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JUSTICE IN TORT CHOICE OF LAW

THE law concerning tort choice of law is in a state of flux. Legislatures, courts and law reform commissions are in the process of changing the law. There is disagreement about the details of the new law, but there is agreement about one thing: greater weight should be given to the law of the place where the tort occurred. The disagreement is about what role should remain for the lex fori, and in what circumstances the lex loci should be displaced in favour of another law. This disagreement results partly from a reluctance to develop a clear theory of tort choice of law. Just what ought these rules be trying to achieve? Now seems like a particularly good time to try to answer this question.[1]

Until recently the law in England, Canada and Australia was based firmly on *Phillips v Eyre.*[2] The well-known two conditions laid down by Willes J in that case required that for a suit on a wrong committed abroad to succeed, the wrong must be of such a character that it "would have been actionable if committed in England" and "the act must not have been justifiable by the law of the place where it was done."[3] There was for a long time disagreement about what these two conditions meant.

The Supreme Court of Canada[4] followed *Machado v Fontes.*[5] The effect was to make the lex fori the governing law. The law of the place of the alleged wrong was relevant only if by that law the act was utterly innocent, that is, of no consequence under the civil or criminal law. Provided it could be shown that the act was even potentially criminal, the second condition was satisfied, and the action could proceed under the law of the forum.

In England[6] and Australia,[7] however, the rule in *Phillips v Eyre* was reinterpreted to produce a double choice of law rule requiring coincident liability.[8] Only to the extent of

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1 See Kincaid, "*Jensen v Tolofson* and the Revolution in Tort Choice of Law" (1995) 74 *Can Bar Rev* 537, for a comparison of the approaches taken in Canada, the UK and Australia.

2 (1870) LR 6 QB 1.

3 (1870) LR 6 QB 1 at 28-29.

4 *McLean v Pettigrew* [1945] SCR 62.

5 [1897] 2 QB 231.

6 *Boys v Chaplin* [1971] AC 356.

7 *Breavington v Godleman* (1988) 169 CLR 41; *McKain v RW Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1.

8 *Boys v Chaplin* [1971] AC 356 at 389 per Lord Wilberforce; *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434 at 443; *Breavington v Godleman* (1988) 169 CLR 41 at 110-111; UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Working Paper No 87, 1984) para 2.17; Cheshire and North's *Private International Law* (Butterworths, London, 12th ed 1992) p543; Briggs, "What did *Boys v Chaplin*

overlap between the two laws could the plaintiff recover. Instead of the lex fori dominating, as under *Machado* and *McLean v Pettigrew*,[9] both laws applied. In England the new double liability rule was subject to a flexible exception. In *Boys v Chaplin,*[10] the lack of connection between the parties (both British) and the place of the accident (Malta) led the House of Lords to displace the general rule and to apply the lex fori alone. It remained unclear, though, whether the flexible exception could be used to displace the lex fori in favour of the lex loci, or even to displace both in favour of a third law. For torts occurring in another Australian state or territory, the High Court of Australia has rejected the flexible exception.[11]

Recent developments in all three countries have shown a new enthusiasm for the lex loci by legislatures, courts, and law reform commissions. The law in the United Kingdom will be radically changed when the *Law Reform (Miscellaneous Provisions) Act* 1995 (UK) comes into force.[12] This Act makes the law governing a tort (occurring abroad or in the United Kingdom) the lex loci, subject to a proper law flexible exception.[13] The Act is the implementation, with amendments, of the recommendations of the Law Commission.[14]

The year before the Act was passed the Privy Council on an appeal from Hong Kong allowed the flexible exception to operate to displace the lex fori in favour of the lex loci.[15] In *Breavington v Godleman*[16] the High Court of Australia appeared to be prepared to abandon the two-legged rule of *Phillips v Eyre* in favour of the lex loci alone. But in *McKain v RW Miller and Co (SA) Pty Ltd*[17] it reinstated *Phillips v Eyre* in the guise of the double-liability test of *Boys v Chaplin*, without the flexible exception. And in a radical

Decide?" (1983) 12 *Anglo-Am LR* 237 at 246; Molnar, "The High Court: Choice of Law in Torts" (1994) 68 *LIJ* 395 at 396.

9 [1945] SCR 62.

10 [1971] AC 356.

11 *McKain v RW Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1 at 38.

12 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK), HL Bill 39, as amended 1 March 1995. The Bill passed, without further amendment, through the final stages in the House of Commons on 31 October 1995. Part III of the Act, tort choice of law, will come into force on a day appointed by the Lord Chancellor by statutory instrument. Its rules apply only to claims arising from events occurring after it comes into force. See Briggs, "Choice of Law in Tort and Delict" [1995] *Ll MCLQ* 519.

13 Sections 11 and 12. The lex loci is displaced in favour of another law if it would be "substantially more appropriate" that another law should apply.

14 UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Report No 193, 1990).

15 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190. See Dickinson, "Further Thoughts on Foreign Torts: *Boys v Chaplin* Explained?" [1994] *Ll MCLQ* 463, and Briggs, "*The Halley*: Holed, but Still Afloat?" (1995) 111 *LQR* 18.

16 (1988) 169 CLR 41.

17 (1991) 174 CLR 1.

decision the Supreme Court of Canada has very recently abandoned *Phillips v Eyre*'s role for the lex fori, and has adopted a rule making the lex loci the law governing a tort.[18]

The Australian Law Reform Commission has recommended reform in substantially the same terms as the United Kingdom Act: a tort before an Australian court should be governed by the law of the place of commission of the tort, subject to displacement by the law of another place with a "substantially greater connection" with the circumstances.[19]

Despite the backtracking by (a majority of) the High Court of Australia, a trend is emerging in three central Commonwealth countries in favour of abandoning the double-liability test of *Boys v Chaplin*'s version of *Phillips v Eyre*. The old rule's emphasis on the lex fori is deplored. There seems to be agreement that the lex loci should prima facie be the law to govern a tort. There is also a measure of agreement that this should not be an inflexible rule, like that of the First Restatement in the USA, but subject to a flexible "proper law" exception. Both the Supreme Court of Canada[20] and the High Court of Australia[21] are against a flexible exception in the case of intra-national torts. The Supreme Court of Canada would limit displacement of the lex loci in international torts to the case where public policy requires the application of the law of the forum.[22]

My object in this article is to ask whether this move to the lex loci as the prima facie governing law is justified, and if so what exceptions to its application are justified.

COHERENCE, RATIONALITY, AND JUSTICE

Much of the discussion of possible reforms has not examined with any rigour the purpose of the law in this area. It seems to me that in order to assess the efficacy of a rule, and any limitations on the rule, you have first to identify what the rule is trying to achieve.[23] My first assumption is that it is desirable to be able rationally to assess a rule like this. That is, it is desirable that the law be coherent and rational, even if it is acknowledged that such a goal can never fully be realised.

The goals of coherence and rationality are an aspect of the rule of law. First, this means that coercion by the state should be governed by knowable rules, and not by the unfettered discretion of officials, including judges. The rules must thus have a degree of precision in

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18 *Jensen v Tolofson* [1995] 1 WWR 609; now reported in (1995) 120 DLR (4th) 289.

19 Australian Law Reform Commission, *Choice of Law* (Report No 58, 1992), Draft Choice of Law Bill cl 6(8)(a).

20 *Jensen v Tolofson* [1995] 1 WWR 609 at 636.

21 *McKain v RW Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1 at 38.

22 *Jensen v Tolofson* [1995] 1 WWR 609 at 631.

23 See La Forest J in *Jensen v Tolofson* [1995] 1 WWR 609 at 625, and Lord Mackay LC in House of Lords, *Debates*, Official Report, Public Bill Committee, Private International Law (Miscellaneous Provisions) Bill (UK), Wednesday 1 March 1995, p 22.

their formulation, so that the results of applying the rules can be predicted. This does not mean absolute predictability, something which can only come from completely mechanical rules. But where rules are not mechanical, the discretion of judges in applying the rule must be guided. This guidance and limitation of discretion must indicate to the judge what the object of the rule is. A phrase like "substantially more appropriate"[24] is essentially meaningless and leaves the judge's discretion unguided.

The idea of an object raises another aspect of coherence and rationality. The rule of law requires not only that laws are knowable in advance and predictable in their application, but requires as well that they be just. Whatever else the idea of "just" laws includes, it requires that legal rules, which fetter freedom, be formulated with some clear objective in mind.[25] What are we trying to achieve in formulating, for example, a rule concerning the law governing a tort? If no clear objective can be identified, the rule is pointless. It restricts freedom to no purpose. If there is an objective in the mind of the law-maker, but it is not identified, the rule may frustrate the objective. The judge may mistakenly think the true purpose of the law is something else, and interpret the law to achieve that mistaken objective. If the purpose of applying the "substantially more appropriate" law were to give effect to the expectations of the parties, the interpretation of that phrase in a particular case might be very different from the interpretation if the purpose were to give effect to the interests of states in having their law applied. But justice requires not only that the objective be identified and that the rule reflect it. It also requires that the objective itself be chosen and be able to be explained in terms of articulated values:[26] why is the rule trying to achieve that?[27] It is because of the goodness or desirability of the objective. These values which must be identifiable behind the objectives of legal rules must be defensible as agreed values within the society.[28]

NATURE OF TORT AND TORT CHOICE OF LAW

Now let me apply those ideas to tort choice of law rules. First, it is necessary to say something about the nature of tort choice of law rules and tort rules in general.

24 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) s12(1).

25 Holmes J seems to have had this idea in mind when in "The Path of the Law" (in Holmes, *Collected Legal Papers* (1920)) he looked forward to a time when "instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them". Quoted in Howe, "The Positivism of Mr Justice Holmes" (1951) 64 *Harv L Rev* 529 at 541.

26 It is not enough that you be able to calculate your social risks. (See Kahn-Freund, "Delictual Liability and the Conflict of Laws" [1968] II *Receuil des Cours* 1 at 43.) The rules allocating those risks must be based on some criteria of justice.

27 "[I]n view of the continuous controversy about the substance of justice, each theory has to acknowledge its value assumptions." Englard, *The Philosophy of Tort Law* (Dartmouth, Aldershot 1993) p29. See also Hart, "Holmes' Positivism - An Addendum" (1951) 64 *Harv L Rev* 929 at 936.

28 See Howe, "The Positivism of Mr Justice Holmes" (1951) 64 *Harv L Rev* 529 at 541, citing Holmes,*The Common Law* (Little, Brown & Co, Boston 1881).

Tort choice of law rules are applied as part of the process of adjudicating a tort dispute between the plaintiff and the defendant in a particular case. They may or may not be seen as conceptually distinct from the "dispositive" or substantive rules of tort law, but dispositive and choice of law rules combine to affect the result. What the plaintiff actually gets, what the defendant is coerced by the state to pay the plaintiff, is affected by the particular dispositive rules applied to the dispute, the selection of those rules of course being made by the application of choice of law rules. So in *Boys v Chaplin*[29] if Maltese law were applied, the defendant would be required to give the plaintiff only £53. If English law were applied the amount would be some £2300.

Just as tort choice of law rules are applied as part of the forum's process of adjudicating a private dispute, so, like the domestic rules of tort law, they are part of the law of the forum. They are part of the forum's municipal law.[30] In the absence of treaties, they are not part of public international law.[31] The forum thus owes no legal duty to other states or to the international community to apply choice of law rules. Nor, it seems, do the constitutions of Canada or Australia require the courts of one province or state to apply the laws of a sister province or state.[32] The result of applying a choice of law rule may be for the court to apply foreign dispositive rules to the case before it, that is to the very plaintiff and defendant before it. If it has no external duty to apply a foreign law, the court only does so because it thinks it is a good idea. That is, the court will do so in furtherance of its own policies and philosophies. It follows that if in applying a tort choice of law rule a court gives effect to foreign public interests, it only does so in furtherance of its own interests.[33] Because tort choice of law rules are part of the municipal legal system, the factors or interests that influence a court to formulate a particular choice of law rule are from the

29 [1971] AC 356.

30 Yntema, "Basic Issues in Conflicts Law" (1963) 12 *Am J Comp L* 474 at 481; Kahn-Freund, *The Growth of Internationalism in English Private International Law* (Jerusalem, Magnes Press 1960) pp7-8.

31 See Kincaid, "Rationalising Contract Choice of Law Rules" (1993) 8 *Otago LR* 93 at 93. Westlake's apparent view to the contrary was probably already out of date when he formulated it in the last century: "by entering a country or acting in it you submit yourself to its special laws *only so far as legal science selects them as the rule of decision in each case*"(emphasis added). Westlake, *Private International Law* (Sweet & Maxwell, London, 7th ed 1925) p281.

32 *McKain v RW Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1 at 3 per Mason CJ, at 37 per Brennan, Dawson, Toohey, and McHugh JJ. This is implied in *Jensen v Tolofson* [1995] 1 WWR 609.

33 Since the demolition of the vested rights theory, "[t]he content of the English rule, and thus of the English obligations, may closely resemble, or even be apparently identical with, those of the foreign *lex causae*, but that this is so stems from a voluntary decision of the English law-maker". Carter, "Torts in English Private International Law" (1981) 52 *Brit YB Int L* 9 at 16. See also Australian Law Reform Commission, *Choice of Law Rules* (Discussion Paper No 44, 1990) paras 5.1 and 5.4.

same bank of factors or interests that influence a court to formulate a particular domestic dispositive tort rule.

These factors or interests can be divided into public ones and private ones. The public ones are the interests of the state as an entity or the interests of the community, that is the communal interests of the members of the society. The private interests are the interests of the parties to the dispute, the plaintiff and the defendant.

There is an element of ideology in how one views the balance of these interests, public and private, in so-called "private" law like torts and contract. A distinction can be made between corrective justice and distributive justice.[34] In my view the central purpose of the law in these areas is and ought to be corrective, not distributive.[35] That is, the object is to achieve a balance between the interests of the two parties before the court.[36] It is not primarily to achieve a fairer or more efficient distribution of wealth in the society at large.[37] As one writer puts it, "[t]he plaintiff sues in order to have the wrong done to him set right. He or she is not a private enforcer of a public interest".[38] That is not to say that public interests do not play a part in the formulation of private law rules. But these are subordinate to the central purpose, which is to do justice to the parties as individuals.[39] "No individual tort is the legitimate concern of anyone but the parties."[40] Since tort choice of law rules are applied as part of the private law of tort, the purpose behind these rules is also to do justice to the parties.[41]

34 Englard, *The Philosophy of Tort Law,* pp2-13.

35 A view not shared by the Australian Law Reform Commission, which states that modern tort law is "more concerned with the distribution of loss risk than the allocation of responsibility": *Choice of Law* (Report No 58, 1992) para 6.13.

36 *Miller v Miller* (1968) 290 NYS 2d 734 at 746 (NY Ct of Appeals); UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Report No 193, 1990) para 3.55.

37 Jaffey, "Choice of Law in Tort: a Justice-Based Approach" (1982) 2 *LS* 98 at 99. See, contra, Kahn-Freund, [1968] II *Receuil des Cours* 1 at 24. Lea Brilmayer, "Rights, Fairness, and Choice of Law" (1989) 98 *Yale LJ* 1277 at 1291, criticises "consequentialist" reasoning in that it "can on occasion require or permit the sacrifice of the claims of one individual to the general good of society, without regard for whether imposing this sacrifice is fair".

38 Englard, *The Philosophy of Tort Law* p46, discussing the views of Ernest Weinrib.

39 Morris perhaps typifies the opposite viewpoint. Rather than doing justice between the parties, he sees the object of tort choice of law rules as achieving "socially convenient" results. Morris, "The Proper Law of a Tort" (1951) 64 *Harv L Rev* 881 at 885. The theoretical opposition in tort and tort choice of law theory is between "moral responsibility and social utility". Englard, as above, p2.

40 Clarence-Smith, "Torts and the Conflict of Laws" (1957) 20 *Mod LR* 447 at 455.

41 Jaffey, "Choice of Law in Tort: a Justice-Based Approach" (1982) 2 *LS* 98 at 101.

JUSTICE TO PARTIES

What does doing justice to the parties mean? To answer this, it is first worthwhile bearing in mind that a suit in tort is an attempt by the plaintiff to invoke the coercive power of the court against the defendant in favour of the plaintiff. If the action succeeds, the defendant will be forced to pay money to the plaintiff. The defendant is entitled to expect the plaintiff to provide a convincing answer to the question *why* the defendant should make good the plaintiff's loss. The reasonable defendant will not be satisfied with the plaintiff's pointing to a rule. It may also expect a demonstration that the rule is just.[42] Justice here means that the rule, prescribing a balancing of the defendant's interests with the plaintiff's, is based on values. These values may express morals, ethics, or merely social desires. Since the laws in an area like torts have general applicability in the community, those values may be expected to be ones held generally in the community. To summarise this point, a private law cannot be just if it decrees a certain balance between the interests of the defendant and those of the plaintiff, but gives no reason for the balance chosen. But a reason that is merely coherent is not enough. It must also be one based on generally agreed values.

An action for personal injury will serve as an example. A rule of strict liability could say, "the defendant is liable for all loss which it has directly caused to the plaintiff". If the defendant asks why it is liable, a coherent answer is "because you caused the loss". But this answer arguably will not strike the defendant as just, because it is not accepted in the community that a person *ought* to be liable on the basis of causation alone. Instead, the prevailing value is something like this: you ought to bear responsibility for causing damage to another which you could reasonably have avoided causing. This translates into the rule that a person is liable for carelessly causing foreseeable damage.

BETTER LAW

If tort choice of law rules form part of the private law of torts then, according to the view outlined above, they are part of the process of achieving a just balance between the plaintiff and the defendant. The dispositive tort rules of the forum presumably reflect the values of the society and represent, for the forum, the "best law" on the subject. If the question of the most just balance between the plaintiff and the defendant in a tort action is considered in the abstract, the forum's tort laws constitute the most just balance. If that general tort law has become unjust in the forum's eyes, then it should be changed by the forum's legislature or courts. But it is surely both undemocratic and a denial of its duty for a court to apply the law of another country because the court thinks the foreign law is superior to its own. It is undemocratic because if the defect in the law is so fundamental that the domestic law can only be changed by legislation (as arguably a move to strict liability would be), then the unelected court is usurping the function of the elected legislature by

42 Carter, "Torts in English Private International Law" (1981) 52 *Brit YB Int L* 9 at 16.

indirectly abandoning its own law in favour of what it regards as a better law.[43] If the defect is less fundamental, then the duty of the court is to alter the domestic law itself, not bypass it as inferior to a foreign law.

JUSTICE AND EXPECTATIONS

How, then, is a court justified in applying foreign law to a case? I have mentioned several invalid reasons. It does not do it as part of an international legal duty. Nor, primarily or as a general rule, does it do so because of public interests of the forum. Nor does it do it because it thinks the content of the foreign rule is a better and more just law. It applies a foreign system's dispositive rules of tort instead of its own because it thinks there is something in the circumstances that would make it unjust to the parties to apply any other than a particular foreign law.

The question in a tort action where the plaintiff has suffered injury is whether "it would be just to require the defendant to compensate him".[44] The forum's dispositive rules of tort answer that question according to the forum's values. How do tort choice of law rules fit in? The common law world outside the USA generally favours choice of law rules that select a jurisdiction, rather than rules that choose between different rules by examining their content. Jurisdiction-selecting choice of law rules are a recognition by the forum that in certain circumstances it will be just (by the forum's standards) for it to adopt a foreign system's standards of justice for answering the principal question. They represent a willingness by the forum to forego the application of its dispositive rules and values in certain cases. A jurisdiction-selecting system of choice of law rules decides in advance that it will confine the application of its standards of justice to *formulating* the choice of law rules. These rules are formulated with the idea in mind that they will be applied generally and "blind", that is, without any idea of the content of the rules of the foreign system indicated by an application of the rule. In such a system, a coherent idea of the criteria of justice to be applied in formulating choice of law rules is essential, because there will be no opportunity to apply the forum's criteria of dispositive justice to the rules on offer.

What criterion of justice, based on the interests of the parties rather than public interests, could induce a court to apply a foreign law rather than its own to the resolution of the dispute between the parties? The only one which occurs to me is their reasonable expectations. If the application of the law of the forum would defeat their expectations, then it is unjust to apply it.[45] This is because of the value that people ought to know the standards that they are expected to conform to and that will protect them, so that they can

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43 Nygh calls this "a quite illegitimate assumption of authority". Nygh, "Some Thoughts on the Proper Law of a Tort" (1977) 26 *ICLQ* 932 at 937.

44 Carter, "Torts in English Private International Law" (1981) 52 *Brit YB Int L* 9 at 16.

45 *Breavington v Godleman* (1988) 169 CLR 41 at 77 per Mason CJ.

govern themselves accordingly.[46] Reasonable expectations should be given effect because, in many instances, people will act in reliance on those expectations.[47]

The facts of *Boys v Chaplin*[48] provide an example of how the justice of party expectations could be applied to choice of law. The parties were in separate vehicles, the defendant in a car and the plaintiff on a motor scooter.[49] They were both serving temporarily in Malta in the British forces, but in different services. There is no evidence that they knew each other. They met by accident on a Maltese road. It was quite fortuitous that they were both British.[50] The defendant could as easily have injured a Maltese by his negligence. Indeed he was more likely to have done so. And for the same reason, the plaintiff was more likely to have been injured by a Maltese. There was nothing British, let alone English, in any law which either party would have expected to bind him or protect him in case of any accident in which he might be involved on a Maltese road.[51] If he had bothered to inquire, the defendant would have learned that by Maltese law he was liable for special damages only in case of any accident caused by his negligence. This knowledge could have affected his assessment of the size of the risk, and hence his decision whether to insure at all. If he did decide to insure, the extent of his potential liability should affect the extent of his cover, and his premium. In the result, the defendant was liable for damages of some £2300, instead of the £53 to which Maltese law would have limited him. This generous result, achieved by the application of English law, may be seen as "just" to the plaintiff, since he received what, in the eyes of English law, seems like fair compensation.[52] But such an explanation begs the question which choice of law rules seek to answer, and in effect denies the premise on which they are based.[53]

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46 Clarence-Smith, "Torts and the Conflict of Laws" (1957) 20 *Mod LR* 447 at 459.

47 It is not necessary for either party to demonstrate actual reliance. This is because the criterion of justice at issue is not a criterion of liability. (See Kincaid, "Third Parties: Rationalising a Right to Sue" (1989) 48 *Cambridge LJ* 243 at 264-265.) It does not by itself justify making the defendant liable to the plaintiff, but only justifies the application of dispositive rules other than the forum's own.

48 [1968] 2 QB 1 (Trial and CA) and [1971] AC 356 (HL).

49 [1968] 2 QB 1 at 4.

50 Nygh, "Some Thoughts on the Proper Law of a Tort" (1977) 26 *ICLQ* 932 at 947.

51 Just before *Boys v Chaplin*, Kahn-Freund described as "remarkable" a Swiss law which would have the effect, he said, that if a Swiss resident were run over in London by a Swiss car, his claim for damages would be governed by Swiss law. Kahn-Freund, [1968] II *Receuil des Cours* 1 at 17. Carter, writing after the case, agrees. The defendant, he says, "had little more reason to suppose that he ought to be complying with English law ... than he had to suppose that he ought to be complying with the law of say, Italy or California". Carter, "Torts in English Private International Law" (1981) 52 *Brit YB Int L* 9 at 28. See also *Jensen v Tolofson* [1995] 1 WWR 609 at 634 per La Forest J.

52 *Boys v Chaplin* (CA) [1968] 2 QB 1 at 24-25 per Lord Denning MR. See also *Boys v Chaplin* (HL) [1971] AC 356 at 405 per Lord Pearson.

53 Lord Wilberforce acknowledged that the application of Maltese law could not be refused on the ground of public policy, but he thought that it could on the ground of lack of interest

The question is, should we apply a law other than our own? If the answer is "no, because our law is more just", there can never be a case for applying a foreign law, as the forum's represents the best law in its eyes. The premise on which choice of law rules are based is that despite our dispositive rules being the most just in our eyes, other considerations of justice warrant our applying another law.[54]

Another point to note concerning the justice of the outcome in *Boys v Chaplin* is that it is illegitimate to justify the outcome by saying that it was good for the plaintiff. The law has no inherent preference for the plaintiff or the defendant. Dispositive tort rules balance the interests of the plaintiff and the defendant by the use of value-based criteria. The balance struck may be tilted towards once party or the other. But it remains a balance, not a blind preference for one party.[55]

NATURE OF PARTY EXPECTATIONS

Let me expand on the nature of party expectations as the criterion justifying displacement of the forum's tort rules for those of a foreign country.

Some people doubt the relevance of party expectations in tort. For example, "the predictability consideration does not have much to do with automobile accident cases. They are not planned."[56] But these observations underrate the importance of expectations in tort by making too close a comparison with contract, and by not examining closely enough what the expectations relate to. In tort, party expectations means their expectations before the tort, not before the trial. That is, it refers to their expectations as to the law governing them before their legal relationship is formed. In contract, party expectations as to the governing law are joint and stem from the time of the formation of the legal relationship. Contract choice of law rules are concerned with intention, and thus expectations, as to choice of law. But in tort the expression "party expectations" should not be understood to refer to their expectations as to choice of law, a technical legal concept. Contractors, with legal advice, frequently do apply their minds to the law a court should treat as governing their contract. But people do not govern their affairs with respect to potential torts with an awareness of choice of law rules. Most people would not even know of the idea of such rules. Even if they did, they would not form an expectation of what law an English court would apply to a tort occurring in Malta. It is only after the tort, when the parties will be likely to seek legal advice, that expectations as to choice of law

of the Maltese state in the application of its law to English parties: [1971] AC 356 at 392. For a discussion of these factors, see below, text accompanying notes 90-105.

54 *Jensen v Tolofson* [1995] 1 WWR 609 at 633 per La Forest J.

55 The "policy is not to provide compensation for plaintiffs, but rather to provide compensation for plaintiffs *when justice requires it*". Jaffey, "Choice of Law in Tort: a Justice-Based Approach" (1982) 2 *LS* 98 at 100.

56 *Clark v Clark* (1966) 222 A 2d 205 at 208 (SC New Hamp). See also Morris, "The Proper Law of a Tort" (1951) 64 *Harv L Rev* 881 at 895.

may be raised.[57] Before the tort, they have expectations, not as to choice of law, but as to the standards that they think they ought to conform to. At heart, the idea of party expectations is linked to the idea of individual liberty. People govern their actions and so curtail their freedom because of a set of standards to which they think they ought to (or must) conform. It is not consistent with the ideal of liberty that they should after the event be benefited or burdened by a set of standards different from those they thought they should conform to.[58]

It is no doubt true that many people do not address their minds explicitly to the detailed legal consequences of their actions. But they are aware of standards to which they are expected to conform. These may range from whether or not one brings a bottle of wine when invited to dinner, to the rule of the road, to modifying one's dress in accordance with Islamic sensibilities, to the need to avoid false and misleading conduct under the Australian *Trade Practices Act*. The standards are a mixture of social and legal norms. The important point is that people do have expectations of the need to conform to those standards.

These standards are usually territorially-defined. So both the legal and social standards of the Romans apply in the territory of Rome. Hence the widespread feeling that when in Rome one should do as the Romans do. The average lay person may not know or think much about law, but he or she is aware of one feature of the international legal order: territorial sovereignty.[59] Everyone knows that each country has its own legal system and that to a large, if undefined, extent one is expected to obey the laws of the country one happens to be in. This consciousness of one bit of legal knowledge reinforces the wider acknowledgment that one is governed by territorially-local standards generally.

However, the standards by which people feel they are governed are not always territorially defined. To a degree they are environmentally defined, and sometimes the environment does not conform to the territory.[60] An extreme example is an Australian aeroplane passing over an Islamic country en route from Sydney to London. The passengers might

57 To formulate tort choice of law rules on the basis of party expectations between tort and trial would lead to the conclusion that the content of the rules does not matter as long as they are certain, that is, clear and knowable. If the choice of law rule is such that a legal adviser can predict with some confidence what law a given court will apply to the dispute in question, then giving effect to party expectations means no more than ensuring that the rule is certain enough so that the result can accurately be predicted. Certainty is an important subsidiary criterion of justice, but it cannot serve as the primary criterion because it does not indicate the content of the laws. The same may be said of uniformity.

58 *Metall & Rohstoff AG v Donaldson, Lufkin, & Jenrette Inc* [1990] 1 QB 391 at 445-446 (CA).

59 *Jensen v Tolofson* [1995] 1 WWR 609 at 628; UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Report No 193, 1990) para 3.17; Clarence-Smith, "Torts and the Conflict of Laws" (1957) 20 *Mod LR* 447 at 460; Carter, "Torts in English Private International Law" (1981) 52 *Brit YB Int L* 9 at 16.

60 Clarence-Smith, "Torts and the Conflict of Laws" (1957) 20 *Mod LR* 447 at 460.

well not feel constrained by Islamic custom or law in the way that they would if on the ground in the Islamic city below. But even on the ground, a group of Australians meeting at the house of one of them for a dinner party in the Islamic city might feel that they were governed by their shared standards of behaviour towards each other, and not by those of the Islamic community outside the house.

So effect should be given to party expectations in choice of law because it is thought to be just to apply to people the standards which, in the circumstances of the tort, they thought governed them. Usually the "when in Rome" rule of thumb will express party expectations.[61] A prima facie rule injects an important element of certainty and predictability.[62] Thus the prima facie rule in tort choice of law should be that the lex loci governs.

Sometimes, however, party expectations will point clearly to a legal system other than that of the country in whose territory the tort took place. So just as the people at the Australian dinner party in Islamia would not expect to conform amongst themselves to an Islamic code of blasphemy, so they might feel that at the party they were governed by their shared Australian standards of behaviour to avoid offending, defaming, or injuring each other. Justice in the shape of party expectations will normally be served by having the lex loci govern. But the presumption must be rebuttable to allow for cases where party expectations clearly indicate another law.[63]

REBUTTING THE PRESUMPTION - GENERAL

Up to this point I have offered a theoretical justification for the conclusion that the law of the place of commission of the tort should prima facie govern. That it should is the view of the Law Commission,[64] the UK Parliament,[65] the Australian Law Reform Commission,[66] the Supreme Court of Canada,[67] and a strong minority of the High Court of Australia.[68] Whether there should be exceptions to this rule, and what form any exception should take, are questions requiring a clear understanding of the purpose of the primary rule. It is here that there is disagreement amongst the reformers. The view of the High Court of

61 As above at 461.

62 *Boys v Chaplin* (HL) [1971] AC 356 at 391.

63 Janet Walker makes this point in a recent note on *Jensen v Tolofson* in (1995) 111 *LQR* 397. She quotes La Forest J as saying that "[o]rder is a precondition to justice". She says of *Jensen*'s inflexible lex loci rule, "[o]rder has come first; but will justice follow? ... Exotic torts from distant lands ... promise to challenge the courts to respond with greater flexibility and sophistication to the interests of those before them": at 399.

64 UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Report No 193, 1990) paras 4.1(2) and (3).

65 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) 31 October 1995 s11.

66 Australian Law Reform Commission, *Choice of Law* (Report No 58, 1992), Draft Bill cl 6(3) and (4).

67 *Jensen v Tolofson* [1995] 1 WWR 609.

68 *Breavington v Godleman* (1988) 169 CLR 41.

Australia[69] and of the Supreme Court of Canada[70] is that there should be no exception (at least for intranational torts). The Law Commission and the UK Parliament favour allowing a law other than the lex loci to apply if "it is substantially more appropriate" to apply the law of another place.[71] The Australian Law Reform Commission would allow departure from the lex loci if there is "a substantially greater connection" with another place.[72] The lack of a clear theory of tort choice of law by these reformers means that the formulations of the exceptions are deficient in two ways. First, they are vague. "Substantially more appropriate" and "substantially greater connection" are essentially meaningless. It is thus left to the unguided discretion of the judge to substitute some other law for the lex loci. Second, they suggest the application of values to a situation, but no indication is given of what those values are. The formula is so devoid of indicated values that the individual judge may insert his or her own values. The formulas are thus an invitation to gut justice, to the rule of men, not of laws.

My thesis is that there is only one value-derived, justice-based reason for a court's applying foreign dispositive tort rules: that is, that justice demands that party expectations as to the applicable law be given effect. Certainty and justice combine to warrant a presumption in favour of the lex loci. That presumption should be rebutted only when it can be demonstrated that because of special circumstances, the expectations of the parties point to another law. Such an approach will give direction to a judge asked to rebut the presumption.

REBUTTING THE PRESUMPTION - SPECIFIC

What sort of circumstances could lead a court to conclude that the parties would not, before the tort, have expected to be governed by the law of the place where the tort occurred? The general answer is where the environment is such that the parties would treat themselves as governed by another set of standards in their relations with each other. The environment might be physically isolated to a greater or lesser degree.[73] The aeroplane example is one of extreme physical isolation from the territory. Morris gives a slightly less extreme example when he imagines a summer camp for an American school in a remote part of Quebec.[74] My dinner party is even less isolated or insulated. An existing social or legal

69 *McKain v RW Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1 at 38.

70 *Jensen v Tolofson* [1995] 1 WWR 609 at 636.

71 UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Report No 193, 1990) Draft Act cl 2(4); *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) s12.

72 Australian Law Reform Commission, *Choice of Law* (Report No 58, 1992), Draft Act cl 6(8)(a).

73 Kahn-Freund, "Delictual Liability and the Conflict of Laws" [1968] II *Receuil des Cours* 1 at 82; UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Working Paper No 87, 1984) para 4.94.

74 Morris, "The Proper Law of a Tort" (1951) 64 *Harv L Rev* 881 at 885.

relationship, such as that between husband and wife, might provide such an environment. In each situation, I suggest that the parties will feel that they are in their relations not wholly governed by the law of the territory. It may be that the degree of isolation will affect the extent to which they feel not bound by local standards. So the passengers in the aeroplane would probably feel utterly unbound by Islamic prohibitions on alcohol in the state below. The members of the Australian dinner party might feel much less sure about drinking, although arguably they would not feel bound by local attitudes to insulting behaviour amongst themselves. This suggests that the parties may have different expectations about different issues concerning the standards governing them.[75] The degree of "foreignness" of the locus in terms of morality might be a factor which is relevant in deciding whether party expectations would lead a judge to displace the lex loci. If a group of Australians are travelling in, say, Canada, a country with a manifestly similar culture, history, and values, it is much less likely that they would expect to be governed by *Australian* moral requirements than if they were in, say, Saudi Arabia.

It is possible that the presumption could be rebutted without pointing clearly to any other law. What law should apply then? It might be clear that the parties would not expect the lex loci to govern, but unclear which law should apply. Suppose our dinner party in Islamia comprised English people, French people, and Italians in equal numbers. As western Europeans with many shared values and standards, they would arguably not feel bound by local Islamic standards of behaviour concerning insult and damage to reputation. So the local Islamic law of defamation should not apply to them. They would not expect it to. But it is not possible to say that the members of such a group would positively expect any other given law to apply.

In this situation the lex fori should apply. This is because the object of the exercise is to achieve justice between the parties. The forum's own dispositive tort rules represent its ideas of justice between the parties. The court gives up its own rules only because its ideas of justice to the parties include taking account of their expectations as to the governing law. If, as supposed in the hypothesis, they have no expectation that any other given law will apply, there is no reason for the court not to apply what it thinks anyway are the most just dispositive rules: its own.[76]

The rebutting of the presumption raises the usual question about the balance between certainty and justice.[77] By justice here I mean ensuring that the outcome of the case is an application of the object of the law (here giving effect to party expectations). I will leave

75 The *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) s12(1) allows the question of displacement of the lex loci to be decided in light of the issue in question. See also Lord Wilberforce in *Boys v Chaplin* [1971] AC 356 at 391.

76 I will not deal with the issue of forum shopping here except to remark that it is open to the defendant to contest jurisdiction by arguing that this is a clearly inappropriate forum: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

77 UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Working Paper No 87, 1984) para 4.18.

open the question as to how closely defined the guidelines for rebutting the presumption should be. Under my proposals the judge would know that the presumption should only be rebutted if it were necessary to do so to give effect to the parties' expectations. That is an advance on no guidelines at all, but not as precise as defining particular relationships and circumstances which would be treated as contrary expectations. My preference would be for additional guidance to be given by way of example, while leaving the general criterion, party expectations, still able to work independently.

THE PLACE OF THE TORT

So far I have assumed that the act and the injury occur in the same place. If they do, the expectations of the plaintiff and the defendant as to the standards governing them may be treated as the same. But if they do not, the parties may well have different expectations. What then is "the place of the tort"? There is no objective factual answer to this question. It depends on the policy one wants to advance.[78] That suggests that the device for working out the place of the tort for jurisdictional purposes[79] is not necessarily applicable to choice of law, as the policies may be different. A tort situation is not like a contractual one, where the agreement between the parties creates joint expectations. Which is to be preferred, the expectation of the defendant as to the governing standards, or that of the plaintiff?

A preliminary point is that the choice of law process itself is neutral as between the two parties. The dispositive law of the forum has its own idea of the correct balance between their interests. By contemplating a choice of law, the court is showing its willingness to abandon its own balance in favour of another. It would be nonsensical to include as part of the choice of law rule a preference, say, for the plaintiff.[80] An example would be to solve the problem of a multi-state tort by saying that, as between the law contemplated by the plaintiff and that contemplated by the defendant, the one that allows the greatest recovery to the plaintiff will be applied. That question of balance must be left to the dispositive rules of the law yielded by the choice of law rule. It cannot logically be part of the choice of law rule.[81]

Nevertheless it may be possible, in keeping with the criterion of justice proposed for tort choice of law, to prefer the expectations of one party to the other. The criterion is that it is unjust to apply to the dispute between the parties a law that they did not, or would not, expect to govern. Neither the plaintiff nor the defendant should be burdened by or able to

78 At para 4.65.

79 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458.

80 In *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14 at 25 the judge cited "justice to the plaintiff" as a reason for ignoring the lex loci in favour of the lex fori.

81 The Australian Law Reform Commission is thus not justified in preferring the place of injury because it will "best redress the claimant's interests". *Choice of Law* (Report No 58, 1992) para 6.32.

claim protection of a law it did not expect would govern. Two factors come to mind in establishing a preference.

First, it is the defendant's freedom of action which is to be interfered with. A person should be free from restrictions or sanctions on actions, except to the extent that the law provides them. It therefore seems just that a person should be able to act or not, and govern any actions, in the knowledge of what those restrictions or sanctions are. The law views freedom as the norm. This is shown by the fact that the onus is always on the plaintiff to show why the defendant should be liable for the effect its action has had upon the plaintiff. This bias towards freedom would seem to point to favouring the defendant's expectations.[82] The result would be to say that a tort is committed where, in substance, the act is done. This, incidentally, would square with the established law for determining the place of commission of a tort for jurisdictional purposes.[83]

On the other hand, defendants act, while plaintiffs are merely passive. This suggests that defendants may be able to contemplate that standards may apply to their behaviour other than those of the place where they act. If the tort is intentional, the defendant intends the effect on the plaintiff. In many cases the defendant will know where the act will affect the plaintiff. In other cases it will be foreseeable. In the case of negligence, not only the fact of injury is foreseeable, but the place of injury will also often be foreseeable. The plaintiff, not knowing or able to foresee who the tortfeasor will be, will not be able to foresee where that person will act. All plaintiffs know is where they are. This way of looking at the matter seems to point to treating the plaintiff's expectation as dominant.[84] The result would be that a tort would be treated as taking place where the effect is felt. This is the solution favoured by the Australian Law Reform Commission[85] and the Law Commission[86] though without convincing reason. It is the solution adopted in the new UK Act.[87] Others favour the place of acting.[88] As this discussion shows, either solution can be justified in terms of party expectations. It is clear that for the prima facie rule to work as a rule of thumb, part of the rule must include a definition of where the tort occurs. I would favour defining the place of a tort as the place of injury, unless the defendant can demonstrate that in the circumstances it could not foresee its behaviour having an effect

82 The second leg of *Phillips v Eyre* is a reflection of this idea. See Fawcett, "Policy Considerations in Tort Choice of Law" (1984) 47 *Mod LR* 650 at 654.

83 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458. In *Metall & Rohstoff AG v Donaldson, Lufkin, & Jenrette Inc* [1990] 1 QB 391 at 446 the Court favoured applying this test to determine the place of the tort for choice of law.

84 See Australian Law Reform Commission, *Choice of Law* (Report No 58, 1992) para 6.35.

85 As above, Draft Bill cl 6(3) and (4).

86 UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Report No 193, 1990), Draft Bill cl 2(1) and (2). See also the American Second Restatement on the Conflict of Laws s146.

87 *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) s11.

88 Notably the Court of Appeal in *Metall & Rohstoff AG v Donaldson, Lufkin, & Jenrette Inc* [1990] 1 QB 391.

outside the country where it took place, in which case the tort should be treated as having occurred there. This solution acknowledges the greater ability of the defendant to foresee another place, while acknowledging the essential value of its freedom of action if it can show that it did not.[89]

RULE

The rule could be stated like this:

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

- 1) Circumstances which might show such a contrary expectation include the social environment in which the tort occurred and any relationship between the parties existing before the tort.

- 2) If the contrary intention points clearly to another law, then that law will apply. If the contrary intention points away from the law of the place of the tort, but does not point unequivocally to any other law, the law of the forum will apply.

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

PUBLIC INTERESTS

I argued above that in the absence of international or constitutional rules requiring the application of foreign law, it is applied only as part of forum policy. I also suggested that in tort choice of law rules, just as in tort dispositive rules, private interests are paramount. What is the effect of the (subordinate) public interests of the forum on tort choice of law rules?

These interests operate via the doctrines of public policy of the forum. A first point is that public policy is applied subject to what Kahn-Freund calls the principle of the "relativity of

89 See Australian Law Reform Commission, *Choice of Law Rules* (Discussion Paper No 44, 1990) para 8.22.

public policy".[90] By this he means that the public harm in applying the foreign law has to be sufficiently great to warrant the "setting aside of the ordinary rules of the conflict of laws". This requires a balancing of the public harm in the individual case against the injustice to the parties in allowing their private interests to be overridden.

Public interests of the forum can be the interests of the state as an entity, or the shared interests of the members of the community. A recognised state interest is comity. This is part of the public policy of the forum and concerns the interest of the forum state in good relations with other states. It has been suggested that comity provides a reason for applying foreign law.[91] That is, the failure to apply the law of a foreign country in certain circumstances will offend the foreign country and damage the forum state's relationship with it. This view assumes that a foreign state will be offended by the non-application of its law. Cheshire, for example, says, "[o]bviously, any country has a real and legitimate concern with the commission of torts within its borders".[92] But is that obvious? States are not interested in application of their law to particular private cases: they have their own ideas of justice if their law *should* apply, as where the matter is litigated in their courts, but are neutral as to whether it should or not.[93] In any case, it cannot be assumed that because a tort happened in X (a fact which itself may be interpreted in different ways) a court in X will apply X law. Its own choice of law rules may well differ from those of the forum and require it to apply the law of Y.[94]

It is therefore implausible and contrary to our goals of justice to imagine comity requiring that we apply foreign law to a torts case. In any case, practice indicates that our courts cannot be very concerned about offending foreign public interests by not applying the foreign law. Parties can choose to have forum law apply by not pleading foreign law. The forum court will not intervene on grounds of public policy.[95] The result is that foreign public interests should be no more relevant indirectly than they should directly to the decision of a court whether or not to apply foreign law.

Community interests, as opposed to state interests, of the forum can translate into public policy concerning tort choice of law in two ways. The first is negative, pressing a court not

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90 Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws" (1953) 39 *Trans Grotius Soc* 39 at 57.

91 See particularly La Forest J in *Jensen v Tolofson* [1995] 1 WWR 609 at 627. His reasons, however, border on treating comity as an international legal duty, a corollary of the international principle of exclusive territorial sovereignty, rather than an application of the public policy of the forum.

92 Cheshire and North, *Private International Law* p529.

93 Jaffey, "Choice of Law in Tort: a Justice-Based Approach" (1982) 2 *LS* 98 at 100.

94 This raises the issue of renvoi. The *Private International Law (Miscellaneous Provisions) Act* 1995 (UK) s9(5) excludes reference to foreign choice of law rules.

95 Jaffey, "Choice of Law in Tort: a Justice-Based Approach" (1982) 2 *LS* 98 at 115.

to apply a foreign law that it would otherwise apply.[96] If the relevant rule of the foreign law is seriously repugnant to our moral standards, the court may refuse to apply it.[97] Or the application of a foreign law may have some practical public effect in the forum on a forum policy like free competition.[98]

The second is positive, pressing a court to apply a particular law. It is hard to see how the community can have an interest, independent of the interests of the parties or the interests of the state as a corporate entity, in seeing a particular foreign law applied. However, it is possible to imagine that the community has an interest in seeing its own dispositive tort rules apply to a particular case. If so, such an interest could be appended to tort choice of law rules. However, as I argued above, the private nature of tort disputes means that there is little public interest in seeing the forum law applied to a particular dispute. When the public order or moral aspect of tort behaviour becomes of paramount public concern, the matter is made a crime.[99] Indeed many forms of behaviour, such as assault, are both torts and crimes, the two legal consequences reflecting respectively the private and the public concern with the behaviour.

The Law Commission assumed that a UK forum would have an interest in seeing its tort law applied to a tort committed in the UK. It recommended that the law of the relevant part of the UK should govern any allegedly tortious act done in the UK.[100] However, this proposal was seen in the House of Lords as reintroducing "the nationalistic attitude which the law commissions are otherwise seeking to obviate".[101] The exception for UK torts was dropped in the version of the Bill which became the *Private International Law (Miscellaneous Provisions) Act* 1995 (UK).[102] Whereas, under the common law, tort choice of law rules do not apply to torts committed in England,[103] the new Act expressly

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96 The negative rule is expressed thus in *Winters v Maxey* (1972) 481 SW 2d 755 at 756: The lex loci doctrine is applied unless it would be "against good morals or natural justice, or for some other reason, its enforcement would be prejudicial to the general interests of our citizens".

97 *Kaufman v Gerson* [1904] 1 KB 591. It has been suggested that the refusal to apply the Belgian law of vicarious liability for a compulsory pilot in *The Halley* (1868) LR 2 PC 193 can be explained this way. Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws" (1953) 39 *Trans Grotius Soc* 39 at 51. However, refusal on such a ground itself raises issues of comity, and judges are reluctant to do it. See *Private International Law (Miscellaneous Provisions) Bill* (UK), second reading, HL, *Weekly Hansard* vol 559 no 11, December 6 1994, 839-840 per Lord Lester.

98 *Rousillon v Rousillon* (1880) 14 Ch D 351.

99 Clarence-Smith, "Torts and the Conflict of Laws" (1957) 20 *Mod LR* 447 at 455.

100 UK Law Commission, *Private International Law: Choice of Law in Tort and Delict* (Report No 193, 1990) para 3.16, Draft Bill cl 3(1).

101 HL, *Weekly Hansard* vol 559 no 11, 6 December 1994, 833 per Lord Mackay LC.

102 Passed 31 October 1995.

103 *Szalatnay-Stacho v Fink* [1947] KB 1 (CA).

makes them apply to torts in the forum.[104] The Act preserves the court's discretion to refuse to apply a foreign law on grounds of public policy.[105]

APPLICATION OF THE THEORY

What difference would my proposed theory make in practice? By way of conclusion, let me apply it to some of the best-known cases.

In *The Halley*,[106] the captains of the ships navigating in Belgian waters would surely have expected that they had to obey Belgian law. Yet the English court applied English law.

In *Phillips v Eyre*,[107] the Jamaican lex loci was in effect applied, as, according to the expectations of the parties, it should have been. Their relationship and acts were confined to Jamaica, in the same way as they were confined to Malta in *Boys v Chaplin*,[108] where Maltese law ought to have been applied. Similarly, nothing before the event could have led the parties in *Machado v Fontes*[109] to suppose that any law other than Brazilian law would have applied. Yet the defendant's liability was tested by the English law of defamation.

The application of my rule to *Red Sea Insurance Co Ltd v Bouygues SA*[110] would have produced the same result as that reached by the Privy Council: the Saudi Arabian lex loci should apply alone. The centring of the parties' relationship in Saudi Arabia and the fact that their contracts were governed by Saudi Arabian law would surely have reinforced the presumption that the lex loci should apply.

In *Breavington v Godleman*[111] the right result was reached. Both the parties lived in the Northern Territory where they collided. They would have expected the lex loci to apply, and it did. In *McKain v RW Miller and Co (SA) Pty Ltd*,[112] however, the retreat of the High Court of Australia to a more traditional position than that promised in *Breavington* meant that a defence of the South Australian lex loci was not applied by the New South Wales court. The result would have confounded the expectations of the parties. The same is true of *Stevens v Head*[113] where the accident happened in New South Wales and the plaintiff sued in Queensland. A New South Wales limitation on damages was not applied for the same reason as the South Australian limitation act was not applied in *McKain*: it

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104 Section 9(6).
105 Section 14(3)(a)(i).
106 (1868) LR 2 PC 193.
107 (1870) LR 6 QB 1.
108 [1971] AC 356.
109 [1897] 2 QB 231.
110 [1995] 1 AC 190.
111 (1988) 169 CLR 41.
112 (1991) 174 CLR 1.
113 (1993) 176 CLR 433.

was classified as procedural. Limitations on potential liability have a direct bearing on the rights and duties of the parties and would be included in the law by which the parties would expect to be governed.[114]

In *McLean v Pettigrew*[115] the Quebec plaintiff was a passenger in a Quebec car driven by a Quebec driver when it had a one-car accident in Ontario. The plaintiff had been invited by her friend in Montreal to go with him to Ontario. These are facts where an exception to the lex loci rule might well be justified by party expectations. Their relationship could lead them to expect that their rights and duties to each other as driver and passenger would continue to be governed by the law of their home province. The defendant was held liable by the law of Quebec, although there would have been no liability by the law of Ontario, because of its "guest" statute. The rule the case established would in most cases confound party expectations, but justice probably was done in the case itself.

In *Jensen v Tolofson*,[116] the lex loci rule was applied, but without the exception to the lex loci which would allow for contrary expectations. The accident happened in Saskatchewan between a Saskatchewan car and a British Columbia car. The plaintiff was a passenger in the British Columbia car. He sued his father, the driver of the car he was in, and the driver of the other car. There seems no argument that the expectations rule would lead to Saskatchewan law being applied in the action against the other driver. But the relationship between father and son might well lead to the expectation that their rights and duties to each other would continue to be governed by the law of their home, British Columbia. So arguably that law should have been applied to their dispute. If it had been, the Saskatchewan guest statute would not have been available as a defence. In the second appeal heard with *Jensen v Tolofson*, *Lucas v Gagnon*, a two-car accident happened in Quebec. The plaintiff driver, from Ontario, sued the Quebec driver in Ontario. Quebec law was applied. This is what the parties would have expected. There were no circumstances to rebut the presumption in favour of the lex loci.

So, it seems that tort choice of law theory does sometimes make a difference to the outcome of the case. The lex loci, increasingly favoured in Canada, England, and

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114 *Jensen v Tolofson* [1995] 1 WWR 609 at 642; *McKain v RW Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1 at 22-27, per Mason CJ. By the *Foreign Limitation Periods Act* 1984 (UK) foreign limitation statues have been classified substantive. The recommendation of the Australian Law Reform Commission in *Choice of Law* (Report No 58, 1992) para 10.33, that limitation periods should be treated as matters of substance has been given effect in New South Wales (*Choice of Law (Limitation Periods) Act* 1993), and in Victoria, the Australian Capital Territory, Western Australia, South Australia, and Tasmania. Uniform legislation is to be passed throughout Australia and New Zealand, but applying only to limitation statutes in Australia or New Zealand. See Nygh, *Conflict of Laws in Australia* (Butterworths, Sydney, 6th ed 1995) pp251-252.

115 [1945] SCR 62.

116 [1995] 1 WWR 609.

Australia, usually produces just results in terms of a theory of party expectations. Lack of a clear theory (*Boys v Chaplin*) or the application of one based on false premises (*Jensen v Tolofson*)[117] can result in injustice. Exceptions to the lex loci rule should be made when required by its purpose: to do justice to the parties by giving effect to their expectations.

117 See Kincaid, "*Jensen v Tolofson* and the Revolution in Tort Choice of Law" (1995) 74 *Can Bar Rev* 537.