil v Rankin* [2000] EWCA Civ 1039, [2001] QB 272.

⁹⁸ *Préjudice physiologique (ou déficit physiologique ou déficit fonctionnel)* is the title that best expresses the notion of non-economic damages for health and bodily harm in France. See for example, the “*tableaux de jurisprudence des cours d’appel*,” periodically published by the Jurisclasseur, or the special publication of the Gazette du Palais called *Indemnités*. The Cour de Cassation does not forbid the reference to tariffs but regularly points out that they can be no more than a mere help to assessment. In its opinion, the only acceptable method is to take previous awards as a starting point for assessment and then to adjust the figures to the “personal, individual and concrete situation of the victim.”

⁹⁹ Erwin Deutsch, *Unerlaubte Handlungen, Schadensersatz und Schmerzensgeld*, 2d ed (Germany: Heymanns, 1995). The German DEM subsequently became obsolete and was replaced with the Euro on January 1, 1999.

¹⁰⁰ See e.g. *California Civil Code*, 4 Cal Civ Code § 3333.2 (West 1997) (non-pecuniary damages in medical malpractice cases capped at \$250,000); *Idaho Code*, IC § 6-1603 (West 2003) (\$250,000 cap, adjusted to inflation, on non-pecuniary damages in personal injury and wrongful death cases).

¹⁰¹ Examples of states without caps are New York, Illinois, Washington, Pennsylvania and North Carolina.

2) *Development of a New Rule*

In Canada, England and Australia, statutory or common law caps on damages have been characterized as procedural, and thus, the *lex fori* is applied to determine the quantum of non-pecuniary damages. Not only does this encourage forum shopping, but it also raises serious issues in the event the enforcing court does not permit recovery of non-pecuniary damages. As one author has stated:

If, however, foreign heads of damages provide all or most of the recovery available under United States law, the slogan of a plaintiff's lawyer might well be, "give me French law, give me German law, give me Ugandan law, just give me an American jury."¹⁰²

This was the very issue before the Ontario Court of Appeal in *Somers v Fournier*.¹⁰³ The plaintiffs were residents of Ontario and were involved in a motor vehicle accident in New York with a driver who was a resident of that state. The plaintiffs commenced an action in Ontario and at issue, *inter alia*, was whether the cap on non-pecuniary damages recognized under Ontario law is a matter of procedure, rather than substance. The Court of Appeal held that the policy considerations, which support the goal of avoiding substantial non-pecuniary awards favour characterization of the cap as a matter of procedural law. Cronk JA held that the cap established in the Trilogy was a device developed to avoid excessive and unpredictable damages awards concerning non-pecuniary losses and the corresponding burden on society which follows from such awards.¹⁰⁴

Similar to compensatory damages, there is little case law in Canada that provides for a choice of law analysis in respect of non-pecuniary damages because most jurisdictions simply apply the *lex fori*. However, it is noteworthy that a couple of American decisions have applied a foreign statutory cap on recovery when awarding non-pecuniary damages.¹⁰⁵

¹⁰² Weintraub, "Choice-of-Law Rules for Damages", *supra* note 1 at 253.

¹⁰³ *Supra* note 96.

¹⁰⁴ *Ibid* at para 57.

¹⁰⁵ In *Cunningham by Cunningham v Quaker Oats Co, Fisher-Price Div* 107 FRD 66 (WDNY 1985), an action was brought by the parents of an infant, an Ontario resident, who had suffered severe brain damage when he ingested a toy contained in a box of cereal. The manufacturer was located in New York, which is where the action was commenced. The jury awarded the infant \$500,000 for pain and suffering. However, citing the Supreme Court in *Andrews*, the Judge held that Canadian law required a reduction to the award for pain and suffering to \$125,000, thus upholding the Trilogy's upper limit for non-pecuniary damages. Similarly, in *Baird v Bell Helicopter Textron*, 491 F Supp 1129 (DC Tex, 1980), a federal case from Texas cited the *Andrews* decision in relying on it to place a \$100,000 limit on recovery for pain and suffering. In that case, the

Therefore, in order to promote the intention of the Supreme Court of Canada, which is to establish uniformity, I suggest, as with general damages, it is appropriate to apply the law where the plaintiff is domiciled (that is, most substantially connected) when assessing non-pecuniary damages. Such an approach will achieve predictability and uniformity. Failure to use a uniform standard to instruct the jury and assess its award can lead, and has led, to large American-style awards far beyond that which would have been forthcoming in the foreign country. This is exactly what the Supreme Court in the Trilogy intended to prevent when setting the cap on non-pecuniary will not require any evidence of foreign law.

C) *Punitive Damages*

1) *Background*

Punitive damages are sums awarded in excess of any compensatory damages in order to punish the wrongdoer for egregious conduct and to provide additional deterrence.¹⁰⁶ Punitive damages are not grounded in compensation or in corrective justice; rather, they are grounded in retributive justice. In Canada, punitive damages are awarded in exceptional cases for “malicious, oppressive and high-handed” misconduct that “offends the court’s sense of decency.”¹⁰⁷

District Court of Texas acknowledged that Canada has explicitly disapproved of the possibility of unlimited recovery for a non-quantifiable injury, and stated as follows at 1151:

In so doing, it has exhibited a policy of protecting its domiciliary defendants from excessive liability. It has also shown a desire to see that its injured plaintiffs are adequately cared for and able to live as tolerably as possible under the circumstances: *Warren v. King*, 3 A11 ER 521 (1963). All of the Canadian policies flowing from the Court’s discussion in the *Andrews* case, *supra*, are relevant here. The plaintiff is Canadian and, therefore, that jurisdiction has a present interest in seeing its law applied. Further, because the third-party defendants are Canadian citizens and they face the possibility of partial liability for Plaintiff’s damages, if any, the Canadian policy of protection for its defendants is also directly involved in this case. Both of these policies would be circumvented if Texas law was applied. Similarly, Texas must also have an implicit interest in protecting its citizen defendants from excessive liability. This desire would be furthered if Canadian law is applied. Canada has affirmatively adopted this particular method of damage calculation as the best way to deal with a difficult problem. An analysis of the interests and policies of both of the jurisdictions involved strongly favors the use of Canadian law.

¹⁰⁶ See *Hill v Church of Scientology*, [1995] 2 SCR 1130, 24 OR (3d) 865, where the Court explained that punitive damages are awarded to punish the defendant and to deter the defendant and others from engaging in such conduct, and not to compensate the plaintiff.

¹⁰⁷ *Ibid* at para 196.

There is no universal consensus on the role of punitive damages in transnational disputes. Countries differ on the purposes that punitive damages serve, the actions in which they may be awarded, the factors considered in determining the amount of the punitive damages award, and on what constitutes an “excessive” award. Countries also differ on whether they will recognize and enforce foreign awards of punitive damages. For example, most civil law countries consider punitive damages to be a penal sanction that may be imposed only in criminal proceedings, and thus, will not enforce a foreign punitive damages award.¹⁰⁸ The most recent iteration of this view is found in Article 11(1) of the *Hague Convention 30 June 2005 on Choice of Court Agreements*, which states: “[R]ecognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.”¹⁰⁹ By contrast, common law countries permit the award of punitive damages in private actions, although the circumstances under which such relief may be awarded vary greatly.

¹⁰⁸ For example, Switzerland, and Germany will not recognize or enforce a foreign court judgment containing punitive damages. In one case, the German court held that the enforcement of a US judgment would be contrary to the compensation principle underlying damages and also contrary to the penal monopoly of the State to impose punitive sanctions: see Judgment of the Bundesgerichtshof, IXth Civil Senate, Jun. 4, 1992, Docket No IX ZR 149/91. Italy also will not recognize or enforce foreign punitive damages awards on the basis that they are contrary to public policy; see *Soc Ruffinatti v. Oyola-Rosado*, Supreme Court 1781/2012, February 8, 2012. Poland is one of the few civil law countries within Europe that appears to allow punitive damages. However, even there, punitive relief is strictly limited to claims involving infringement of liberty, violation of sexual integrity and honor, or invasion of privacy; see *Civil Code of the Polish People’s Republic* art. 448. However, it has been suggested that the “tide may be about to change,” and that recent developments in some civil law countries point toward greater receptivity toward punitive damages and the enforcement of these foreign awards; see John Y Gotanda, “Charting Developments Concerning Punitive Damages: Is the Tide Changing?” (2007) 45 *Colum J Transnat’l L* 507 at 508. Indeed, France’s highest court, the Cour de Cassation, recently ruled that foreign judgments awarding punitive damages are enforceable, at least in principle. The Court held that punitive damages are not contrary to public policy, unless the amount of punitive damages is disproportionate to the amount of the damage sustained. Unfortunately, the Court did not provide much guidance on what constitutes a disproportionate amount, although French legislators have proposed a revision to the French Civil Code to permit punitive damages up to twice the amount of the compensatory damages; see Cass civ 1^{re}, 1 December 2010, *Epoux Schlenzka v Fountaine Pajot*, D 2010.

¹⁰⁹ The Special Commission of the Hague Conference on Private International Law, “Choice of Law Agreements” (delivered at the Convention of 30 June 2005), Preliminary Document 14, online: Hague Conference on Private International Law <http://www.hcch.net/index_en.php?act=publications.details&pid=3497&dtid=35> [Hague Convention].

One major aspect of the controversy surrounding punitive damages is related to quantum. The most widespread use of punitive damages is in the United States, which is why it has become known as a “magnet forum”¹¹⁰ attractive for litigating the claims of persons killed or injured in other places.¹¹¹ In England, punitive damages are limited to only two situations: when there is oppressive, arbitrary, or unconstitutional action by the servants of the government; and when the defendant’s conduct results in profit that is not fully offset by the award of compensatory damages.¹¹² The legislature has gone so far as to enact a statute that refuses to recognize foreign judgments for punitive and multiple damages.¹¹³ In Australia, punitive damages may be sought in a wide variety of tort actions. They are considered an extraordinary remedy, however, appropriate only in cases of truly outrageous conduct.¹¹⁴ It is also noteworthy that some states have placed limitations on the awarding of punitive damages. For example, New South Wales does not allow punitive damages for motor accident injuries

¹¹⁰ Weintraub, “Magnet Forums,” *supra* note 4 at 195.

¹¹¹ Critics of punitive damages warn against an “Americanization” of Canadian law that, if adopted, would bring the administration of justice in this country into disrepute; see *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 39, 1 SCR 595 [*Whiten*]. In *Whiten*, the Supreme Court of Canada cited two cases referred to by critics of punitive awards to substantiate this fact: (1) *BMW of North America, Inc v Gore*, 517 US 559 (1996) (an Alabama jury awarded \$4 million in punitive damages against a BMW dealership for failure to disclose a minor paint job to fix a cosmetic blemish on a new vehicle); (2) *Liebeck v McDonald’s Restaurants, PTS, Inc*, 1995 WL 360309 (Dist Ct N Mex) (in 1994, a jury in New Mexico awarded 81-year-old Stella Liebeck \$160,000 in compensatory damages and \$2.7 million in punitive damages against McDonald’s Restaurants for burns resulting from a spilled cup of coffee, notwithstanding that she tried to open the cup while balancing it on her lap in the passenger seat of a car).

¹¹² *Rookes v Barnard (No 1)*, [1964] AC 1129 HL. The decision to restrict punitive damages in England is based purely on policy concerns, such as the risk of unfairly penalizing the defendant without due procedural protection and confusing the functions of civil and criminal law.

¹¹³ See *Protection of Trading Interests Act 1980* (UK), 1980 c 11, which protects UK defendants from multiple damages awards by rendering such awards unenforceable in their entirety. Section 5(3) defines a judgment for “multiple damages” as “a judgment for an amount arrived at by doubling, trebling, or otherwise multiplying a sum assessed a compensation for the loss or damage sustained by the person in whose favour the judgment was given.”

¹¹⁴ There are two significant limitations on the availability of punitive damages. First, while Australia has rejected the English categorical approach to the availability of punitive damages, Australian courts will only award punitive damages if compensatory damages are inadequate to punish the defendant, deter the defendant from repeating such conduct, and mark the court’s disapproval of such conduct; see *Blackwell v AAA*, (1997), 1 VR 182 (SC). Second, punitive damages may not be assessed against the defendant if he or she has already been substantially punished in a criminal proceeding; see *Gray v Motor Accident Commission* (1998) 196 CLR 1 (HCA).

and industrial injuries.¹¹⁵ In addition, Victoria bars punitive damages in wrongful death actions.¹¹⁶

Punitive damages in Canada are more broadly available than in England and Australia, but more narrowly available than in the United States. The main factors Canadian courts use to determine quantum is the nature of the defendant's conduct and the extent to which the award of compensatory damages already given is likely to deter such future misconduct.¹¹⁷

Since numerous countries prohibit or severely limit punitive damages in private actions, parties may be unsuccessful in having punitive damages awards recognized and enforced in these countries. Thus, it is important to consider the ultimate enforceability of the award. We are in need of a uniform rule that will increase the likelihood of recognition and enforcement of a foreign punitive damages award. A uniform standard will also reduce forum shopping, enhance predictability and protect defendants sued in Canadian courts when the claim is governed by a foreign country's law.

2) *Development of a New Rule*

Courts in the United States have considered various approaches to choosing the applicable punitive damages law. It is recognized that the American analysis operates within a larger context that is quite different from the general approach taken in England, Canada and Australia, but it is nevertheless instructive. Some jurisdictions within the US consider the issue of punitive damages as substantive. That has led courts to focus on the defendant's domicile or principal place of business, the situs of the defendant's conduct, or the place of injury. Because punitive damages have a conduct-regulating function, the place of the plaintiff's domicile ought to

¹¹⁵ See *Motor Accidents Compensation Act 1999* (NSW), s 144: "A court cannot award exemplary or punitive damages to a person in respect of a motor accident."

¹¹⁶ See *Reindel v James Hardie & Co Pty Ltd*, (1994) 1 VR 619 (SC).

¹¹⁷ Additional factors that courts take into account include: the degree of moral turpitude involved in the tort; whether the defendant has apologized or expressed remorse in any way; any profit earned by the defendant from committing the wrong and the extent to which that profit exceeds the compensatory damages; and, the means of the defendant; see Cassels, *supra* note 8 at 296-97. The highest punitive damages award granted in Canada was a jury's verdict of \$1,000,000, which was upheld by the Supreme Court of Canada in *Whiten*, *supra* note 111, involving an insurer's liability for refusing to honour its policy obligations.

have little or no interest in having its law applied to punitive damages claims.¹¹⁸

a) The Place of the Alleged Misconduct

With respect to punitive damages, the “place of the tort” is not synonymous with the place of the injury, but rather, with the place where the alleged misconduct to which an award of punitive damages could attach.¹¹⁹ Often, the place of the conduct is the same as the defendant’s domicile. In *Dobelle v National Railroad Passenger Corp.*,¹²⁰ the plaintiff was domiciled in Pennsylvania but was injured when a train derailed in New Jersey. The cause of the derailment was traced back to Pennsylvania, where some of the defendant’s employees failed to inspect the train and fell below the standard of conduct required by their employer. The plaintiff commenced an action in the courts of the Southern District of New York and sought punitive damages. The punitive damages laws of Pennsylvania and New Jersey differed in regard to when a corporation is vicariously liable for punitive damages because of the acts of its employees. The court of the Southern District of New York selected the law of Pennsylvania, the situs of the alleged misconduct, reasoning that the interests of the place where the majority of the wrongful acts took place were stronger than the plaintiff’s domicile or the place of injury. The Court found that the interest of the jurisdiction where the plaintiff resided has little relevance since punitive damages are designed to punish a defendant, not to compensate a plaintiff. Similarly, where the place of injury, in this case New Jersey, is largely fortuitous, its interest in and ability to control behavior by deterrence or punishment, or to protect defendants from liability, is lower than that of the place of misconduct or principal place of business. The Court found that the determinative factor of this issue was the place where the conduct causing the injury occurred.

A significant problem with applying the substantive law of the place of the misconduct to quantify punitive damages is that ultimately, the resulting judgment may not be enforceable. While the defendant may have assets in the place where the misconduct occurred, this may not always be the case. If the enforcing court is located in a jurisdiction that does not

¹¹⁸ See Symeon C Symeonides, “Resolving Punitive Damages Conflicts” (2003) 5 Yearbook of Private International Law 1. Further, because the place of the injury is often much more fortuitous than the place of the misconduct or the principal place of business, its interest in and ability to control behaviour by deterrence or punishment, or to protect defendants from liability, is lower than that of the place of misconduct or the principal place of business.

¹¹⁹ Furtak, *supra* note 71 at 277.

¹²⁰ 628 F Supp 1518 (NY Dist Ct 1986).

enforce judgments for awards of punitive damages, then the punitive damages award will be worth nothing. Consider a Canadian punitive damages judgment awarded against a German manufacturer for misconduct that occurred in Canada. If the judgment is to be enforced in Germany, because that's where the defendant's assets are located, the punitive damages portion of the award will not be enforced on the basis that it is not recognizable in the enforcing country. Although this may not be the case in every action, it would likely be a common problem.

b) The Defendant's Domicile or Principal Place of Business

The defendant's domicile or its principal place of business has also been found to be very important in determining the applicable law of punitive damages. These factors are important to this issue because they satisfy the expectations of defendants that the laws of their home jurisdiction will apply to all conduct-regulating rules. These factors are also important insofar as those jurisdictions have a substantial interest in regulating misconduct within their borders.

The principal place of the defendant's business is a key factor in choice of law determinations relating to punitive damages issues in products liability cases. In *re Aircrash Disaster Near Roselawn, Indiana*,¹²¹ an action was commenced as a result of an aircraft crash in Indiana. The manufacturer defendants, however, maintained their principal place of business in France. Although the plaintiffs alleged that the defendants' misconduct occurred outside of France, the Court applied French law because it was also the defendants' principal place of business. The Court held that France's interest in having its own law of punitive damages applied outweighed the interests of the state where the misconduct occurred.¹²²

Similarly, in *re Air Crash at Belle Harbor, New York*,¹²³ an aircraft manufactured in France by a company organized under French law with its headquarters in France, crashed in Belle Harbor, New York shortly after its take-off in New York City. The US District Court for the Southern District of New York divided the issue of damages into two separate analyses: compensatory damages and punitive damages. The Court determined that unlike compensatory damages, French law would apply to determining the

¹²¹ 172 FRD 295 at 9 (II Dist Ct 1997) [*Roselawn*].

¹²² *Ibid* at 17. This case also illustrates how domestic courts may apply foreign law that does not permit the recovery of punitive damages against foreign defendants, even where the place of injury and the domiciles of many plaintiffs were elsewhere (in this case many of the victims were from the United States).

¹²³ 2006 AMC 1340, WL 1288298 (NY Dist Ct 2006) [*Belle Harbor*].

issue of punitive damages for all passengers on board because that was where the defendant's principal place of business was located.¹²⁴

On balance, the application of the law of the defendant's domicile or principal place of business is a reasonable resolution to these conflicts. In assessing the amount of punitive damages it should award, if any depending on the enforcing country,¹²⁵ the court should consider precedents under the foreign substantive law in order to assess the reasonableness of the award. A comparative standard has been suggested using representative ranges of foreign jury awards to help guide judges in their assessment, to help fill the void created between the laws and values of the foreign country and domestic judges and juries' corresponding lack of familiarity with them.¹²⁶ This standard seems reasonable. In addition, applying the law of the defendant's domicile or principal place of business will increase the likelihood of enforceability of the punitive damages award because the place where the defendant has assets will almost always be the same as the location of the defendant's domicile or principal place of business. This should provide plaintiffs with some comfort when seeking punitive damages against a foreign defendant.

D) Public Policy as a Check on the Quantification Analysis

Courts always retain the power to refuse to apply a foreign law or recognize a foreign judgment on the grounds of inconsistency with public policy. The existence of such discretion is recognized in common law

¹²⁴ There were also claims commenced by some who were not on board the airplane, but died as a result of the aircraft's impact on the ground in Belle Harbor. The Court concluded that in determining what substantive law to apply to the issue of punitive damages for the accident, French law would apply to the passenger claims, but New York substantive law would apply to the ground victims; see *ibid* at 30.

¹²⁵ Even though a plaintiff might find it harsh that it cannot recover punitive damages against a defendant, where the enforcing country does not recognize such an award, we must keep in mind what the rationale behind punitive damages is – not to compensate the plaintiff, but to punish the wrongdoer. In essence, the plaintiff must take the defendant as they find him.

¹²⁶ Janet Hallahan, "Damage Control: Should a Foreign Nation's Jury Awards Limit American Juries?" (1994) 67 Temp L Rev 729 at 767. See also Weintraub, "Choice-of-Law Rules for Damages," *supra* note 1. In Weintraub's opinion, if the jury verdict clearly exceeds what would be within acceptable limits in the foreign country, the judge should either order a new trial if the plaintiff does not agree to a remittitur to an amount at the high end of the foreign range, or perhaps simply reduce the award to this level on the ground that, as a matter of law, this is the maximum recoverable.

rules,¹²⁷ embodied in statutory codifications of private international law,¹²⁸ and is a standard feature of international conventions on private international law.¹²⁹ It has been said that public policy can be used as a “safety-net” to choice of law rules.¹³⁰ It is a doctrine which crucially defines the outer limits of the “tolerance of difference” implicit in those rules. Accepting that the use of public policy must be restricted, guidelines have been suggested to explain and construe the way in which public policy ought to be applied by the courts. The most pertinent principle, in my opinion, is for courts to have the discretion to use public policy as a choice of law rule. For example, where a damages award would give rise to inadequate compensation to the plaintiff (that is, either excessive or absurdly low) then the courts should apply a public policy check to ensure the plaintiff is being properly compensated.¹³¹ Thus, where a foreign law is chosen, the effect of public policy would be to apply a local norm in priority over that foreign law. This is in keeping with La Forest J’s position in *Tolofson* that an exception should be made where the application of the general rule would give rise to injustice.

In Canada, use of this so-called policy check can be found in the British Columbia Superior Court decision, *Wong v Wei*.¹³² A motor vehicle accident occurred in California involving parties who were both British Columbia residents. The plaintiffs brought an application for a determination of the applicable law to the quantification of damages. Not surprisingly, the plaintiffs argued that the damages should be adjudicated in accordance with California law, which did not provide for an upper limit in respect of non-pecuniary damages. By contrast, the defendants argued that British Columbia law, which of course, is bound by the Trilogy’s cap, should apply. The Court ultimately applied British Columbia law, the *lex fori*, to the quantification of damages. Interestingly, the substance versus procedure debate did not play a role in the court’s determination; rather, the discussion turned on the issue of public policy. The Court was asked to consider the policy concerns that were apparent if California law were to be used to assess damages and whether the non-existence of a rough upper-

¹²⁷ For example, the law which would ordinarily be applicable under choice of law rules may be denied application where the applicable law “could give rise to injustice;” see *Tolofson*, *supra* note 2 at 49.

¹²⁸ See e.g. *PIL Act*, *supra* note 44, s 14(3)(a).

¹²⁹ See e.g. Article 33 of the Hague Convention, *supra* note 109.

¹³⁰ Alex Mills, “The Dimensions of Public Policy in Private International Law” (2008) 4 J P Int’l L 201 at 211.

¹³¹ Garnett, *supra* note 1 at 339, who suggests that while the Canadian “injustice” test is potentially vague, it does at least satisfy the protection of claimants as a legitimate policy in awarding damages; see also Mills, *ibid* at 218; Carruthers, *supra* note 3 at 702; and Weintraub, “Bad Rule Worse,” *supra* note 38 at 320.

¹³² [1999] 65 BCLR (3d) 222, BCJ No 768, (Sup Ct).

limit in respect of non-pecuniary damages would be unjust according to Canadian law. Kirkpatrick J considered the specter of exorbitant awards for non-pecuniary losses in the United States and held that the policy concerns expressed by the imposition of the Trilogy cap was an overriding consideration and was cause not to quantify the plaintiff's damages in accordance with California law. In his view, it would be unjust to apply any law of damages other than that of British Columbia to an action involving only British Columbia residents.¹³³

In an attempt to streamline the application of public policy in respect of choosing the applicable law, the trial judge should receive evidence on the range of awards in the foreign country.¹³⁴ The trial court should compare the size of the damages award against the average amounts of similar awards of the foreign country and then reduce (or increase) the award if it appears excessive (or low) in light of those awards.¹³⁵ This method, in my opinion, is compelling and would result in uniform and predictable results.

E) Final Considerations

I do appreciate that because I have recognized different governing laws, in addition to the substantive law that will be applied to liability issues, this may prove to be too burdensome in certain cases in terms of the adjudication and gathering of evidence. Such an approach requires evidence as to the substantive law on each issue, which can be extremely costly. However, application of this principled approach will ensure that the plaintiff is adequately compensated, which is the goal of damages law in Canada. Simply applying the *lex fori* because that's where the matter is being heard, is not the answer; neither is applying the *lex loci*, which may have absolutely nothing to do with where the plaintiff is substantially connected. Indeed, such an increase in the cost of litigation may serve as an incentive to eliminate trivial damages claims that a plaintiff might otherwise seek, or facilitate early settlement. Nevertheless, the place where the plaintiff is domiciled will often be the law of the forum, not requiring proof of foreign law in any event.¹³⁶ It is only when the plaintiff chooses to sue in a different jurisdiction (which can sometimes be a result of forum

¹³³ *Ibid* at para 18. This has also been addressed in *Rome II*, *supra* note 58, Art 26, which provides that the application of a provision of the law of any country may be refused if it is "manifestly incompatible" with the public policy of the forum.

¹³⁴ See Weintraub, "Choice-of-Law Rules for Damages," *supra* note 1 at 253.

¹³⁵ See Hallahan, *supra* note 126 at 762.

¹³⁶ The law of the forum will also be applied when assessing punitive damages where the defendant resides in the same jurisdiction as the plaintiff (but the accident occurred outside of Canada).

shopping) will the court be required to apply foreign law in assessing general and non-pecuniary damages. Thus, it is the plaintiff who must decide whether the possibility of obtaining a higher damages award outweighs the substantially higher costs it will incur when opting to sue in a court other than where he or she is the most substantially connected. Further, where it appears that the plaintiff has chosen to sue in a foreign court as a result of forum shopping,¹³⁷ it always remains open to the court to issue a costs award in favour of the defendant if it is ultimately determined that the law of the plaintiff's domicile applies to quantify general and non-pecuniary damages. Indeed, without consistent use of a uniform standard, foreign plaintiffs will continue to search out attractive forums in hope of large damages awards.¹³⁸

3. Conclusion

The task of determining which law to apply when quantifying a damages award in a tort case comprising elements from more than one jurisdiction is not an easy one. Many different approaches have been tried and discarded by the courts. Some approaches provide for a general rule, but include an exception. Others provide for a completely inflexible test. While not ignored, these issues have not received the attention that they deserve.

History has certainly shown us that forum courts have often been very tempted to find a way to apply the *lex fori*. Although the Supreme Court of Canada took some steps to reform the difficult area of choice of law rules in tort with respect to liability issues in *Tolofson*, it now needs to take further steps to address issues surrounding the quantification of damages. In my analysis, a reasonable framework toward assessing damages in a case involving more than one law requires a careful categorization of those issues and a conflicts approach that will yield reasonable and fair results. Accordingly, I conclude that in most cases, the following rules should be applied by the courts in determining the applicable damages award, subject to relevant public policy considerations:

- (a) *Compensatory/General Damages*: the law of the plaintiff's domicile (i.e. where the plaintiff is most substantially connected);
- (b) *Non-Pecuniary Damages*: same as (a); and

¹³⁷ One example would be if the only tie the plaintiff has with the foreign court is that the tort or misconduct occurred there, even though the plaintiff is substantially connected to another jurisdiction.

¹³⁸ See Hallahan, *supra* note 126 at 6: "Foreign plaintiffs seek United States jurisdiction because of jury trials and higher damage awards."

- (c) *Punitive Damages*: the law of the defendant's domicile (i.e. where the defendant is most substantially connected) or principal place of business.

This functional framework precludes the procedural label for any rule that is likely to affect the result in a manner that would invite forum shopping, unless injustice would result. Such an application is imperative in order to prevent courts from overcompensating plaintiffs and obtaining large awards of damages, which may push some defendants into bankruptcy. Issues of order and fairness, which lie at the heart of private international law, must not go unchecked, while still promoting the underlying purpose of damages. It is hoped that the framework articulated in this paper might help provide guidance for future cases, making the assessment of a foreign damages award more certain, predictable, and justifiable, as well as consistent with well-established Canadian damages principles.