THE NEW CHOICE OF LAW RULES IN TORTS: THE AFTERMATH OF *TOLOFSON* V. *JENSEN; LUCAS* V. *GAGNON*

By John Swan[*]

Les récents arrêts *Tolofson* v. *Jensen* et *Lucas* v. *Gagnon* ont remis les problèmes de conflit de lois à l'avant scène du droit canadien. En droit canadien, la structure de l'analyse du conflit de lois exige que, lorsque l'on est confronté à une question de loi étrangère, celle-ci doit être qualifiée comme une question de substance ou de procédure. Dans le premier cas, une qualification plus approfondie est requise quant à la catégorie de loi, à savoir s'il s'agit d'une question de nature contractuelle ou délictuelle. Dans le deuxième cas, la *lex fori*, ou la loi du for, s'applique. Dans *Tolofson/Gagnon*, la Cour suprême a décidé non seulement que les questions de prescription sont des questions de substance et non de procédure, mais également que la régle de conflit applicable à la responsabilité délictuelle est celle de la *lex loci delicti*, c'est-à-dire que c'est la loi du lieu où la faute a été commise qui détermine les droits et les obligations des parties. L'article aborde les aspects de la règle de conflit utilisée dans *Tolofson/Gagnon* ainsi que la forme de la règle, la capacité à justifier son application et la structure générale de l'analyse du conflit. Les motifs de la cour pour le choix de la règle de conflit étaient la simplicité, la certitude ainsi que le respect des limites des compétence provinciales. On prétend que l'adoption de cette règle était inattendue et qu'elle n'a été suivie ni au Canada, ni aux États-Unis. L'arrêt ontarien *Hanlan* c. *Sernesky* démontre que la règle de la *lex loci delicti* n'engendre pas de certitude parce que dans les arrêts où la *lex loci* entraîne une injustice, le juge garde la discrétion d'appliquer la *lex fori*. L'auteur soutient que bien que les faits et raisonnements de *Hanlan* ne puissent être distingués de ceux de *Tolofson/Gagnon*, les deux arrêts sont arrivés à des résultats opposés.

Étant donné l'incertitude générée par l'analyse de la structure des conflits de lois, des «dispositifs d'évitement» ont été adoptés par les cours anglaises, françaises, canadiennes et américaines afin d'écarter l'application de la loi déterminée par la régle de conflit. Le premier dispositif examiné a été l'ajustement de la qualification de la question de sorte que, par exemple, elle soit examinée comme une question de nature contractuelle ou de droit de la famille et non comme une question de nature délictuelle. La qualification de la question est particulièrement importante parce que chaque question est soumise à la même régle. Un autre dispositif utilisé est la doctrine du renvoi qui intégre dans l'analyse du conflit, les régles de conflit contenues dans la loi étrangère. Il est difficile de réconcilier *Tolofson/Gagnon* avec d'autres arrêts de la Cour suprême tels que *Morguard*, *Moran* et *Amchem*, puisqu'il nie le développement selon lequel la Cour suprême du Canada a droit de regard sur les litiges ayant un élément étranger afin de s'assurer que les valeurs canadiennes soient représentées. L'auteur exprime clairement son mécontentement à ce sujet tout en espérant un revirement rapide de la jurisprudence.

The recent cases of *Tolofson* v. *Jensen* and *Lucas* v. *Gagnon* have again brought the problem of the Conflict of Laws to the forefront of Canadian law. The structure of Canadian conflict of laws analysis dictates that when there is an issue of foreign law, it must be characterized as either a substantive or procedural question. In the former case, further characterization into category of law is required, e.g. whether it is a contracts or a torts question. In the latter case, the *lex fori*, or the law of the forum applies. In *Tolofson/Gagnon*, the Supreme Court decided not only that questions of limitation period are questions of substance rather than procedure, but also that the choice of law rule in torts is that of *lex loci delicti*, i.e., the law of the place of the wrong determines the rights and obligations of the parties. The article addresses the choice of law aspects of

[*] Lawyer at Stikeman Elliott; Professor at the Faculty of Law of McGill University, Montreal.

the *Tolofson/Gagnon* decision and the form of the rule, the ability to justify its application and the general structure of conflict analysis. The court's reasons for the choice of law rule were simplicity and certainty, and respecting the limits on provincial powers. It is argued that the adoption of the rule was unexpected, and it was followed neither in Canada, nor in the U.S.. The Ontario case of *Hanlan* v. *Sernesky* demonstrates that the *lex loci delecti* rule will not provide certainty because in cases where *lex loci* leads to injustice, the judge has discretion to apply the *lex fori*. The author maintains that while the facts and reasons of *Hanlan* cannot be distinguished from *Tolosfon/Gagnon*, the two cases came to opposite results.

Given the uncertainty created by the structure of conflict analysis, "escape devices" have been adopted by English, French, Canadian and American courts to avoid the application of the law "selected" by the choice of law rule. The first device discussed was to adjust the characterization of the question, so that for example, it would be examined as a contracts or family law question rather than a torts one. The characterization of the question is particularly important because every question must be answered by the same choice. Another device is the use of the doctrine of renvoi which includes in the conflict analysis, the choice of law rule of the foreign law. *Tolofson/Gagnon* is hard to reconcile with other SCC cases such as *Morguard*, *Moran* and *Amchem*, as the former denies the development that the SCC can oversee litigation with a foreign element and ensure that Canadian values are represented. The author clearly indicates that he is unhappy with this situation and that he hopes for a quick change in the Canadian case law.

I. Introduction

This paper is principally confined to the discussion of choice of law rules, specifically the choice of law rule in torts derived from the decision of the Supreme Court of Canada in *Tolofson* v. *Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*.[1] I shall deal only briefly with issues of jurisdiction for, though they are intimately connected with issues of choice of law, they raise other issues that transcend the scope of this paper.

When a lawyer faces a problem of the Conflict of Laws — specifically a choice of law problem, i.e., what law to apply to a problem — he or she has to stop thinking in ways that are natural. The lawyer has, instead, to adopt a mode of thinking that is foreign to everything that he or she has always believed was important. I can put the matter in an extreme form by saying that the lawyer has got to put out of his or her mind all that the Enlightenment stood for, the idea that law is about Reason, what is more important, all that Canadian courts have done in every other area of the law in "making sense" of it. "Making sense" of the law means being concerned about purposes, about fairness and about the relation between values and results.

The formal structure of the Conflict of Laws makes any of these concerns invalid. Table 1 on the following page is an outline of the structure that must be followed in every case that is put into the category of "conflict of laws". One way of defining such a case is to say that conflicts cases are those with relevant geographically complex facts. In other words, the pleadings in the action make allegations that the law or a legal event in some other place is relevant to the dispute. The allegation could be that a party was born or died in a foreign country, that a contract was made or was to be performed in a foreign country, i.e., a foreign state or another province, or that, for example, a motor-vehicle accident happened in a foreign country.

---

[1] [1994] 3 S.C.R. 1022, [1995] 1 W.W.R. 609, 120 D.L.R. (4th) 289. One judgment was given in two cases, one (*Tolofson*) from British Columbia and one (*Gagnon*) from Ontario. I shall refer to the case as "*Tolofson/Gagnon*" or to the actions separately as *Tolofson* or *Gagnon*. All references will be to the S.C.R.

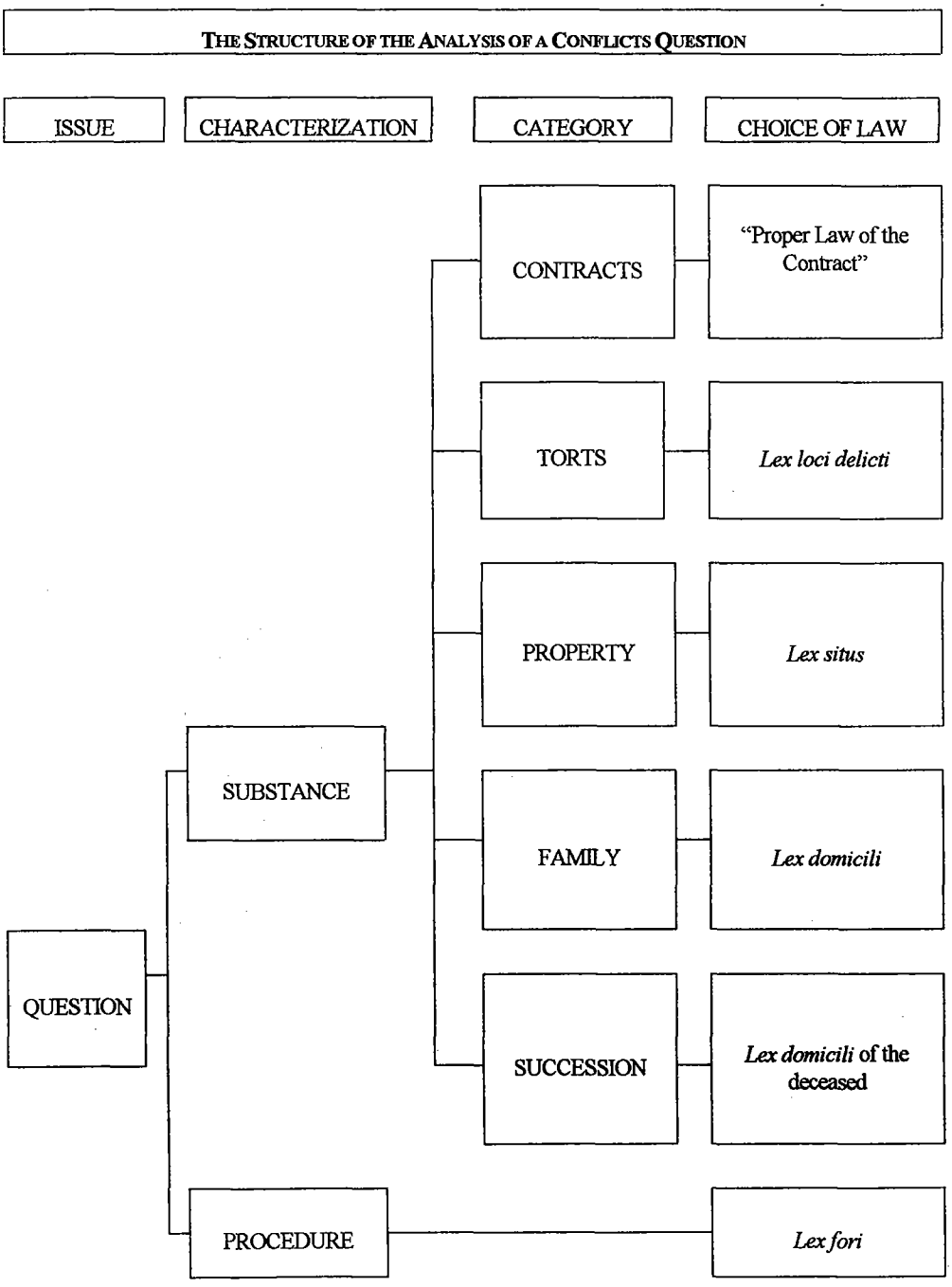
THE STRUCTURE OF THE ANALYSIS OF A CONFLICTS QUESTION
ISSUE
CHARACTERIZATION
CATEGORY
CHOICE OF LAW
QUESTION
SUBSTANCE
PROCEDURE
CONTRACTS
"Proper Law of the Contract"
TORTS
Lex loci delicti
PROPERTY
Lex situs
FAMILY
Lex domicili
SUCCESSION
Lex domicili of the deceased
Lex fori

Table 1 illustrates the following process : The pleadings in the action raise an "issue" of foreign law, what is identified in the Table as the "Question". It might be the defendant's argument that the plaintiff brought his action out of time because under the law of, say, Saskatchewan, the action should have been brought within one year; the issue might be the plaintiff's argument that, under the law of some other jurisdiction, she has more extensive rights against the defendant and, for example, is not to be restricted by the Ontario *Insurance Act*; the issue could be any one of a huge number of similar arguments.

The "issue" raised by the pleadings then has to be characterized : is it a matter of "substance" or "procedure"? All lawyers characterize things when they have to decide whether to look in a contracts text or a torts text, or in one volume of the *Canadian Abridgement* rather than another to find an answer to a client's problem. Generally speaking, the process of characterization is tentative : not much turns on the result and if the contracts text does not provide an answer, the torts one might. In conflicts, the process is at the heart of choice of law. *Tolofson*, for example, decided that a question whether a limitation period applied was to be decided as a matter of substance rather than, as had been almost universally accepted until then, as a matter of procedure[2]. Important issues lie hidden in the process of characterization, though they are not often examined : is a right to discovery of a particular witness a matter of substance or procedure? What should be the effect of, for example, a foreign blocking statute?[3] Claims to interest and damages may also raise the question of characterization : is the right to pre-judgment interest or punitive or exemplary damages a right determined by the *lex fori* or by the law governing the substantive issues?

The conclusion that a matter is one of procedure leads automatically to the application of the *lex fori*, the law of the court hearing the matter. This conclusion excludes any reference to foreign law; the *lex fori* will be applied regardless of whether the foreign law does or does not purport to apply to the matter.

If the matter is not one of procedure, but is one of substance, then a second process of characterization has to be undertaken. This process, what I have called the allocation to a "Category", requires the court to say that the matter is one of "tort" and not "contract" or "property". I shall return to this issue later but, for the moment, it is only important to note that the need to decide what label applies to the issue is required by the choice of law process : one cannot move through the steps necessary to reach the conclusion unless a decision on the kind of action is made. Once the category of the law has been selected, the actual choice of law rule is identified. There are, of course, other categories than those I have listed and the "Property" category is divided into two : movable and immovable property. I have stated the rule for immovable property.

---

[2] It was a matter of "procedure" because the operation of a limitation period barred the action and any proceedings on the claim, though it had no effect on the underlying cause of action.

[3] Canada has a blocking statute, the *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29, and other countries, the United Kingdom, France and Australia, have similar legislation. Such legislation is designed to frustrate what Canada regards as excessive American anti-trust actions and now legislation like the *Helms-Burton Act*, the *Cuban Liberty and Democratic Solidarity of 1996*, 22 U.S.C.S. at 6021-91.

Once the category of the law is decided, then the appropriate choice of law rule is identified. There may be a dispute about the form or content of the rule. *Tolofson/Gagnon* radically changed the law regarding the choice of law rule for torts in Canada — but those disputes are, so to speak, inside or within the structure; they do not challenge it.

II. Alternative Structures for Analysis

Not all cases with geographically complex facts are treated as conflicts cases, i.e., only some of the cases that might be subjected to a conflicts analysis are. There are two reasons for this. The first is that there are alternative ways to deal with them. Cases in which the constitutional competence of the provincial legislature or even a provincial court are challenged may, for example, be dealt with under the *Constitution Act, 1867*[4]. The Supreme Court of Canada has held that there is an underlying constitutional element in all interprovincial conflicts in that a provincial court may be disabled or unjustified in applying its law because to do so would violate the constitutional limitations on its power. This is an important issue that was given cursory examination in *Tolofson/Gagnon*[5]. The issue was more fully examined in *De Savoye* v. *Morguard Investments Ltd.*[6] and *Hunt*[7]. I shall argue that the constitutional analysis in *Tolofson/Gagnon* did not deal well with the issues that had to be decided.

The second reason that a case with geographically complex facts may not be dealt with as a conflicts case is harder to pin down. A good example of such a case is *Québec (Sa Majesté du Chef)* v. *Ontario Securities Commission*[8]. The issue in that case was the right of the Ontario Securities Commission to impose on the Government of Quebec an obligation to make a follow-up offer to minority shareholders after the Quebec Government had bought control of Asbestos Corporation Limited from General Dynamics. The Court of Appeal, in a judgment by McKinlay J.A., recognized the conflict

---

4 See, e.g., *Hunt* v. *T & N plc*, [1993] 4 S.C.R. 289, [1994] 1 W.W.R. 129, 109 D.L.R. (4th) 16 [hereinafter *Hunt*].

5 The relation of conflicts and constitutional law was explored in J. Swan, «The Canadian Constitution, Federalism and the Conflict of Laws» (1985) 63 Can. Bar Rev. 271. See also, P. Hogg, *Constitutional Law of Canada*, loose leaf ed., Section 13.5.

6 [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256 [hereinafter *Morguard*]. *Morguard* built on the earlier case of *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 58, 43 D.L.R. (3d) 239 [hereinafter *Moran*]. Together, these two cases offered the Supreme Court a sound basis for a radical restructuring of conflicts that, unfortunately, it turned down in *Tolofson/Gagnon*.

7 *Supra* note 4.

8 (1992), 10 O.R. (3d) 577, 97 D.L.R. (4th) 144, (*sub nom. Re The Queen in right of Quebec and Ontario Securities Commission, et al.*) [hereinafter *Asbestos Case* cited to O.R.]. The Ontario Securities Commission [hereinafter OSC} seems to be very reluctant to have a fight with the Quebec Government. After the judgment of the Court of Appeal, the case was sent back to the Commission to be determined on its merits. The Commission's refusal to make the order led to a challenge by the minority shareholders. In *Committee for the Equal Treatment of Asbestos Minority Shareholders* [hereinafter *CETAMS*] v. *Ontario Securities Commission*, [1999] O.J. No. 388, judgment delivered, 18 February, 1999, (C.A., Doherty, Laskin and Rosenberg JJ.A.) the Court of Appeal upheld the right of the Ontario Securities Commission to refuse to make an order against Quebec.

between the rules of the OSC and the decision of Quebec not to make the payment. McKinlay J.A. did not analyse the case as a conflicts case; she did not adopt the structure that I have outlined. Instead, she said :

> There can be no doubt that both [provincial] objectives represent "compelling governmental interests". The question posed by the appellant's [the Quebec Government's] argument is, "Which is the more compelling?" For Quebec to comply with the provisions of the Ontario Act, the cost to it, we are told, would be approximately $100,000,000. But that $100,000,000 is saved at the expense of persons who have invested in shares trading on Ontario markets, trusting that all who use those markets will trade in accordance with the rules. I see no way the courts can assist in advancing interprovincial harmony in a situation such as this, since there is no objective way of choosing which governmental interest is more compelling. However, I see no reason why residents of one province should suffer financial loss for the purpose of benefiting another province in advancing its legitimate interests[9].

McKinlay J.A. felt able to talk like this — it is, if you like, pure common sense — and to avoid the formal structure of conflicts analysis because there was (and is) no choice of law rule associated with stock exchanges, follow-up offers, minority shareholder rights or any of the other categories into which the issue, the liability of Quebec, could have been put.

The judgment of McKinlay J.A. also illustrates that, once the court has decided that both provincial laws are valid under the *Constitution Act, 1867*, the court has no constitutional basis for choosing or preferring one over the other. An Ontario court, like the Court of Appeal, is justified in making its decision based solely on the fact that it is an Ontario court, committed to forwarding Ontario values as represented by Ontario legislation. This decision says nothing about the power or justification of the Quebec court in coming to a different conclusion on exactly the same basis. Should the matter come before the Supreme Court on appeal from one or even both courts, that court too has no constitutional basis for saying that one provincial law can trump the other : the court may have no choice but to dismiss both appeals[10].

An alternative method, though based explicitly on a "conflicts" analysis, is illustrated by the judgment of Morden A.C.J.O. in *Grimes* v. *Cloutier*[11]. In that case an Ontario plaintiff claimed against a Quebec defendant for damages for injuries caused in a motor vehicle accident that occurred in Quebec. The rule then applied by Canadian courts, the rule of *Phillips* v. *Eyre*[12], would have made it simple to have applied Ontario

---

[9] *Asbestos Case, supra* note 9 at 590-91.

[10] See J. Swan, *supra* note 5, and J. Swan, «Federalism and the Conflict of Laws : The Curious Position of the Supreme Court of Canada» (1995) 46 South Carolina Law Review 923.

[11] (1989), 69 O.R. (2d) 641, 61 D.L.R. (4th) 505, (C.A.).

[12] (1870), 6 Q.B. 1.

law without much concern for the position of the Quebec defendant[13]. Morden A.C.J.O. adopted an approach that was both careful and very creative. He said :

> In these circumstances, to ignore the Quebec legislation, which relieves the defendants of civil liability, would be unfair to the appellants and, also, an "officious intermeddling with the legal concerns of a sister province". Hancock, *Studies in Modern Choice of Law : Torts, Insurance, Land Titles* (1984), p. 183.

Here we see all that we need to deal sensibly and constructively with conflicts problems. The meaning of "officious intermeddling" must either be identical to or closely reflect the kind of constitutional factors that underlie a case like *Moran*. There is no need for any talk of a choice of law rule or of any inquiry into anything more exotic than considerations of constitutional propriety, fairness to the defendant and the realization that someone who comes to Quebec may have to take the law as he or she finds it[14].

III. The Decision in *Tolofson/Gagnon*

Tolofson/Gagnon not only decided that the question whether a limitation period is a matter of substance or procedure is to be answered by holding that it is the former, but also that the choice of law rule in torts is that the *lex loci delicti*, the law of the place of the wrong, governs the parties' rights and obligations. There were two issues in *Tolofson* : the applicable limitation period and the question whether the plaintiff, as a gratuitous passenger in his father's car, could sue his father without having to prove "wilful or wanton misconduct". In *Gagnon* the issue was the applicability of the Quebec *Automobile Insurance Act*[15] in a case where a wife and children were injured by the negligence of her husband and their father.

The law that was held to govern each action was that of the *lex loci delicti*, in other words, whether the son could sue his father or the wife her husband, was to be decided by the law of the place where the accident took place. The rule was justified on a

---

[13] The House of Lords had done as much, even as it claimed to reject the strict application of *Phillips* v. *Eyre*, in *Boys* v. *Chaplin*, [1971] A.C. 356, [1969] 2 All E.R. 1085.

[14] Two cases were decided by the Court of Appeal at the same time, *Grimes* v. *Cloutier* and its companion case, *Prefontaine Estate* v. *Frizzle*; *Cuddihey* v. *Robinson* (1990), 71 O.R. (2d) 385, 65 D.L.R. (4th) 275. Both offer an excellent example of how the law should respond to changed facts and how changed facts can lead to radically changed results and even to changes in the justification of any results. I have commented on these and earlier decisions : J. Swan, «The Canadian Constitution, Federalism and the Conflict of Laws» (1985) 63 Can. Bar Rev. 271 at 272; J. Swan, «Choice of Law in Torts : A Nineteenth Century Approach to Twentieth» (1989) 10 Advocates' Q. 57; J. Swan, «Choice of Law in Torts - A Renvoi : *Gagnon* v. *Gagnon*, *Williams* v. *Osei-Twum*» (1993) 15 Advocates' Q. 356; and J. Swan, «Conflict of Laws—Torts—Automobile Accident in Québec—Action in Ontario— 'Paradigm Shift or Pandora's Box'?—*Grimes* v. *Cloutier*, *Prefontaine* v. *Frizzle*» (1990) 69 Can. Bar Rev. 538.

[15] L.Q. 1977, c. 68, ss. 3, 4.

number of grounds : (For convenience I shall adopt the summary made by Cumming J. in *Hurst* v. *Leimer*[16])

> Under the rules of private international law the applicable substantive law is normally the place where the tort arises or *lex loci delicti*. This is the place where the defining activity occurred that gives rise to the claim of a civil wrong in tort[17]. This approach is a practical one for several reasons, including that it prevents forum shopping and creates certainty in the law. As well, this approach accords with the reasonable expectations of the persons involved. It also responds to the territorial principle underlying both the international legal order and the federal regime in Canada[18]. The provinces exercise territorial legislative jurisdiction. An act committed in one province should be given the same effect throughout Canada. Application of the *lex loci delicti* has the advantage of conforming to the requirements of the Canadian Constitution[19].

These justifications fall into two classes : (i) the rule is simple and certain[20] and (ii) the rule respects the limits on provincial power under the *Constitution Act, 1867*. I shall argue later that, as a general rule or as an example of a general solution to conflicts problems, the rule, as has now been demonstrated[21], will not achieve the certainty that is its principal justification. I shall offer later some suggestions for ways in which counsel can argue that the rule should not apply.

The constitutional issue is a red-herring. One can acknowledge that both provincial legislatures and courts are limited by section 92(13) (or 92(14)) without having to hold that, for example, aspects of Ontario law may not be properly applied by an Ontario court even though the event giving rise to that claim occurred outside Ontario. An example would be the application of Ontario law as the proper law of the contract, even though the contract was made in British Columbia. Another example would be the power of a provincial court to apply many aspects of its law to those who are domiciled in the province but resident outside it.

The adoption of this choice of law rule was, to say the least, unexpected. The rule was suggested in the leading English case that had been followed in Canada up to *Tolofson/Gagnon*, *Phillips* v. *Eyre*[22], though it had been ignored in favour of the rule, the "double actionability" rule that had been adopted and fairly consistently applied by

---

[16] (1995), 26 O.R. (3d) 760-765, (Ont. Ct. (Gen. Div.)).

[17] *Supra* note 1 at 1049-50.

[18] *Ibid.* at 1050-51.

[19] *Ibid.* at 1064-66.

[20] La Forest J. deals with the possibility that the *Civil Code of Quebec*, Art. 3126, (which did not apply at the date of the accident in *Gagnon*) might in later cases lead to a different result. He deals with that point by saying that the *Automobile Insurance Act*, L.Q. 1977, c. 68, ss. 3, 4, is so clear that it must be taken to have displaced Art. 3126. This argument simply means that, in any case other than a motor vehicle accident, the goal of uniformity will not be attained.

[21] *Hanlan* v. *Sernesky* (1997), 35 O.R. (3d) 603, (Ont. Ct. (Gen. Div.)), aff'd (1998) 38 O.R. (3d) 479, 108 O.A.C. 261, 41 C.C.L.T. (2d) 168.

[22] *Supra* note 12.

Canadian courts until the Supreme Court's decision[23]. The adoption of the *lex loci delicti* was the cornerstone of the original *Restatement of the Law, Conflict of Laws*, of the American Law Institute in 1934[24]. Even before the ink was dry on that publication, American academics and courts had begun a long sustained attack on the rule and, by the time the Supreme Court adopted it, it had been almost entirely rejected in the United States.

The reasons for the rejection of the rule by American courts were never investigated by the court; in fact the analysis that the court made of the American position was very poor. The Court could not have understood the case it referred to which and its conclusions ignored, as I have said, the huge number of cases that had rejected the rule. The rule of the *lex loci delicti* was rejected for the reason that it was inappropriate to decide cases by reference to a rule that invited mechanical application. We have almost entirely rejected rules that can be or that are expected to be mechanically applied. We consider things like the purpose of the rule : would some social value be forwarded by the application of *this* rule in *this* situation? The judgment in, for example, *Moran*[25] is an excellent example of a court considering the fairness and appropriateness of the application of the Saskatchewan law in that case. Similarly, in *Morguard*[26], the Supreme Court made a careful analysis of the characteristics of a desirable rule for the enforcement of foreign judgments in the light of the nature of Canadian society and the interprovincial economic relations. I do not believe that La Forest J. in giving the judgment in *Tolofson/Gagnon* was faithful to those cases.

It may well be that it is pointless to criticize the decision; it has been given and it has been applied[27]. What is, however, important is to note that, while the *lex loci delicti*

---

[23] The leading case up to the date of *Tolofson/Gagnon* had been *McLean* v. *Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65. This case was one of the most reviled in all the history of the Supreme Court of Canada. It is an excellent example of a court abusing the rule that it purported to apply so as to reach a result that it considered correct : the court was simply not going to apply the Ontario "guest passenger" rule to two Quebec parties temporarily in Ontario on a weekend drive when the accident occurred. It is ironic that not only was the case seen for what it was in the leading American case of *Babcock* v. *Jackson* (1963) 12 N.Y. (2d) 473, 191 N.E. (2d) 279, [1962] 2 Lloyd's Rep. 286, (New York Court of Appeals), but the result—the unquestionably correct result—reached by the case would now be unreachable under the rule stated so emphatically in *Tolofson/Gagnon*.

[24] The principal provisions of the Restatement are set out, para. 45, below.

[25] *Supra* note 6.

[26] *Ibid.*

[27] See, e.g., *Michalski* v. *Olson*, [1998] 3 W.W.R. 672, (Man. C.A., Huband, Helper & Monnin JJ.A.) and *Leonard* v. *Houle* (1997), 36 O.R. (3d) 357, (C.A., Brooke, Labrosse & Charron JJ.A.). The latter case raises the problem of determining what is the place of the tort. The plaintiff was injured as a result of a high-speed police chase that began in Ontario and ended in Quebec where the plaintiff was injured. The court rejected the argument that, since the Ontario police might have been negligent in Ontario, it was possible, under *Tolofson/Gagnon*, to apply Ontario law. The court held that the place was where the injury was suffered. In so doing, the Court ignored the fact that the Supreme Court had expressly left open the determination of the *lex loci delicti* in such a case. See V. Black, «Crash, The Ontario Court of Appeal Bumps into *Tolofson*» (1998) 41 C.C.L.T. (2d) 170. There is a large jurisprudence on this issue arising out of Rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 17.02, which provided that service *ex juris* was available in respect of a "tort committed in the jurisdiction". See, e.g., *Vile* v. *Von Wendt* (1979), 26 O.R. (2d) 513, 103 D.L.R. (3d) 356, (Div. Ct.). The decision in *Moran* (where the cases to that date are mentioned) dealt exactly with this question, though the Supreme Court's

may well be, by accident, an appropriate rule in some cases[28], the nature of the rule in the context of the structure for analysis that I have described has set the stage for manipulation of the rule. This manipulation was exactly what happened in the United States and was one of the vivid reasons for its rejection there : what good is a mechanical rule, designed to give certainty, if it can be manipulated so as to deny in practice any certainty in fact?

The demonstration that the rule will *not* provide certainty is illustrated by the decision of Platana J. in *Hanlan* v. *Sernesky*[29]. The headnote states the facts :

> One of the plaintiffs was injured in the state of Minnesota when the motorcycle on which he was a passenger collided with an automobile. He sued the driver of the motorcycle for damages. The other plaintiffs asserted *Family Law Act* (R.S.O. 1990, c. F.3) claims. All of the parties were Ontario residents at the time of the accident, and the motorcycle operated by the defendant was registered in Ontario and subject to a motor vehicle liability policy issued in Ontario. The defendant moved for summary judgment dismissing the *Family Law Act* claims on the grounds that the proper law was that of Minnesota and that claims of this nature are not permitted under Minnesota law.

Platana J. finds comfort in the statement of La Forest J. in *Tolofson/Gagnon* that the argument that the law of the parties' common residence should not be applied when the parties are resident in Canada. From this, Platana J. concludes that, in an international setting, it *is* appropriate that the law of the parties' residence be applied. Platana J. also took comfort from what Major J. (with whom Sopinka J. agreed) said in *Tolofson/Gagnon*[30]:

> However, I doubt the need in disposing of these appeals to establish an absolute rule admitting of no exceptions. La Forest J. has recognized the ability of the parties by agreement to choose to be governed by the *lex fori* and a discretion to depart from the absolute rule in international litigation in circumstances in which the *lex loci delicti* rule would work an injustice. I would not foreclose the possibility of recognizing a similar exception in interprovincial litigation.

---

decision would appear to take a broader view of "the place of the tort" than the Court of Appeal. There is a constitutional issue arising out of *Morguard* and section 92(14) of the *Constitution Act, 1867*: a broad claim to take jurisdiction or to apply provincial law based on a very technical determination of the place of the tort may be unconstitutional. It can be argued, e.g., that the decision in *Robinson* v. *Warren* (1982), 55 N.S.R. (2d) 147 (N.S.S.C., A.D.) (though based on different Rules of Court) would now be unconstitutional in the light of *Morguard*. See V. Black & G. Flack, «Choosing the Applicable Law for Cross-Border Auto Accidents» (1993) 15 C.C.L.T. (2d) 73.

[28] The rule may have been appropriate in *Stewart* v. *Stewart*, [1997] 5 W.W.R. 353, (B.C.C.A., Macfarlane, Esson & Hall JJ.A.) for the same reasons as, again by accident, it would have been appropriate to have applied in it *Grimes* v. *Cloutier*, *supra* note 11.

[29] *Supra* note 21.

[30] *Supra* note 1 at 1078.

The Court of Appeal dismissed an appeal from the judgment of Platana J[31]. In a short, two-page judgment the court first noted the facts that the trial judge had considered important, *viz* :

1. that the parties were both resident in Ontario;
2. that the contract of insurance was issued in Ontario;
3. that there was no connection with the State of Minnesota other than that it was the place of the accident;
4. that although the accident occurred in Minnesota, the consequences to members of the injured plaintiff's family were directly felt in Ontario; and
5. that the uncontradicted evidence before him was that claims of this nature are not permitted under Minnesota law.

The court expressed its conclusion, saying :

> In accordance with *Tolofson*, we are satisfied that the motions judge had a discretion to apply the *lex fori* in circumstances where the *lex loci delicti* rule would work an injustice.

The Court of Appeal did not elaborate on its concept of "justice" or "injustice". At base the Court's conclusion must mean that it was in some way improper or unjust that the rights of two Ontario people *inter se* should be dealt with by the law of Minnesota. In a passage summarized by the Court of Appeal, Platana J. had justified his decision not to apply Minnesota law by saying[32]

> Further, I do not read the reasons of La Forest J. in *Tolofson* as creating a "without exception rule" which would include accidents occurring in foreign jurisdictions in some circumstances. The circumstances highlighted in this case by the plaintiffs which I consider to be relevant are that the principal parties are both residents of the same province (forum) and the contract of insurance in effect was issued in Ontario. I am not unmindful that at the time this action arose, there was no question but that Ontario law applied. Taking into account the test suggested by Major J. in *Tolofson*, I am also of the view that in the particular circumstances before me, it can be said that the operation of the *lex loci* rule would work an injustice. But for the actual location of the incident, there is absolutely no connection with the State of Minnesota.
>
> In all of these circumstances, it seems that the appropriate law to apply is the law which is closely connected to the parties and not the *lex loci delicti*.

There are several points to be made on the judgments of Platana J. and the Court of Appeal. First, it is not justifiable to claim that there can be a different rule for interprovincial torts and international ones, i.e., those that occur in the United States. It is

---

[31] *Supra* note 21. See V. Black, *supra* note 27.

[32] *Supra* note 21 at 610-11.

abundantly clear that Canadian automobile insurance coverage is based on the explicit assumption that the standard Canadian policy covers activity in Canada and in the United States. To the extent that the application of the *lex loci delicti* reflects the underlying insurance coverage of Canadian motorists, the standard policies of every province make no distinction between accidents in Canada and accidents in the United States[33]. In spite of the fact that, from some points of view, American law may appear to be very different from Canadian, Canadian courts accept American judgments and the application of American law in those judgments as meeting any test of fairness or reasonableness[34]. In short, all the reasons that La Forest J. considered as justifying his rule on the facts of *Tolofson/Gagnon* apply to an international tort[35]. Second, if there is a need for certainty in interprovincial torts within Canada, then there is an equal need for certainty in international torts within Canada and the United States. Third, the facts of *Hanlan* v. *Sernesky* cannot be distinguished from those in either *Tolofson* v. *Jensen* or *Lucas* v. *Gagnon*.

What is most interesting is that the facts listed by the Court of Appeal as justifying the decision of Platana J. are almost identical to those in both *Tolofson* v. *Jensen* and *Lucas* v. *Gagnon*. In the former case, the plaintiff sued his father for injuries that were caused by an accident in Saskatchewan. In the latter, the claim was brought by a wife and children against her husband and their father. It is true that in both cases there was another defendant, but in respect of the intra-family claims in each case, i.e., the claim of the son against his father in *Tolofson* v. *Jensen* and that of the wife and children against the husband and father in *Lucas v. Gagnon*, the list of factors mentioned by the Court of Appeal in *Hanlan* v. *Sernesky* fits exactly :

1. the parties in *Tolofson* v. *Jensen* were both resident in British Columbia and in *Lucas* v. *Gagnon* all were resident in Ontario;
2. the respective contracts of insurance were issued in British Columbia and Ontario;
3. there was no connection with the provinces of Saskatchewan or Quebec other than that they were the places of the accidents;
4. although the accidents occurred in Saskatchewan and Quebec, the consequences to members of the injured plaintiffs' families were directly felt in British Columbia and Ontario; and
5. the Supreme Court held that claims of these kinds were not permitted under Saskatchewan or Quebec law.

---

[33] See, e.g., *Insurance Act*, R.S.O. 1990, c. I-8, s. 266 (as amended, S.O. 1993, c. 10, s. 25 (adding s. 267.1) and S.O. 1996, c. 21, s. 29 (adding s. 267.4)).

[34] See, e.g., the judgment of Sharpe J. in *United States of America* v. *Ivey* (1995), 26 O.R. (3d) 533, (1995), 27 B.L.R. (2d) 221, 130 D.L.R. (4th) 674, affirmed, (1996), 27 B.L.R. (2d) 243.

[35] The rule to be applied to torts that occur outside Canada and the United States may, perhaps, be justifiably different. If it is, the reasons that would justify the difference would, as it were, rebound to show that even within Canada, the *lex loci delicti* cannot be applied as the Supreme Court appears to have intended that it be applied.

In short, *Hanlan* v. *Sernesky* cannot be distinguished from *Tolofson* v. *Jensen* and asserts a discretion to refuse to apply the *lex loci delicti* that, at least on its facts, conflicts directly with the Supreme Court's stated rule.

It can be noted parenthetically that the argument, implicit in the judgment of La Forest J., that there has to be one rule to deal with *all* the issues arising out of each of *Tolofson* and *Gagnon* is nothing more than an unthinking application of the traditional structure of the conflict of laws : the law of one jurisdiction has to govern every issue characterized as a "tort". But think how odd this conclusion is. We do not consider it necessary that the same rule be applied to two defendants just because they are sued in the same action; one may have a defence based on some facts special to it and the other may not for the same reasons; one may be liable in contract and the other in tort; one may be a fiduciary, the other may not. There is no reason that the resident of Saskatchewan in *Tolofson* or the Quebec resident in *Gagnon* should have their liability determined by the same rule as could determine the liability of the father and husband in each case. The linking of the two defendants is both unnecessary and distracts the court from the two simple problems that each case presented.

Similarly in *Ostroski* v. *Global Upholstery Co.*[36], the court claimed to have flexibility in determining the place of the tort, even if it did not have flexibility in determining the rule to be applied once the place had been chosen. An interesting demonstration of the pointlessness of La Forest J.'s concerns is provided by the judgment of the Newfoundland Supreme Court, Trial Division, in *Alteen* v. *Informix Corp.*[37]. The plaintiff sued in Newfoundland in respect of shares of a Delaware corporation that were not traded on a Canadian exchange. The basis of plaintiff's claim was that the defendant had made statements that were quoted in the Canadian press. The court held, dismissing the defendant's application to have the claim dismissed as disclosing no cause of action, that the shares were purchased in Newfoundland; therefore, the tort was committed there. The defendant's argument that Newfoundland was not a convenient forum was similarly dismissed; the defendants should have foreseen that the shares might be bought by Canadians[38].

---

[36] (1995), 61 A.C.W.S. (3d) 1990 (Ont. Ct. (Gen. Div.), Lofchik J.). In that case the plaintiff resided in Pennsylvania and was injured in an accident which occurred in Pennsylvania when the chair in which she was sitting tipped forward causing her to fall. The treatment which the plaintiff received and the damages she suffered occurred in Pennsylvania. An action brought in Ontario was dismissed on the ground that Ontario was not a jurisdiction "substantially affected by the defendant's activities or its consequences and [neither was its law one] which [was] likely to have been in the contemplation of the parties".

[37] (1998), 164 Nfld. & P.E.I.R. 301, 79 A.C.W.S. (3d) 1157.

[38] The following are a partial listing of other cases where courts have found ways to avoid the application of *Tolofson/Gagnon* by manipulating either the place of the tort or some aspects of the *lex loci delicti* : *Nystrom* v. *Tarnava* (1996), 44 Alta. R. 355, (Q.B.); *K.A.T.* v. *J.H.B.*, [1998] B.C.J. No. 1141; *Hrynecko* v. *Hrynecko* (1997), 37 B.C.L.R. (3d) 35; *Throness Estate* v. *Kerr* (1998), 80 A.C.W.S. (3d) 766, (Alta. Q.B., Kent J.).

IV. Escape Devices

It would be foolish to imagine that a structure as rigid and mechanical as the one that I have described could ever be entirely satisfactory. No mechanical rule can deal with the various issues that can arise in litigation: a rule that works well — fairly, sensibly, efficiently — in one case will not work well in another. The history of the common law is one in which the mechanical rules of one generation were avoided (if not repudiated) by the next. The development of equity in the English courts is, for example, one long story of the rejection of the common law rules as guides to the result that would actually be reached and the assertion of a power to adjust rigid rules to the circumstances of each case[39].

Moreover, the structure of conflicts analysis (as described in Table 1) carries with it deep and inevitable problems of making it work. Once a judge realizes and asks, "What do I want to do and why do I want to do it?" the problems with the structure appear. La Forest J. may say that his rule contributes to certainty and simplicity, but the cost of achieving such goals may be very high. Almost every rule that one can think of — the general rules for damages, the doctrine of consideration, the right to recover mistaken payments, liability for fault — is subject to so many qualifications that an accurate or useful statement of the rule would be hugely complex. Life is not simple; "general propositions do not decide concrete cases" and "certainty is an illusion and repose is not the destiny of man". The questions that the judgment in *Tolofson/Gagnon* raises are simply, "How can we avoid it when we want to?"

All courts, English, French, Canadian and American, have developed a number of techniques to avoid the application of the law "selected" by the choice of law rule that the court felt compelled to follow. There were three general techniques that American (and English) courts developed. The class of techniques was recognized as offering a variety of "escape devices", i.e., devices used to escape the application of a choice of law rule considered to be unsuitable on one ground or another[40]. There were three general techniques of this type. The first, is to "adjust" the characterization of the "question" so that, e.g., it is characterized as a "contract" question, not a "tort" question (or a "procedure" question, not a "substance" question)[41]. The second (which is comparatively uncommon and which I shall not deal with here) is to treat one question, which might have its own choice of law rule, as "incidental" to another question, what can be called the "main" question and, therefore, to be governed by the latter's choice of law rule[42].

---

[39] Indeed, the history of the common law is filled with statements by common law judges that, with the advent of equity, the world was going to hell in a handcart and that "civilization as we know it" would disappear. The achievement of a proper balance between rules and principles of fairness is not an easy task.

[40] The statement of the Court of Appeal in *Hanlan* v. *Sernesky*, *supra* note 21, para. 20, that the rigid application of *Tolofson/Gagnon* would work an "injustice" is a good example of the kind of reason for rejecting the rigid rule : the statement is quite unanalysed and no explanation for the conclusion is given.

[41] Characterization is, for example, legislatively required under the *Personal Property Security Act*, R.S.O. 1990, c. P-10, s. 8.

[42] The "incidental question" is illustrated by the decision of the Canadian courts in *Schwebel* v. *Ungar*, [1964] 1 O.R. 430, 42 D.L.R. (2d) 622, affirmed, [1965] S.C.R. 148, 48 D.L.R. (2d) 644.

Characterization as a technique of dealing with inconvenient choice of law rules was well developed in the United States as a response to the mechanical statement of the choice of law rule expressed, for example, in the rule that the *lex loci delicti* governs all aspects of a "tort" question. The technique is based on the argument that the characterization of an issue or the category into which it is put is not beyond dispute or discussion. It is, for example, not obvious that a claim by a dependent under the *Family Law Act* has to be characterized as a "tort" claim rather than as a "family" claim. It is important to note that the characterization issue is inherent in the structure of analysis of a conflicts case. The need for an "escape device" arises precisely because, as the structure illustrates, once a question has been categorized or characterized as, e.g., a "torts" question, *every* question that comes up is to be answered by the same choice. Both *Tolofson* and *Gagnon* could have raised serious problems of this type and the opportunity for such arguments clearly exists. One recent case illustrates exactly this point. In *Cowley* v. *Brown*[43], the Alberta Court of Appeal held that an issue of subrogation rights was not necessarily governed by the law of a province other than that where the accident had occurred[44].

Assume that neither case involved a local resident and that in each case the plaintiff's claim is only against his or her father or husband. It may be appropriate — though I would not concede that it would always be — to use Saskatchewan or Quebec law to determine if the acts were negligent; it does not follow automatically that either of those laws have to deal with other issues like other plaintiffs' rights to claim under the *Family Law Act* (or analogous legislation)[45]. I suspect that, as the cases dealing with interprovincial or international torts increase, courts and counsel will find ways to avoid *Tolofson/Gagnon* by arguing that the question is not a "tort" issue but is, for example, a family law issue, governed by different rules[46] or that a question is one of procedure and not substance[47].

The Supreme Court's insistence over the last few years that there are no hard and fast divisions between tort and contract[48] makes its apparent belief that it will easily

---

[43] [1997] 7 W.W.R. 380, 147 D.L.R. (4th) 282, (Alta. C.A.).

[44] The decision in *Cowley* v. *Brown* can be compared with the decision of the same court in *Brill* v. *Korpach Estate* (1997), 148 D.L.R. (4th) 467, where *Tolofson/Gagnon* was applied even though it produced "a harsh result for the plaintiff". See V. Black *supra* note 27.

[45] See, e.g., The decision of Cumming J. in *Hurst* v. *Leimer*, *supra* note 16, at 767-68, on the characterization of s. 266(1) on the Ontario *Insurance Act*.

[46] Issues of characterization are well-known in Canadian law. See, e.g., *Toronto-Dominion Bank et al.* v. *Martin Estate* (1985), 39 Sask. R. 60, (Q.B., Walker J.); *Alberta Treasury Branches* v. *Granoff* (1984), 58 B.C.L.R. 370 (C.A., Seaton, Aikens and Esson JJ.A.); *Block Bros. Realty Ltd.* v. *Mollard and Detra Holdings Ltd.*, [1981] 4 W.W.R. 65, 27 B.C.L.R. 17, 122 D.L.R. (3d) 323, (B.C.C.A. Nemetz, C.J.B.C., Seaton and Craig, JJ.A.); *Livesley* v. *E. Clemens Horst Co.*, [1924] S.C.R. 605.

[47] See, e.g., *Bachand* v. *Roberts* (1996), 7 C.P.C. (4th) 93, (Ont. Ct. (Gen. Div.), Bell J.). Liability for costs is a matter of procedure, not substance.

[48] *Central Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147, (*sub nom. Central & Eastern Trust Co.* v. *Rafuse*) 31 D.L.R. (4th) 481, 42 R.P.R. 167, Varied, [1988] 1 S.C.R. 1206; *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289; *Edgeworth Construction Ltd.* v. *N. D. Lea & Associates*, [1993] 3 S.C.R. 206, [1993] 8 W.W.R. 129, 107 D.L.R. (4th) 169, 83 B.C.L.R. (2d) 145, 17 C.C.L.T. (2d) 101; and *Winnipeg Condominium Corp. No. 36* v. *Bird Construction Co.*, [1995] 1 S.C.R. 85,

and always recognize a torts problem when it sees one surprising[49] (I admit that a motor-vehicle accident looks like a tort, but the related issues, e.g., rights under insurance policies, claims of dependents and even the nature of the damage award, may not be so easily categorized.). The structure of analysis required by the Supreme Court's theory of conflicts, allows no blurring of the boundaries : there is a torts "hopper" and a contracts "hopper"; there is no intermediate hopper. The categorization of the problem leads to radically different choice of law rules[50].

The third device is the doctrine of renvoi, a doctrine originally developed by a French court. The issue of or the possibility of using the doctrine of renvoi is, like characterization, inherent in the structure of conflicts analysis I have described. The doctrine of renvoi focuses on the content of the foreign law chosen by the process. When La Forest J. says that we apply "Saskatchewan law" or "Quebec law" what does he mean? What is a "foreign law"? Is a foreign law, the law that a foreign court would apply to deal with a problem before it? If a foreign court would, for example, adopt a choice of law rule that referred the question to, say, Ontario law, should an Ontario court apply the whole foreign law or only some part of it? The acceptance of the doctrine of renvoi requires a court, an Ontario court, to look at the conflicts rules of the jurisdiction to which its (Ontario's) choice of law rule referred it and choosing the law of the jurisdiction referred to by the foreign law. The doctrine was called the doctrine of "renvoi" or "return" because it often happened that the question was "returned" to the *lex fori* by the operation of the foreign jurisdiction's conflicts rules and, indeed, was often used by courts to justify the application of the *lex fori*. Like characterization, the doctrine of renvoi has insuperable and fundamental logical and practical problems.

A golf analogy would be appropriate to describe the process. Imagine that a Ontario couple are vacationing in New York. While they are playing golf, the husband carelessly injures his wife. She and her children sue in Ontario and the issue is whether one of the children has some claim under the *Family Law Act*. The Ontario court serves (by applying the rule in *Tolofson/Gagnon*) and determines that the law of New York is to be applied. The ball has now landed in the New York court (I make no apology for the

---

[1995] 3 W.W.R. 85, 121 D.L.R. (4th) 193. Cases that raise a similar issue include *J. Nunes Diamonds Ltd.* v. *Dominion Electric Protection Co.*, [1972] S.C.R. 769, 26 D.L.R. (3d) 699; *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201, 68 D.L.R. (3d) 385, (C.A.) (affirmed, *sub nom. Giffels Associates Ltd.* v. *Eastern Construction Co. Ltd.*), [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344.); and *Queen* v. *Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626.

[49] Consider the recent case of *National Bank of Canada* v. *Clifford Chance* (1996), 30 O.R. (3d) 746, (Ont. Ct. (Gen. Div.), Ground J.) which raised the issue of the liability of a firm of English solicitors under an opinion letter to Canadian lenders. While the decision in that case was to stay the Ontario actions, had the actions gone ahead in Ontario, the question would have been whether the "question" was a contracts one or a torts one. Given the Supreme Court's recent cases (*supra* note 48) it is not easy to see how a claim in misrepresentation might be characterized.

[50] The torts - contract characterization issue has already surfaced in *Orfanakos* v. *Ingoglia* (1995), 22 O.R. (3d) 167, (Ont. Ct. (Gen. Div.), O'Brien J.). See also *Encal Energy Ltd.* v. *Numac Energy*, [1996] B.C.W.L.D. 2486, [1996] B.C.J. No. 1918, Vancouver Registry No. C962977, (B.C.S.C., Sinclair Prowse J.), Judgment filed September 6, 1996, ¶ 18 where the germ of the characterization question surfaced.

pun). Under the law of New York (which has rejected the *lex loci delicti*) the law to govern the children's claim is the law with which that issue[51] is most closely connected and it is proved that the New York court would apply Ontario law. That court has now, as it were, returned the ball to Ontario. The question now is what happens next? Does the game continue in an endless rally or does one side simply stop the game? If one court stops the game, on what ground does it do so?

The game will be stopped by one court's deciding to apply either the Ontario law of torts or the New York law of torts, exclusive of its conflicts rules. On the facts of the imaginary case I have considered, if the Ontario court "accepted" the renvoi from the New York court, it would give the child its *Family Law Act* claim. If the Ontario court returns the ball to the New York court, i.e., if it does not accept the renvoi, it would apply New York law. (Some cases discuss the question whether the New York court would accept the renvoi from Ontario; if it would not and this fact is proved to the Ontario court, then the Ontario court (sadly, and with a sense that a promising rally has been aborted) would apply Ontario law).

The importance of the doctrine of renvoi lies in the fact that, like the issue of characterization, it is an inescapable consequence of the choice of law process as I have described it. Notice also that, as would be the case with New York law, the decision of the New York court that the claim that I have been discussing that its law does not apply is not the result of the application by the New York court of process similar to that adopted by the Supreme Court. The New York court does not accept the structure for analysis that I have described. The decision of the New York court would be based on the fact that it is inappropriate that the relation of parent and child should, on the kind of facts that I have imagined, be determined by a law that has really nothing to do with that relation. *Tolofson/Gagnon* sets up the clear possibility that in the interests of certainty and simplicity, Canadian courts will apply a rule that leads to the application of a law of a jurisdiction that the courts of that jurisdiction would regard as inapplicable[52]. It is in these situations that the awkwardness and unsatisfactory nature of the Supreme Court's new rule can be clearly seen.

The principal distinction between the structure adopted by the Supreme Court and American courts is that in the United States there is, in general, no concept of *a governing law*; there are, instead, several choices to be made, depending on the issue that has to be decided. The difference in theoretical terms is between a structure that selects the law — in some sense the "whole" law — of a jurisdiction to govern and one that focuses on the actual issue and tries to find the appropriate rule to govern that particular issue. The cases are legion. The American approach is not free from difficulty for it, like the

---

[51] Note that the New York court does not even speak the same language as the Supreme Cour : it rejects the structure that underlies the Supreme Court's approach.

[52] The issue was not raised in *Sidiropoulos* v. *Johnson* (1996), 7 W.D.C.P. (2d) 70, (Ont. Ct. (Gen. Div.), (Sheppard J.), which was concerned with the preliminary question whether the plaintiffs could sue in Ontario. The choice of law issue was left to be determined. The applicable foreign law (under the *Tolofson/Gagnon* test) would be the law of Virginia. It is very probable that the Virginia courts would not apply that law to *all* the issues arising out of the accident.

Canadian, generally accepts that results should not depend on the place where the action is brought. This belief in the need for uniformity has bedevilled conflicts analysis for centuries and is, in my opinion, quite inconsistent with the right of the Canadian provinces to adopt differing legislative solutions. Why should provincial court decisions be uniform when provincial legislation is not? Why should the Supreme Court insist on uniformity across (at least common law) Canada? These are large issues that may not be immediately dealt with in the light of *Tolofson/Gagnon*. They are implicit in *Moran*, *Morguard* and *Hunt*[53].

It is also worth noting that the legislative "abolition" or rejection of the doctrine of renvoi[54] is no more a satisfactory solution than its acceptance. The rejection of the doctrine certainly avoids the absurdity of the (potential) endless rally, but it does not meet the issue that prompted the rally in the first place, *viz.*, the realization that it may be entirely silly to apply a foreign law that *as understood by the foreign court* is considered to be inapplicable. In other words, in my New York example, the decision to apply New York law by rejecting renvoi simply ensures that the wrong solution is adopted : the court will be applying a rule that will advance neither the policy and values of the Canadian province nor those of New York.

One final "escape device" must be noted. All courts assert for themselves a power to refuse to give effect to any foreign law that contradicts the public policy of the *lex fori*. Perhaps the most explicit example of this power is that expressed in Art. 3129 of the *Civil Code of Quebec*, dealing with liability for raw materials originating in Quebec. This power is an obviously necessary one. It differs in a fundamental way from the other devices that I have discussed in that its existence does not depend on the structure or theory of conflicts, but simply on the right and duty of the court to have regard to the values and characteristics of the place where it is located.

V. Jurisdiction

While the decision in *Tolofson/Gagnon* is quite emphatic on what Canadian courts must now do in conflicts cases in tort (or, at least, conflicts cases involving motor-vehicle accidents) the decision is, as I have suggested, hard to reconcile with the decisions of the Supreme Court in both *Morguard* and *Moran*. The decision is also hard to reconcile with another recent decision of the Supreme Court, *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*[55].

In *Amchem*, the Supreme Court had to deal with the right of a defendant to obtain an injunction preventing the plaintiffs from suing the defendant in Texas. In the course of a judgment in which, reversing the decision of the British Columbia Court of Appeal, the injunction was denied, Sopinka J. discussed the criteria upon which Canadian

---

[53] *Supra* note 4. See the articles mentioned, *supra* note 5.

[54] See, e.g., Art. 3080 C.c.Q.

[55] [1993] 1 S.C.R. 897, [1993] 3 W.W.R. 441, 102 D.L.R. (4th) 96, 77 B.C.L.R. (2d) 62 [hereinafter *Amchem*].

courts should either take or deny jurisdiction in actions in which one party wants to sue in a jurisdiction in which the other does not want to be sued. In the context of interprovincial or international litigation, an anti-suit injunction is an intrusive and brutal weapon. In dealing with the criteria that should be considered before such an injunction will be issued, Sopinka J. said[56] :

> When will it be unjust to deprive the plaintiff in the foreign proceeding of some personal or juridical advantage that is available in that forum? I have already stated that the importance of the loss of advantage cannot be assessed in isolation. The loss of juridical or other advantage must be considered in the context of the other factors. The appropriate inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of a judicial or other advantage, having regard to the extent that the party and the facts are connected to that forum based on the factors which I have already discussed. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection. Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum.

If this language is considered in the context of *Tolofson/Gagnon*, there is an odd inconsistency. The Supreme Court in both *Amchem* and *Tolofson/Gagnon* is strongly opposed to forum-shopping. The tests used to identify the "natural forum"[57] assume that it will usually be obvious where that place is. These tests also make it clear that a plaintiff will not often be able to get a substantial advantage by choosing the place where to sue. It is important to note that the language that Sopinka J. uses in *Amchem* does not focus on procedural matters : where will it be most convenient to hold the trial? where will the witnesses come from? which court might be more familiar with the commercial issues involved? Sopinka J. focuses on what can only be regarded as choice of law issues. For example, Sopinka J. says[58] :

> [... A] party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

It is consistent with this statement that not only would the forum be an appropriate one to deal with the litigation, it would be appropriate *from a choice of law perspective*[59]. The statement that there is an intimate relation between the issues relevant in deciding where the action may properly be brought and what law should determine the issues in dispute was at the heart of both *Moran* and *Morguard*. The judgment in

---

[56] *Supra* note 55 at 933.

[57] *Ibid.* at 931-32.

[58] *Ibid.* at 920.

[59] In *Moran*, [S.C.R.] Dickson J. makes a similar slide from principles justifying the assertion of jurisdiction to those governing choice of law, the rule of decision to be used to determine the merits of the dispute, *supra* note 6 at 408-09.

Tolofson/Gagnon seems to be based on the denial that there is any connection whatsoever : how else can one explain a rule that makes the only relevant fact the place where the accident happened?

La Forest J., giving the judgment of the Court in *Tolofson/Gagnon*, states unequivocally that the law of the place of the wrong, the *lex loci delicti*, must be applied to determine the rights of the parties. It is irrelevant that the actions in both the cases dealt with in *Tolofson/Gagnon* were brought by the passengers in the car driven by the defendant, or were part of the family of the defendant, as it was irrelevant that under the law of their residence substantial damages would have been recoverable. La Forest J. rejects the choice of law rule based on *Phillips* v. *Eyre* and all other alternatives other than the *lex loci delicti*. It can be assumed that in *Tolofson/Gagnon* both B.C. and Ontario would, under the principles stated in *Amchem*, be appropriate places for the litigation. Why then cannot the law of B.C. or Ontario be applied? The answer given by La Forest J. in *Tolofson/Gagnon* is that to do so would permit forum-shopping and deny certainty. Notice, however, that what Sopinka J. says in *Amchem* in the quotation in the previous paragraph is a clear endorsement of the propriety of giving the plaintiff the advantages of the place where it sues. Sopinka J.'s statement is consistent with the fact that there may be more than one appropriate place to litigate and that the plaintiff in making a choice between the places that have a "real and substantial connection" with the litigation, may properly take advantage of his or her freedom of choice[60].

Amchem suggests that there will be one, perhaps two, places where the plaintiff may sue and that choice of law rules will be largely if not entirely subsumed in the jurisdictional question. *Tolofson/Gagnon* assumes that there will be many places where the plaintiff may sue and that to prevent the plaintiff from obtaining an advantage from this opportunity, brutally mechanical choice of law rules must be applied. *Amchem* is consistent with the law as it had been developing since *Morguard* and even since *Moran*. The basic principle of this approach is that the Supreme Court can supervise litigation with a foreign element and can ensure that the values implicit in the Canadian federation are recognized in the rules for such litigation. *Tolofson/Gagnon*, on the other hand, seems to be an explicit denial of this development. It rejects any idea that the flexible constitutional principles in the earlier cases (and in *Amchem*) are applicable to the ordinary choice of law problem[61].

---

[60] Of course, in some cases there may be only one appropriate court and only one rule that can be sensibly applied. An example of this is *Ferguson* v. *Arctic Transportation Ltd.* (1998), 79 A.C.W.S. (3d) 1156, (F.C.T.D., Reed J.) The claim was brought by a Panamanian pilot for injuries caused when he was piloting a ship belonging to defendant. The defendant's argument was that the claim was statute-barred on the ground that the applicable limitation period was that of Panama, i.e., one year. The court dismissed the plaintiff's claim on the ground that Panamanian law applied as the place of tort, the place of the damage or the place with most substantial connection. In any event, the court went on the say that there was no negligence.

[61] The horror of and opposition to forum-shopping is, in my opinion, inconsistent with the tests established in both *Morguard* and *Amchem*, both of which are consistent only with the idea that more than one place may be an appropriate jurisdiction and that any such place may, as I have said, appropriately apply its own law.

VI. Long-Term Developments

It is still relatively early days after the decision, but what is already appearing is evidence that a determined court will find a way to reach the result that it considers appropriate[62]. What is interesting is that this development parallels what occurred in the United States in response to the original Restatement. The beauty — or the danger — of the "escape devices" that I have discussed is that they leave the formal structure of the choice of law rules intact, and as a result, they operate haphazardly and awkwardly. Because there can be no principled way to decide if something is a torts question, a family law question or some other question, courts and lawyers have no guidance and the decisions will not "cumulate" — to use Karl Llewellyn's memorable word — into something that can be reasoned about. Devices that are formally entailed by the structure and which present logically insoluble problems are simply outside the ordinary scope of the arguments that courts can deal with. The endless rally or the arbitrarily spoiled game that is the inevitable consequence of the doctrine of renvoi suggests that there is something fundamentally wrong with the acceptance of the doctrine in the first place. In the long run then there is no alternative to a re-consideration and ultimate rejection of the whole structure of choice of law rules.

One of the very depressing things about the judgment of the Supreme Court in *Tolofson/Gagnon* was the fact that the Court did not appear to understand what had happened in the United States. Since we are likely to have to repeat the American experience over the last sixty-five years, it is worth briefly reviewing the developments that occurred there. I have already mentioned[63] the fact that the Restatement of the Law, Conflict of Laws, adopted the *lex loci delicti* as its governing principle. Its rules are worth noting. The Restatement provided :

> **§ 377. The Place of the Wrong**
>
> The place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.
>
> **§ 378. Law Governing Plaintiff's Injury**
>
> The law of the place of the wrong determines whether a person has sustained a legal injury.

These principles essentially state the law established by *Tolofson/Gagnon*.

---

[62] See, e.g., the remarks of Esson J.A. in *Stewart* v. *Stewart*, *supra* note 28 at 357 :

> **[13]** If I were free, by reason of [section 13 of the B.C. *Limitation Act*], to apply British Columbia limitation law, I would do so. The application of the limitation law of Saskatchewan to this case will not produce a "more just result" — indeed, it will produce a patently unjust result.

and the judgment of the Court of Appeal in *Hanlan* v. *Sernesky*, *supra* note 21, and quotation from the judgment, at para. 31.

[63] See para. 17, above.

Though the rules of the Restatement came under attack almost as soon as they were published, their overthrow and replacement was made inevitable by the decision of the New York Court of Appeals in *Babcock* v. *Jackson*[64]. Though the judgment was not unanimous and the reasoning is open to criticism, the Court refused to apply the principles that I have quoted to deny a remedy to a New York plaintiff injured by the negligence of a New York defendant[65]. The negligence and injury had occurred in Ontario which at that time had legislation that denied a guest passenger any recovery from the driver or owner of the vehicle[66]. It is not necessary to deal with the judgments in *Babcock* v. *Jackson*. What is interesting is that the Ontario Court of Appeal in *Hanlan* v. *Sernesky*, in effect, followed the New York Court of Appeals : it refused to follow *Tolofson/Gagnon* because to do so would cause injustice[67].

The Court of Appeal did not elaborate on its concept of justice. At base the Court's conclusion must mean that it was in some way improper or unjust that the rights of two Ontario people *inter se* should be dealt with by the law of Minnesota in exactly the same way that the New York Court of Appeals thought that it was improper to apply Ontario law to determine the liability of one New York resident to another. What distinguishes the decision of the court in *Babcock* v. *Jackson* from that of the Court of Appeal in *Hanlan* is the extent to which the former court was at pains to deal in a principled way with its decision not to apply the rules of the Restatement.

It will not do to argue that *Tolofson/Gagnon* only applies within Canada and that in international torts another rule can be adopted. La Forest J. is at pains to argue that his rule will achieve certainty and predictability. This goal is at least as important in actions involving interprovincial torts as it is in cases of international torts. To the extent that the application of the *lex loci delicti* reflects the underlying insurance coverage of Canadian motorists, the standard policies of every province make no distinction between accidents in Canada and accidents in the United States[68]. In short, all the reasons that La Forest J. considered as justifying his rule on the facts of *Tolofson/Gagnon* apply to an international tort[69].

---

[64] *Supra* note 23. The facts of *Babcock* v. *Jackson* are briefly, but more extensively than here, set out in *Tolofson/Gagnon* at 1055-56.

[65] The New York court's refusal was motivated by exactly the same reasons as moved the Supreme Court to refuse to apply the same rule in *McLean* v. *Pettigrew*, *supra* note 23.

[66] The application of the identical Saskatchewan rule in *Tolofson* by the Supreme Court justified the dismissal of the plaintiff's action against his father. The plaintiff and his father both came from British Columbia. There was another defendant, a Saskatchewan resident, but that fact is completely irrelevant to the question whether the son may sue his father.

[67] The Court of Appeal's conclusion is quoted, para. 20, above.

[68] See, e.g., R.R.O. 1990, Reg. 676, s. 4(1)(c). The Regulation is set out in *Orfanakos* v. *Ingoglia* (1995), 22 O.R. (3d) 167.

[69] The rule to be applied to torts that occur outside Canada and the United States may, perhaps, be justifiably different. If it is, the reasons that would justify the difference would, as it were, rebound to show that even within Canada, the *lex loci delicti* cannot be applied as the Supreme Court appears to have intended that it be applied.

The importance of *Babcock* v. *Jackson* lay in the fact that it rejected the structure of conflicts analysis that underlay the Restatement; it rejected the concept of a governing law chosen by reference to a connecting factor, i.e., the place of the tort. In doing so, it rejected the process of characterization and the possibility of renvoi. The court in *Babcock* v. *Jackson* chose instead to apply a law to govern an issue in the case itself, the question whether the plaintiff might sue the defendant by one law, the law of New York, leaving it open to apply another law to govern another issue or if there were another defendant. I cannot here review the development of American law since *Babcock* v. *Jackson*. The development has not been even and any rule that has been proposed has proved inadequate in some situation. What has endured is the determination to avoid the kind of conceptualism that underlay the Restatement and an effort to find defensible bases for the results reached.

An aspect of *Tolofson/Gagnon* that is particularly sad is the apparent failure of the Supreme Court to understand what happened in the United States[70]. La Forest J. is seduced by an idea that has been frequently cited as an alternative to the rule of the Restatement, *viz.*, that the court should apply, instead of the *lex loci delicti*, the "proper law of the tort". This idea was originally floated by John Morris, then the editor of Dicey, *The Conflict of Laws*[71]. *Babcock* v. *Jackson* did not, as La Forest J. suggests, adopt this idea. As articulated by Morris, the "proper law of the tort" was a rule of the same type as the *lex loci delicti*; it selected or chose a law to govern the tort; the New York Court of Appeals did not adopt Morris's suggestion.

* * *

For several years I had had the hope that the combination of *Moran* and *Morguard* had opened new light and understanding on the analysis of conflicts cases in Canada[72]. In many respects those cases were among the very best in the common law world for dealing sensibly with conflicts cases, i.e., cases with geographically complex facts. *Tolofson/Gagnon* has set this development back by decades, I hope not for ever. If we examine, for instance, the justification for the result stated by Cumming J. in *Hurst* v. *Leimer*[73] not one of his claims is valid :

- The statement that "under the rules of private international law the applicable substantive law is normally the place where the tort arises or *lex loci delicti*" is circular. There are no "rules of private international law" other than those made

---

[70] The Supreme Court refers, at 1056, to one case, *Richards* v. *United States*, 369 U.S. 1 (1962) at 11-14, decided before *Babcock* v. *Jackson*, for the proposition that the majority of American states "still" apply the rule of the 1934 Restatement.

[71] J. Morris, «The Proper Law of a Tort» (1951) 64 Harv. L. Rev. 881.

[72] Principal among the cases that had given me hope was the decision of the Ontario Court of Appeal in *Grimes* v. *Cloutier*, *supra* note 11.

[73] *Supra* note 16. The quotation is set out at para. 14, above.

by the court and to say that one form of such a rule is justified because it exists adds nothing to our knowledge of the world or what form the rule should take.

- The statement that the place where the tort arises "is the place where the defining activity occurred that gives rise to the claim of a civil wrong in tort" is again circular and misleading. It is circular because whether anything that happens anywhere in the world does or does not give rise to a cause of action before an Ontario court depends on that court holding that it does. If the Ontario court, for example, holds that the question is a "contracts" question and not a "torts" question, the "place where the defining activity occurred" may ultimately be irrelevant in the determination of any issue because the choice of law rule associated with contracts is not the same as that associated with torts. (Cumming J. (and La Forest J.) are also here stating the "vested rights" theory of conflicts that has been rejected in the common law world for about 80 years)[74].

  Furthermore, the statement is misleading because, as La Forest J. had to admit[75], the place where any "defining activity" may have occurred may be anything but clear. (Consider, e.g., cases of products liability and multi-state libel[76]).

- Cumming J., like La Forest J. is hostile to "forum shopping". There are two aspects to this attitude, one justifiable, one not. The justifiable position is that the plaintiff should not be able, just because it has the opportunity to choose the place where to sue, to put the defendant at a serious tactical disadvantage. This concern will not be dealt with by any choice of law rule but by direct controls on

---

[74] See *supra* note 1 at 1040. La Forest J. quotes the statement of Willes J. in *Phillips* v. *Eyre* (1870), 6 Q.B.1 at 28 :

> [C]ivil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law.

La Forest J. then says (p. 1050) :

> In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

The statement made by Willes J. has always been taken as a classic example of the vested rights theory, but no one (at least to my knowledge) had ever suggested until now that it was anything other than an interesting fact in the history of conflicts theory. While Dicey, the original author of the leading English text, *A Digest of the Law of England with reference to The Conflict of Laws*, published in 1896, stated the vested rights theory as a "general principle", changes in the theory were detectable as early as the fifth edition in 1932. The theory was abandoned by the sixth edition, the first edition under John Morris, and by the eighth edition, the category of "General Principles" had been abandoned as well. Falconbridge discusses Dicey's vested rights theory and its evolution. Falconbridge suggests that Dicey never took it very seriously and refers to Dicey's statement that,

> English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country, as evidence of that fact.

[75] See, e.g., *supra* note 1 at 1050.

[76] The issue of the applicability of *Tolofson/Gagnon* in a multi-state libel action was avoided in *Olde* v. *Capital Publishing Ltd. Partnership* (1996), 5 C.P.C. (4th) 95, affirmed, 22 January, 1998 (Ont. Ct. (Gen. Div.), Brockenshire J.; C.A., Krever, Carthy & Osborne JJ.A.) as the court held that Ontario was not a convenient forum. See *Shevill* v. *Presse Alliance*, [1996] 3 All E.R. 929, (H.L.) where it was held, following a ruling of the Court of Justice of the European Communities, that the plaintiff in a multi-state libel action could sue in any jurisdiction in which the libel had been published.

forum non conveniens. The more general attitude — forum-shopping is bad — is based on the idea that I have already referred to, *viz.*, that uniformity of results is a "good thing" and to be sought through uniform choice of law rules[77]. There is no justification for such an attitude. The logical development of the ideas in *Morguard* entails the recognition that, *so long as both courts have behaved themselves* in the constitutional sense, the courts of two provinces may be permitted to differ in the results that they reach on identical facts. This position can be justified on the ground that, if provinces can differ in their legislative solutions to social problems, so too can the courts of each province[78]. The claim that an "act committed in one province should be given the same effect throughout Canada" simply cannot be sustained under *Morguard* and a uniform solution no more conforms to the Canadian Constitution that does one that would permit diversity.

- The "reasonable expectations of the persons involved" have nothing to do with anything unless there is evidence that the people involved would be unfairly surprised by being made liable in circumstances where they did not expect to be. This issue was the focus of the judgment of the Court of Appeal in *Grimes* v. *Cloutier*[79] and the Court of Appeal's disposition was an excellent one, dealing precisely with the issues that had to be considered. Whether and to what extent parties have actual expectations and the extent to which any can be protected is a very difficult issue.

The form of the rule stated by the Supreme Court, the inability of that rule to be justified in its application (except where, by accident, it may make sense to be applied) and, above all, the structure of conflicts analysis make it almost certain that courts and counsel will be assiduous in finding ways around it. I have shown that there are several ways in which a court may be offered a basis for reaching "better" results, i.e., results that a court might want to reach. The tragedy is, of course, that we have to proceed to develop the law in this way.

---

[77] See para. 36, above.

[78] See, e.g., *supra* note 1 at 1065-66 where La Forest J. admits that courts are as subject to section 92(13) limits as legislatures. McKinlay J.A. in giving the judgment of the Ontario Court of Appeal in *Québec (Sa Majesté du Chef)* v. *Ontario Securities Commission*, *supra* note 8, and in the quotation at note 9, explicitly recognizes that an Ontario court can adopt a result that a Quebec court would not.

[79] *Supra* note 11.