

A PROPOSED CHOICE OF LAW METHODOLOGY FOR TORT IN CANADA: COMPARATIVE EVALUATION OF BRITISH AND AMERICAN APPROACHES

*Robin M. Junger**

This article examines the history and development of choice of law methodologies for tort in Canada, Britain and the United States. Recognizing that the present state of law in Canada resulting from the Supreme Court of Canada's 1945 decision in McLean v. Pettigrew has proven unsatisfactory, the author argues that while neither British nor American approaches can successfully be adopted in Canada, the experience of those jurisdictions in fundamentally rethinking choice of law methodologies should be used to fully inform Canadian debate. On this basis, a specific reform proposal is presented for Canada which seeks to draw upon the strengths and weaknesses of several methodologies while at the same time addressing the particular needs of the Canadian choice of law system.

Dans cet article, l'auteur examine l'histoire et l'élaboration des méthodologies du choix de la loi applicable en matière de délits au Canada, en Grande-Bretagne et aux États-Unis. Tout en reconnaissant que le droit positif canadien, qui résulte d'une décision rendue par la Cour suprême du Canada en 1945 dans l'affaire McLean c. Pettigrew, s'est avéré insatisfaisant, l'auteur soutient que bien que les approches britannique et américaine ne puissent pas être adoptées avec succès au Canada, on devrait profiter de l'expérience que ces pays ont acquise en repensant en profondeur les méthodologies du choix de la loi applicable pour éclairer le débat au Canada. Dans cet ordre d'idées, l'auteur présente une proposition précise de réforme du droit canadien, proposition qui cherche à tirer parti des forces et des faiblesses de plusieurs méthodologies, tout en répondant aux besoins particuliers du régime canadien relatif au choix de la loi applicable.

* This article is a revised version of an LL.M. thesis completed at Harvard Law School in 1993. The author wishes to express sincere gratitude to Professor Authur von Mehren for his kind and invaluable assistance with the project, and to the Law Society of British Columbia and the Law Foundation of British Columbia for their generous financial assistance.

TABLE OF CONTENTS

I. INTRODUCTION	77
II. BACKGROUND	78
A. <i>American developments</i>	78
1. <i>Vested Rights Approach</i>	79
2. <i>Local Law Theory</i>	79
3. <i>Cavers</i>	80
4. <i>Currie</i>	81
5. <i>Second Restatement</i>	82
6. <i>Babcock v. Jackson</i>	84
7. <i>Principles of Preference</i>	86
8. <i>Choice Influencing Considerations</i>	87
9. <i>Functional Approach</i>	87
10. <i>Comparative Impairment</i>	88
11. <i>Return to Rules</i>	89
12. <i>General Comments</i>	91
B. <i>Britain: The Origins of the Rule in Phillips v. Eyre</i>	92
1. <i>The Halley</i>	92
2. <i>Phillips v. Eyre</i>	92
3. <i>Machado v. Fontes</i>	93
4. <i>Boys v. Chaplin</i>	94
5. <i>Continuing Debate — The Law Commissions Report</i>	98
(a) <i>Lex Fori as the Uniquely Applicable Law</i>	98
(b) <i>Lex Fori as the Basic Rule Subject to Displacement</i>	99
(c) <i>Rule Selecting Approaches</i>	99
(i) <i>Governmental Interest Analysis</i>	99
(ii) <i>Principles of Preference</i>	100
(iii) <i>Choice Influencing Considerations</i>	100
6. <i>The Recommended Approach</i>	102
C. <i>Canadian Developments</i>	103
1. <i>McLean v. Pettigrew</i>	104
2. <i>Grimes v. Cloutier</i>	105
3. <i>Tolofson v. Jensen</i>	107
4. <i>Gagnon v. Gagnon</i>	108
5. <i>Necessity of Reform</i>	109
III. ANALYSIS	110
A. <i>Rules or Approach</i>	111
B. <i>Rule Selecting or Jurisdiction Selecting</i>	111
C. <i>Governmental Interest Analysis</i>	112
D. <i>Multi-State Concerns</i>	114
E. <i>Approach of the Second Restatement</i>	114
F. <i>Specific Rules</i>	115
G. <i>Lex Loci Delicti as the Standard Rule</i>	115
H. <i>Dépeçage</i>	117
IV. A PROPOSED CANADIAN METHODOLOGY	118
A. <i>The Proposal</i>	119
B. <i>Comments</i>	120

I. INTRODUCTION

It is the nature of conflict of laws that complex problems arise which require legal rules that are challenging in both theory and practice. In certain instances it seems that the solutions themselves embody difficulties which ultimately prove more formidable than the problems they sought to address. Fortunately for the academic, but perhaps unfortunately for the jurist, periodically the state of affairs in a particular area becomes so patch-ridden and unsatisfactory that fundamental rethinking is necessitated. This point has been reached in choice of law methodologies for tort in Britain and the United States in recent decades, and the bell now tolls for present Canadian doctrine.

The purpose of this paper is to examine historic developments in the United States and Britain relating to choice of law methodologies for tort, and to use this analysis to inform the imminent recasting of such methodologies in Canada. In doing so, I shall examine the historic British doctrine which came to be known as the rule in *Phillips v. Eyre*¹ and the progression towards its modern manifestation. I shall also evaluate the American literature and jurisprudence which rejected the *Phillips* rule, and compare and contrast it with the British developments. A central purpose of the examination will be to compare the relationship of modern American "approaches" with the "flexible exception" to the rule in *Phillips* established in Britain by the case of *Boys v. Chaplin*.² Ultimately a particular methodological reform for Canada shall be proposed.

As a preliminary point, I must note that this paper is far from the first to address the unsatisfactory nature of Canadian conflicts law in this area.³ Ever since the Supreme Court of Canada's unfortunate decision in *McLean v. Pettigrew*,⁴ the issue of reformulation of choice of law methodology for tort in Canada has been debated by academics, practitioners and jurists alike. However, because the present doctrine has the support of the Supreme Court's authority, an impediment to reform is

¹ *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, 22 L.T. 869 (Ex. Ch.) [hereinafter *Phillips* cited to L.R.].

² *Boys v. Chaplin* [1969] 2 All E.R. 1085, [1969] 2 Lloyd's Rep. 487 (H.L.) [hereinafter *Boys* cited to All E.R.].

³ See e.g. W.S. Maslechko, "Revolution and Counter-revolution: An Examination of the Continuing Debate over 'Interest Analysis' in the United States and its Relevance to Canadian Conflict of Laws" (1986) 44 U. T. Fac. L. Rev. 57; B. Schwartz, "Choice of Law in Torts: One More Time for the Road" (1982) 12 Man. L.J. 175; J.G. Castel, "Conflict of Laws — Foreign Tort — Not Justifiable by the Lex Loci Delicti — Residence of Defendant — Interprovincial Comity — Judicial Creativity" (1990) 28 Alta. L. Rev. 665; P. Bates, "Foreign Torts: The Canadian Choice of Law Rule" (1987) 8 Advocates' Quarterly 397; J. Swan, "Conflict of Laws — Torts — Automobile Accident in Quebec — Action in Ontario — 'Paradigm Shift or Pandora's Box'?: *Grimes v. Cloutier*; *Prefontaine v. Frizzle*" (1990) 69 Can. Bar Rev. 538; J. Blom, "Recent Developments in Canadian Law: Conflict of Laws" (1988) 20 Ottawa L. Rev. 415; J. Swan, "Choice of Law in Torts: A Nineteenth Century Approach to Twentieth Century Problems" (1989) 10 Advocates' Q. 57.

⁴ *McLean v. Pettigrew* [1945] S.C.R. 62, [1945] 2 D.L.R. 65 [hereinafter *McLean* cited to S.C.R.].

presented. Although at least one provincial appellate court has sought to distinguish this discredited precedent,⁵ another has suggested that concerns of *stare decisis* are significant and, moreover, that reform must proceed on the basis of careful consideration.⁶ It therefore appears that it will require either another Supreme Court of Canada decision or legislative action to achieve reform, and one may reasonably hope that this will occur in the not too distant future. It is submitted that this situation affords an opportunity for studied reflection on the wide array of possibilities which presently exist. I hope this paper can draw upon such knowledge and focus more on examining the various possible reforms than on presenting the inadequacies of existing Canadian law. While the former issue can be well served by additional debate, the latter is hardly in need of further consideration.

II. BACKGROUND

A. *American Developments*

Although it is neither necessary nor possible to give a detailed examination of American methodologies in this field, I must at least briefly note main developments and different philosophies related to American choice of law determinations. If one is to use American literature and jurisprudence to illuminate Canadian debate relating to this issue, it is imperative that there exist a minimal level of appreciation of the various approaches and their often subtle distinctions.⁷

Interestingly, American experience with choice of law methodology has not been significantly affected by British developments in this area. There appear to be two reasons why this is so. First, "American scholarship has been largely preoccupied with matters of 'inner-national' concern"⁸ and second, to the extent that American work in this field owes its origins to developments abroad, it was the continental scholars who have had the greatest impact.⁹ M. Hancock notes, "*The Phillips v. Eyre*

⁵ See *Grimes v. Cloutier* (1989), (1990) 69 O.R. (2d) 641, (1989) 61 D.L.R. (4th) 505 [hereinafter *Grimes* cited to O.R.].

⁶ See *Tolofson v. Jensen*, [1992] 3 W.W.R. 743, 89 D.L.R. (4th) 129 (B.C.C.A.), leave to appeal granted, [1992] 6 W.W.R. lviii, 70 B.C.L.R. (2d) xxxiii (S.C.C.) [hereinafter *Tolofson* cited to W.W.R.].

⁷ See Symeon Symeonides, *An Outsider's View of the American Approach to Choice of Law: Comparative Observations on Current American and Continental Conflicts Doctrine* (S.J.D. Thesis, Harvard Law School, 1980) [Unpublished] at Chap. 2; R.C. Cramton, D.P. Currie & H.H. Kay, *Conflict of Laws*, 4th ed. (St. Paul, Minn.: West Publishing Co., 1987) at 5-6; A.A. Ehrenzweig, *Conflicts in a Nutshell*, 3rd ed. (St. Paul, Minn.: West Publishing Co., 1974); B. Hanotiau, "The American Conflicts Revolution and European Tort Choice-of-Law Thinking" (1982) 30 Am. J. Comp. Law 73.

⁸ F.K. Juenger, "Trends in European Conflicts Law" (1975) 60 Cornell L. Rev. 969 at 969-70.

⁹ See Ehrenzweig, *supra* note 7 at 12-20. He writes, "[C]onflict of laws is perhaps the only field of the common law in which it was England that has borrowed from the United States, and in which 'Anglo-American' law is largely of continental origin" (*ibid.* at 14-15). See also the

formula....received some support but in 1902 it was decisively rejected by the Supreme Court of the United States" [citations omitted]¹⁰ in *Slater v. Mexican National Railway*.¹¹

1. *Vested Rights Approach*

The original basic rule of *lex fori*, which had been assumed by the courts, gave way to the *lex loci delicti* rule, starting at about 1880.¹² This approach, premised on vested rights theory,¹³ owes its origin to the work of Professor Beale¹⁴ and was recognized by the *First Restatement*.¹⁵ The significance of the *First Restatement* to the present paper is that it provided the focal point for a great deal of critical work which has ultimately led to radical change in American approaches to choice of law determinations.

2. *Local Law Theory*

The vested rights approach captured in the *First Restatement* was rapidly and soundly criticized. Sir Walter Wheeler Cook, along with Judge Learned Hand, used the "local law theory" to discredit the application of foreign law and the rigid jurisdiction selecting rule that the vested rights theory propounded.¹⁶ In the words of Professor von Mehren,

Cook's local-law approach provides a theory for determining the formally-controlling legal order. No selection is involved because the forum, *from the perspective of the source of authority*, always applies forum law, although the given rules may be modeled on the law of another legal order. [Emphasis added]¹⁷

seminal work of J. Story, *Commentaries on the Conflicts of Law*, 8th ed. (Boston: Little, Brown and Co., 1883).

¹⁰ M. Hancock, *Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles* (Buffalo, N.Y.: William S. Hein Co., 1984) at 223.

¹¹ *Slater v. Mexican National Railway*, 48 L.Ed. 900 (S.C. 1903).

¹² Hanotiau, *supra* note 7 at 73.

¹³ This theory held that legal rights which accrue in one jurisdiction follow a person to another and controlling effect must be given to the legal order according to which the rights arose. As Justice Holmes said in *Slater*, the right "follows the person, and may be enforced wherever the person may be found" (*supra* note 11 at 903).

¹⁴ See J.H. Beale, *Selections from a Treatise on the Conflict of Laws* (New York: Baker, Voorhis & Co., 1935).

¹⁵ *Restatement of the Law, Conflicts of Laws* (St. Paul, Minn.: American Law Institute, 1934).

¹⁶ W.W. Cook, *The Logical and Legal Base of the Conflict of Laws* (Cambridge, Mass.: Harvard University Press, 1942). See also E.G. Lorenzen, *Selected Articles on the Conflict of Laws* (New Haven, Conn.: Yale University Press, 1947).

¹⁷ A.T. von Mehren, "Recent Trends in Choice-of-Law Methodology" (1975) 60 Cornell L. Rev. 927 at 930-31.

Clearly, however, this local-law theory did little to assist in the substantive determination of which legal rules should be applied to determine the outcome of a dispute when a conflict arose. Professor von Mehren notes "the forum will not wish to apply its domestic rules to every matter involving multistate elements litigated in its courts. Yet the local-law theory, as such, provides no guidance as to when recourse should be had to other rules."¹⁸

Notwithstanding these shortcomings, this attack on the vested rights theory had an important impact and it has particular significance for the Canadian observer. As Professor von Mehren states,

Theories of the kind represented by Story and Beale coalesce problems — what legal order is to control the situation and how it will wish to control — that Cook's analysis separates.¹⁹

This fundamental recognition was a precondition to differentiation between jurisdiction and rule selecting approaches. This differentiation has particular importance which much British and Canadian jurisprudence and commentary tends to confound.²⁰ I shall return to this later when comparing the flexible exception in *Boys v. Chaplin* to modern American approaches.

3. *Cavers*

Professor David Cavers also rejected the view of the *First Restatement* and attacked the notion that choice of law questions should be settled through rules determining which *jurisdiction* should govern a particular legal problem. Rather, he emphasized that courts should concern themselves with examination of the result the application of a particular legal order's rules would produce in the particular case.²¹ Notwithstanding the significance of Cavers' fundamental shift in thinking, however, he originally did little to establish a means by which judges were to make

¹⁸ *Ibid.* at 931.

¹⁹ *Ibid.*

²⁰ *Ibid.* at 932-33: "In sum, the inevitable consequence of approaching the choice-of-law problem exclusively in terms of jurisdiction-selecting analyses is a looseness and incoherence of theory and practice. A facade of order and principle prevails, but the reality that it conceals is far more complex than theory admits or suggests. Consequently, theories such as those adumbrated by Story and Beale have little explanatory or directive force. They serve as *ex post facto* rationalizations for results often reached on other grounds, thus failing to discipline and criticize theory and practice."

²¹ See D.F. Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47 Harv. L. Rev. 173. The following is the summary set out at 192-93:

"When a court is faced with a question whether to reject, as inapplicable, the law of the forum and to admit in evidence, as determinative of an issue in a case before it, a rule of law of a foreign jurisdiction, it should

- (1) scrutinize the event or transaction giving rise to the issue before it;
- (2) compare carefully the proffered rule of law and the result which its application might work in the case at bar with the rule of the forum (or other competing jurisdiction) and its effect therein;
- (3) appraise these results in light of those facts in the event or transaction

such determinations. Rather, he suggested “a more discriminating use of *stare decisis* and the development of a new body of choice of law rules”²² as a means to temper the value-laden discretion inherent in his emphasis on justice in the individual case.²³

4. Currie

Professor Brainerd Currie built upon Cavers’ work and sought to establish a mechanism by which judges might be able to determine which legal rules should be given controlling effect in a particular case.²⁴ Currie advocated the use of “interest analysis” as a means of determining which legal regime’s rule should be given controlling order. He suggested that

[w]hen a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary process of construction and interpretation.²⁵

which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke, link that event or transaction to one law or the other; recognizing....

(b) in the evaluation of contacts, that the contact achieves significance in proportion to the significance of the action or circumstance constituting it when related to the controversy and the solutions thereto which the competing laws propound.”

²² See D.F. Cavers, “Contemporary Conflicts Law in American Perspective” (1970) 77 *Recueil des cours* III 75.

²³ Cavers’ later work did further respond to the criticism that his approach would yield unprincipled decision-making. See *Principles of Preference* below.

²⁴ See B. Currie, *Selected Essays on the Conflict of Laws* (Durham, N.C.: Duke University Press, 1963).

²⁵ See Currie’s own full summary as set forth in E.E. Cheatham, E.N. Griswold, W.L. Reese & M. Rosenberg, *Cases and Materials on Conflict of Laws*, 5th ed. (Brooklyn, N.Y.: Foundation Press, 1964) at 477-78 as follows:

- “1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.
2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.
3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.
4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

Currie was able to indicate that certain choice of law determinations, when examined from the perspective of governmental interest, yield a false conflict. Where in reality only one legal order was concerned with having its laws applied to the dispute in question, the conflict was resolved and that rule was to be applied. Importantly, however, Currie did not assist with the difficult question of which rule should be given controlling effect in a situation where a true conflict exists. There he resigned himself to application of the law of the forum.

Given the significance of interest analysis to contemporary American approaches to choice of law determination, it will of course be necessary to explore some of the reasons for rejecting the jurisdiction selecting method and to examine as well the strengths and weaknesses this theory provides in a broader analytic context. I will, however, reserve this discussion for later in this paper.

5. *Second Restatement*

Following these significant developments, a major effort was undertaken by Professor Reese and the American Law Institute to replace the discredited *First Restatement* with one which would properly reflect the modern state of 'law'. Following approximately 15 years of drafting, debate, and revision, the *Restatement of the Law Second, Conflicts of Laws*²⁶ emerged, reflecting what has been called "a blend of all the American Conflicts theories advanced during the last quarter of the century".²⁷

The *Second Restatement* states:

Section 6. Choice of Law Principles

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield."

²⁶ *Restatement of the Law, Conflicts of Laws* (St. Paul, Minn.: American Law Institute, 1971).

²⁷ Symeonides, *supra* note 7 at 39.

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Section 145. The General Principle

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place where the injury occurred,
 - (b) the place where the conduct causing the injury occurred,
 - (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
 - (d) the place where the relationship, if any, between the parties is centered.

It is important to note that apart from these general provisions, the *Second Restatement* also set out a number of rather specific *prima facie* “rules”. For example, § 146 states:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Similarly, § 149 indicates that in a defamation action, the law that should generally be applied is that of the place where the publication occurred.²⁸ Thus, as Schwartz has noted, “[t]he *Second Restatement* is not as amorphous as it is often portrayed to be”.²⁹ Nonetheless, the discussion of the *Second Restatement* which is of most interest is that which relates to the general approach advocated where particular rules do not exist or where it is deemed appropriate that they be displaced in favour of more flexibility.

Professor von Mehren has said the following of the *Second Restatement*:

The approach is ample enough to encompass a highly developed policy-based analysis. However, the *Restatement* does not significantly refine and discipline theory and

²⁸ Schwartz has noted that most of these rules in fact favour the *lex loci delicti*. See Schwartz, *supra* note 3 at 182.

²⁹ *Ibid.*

analysis. No principled basis is adumbrated, for example, in terms of which clashes between policies underlying specific domestic-law rules and more general policies of comprehensibility or of facilitation of multistate activity can be resolved. The need for additional guidance is felt....By and large, the new *Restatement* is a monument to the fundamental changes that have in the last decades taken place in American thinking regarding the choice-of-law problem. It does not, however, resolve the difficulties and tensions that policy-based approaches encounter.³⁰

6. *Babcock v. Jackson*

Whatever the methodological uncertainty of the *Second Restatement*,³¹ it has been noted and used by American courts in numerous cases, the most significant being the celebrated case of *Babcock v. Jackson*.³² In that case the plaintiff and the defendant, both ordinarily resident in New York, travelled in the defendant's car for a weekend trip into Ontario. An accident resulted in that province and the plaintiff sought to claim damages from the defendant for negligence. According to the law of Ontario the defendant would not have been liable for injuries sustained by a gratuitous passenger. According to the law of New York, no such immunity existed. The New York Court of Appeal rejected the *lex loci delicti* determination and instead applied the law of New York. It stated:

Justice, fairness and "the best practical result" [citation omitted] may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that "it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context" and thereby allows the forum to apply "the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'" (Auten v. Auten, 308 N.Y. 155, 161...supra.)

Such, indeed, is the approach adopted in the most recent revision of the Conflict of Laws Restatement in the field of torts. According to the principles there set out, "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort"...and the relative importance of the relationships or contacts of the respective jurisdictions is to be evaluated in the light of "the issues, the character of the tort and the relevant purposes of the tort rules involved."³³

It is important to note that a definite element of interest analysis can be found in the court's decision. Fuld J. stated,

Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York

³⁰ von Mehren, *supra* note 17 at 964.

³¹ One may query whether it is a rule-selecting approach or jurisdiction selection, what effect it gives to policy or government interest analysis, etc.

³² *Babcock v. Jackson*, 191 N.E.2d 279 (1963) [hereinafter *Babcock*].

³³ *Ibid.* at 283-84.

is unquestionably the greater and more direct and that the interest of Ontario is at best minimal.³⁴

For the present purposes, I will simply note that application of interest analysis in the *Babcock* case resulted in the determination of a false conflict. It therefore did not require consideration of the more difficult and intriguing question of how to address a true conflict situation.

It is submitted that much Canadian appreciation of the American "approach" to these matters is premised upon consideration of the *Babcock* case. This is somewhat unfortunate because the decision lacks a coherent, single methodology. Although the case is sometimes referred to for its adoption of "interest analysis" or the "most significant relationship test", the decision follows the *Restatement* in terms of embracing a mixture of approaches. As Professor Currie stated:

[T]here is more than governmental-interest analysis in the decision. Indeed, the majority opinion contains items of comfort for almost every critic of the traditional system.³⁵

Whatever its contribution to choice of law development in the United States, *Babcock* should not be taken as indicative of a single particular methodology, nor should its malleable nature be taken as representative of "a dominant" (if somewhat elusive) American approach.³⁶ If this were more widely recognized in Canada it is possible that greater consideration would be given to the variety of American theories in this area.

Subsequent cases and scholarly work following *Babcock* have moved well beyond the discovery of false conflicts into the treacherous waters of developing methods for addressing true conflict situations. These theories are both varied and complex and I do not propose to cover them in any comprehensive way in this paper. I will, however, make an effort to examine some of the most significant developments.

Before so doing, it is perhaps worthwhile to note that at this level of consideration it appears there may be a rather large gulf between the theoretical exposition of commentators and the actual practice of courts. As Sedler has noted:

[W]henever a court has been faced with a true conflict, it has almost invariably — unless it continues to apply the place of the wrong rule — ended up by applying its own law.³⁷

One might suggest that to the extent this is a true conclusion it lessens the significance of comparative examination of the American experience, and indeed this has been the suggestion of some foreign commentators. Nonetheless, there are invariably cases where this conclusion does not apply and, more importantly, the

³⁴ *Ibid.* at 284.

³⁵ B. Currie, "Comments on *Babcock v. Jackson*" (1963) 63 Colum. L. Rev. 1233.

³⁶ "Suffice it to say here merely that today there exists extreme disagreement among both judges and commentators not simply over the details of choice-in-law policy but over the most fundamental principles of the subject." Cramton, *supra* note 7 at 6.

³⁷ R.A. Sedler, "Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts" (1972) 57 Iowa L. Rev. 1229 at 1234.

difficult issues considered by those attempting to deal with the true conflict situation greatly enhance one's understanding of the problems presented by this complex area of law.

7. Principles of Preference

One of the difficult problems Professor Cavers sought to address was the incidence, or at least perception, of *ad hoc* decision-making which had emerged in the field of choice of law following the development of the more flexible modern approaches. He noted,

If we are to avoid slipping into a chaos of essentially meaningless *ad hoc* decisions or, instead, reverting to our inherited apparatus of mechanical, jurisdiction-selecting rules, I believe courts and scholars must recognize that there is need for the development of rules and principles of appropriate breadth to resolve...those cases in which legislative purposes are unclear or conflicting, cases which cannot be disposed of as posing...false conflicts.³⁸

Cavers set forth a number of specific "principles" and suggested that other such principles might be developed. For example, he argued that where the laws of the state of injury provide for a lower standard of conduct or financial protection than the home state of the injured party, the former laws should prevail because it would be unfair to impose a higher standard on the defendant. Cavers recognized that many of the specific principles which he discussed led to a territorial bias and he did not seek to discount fully this observation. Rather, he recognized that our legal systems are territorially based and that there are significant reasons for giving due regard to this point.³⁹

Cavers' approach was used by the Supreme Court of Pennsylvania in *Cipolla v. Shaposka*.⁴⁰ In that case a motor vehicle accident occurred in the state of Delaware. The plaintiff (a resident of Pennsylvania) was a guest passenger in the defendant's car (a resident of Delaware). At issue was whether the law of Delaware (which denied recovery for guest passengers) or the law of Pennsylvania (which allowed recovery) should be applied. The court noted that this was a true conflict situation because here the plaintiff was from a jurisdiction which had adopted a plaintiff protecting rule, and the defendant was from a jurisdiction which sought to protect defendants from such actions. It went on specifically to embrace the arguments of Cavers and rule for the defendant. Quoting from Cavers, the court stated:

By entering the state or nation, the visitor has exposed himself to the risk of the territory and should not subject persons living there to a financial hazard that their law had not created....

³⁸ D.F. Cavers, *The Choice-of-Law Process* (Ann Arbor: University of Michigan Press, 1965) at 121-22.

³⁹ *Ibid.* at 139-40.

⁴⁰ *Cipolla v. Shaposka*, 267 A.2d 854 (1970).

This is, of course, a highly territorial approach....The very use of the term true conflict implies that there is no one correct answer, but as a general approach a territorial view seems preferable to a personal view.⁴¹

8. Choice-Influencing Considerations

R.A. Leflar openly acknowledged that a variety of factors external to the various methodological tests affected choice of law determinations in practice. Moreover, he argued that the choice of law system was being ill-served by a failure explicitly to recognize these factors. He wrote:

[There is] a need to reduce the choice-influencing considerations to a manageably compact form, a form in which it is realistically practical to make use of them in the day-to-day process of deciding conflicts cases. An effort to do this has produced a tentative list of five major choice-influencing considerations, within which all or most of the factors that ordinarily affect choice-of-law decisions can be incorporated.⁴²

The five considerations Leflar set out were Predictability of Results, Maintenance of Interstate and International Order, Simplification of the Judicial Task, Advancement of the Forum's Governmental Interest, and Application of the Better Rule of Law.

It is this last factor which has attracted the greatest amount of attention. Here Leflar argued that "[j]udges know from the beginning between which rules of law, and not just which states, they are choosing".⁴³ Therefore, they should be explicit in choosing the "rules of law which make good socio-economic sense"⁴⁴ irrespective of whether that is the law of the forum or the law of another state. He was careful to note, however, that it is the better law which was to be preferred on an objective basis, not in terms of a particular result for preferred parties.

9. Functional Approach

Professors von Mehren and Trautman have sought to move beyond the limits of Currie's interest analysis by suggesting a "functional approach" to multi-state problems which present a true conflict.⁴⁵ The approach is best understood through the stages of reasoning which it endorses. First, the court should endeavour to determine all concerned jurisdictions based on either contact or policy (these are referred to as relating elements). Such a jurisdiction is deemed to be "concerned" only if it has (directly or generally) indicated an interest in regulating the issue under consideration. In theory, many conflict situations will be resolved at this stage as the

⁴¹ *Ibid.* at 856-57.

⁴² R.A. Leflar, "Conflicts Law: More on Choice-Influencing Considerations" (1966) 54 Calif. L. Rev. 1584 at 1585. This approach was adopted in *Milkovich v. Saari*, 203 N.W.2d 408 (1973).

⁴³ Leflar, *ibid.* at 1587.

⁴⁴ *Ibid.* at 1588.

⁴⁵ A.T. von Mehren & D.T. Trautman, *The Law of Multistate Problems* (Boston: Little, Brown and Co., 1965).

number of "concerned" jurisdictions may be more limited than under traditional notions of interest analysis.

Where there is more than one concerned jurisdiction it becomes necessary to ascertain a "regulating rule" for each. It is important to note that the regulating rule a state seeks to apply may not be the same as its own domestic law (perhaps because of concerns of the multi-state system, etc.). It is possible that a potential conflict would be resolved in this manner as the concerned jurisdictions may seek to apply the same regulating rule.

If a true conflict persists, the functional approach suggests that the court should choose the "predominantly concerned" jurisdiction. It would seem that this requires a qualitative analysis "taking into account the relative gravity of concerns rather than their number".⁴⁶ If this again does not yield a satisfactory answer, it becomes necessary to engage in "policy weighing". Professors von Mehren and Trautman suggest that certain criteria should be used in this regard, such as giving greater effect to emerging (rather than regressing) policy, or giving effect to policy supported by a specific rule rather than general interest. If the above approaches fail to yield a satisfactory answer, the court should either apply the law of the jurisdiction having the greatest effective control, or it should construct a new multi-state rule.

It is interesting to consider the source and nature of such special multi-state rules. One intriguing proposal is that such a rule be a substantive compromise between the competing rules. For example, where one state bars recovery for a particular injury, and another allows recovery, if the matter cannot be resolved by recourse to the ordinary methods, a court should allow *partial* recovery.⁴⁷ The particular attractiveness of this special multi-state rule paradigm is that it seeks to achieve "decisional harmony" in conflict situations. Professor von Mehren states:

[W]here more than one community is concerned with a given situation or transaction and these communities do not share common values and purposes respecting resolution of the controversy....[decisional harmony cannot be achieved] unless principles for choice can be developed that recommend themselves to all concerned legal orders.⁴⁸

To the extent that this is a workable alternative, it provides an imaginative method by which to approach resolution of multi-state problems.

10. *Comparative Impairment*

This approach to the resolution of true conflict situations has been adopted by the California courts and is perhaps best explained in the context of one notable

⁴⁶ Symeonides, *supra* note 7 at 66.

⁴⁷ *Ibid.* at 89-90. For a criticism of this approach see A.D. Twerski and R.G. Mayer, "Toward a Pragmatic Solution of Choice-of-Law Problems — At the Interface of Substance and Procedure" (1979) 74 Nw. U. L. Rev. 781; R.A. Sedler, "On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems" (1979) 7 Hofstra L. Rev. 807.

⁴⁸ A.T. von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (1974) 88 Harv. L. Rev. 347 at 365-66.

decision. In *Bernhard v. Harrah's Club*,⁴⁹ a motor vehicle accident occurred in California between two California residents. One of those parties had been drinking in the defendant's Nevada tavern and was still intoxicated at the time of the accident. The plaintiff brought suit against the other driver and the Nevada tavern. California law imposed liability on the defendant tavern for injuries caused by intoxicated persons to whom they continued to serve drinks. Nevada law did not impose any such liability. The California Supreme Court identified the situation as a true conflict and went on to state:

Once this preliminary analysis has identified a true conflict of the governmental interests involved as applied to the parties under the particular circumstances of the case, the "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied. Exponents of this process of analysis emphasize that it is very different from a weighing process. The court does not "'weigh' the conflicting governmental interests in the sense of determining which conflicting law manifested the 'better' or the 'worthier' social policy on the specific issue....[E]mphasis is placed on the appropriate scope of conflicting state policies rather than on the 'quality' of those policies" [Citations omitted]⁵⁰

The court went on to conclude that California's law, which was designed to provide protection to California residents from such injuries, would be most impaired if it were not applied. It also stated:

Nevada's interest in protecting its tavern keepers from civil liability of a boundless and unrestricted nature will not be significantly impaired when as in the instant case liability is imposed only on those tavern keepers who actively solicit California business.⁵¹

One may question to what extent this approach really differs from the weighing of different policies, which it clearly purports to reject. Indeed, one might suggest that the impairment of a state's interest can only be assessed by appreciating the importance of the application of its policy in a substantive sense. Put another way, one might suggest that "the appropriate scope of conflicting state policies" cannot be possibly determined without regard to the merits of the underlying policies at issue. Notwithstanding this criticism, it is clear that this approach has assumed its own position in choice of law debate and it is important that it be discussed.

11. *Return to Rules*

In addition to the various debates discussed above, another important shift has taken place in recent decades in American choice of law methodologies, and this

⁴⁹ *Bernhard v. Harrah's Club*, 546 P.2d 719 (S.C. Cal. 1976) [hereinafter *Bernhard*]. See also *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (S.C. Cal. 1978).

⁵⁰ *Bernhard*, *ibid.* at 723-24.

⁵¹ *Ibid.* at 725.

relates to the re-introduction of particular choice of law rules. These rules, which exist in addition to the *prima facie* rules set out in the *Second Restatement*, have been developed through judicial consideration of particular conflict problems. Professor von Mehren has said:

One type of juristic effort...that is likely to assume increasing importance is the development of choice-of-law rules. In the administration of justice, rules are psychologically attractive and of considerable practical advantage. Inevitably, a radical shift in methodology involves, as the new *Restatement* so well illustrates, a discarding of old rules before new ones have had time to emerge....Consequently, it is understandable that today instrumental analyses typically provide a statement of method and of factors to be considered rather than a dispositive statement of results. There remains what Willis Reese has called the "principal question in choice of law today...whether we should [and can] have rules".⁵²

This rule-oriented approach comports with Professor Cavers' work in respect of principles of preference and was given judicial acceptance by the New York Court of Appeals in *Nuemeier v. Kuehner*.⁵³ In that case an automobile accident occurred in the province of Ontario. Both the passenger who resided in Ontario (Nuemeier) and the driver who resided in New York (Kuehner) were killed. An action was brought in New York on behalf of the plaintiff passenger against the estate of the defendant. At the time Ontario had a guest passenger statute which would have denied recovery, whereas New York did not. The question for the court, therefore, was whether the Ontario law should be applied. After recognizing the importance of *Babcock v. Jackson* in terms of rejecting the old mechanical approach to choice of law problems, Fuld C.J. stated,

The single all-encompassing rule which called, inexorably, for selection of the law of the place of injury was discarded, and wisely, because it was too broad to prove satisfactory in application. There is, however, no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and experience....*Babcock* and its progeny enable us to formulate a set of basic principles that may be profitably utilized, for they have helped us uncover the underlying values and policies which are operative in this area of the law....

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not — in the absence of special circumstances — be permitted to interpose the law of his state as a defense.

⁵² von Mehren, *supra* note 17 at 965.

⁵³ *Nuemeier v. Kuehner*, 335 N.Y.S. 2d 64 (C.A.N.Y. 1972).

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants. (Cf. Restatement, 2d, Conflict of Laws, P.O.D., pt. II §§ 146, 159 [later adopted and promulgated May 23, 1969]).⁵⁴

The court went on to note that this case was covered by the third principle and it declined to find any sufficient reason for displacing the rule of *lex loci delicti*.

The development of particular rules has been supported by a number of commentators. For example, Professor Rosenberg has stated:

[A] choice-of-law rule need not achieve perfect justice every time it is invoked in order to be preferable to the no-rule approach. The idea that judges can be turned loose in the three-dimensional chess games we have made of these cases, and can be told to do hand-tailored justice, case by case, free from the constraints or guidelines of rules, is a vain and dangerous illusion.⁵⁵

On the other hand, the adoption of particular multi-state rules has been criticized by a variety of commentators, including Sedler,⁵⁶ Baade⁵⁷ and Trautman.⁵⁸ As Symeonides notes, “[a]lthough these rules have been followed by some more recent New York decisions of lower courts and by the courts of Colorado, their future seems rather bleak”.⁵⁹

12. General Comments

Given the variety of approaches discussed above, it is not possible to single out one particular methodology as representative of the “American approach”. Various courts throughout the country have adopted either particular approaches such as those discussed above or a combination thereof. For example, the “most significant relationship” approach as set out in the Second Restatement has been used in Arizona, Colorado, Connecticut, Idaho, Illinois, Iowa, Maine, Massachusetts, Mississippi, Missouri, Montana, Ohio, Oklahoma, Texas and Washington.⁶⁰ A

⁵⁴ *Ibid.* at 69-70.

⁵⁵ M. Rosenberg, “Comments on *Reich v. Purcell*” (1968) 15 U.C.L.A. L. Rev. 641 at 644. See also M. Rosenberg, “The Comeback of Choice-of-Law Rules” (1981) 81 Colum. L. Rev. 946; W.L. Reese, “Choice of Law: Rules or Approach” (1972) 57 Cornell L. Rev. 315; A.D. Twerski, “*Neumeier v. Kuehner*: Where are the Emperor’s Clothes?” (1973) 1 Hofstra L. Rev. 104 (as noted in Cramton, *supra* note 7 at 346).

⁵⁶ R.A. Sedler, “Interstate Accidents and the Unprovided For Case: Reflections on *Neumeier v. Kuehner*” (1973) 1 Hofstra L. Rev. 125.

⁵⁷ H.W. Baade, “The Case of the Disinterested Two States: *Neumeier v. Kuehner*” (1973) 1 Hofstra L. Rev. 150.

⁵⁸ D.T. Trautman, “Rule or Reason in Choice of Law: A Comment on *Neumeier*” (1976) 1 Vt. L. Rev. 1.

⁵⁹ Symeonides, *supra* note 7 at 99. See cases cited therein.

⁶⁰ Cramton, *supra* note 7 at 306-07.

combination of interest analysis and the most significant relationship test has been used in Oregon and Pennsylvania.⁶¹ Some states have also continued to apply the old *lex loci delicti* test.⁶²

For the purposes of this paper, it is not necessary to determine which of these approaches has received the warmest judicial reception. Rather, I am concerned with setting out the various methodologies and their numerous distinctions so that an examination of the British and Canadian situation may be informed by such an appreciation. Even if Canadians are reluctant to make as bold a break from historic jurisprudence in this area as the United States (and to a lesser extent Britain) has done, a great deal can be learned about the nature of the problems as well as the advantages and disadvantages of various proposals by focusing on American methodologies.

B. *Britain: The Origins of the Rule in Phillips v. Eyre*

1. *The Halley*

The rule in *Phillips* was an expansion upon an earlier case which held that for an action to be brought in England, it must be of such a nature that it would have been actionable in England if the act had occurred there. In *The Halley*⁶³ two ships collided in Belgian waters. The defendant ship was, at the time, under the control of a mandatory pilot. According to Belgian law the defendants would have been liable, but according to English law they would not have been. The Judicial Committee of the Privy Council dismissed the action and, in so doing, stated:

[I]t is...contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.⁶⁴

The lingering impact of the rule in *The Halley* has been the subject of much criticism, primarily because the rule unduly impairs the ability of persons to bring suit for wrongs recognized by other legal systems, but not by the domestic law of the forum.⁶⁵

2. *Phillips v. Eyre*

Phillips v. Eyre expanded upon the *lex fori* approach established in *The Halley*. The resulting rule was succinctly stated by Willes, J. as follows:

⁶¹ *Ibid.* at 307-08.

⁶² Symeonides, *supra* note 7 at 97 n.262.

⁶³ *The Halley* (1868), [1867-69] L.R. 2 P.C. 193, [1868] 18 L.T. 879 [hereinafter *Halley* cited to L.R.].

⁶⁴ *Ibid.* at 204.

⁶⁵ See e.g. J.H. Morris, ed., *Dicey and Morris on the Conflict of Laws*, 10th ed. (London: Stevens & Sons Ltd., 1980) at 937 n.82.

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England....Secondly, the act must not have been justifiable by the law of the place where it was done.⁶⁶

The case involved a suit in England for false imprisonment and arrest allegedly suffered at the hands of the Governor of Jamaica during a civil uprising in that country. Prior to the time of the suit a statute was passed in Jamaica granting the Governor immunity. Since the second requirement was not met (i.e. the act was "justified") the English court refused to find the defendant liable.

This rule has, of course, also been the subject of significant academic⁶⁷ and judicial⁶⁸ criticism. Notwithstanding this, the rule in *Phillips* remains to this day the basic method for choice of law determination in Canada and Britain. It is, therefore, important to understand how efforts to address its inherent problems have been undertaken in Britain through modification. Although certain concerns may be addressed by introducing a greater degree of flexibility, one must also acknowledge that a rule-oriented approach will, by its very nature, provide a greater degree of predictability, certainty, and uniformity of result. Obviously a particular balance must be struck in terms of flexibility and justice in the individual case versus certainty, predictability and uniformity of result, and it is with this in mind that we should evaluate the more recent developments with respect to the rule in *Phillips*.

3. *Machado v. Fontes*

A significant development occurred with respect to the rule in *Phillips* in the English case of *Machado v. Fontes*.⁶⁹ There, the Court of Appeal reinterpreted the reference to "not justifiable" in the second branch of the rule to mean simply that the act must not have been innocent under the *lex loci delicti*. Thus, the existence of criminal liability was sufficient to satisfy the test, and corresponding civil liability need not be shown. Because *some* form of liability could usually be found, "[i]t followed from *Machado v. Fontes* that the *lex causae* in cases of foreign torts was

⁶⁶ *Phillips*, *supra* note 1 at 28-29.

⁶⁷ See e.g. J.D. Falconbridge, *Essays on the Conflict of Laws*, 2nd ed. (Toronto: Canada Law Book Co., 1954) at 815-18; G.C. Cheshire, *Private International Law*, 7th ed. (London: Butterworths, 1965) at 243-44 & 254; O. Kahn-Freund, "Torts" in J.H. Morris, ed., *Dicey's Conflict of Laws*, 7th ed. (London: Stevens & Sons Ltd., 1958) 932 at 943-44; A.H. Robertson, "The Choice of Law for Tort Liability in the Conflict of Laws" 4 Mod. L. Rev. 27 (as noted in Hancock, *supra* note 10 at 181).

⁶⁸ See e.g. *M'Elroy v. M'Allister* [1949] S.C. 110 at 132; *Lieff v. Palmer* (1937), 63 B.R. 278 at 285-86 (Rivard J.) and 288-89 (Létourneau J.) (Que. S.C.) [hereinafter *Lieff*]; *Naftalin v. London, Midland and Scottish Rly. Co.* [1933] S.C. 259 at 274-75 (Lord Murray); *Walpole v. Canadian Northern Railway Co.* (1921), [1922] 15 Sask. L. Rev. 75 at 79 (Haultain C.J.), [1922] 1 W.W.R. 82; *Varawa v. Howard Smith Co. Ltd. (No. 2)*, [1910] V.L.R. 509 at 526 and 536 (Cussen J.) (as noted in Hancock, *supra* note 10 at 18). For Canadian criticism see e.g. *Tolofson*, *supra* note 6; *Grimes*, *supra* note 5. But see *Lewis v. Leigh* (1986), 54 O.R. (2d) 324, 26 D.L.R. (4th) 442 (C.A.).

⁶⁹ *Machado v. Fontes* [1897] 2 Q.B. 231, 76 L.T. 588 (C.A.).

English law.”⁷⁰ This decision had a number of undesirable effects which made it the subject of much criticism.⁷¹ Perhaps the most disconcerting aspect of the decision was its “blatant encouragement”⁷² of forum shopping.

4. *Boys v. Chaplin*

The discredited *Machado* gloss on the rule in *Phillips* was overruled by the House of Lords in 1971 in the case of *Boys v. Chaplin*.⁷³ In that case two English servicemen were involved in a motor vehicle accident while stationed in Malta. According to Maltese law, the plaintiff was entitled to special damages but he was not entitled to general damages for pain and suffering. Ultimately, the House of Lords allowed recovery for pain and suffering according to English Law. Although there is significant debate about what *ratio decidendi* actually emerged from the multiple decisions in *Boys*,⁷⁴ it is clear that the *Machado* gloss on the rule in *Phillips* was overruled such that double actionability, in terms of civil liability was henceforth required.⁷⁵ (Civil liability is to be understood as broader than tortious liability and may be “contractual, quasi-contractual, quasi-delictual, proprietary or *sui generis*”)⁷⁶ Moreover, it is important to note that civil liability was required *between the actual parties to the dispute*.⁷⁷ Therefore, the *Phillips* test, as understood, would preclude recovery on the basis of guest passenger or inter-spousal immunity under the *lex loci delicti*, even though the forum law did not recognize such immunity. The shortcoming of this approach is at once apparent and, in the absence of some form of flexible exception, recourse to “procedure/substance” distinctions or “public policy” becomes

⁷⁰ A. Briggs, “What Did *Boys v. Chaplin* Decide?” (1983) 12 Anglo-American L. Rev. 237 at 239.

⁷¹ See e.g. Cheshire, *supra* note 67 at 269; R. Wolff, *Private International Law*, 2nd ed. (Oxford: Clarendon Press, 1950) at 490; Falconbridge, *supra* note 67 at 815ff; Hancock, *supra* note 10 at 15-18 and 121-22; Morse, *infra* note 72 at 56-61. For a defence of the decision see Lorenzen, *supra* note 16 at 360-78; H.C. Gutteridge, “A New Approach to Private International Law” (1938) 6 Camb. L.J. 16 at 20; J.A. Smith, “*Machado v. Fontes* Revisited” (1956) 5 I.C.L.Q. 466 (as noted in *Dicey & Morris*, *supra* note 65 at 940 n.11).

⁷² C.G. Morse, *Torts in Private International Law* (Amsterdam: North Holland Publishing Co., 1978) at 57. See also I.G. Karsten, “*Chaplin v. Boys*: Another Analysis” (1970) 19 I.C.L.Q. 35 at 44, where he refers to *Machado* as a “forum shopper’s charter.” See also Briggs, *supra* note 70 at 240: “*Machado v. Fontes*...had two real merits. Firstly it resulted in English law having a rule of single actionability - that the conduct be actionable by English Law....Secondly, it did not defy what is alleged to be the policy behind the single application of *lex loci*: that it is the legal system which the man on the Clapham omnibus expects to govern his legal rights and duties when abroad.”

⁷³ *Boys*, *supra* note 2.

⁷⁴ See e.g. Briggs, *supra* note 70.

⁷⁵ *Ibid.* at 239: “[I]t is clear that *Machado* was overruled.” See also *Dicey & Morris*, *supra* note 65 at 942.

⁷⁶ See L. Collins, ed., *Dicey & Morris on the Conflict of Laws*, 11th ed. (London: Stevens & Sons Ltd., 1987) at 1372.

⁷⁷ *Ibid.*, “[T]he plaintiff’s action will fail if there is no civil liability under the *lex loci delicti* as between the actual parties.” See also cases cited therein.

more likely. In addition, one might note that even if actionability were understood as meaning simply the tortiousness of the tort, there may be sufficient disparity among jurisdictions to make this formidable deference to the *lex loci delicti* undesirable in theory and unlikely in practice.

Lord Hodson and Lord Wilberforce recognized that rigid application of the rule would not serve the interests of justice in all circumstances. Lord Hodson stated:

If controlling effect is given to the law of the jurisdiction which because of its relationship with the occurrence and the parties has the greater concern with the specific issue raised in the litigation, the ends of justice are likely to be achieved.⁷⁸

Similarly, Lord Wilberforce stated:

Given the general rule... as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained from that principle which represents at least a common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy or as WESTLAKE said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to enquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet.⁷⁹

It is now clear that this decision is taken to have established a flexible exception to the rule in *Phillips*,⁸⁰ but the precise nature of this exception has been the subject of limited use⁸¹ and lingering debate.⁸² In the words of the English and Scottish Law Commissions, "The exception is almost wholly undefined and the manner of its application in future cases is a matter for speculation".⁸³

Castel states:

In *Chaplin v. Boys*, the House of Lords did not replace the rule in *Phillips v. Eyre* by the doctrine of the proper law of a tort. However, Lords Hodson and Wilberforce

⁷⁸ *Boys*, *supra* note 2 at 1094.

⁷⁹ *Ibid.* at 1104.

⁸⁰ See P.B. Carter, "Choice of Law in Tort and Delict" (1991) 107 L.Q. Rev. 405 at 406.

⁸¹ See *Johnson v. Coventry Churchill International* (1991), [1992] 3 All E.R. 14 (Q.B.); *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*, [1989] 3 All E.R. 14, [1989] 3 W.L.R. 563 (C.A.); *Dimskal Shipping Co. v. Int'l Transport Workers*, [1989] 1 Lloyd's Rep. 166; *Church of Scientology of California v. Commissioner of Metropolitan Police* (1976) 120 Sol. J. 690 and see subsequent proceedings in *The Times* (25 October 1977); *Coupland v. Arabian Gulf Petroleum* [1983] 2 All E.R. 434, and see the Australian cases of *Breavington v. Godleman* (1988), 80 A.L.R. 362 (Aust. High Ct.); *Warren v. Warren*, [1972] Qd. R. 386 (S.C. of Queensland); and *Corcoran v. Corcoran* (1973), [1974] V.R. 164 (S.C. of Vict.).

⁸² "The precise scope of this exception to the general rule of double actionability will not become clear until it has been elucidated by subsequent judicial decisions". *Dicey & Morris*, *supra* note 76 at 1374-75.

⁸³ U.K., The Law Commission and the Scottish Law Commission, *Private International Law: Choice of Law in Tort & Delict* (Law Commission Report No. 193, Scottish Law Commission No. 129) (London: Her Majesty's Stationary Office, 1990) [hereinafter *Report*] at 8.

introduced that doctrine as an exception in the name of flexibility in order to achieve individual justice in cases where with respect to a particular issue, the place of tort has little interest in seeing its law applied due to lack of other proper connections.⁸⁴

It appears that the exception in *Boys* was modelled upon the American *Second Restatement* which, as noted in *Dicey & Morris*, is also “formulated in terms of rule and exception”.⁸⁵ However, Swan suggests that the judges in both the Court of Appeal and the House of Lords in *Boys v. Chaplin* “who refer to the American cases, show that they have not understood any of the then recent cases”.⁸⁶ Fawcett also suggests that *Boys v. Chaplin* introduced “the proper law of the tort as adopted in America”⁸⁷ and in a footnote states that he uses the phrase “to connote a rule which looks at contacts, analogously to the objectively determined proper law of the contract, and does not pay any attention to the interests of States.”⁸⁸ This narrow view, however, appears clearly to contradict the express comments of Lord Wilberforce.⁸⁹ (Fawcett later stated that “[t]here are definitional problems with the proper law of the tort and it has been suggested that the phrase is meaningless, being merely a generic name for a wide variety of new flexible approaches.”)⁹⁰ To the extent that “the proper law of the tort” is supposed to be a reflection of American developments in the *Second Restatement*, one must note that it is indeed broad enough to contemplate a degree of governmental interest analysis. Section 6(2) of the *Second Restatement* includes as relevant factors (b) the relevant policies of the forum, and (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue.

One interesting element of the decision in *Boys* is the clear acknowledgment of the role of *dépeçage*, particularly in the judgement of Lord Wilberforce. I pause to note that the use of *dépeçage* here is in respect of isolation of particular elements or issues for the purposes of the application of the flexible exception. The discussion of *dépeçage* should not be taken to undermine the rather strict standard established by Lord Wilberforce with respect to the determination of whether there is “actionability” under the *lex loci delicti* by suggesting that “tortiousness of the tort” is sufficient.⁹¹ In *Boys*, Lord Wilberforce decided the case by segregating the issue

⁸⁴ Castel, *supra* note 3 at 667.

⁸⁵ *Dicey & Morris*, *supra* note 65 at 943. See also Morse, *supra* note 72 at 284.

⁸⁶ Swan, *supra* note 3 at 550 n.50.

⁸⁷ J.J. Fawcett, “Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?” (1982) 31 I.C.L.Q. 150 at 152. It appears that the term “proper law of the tort” originated from J.H. Morris, “The Proper Law of A Tort” (1951) 64 Harv. L. Rev. 881.

⁸⁸ Fawcett, *ibid.* at 152 n.7.

⁸⁹ See Morse, *supra* note 72 at 285.

⁹⁰ J.J. Fawcett, “Policy Considerations in Tort Choice of Law” (1984) 47 Mod. L. Rev. 650 at 659.

⁹¹ “The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed. This non-existence or exclusion may be for a variety of reasons and it would be unwise to attempt a generalisation relevant to the variety of possible wrongs. But in relation to claims for personal injuries one may say that provisions of the *lex delicti*,

of heads of damage from the rest of the case and using the flexible exception to allow application of English law. He stated:

The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case, negligence or otherwise, related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties so circumstanced.⁹²

Unfortunately, although it is clear that the use of *dépeçage* is accepted in *Boys*, the basis upon which it is to be invoked is somewhat unclear. Lord Wilberforce seems to consider both the connection of the parties to the place of the wrong as well as the governmental interests of Malta,⁹³ but there does not appear to be any more principled criteria in the decision. Subsequent commentary on the *Boys* case offers little assistance in this regard because the “flexible exception” is generally taken to mean a total displacement of the otherwise-applicable law.⁹⁴ Stated another way, discussion of the instances in which the flexible exception will be applied tend to focus much more on the relationship of the facts or parties to a particular jurisdiction on the whole, rather than on “segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought...to be applied.” Where discussion of “a particular issue” does occur, it seems to be based on a need to recognize the special importance of the issue at stake to the case generally, rather than the uniqueness of one such element. As I shall set out below, there is something in the use of *dépeçage* which, in the proper sense of the term, recommends itself to a proposed Canadian methodology.

It is quite evident that the exception established in *Boys v. Chaplin* is premised upon a rather undisciplined appreciation of certain concepts such as proper law, governmental interest and most significant connection. The ostensible contribution of American developments, when understood simply as *ad hoc* unguided departures from disciplined reasoning, do not significantly improve methodology in this area. Even if one accepts that the modern American approaches cannot give *sufficient* guidance and certainty however, the earlier survey of American approaches indicates that it is wrong to believe that there is no discipline involved whatever. Unless the American approaches are understood as representing something more than simply a *gestalt* notion of justice, there is great danger in replacing traditional rules (however defective they may be) with such a perspective.

Although some Canadian observers have commented favourably upon the *Boys v. Chaplin* approach,⁹⁵ one must be careful not to embrace a less than satisfactory

denying, or limiting, or qualifying recovery of damages because of some relationship of the defendant to the plaintiff, or in respect of some interest of the plaintiff (such as loss of consortium) or some head of damages (such as pain and suffering) should be given effect to” (*Boys, supra* note 2 at 1102).

⁹² *Ibid.* at 1104.

⁹³ *Ibid.*

⁹⁴ See e.g. Fawcett, *supra* note 90 at 659: “it appears [the flexible exception] will only be used where the factual contacts or state interests point clearly towards one country.”

⁹⁵ See Castel, *supra* note 3 and Blom, *supra* note 3.

rule simply because it is better than the unfortunate one we presently utilize. Indeed, as I shall note shortly, this is precisely the manner in which the *Machado* gloss on the rule in *Phillips* came to be part of Canadian jurisprudence.

5. Continuing Debate — The Law Commissions Report

It is useful to note that the case of *Boys v. Chaplin* did not resolve the debate regarding choice of law rules for tort in the United Kingdom, but rather has played only one part in a much larger re-examination of this issue. Consideration of the issue of choice of law rules for tort was originally undertaken in the United Kingdom by the Law Commission and the Scottish Law Commission in relation to proposals for an E.E.C. Convention on the law applicable to contractual and non-contractual obligations. In 1978 the E.E.C. decided that the Convention would focus only on contractual obligations,⁹⁶ with non-contractual obligations to comprise a separate convention. Work proceeded in the United Kingdom in this regard, and although the convention on non-contractual obligations did not materialize, a re-examination of the tort issue was completed.

In 1984 a Consultative Paper was published by the Commissions.⁹⁷ This paper acknowledged that the existing choice of law rules for tort in Great Britain were anomalous, unjust, uncertain, and that they led to forum shopping. In addition, the flexible exception was described as "almost wholly undefined and the manner of its application in future cases is a matter for speculation".⁹⁸ The Commissions therefore recognized the need to abolish the existing rules, and they considered a variety of possible reform proposals.

Several options were rejected at the outset by the Commissions in the Working Paper.⁹⁹ It is worth setting these out in some detail, as they illustrate the strengths and weaknesses of some possible approaches to this issue in Canada.

(a) *Lex fori as the Uniquely Applicable Law*

This proposal had the positive feature of providing certainty, simplicity, and ease of application. It was rejected, however, for several reasons. First, it was deemed parochial and unnecessary for the forum court always to apply its own notions of justice. Second, where there are several countries involved, this rule would not really provide certainty until *after* an action had been commenced, and this would serve to discourage settlement. Third, justice would not be served because it could lead to recovery in the forum country for an action which had no connection with that legal order and which was not actionable elsewhere. Fourth,

⁹⁶ See *Rome Convention on the Law Applicable to Contractual Obligations*, 19 June 1980, O.J. 1980 L226/1 (entered into force 1 April 1991).

⁹⁷ U.K., The Law Commission and the Scottish Law Commission, *Private International Law: Choice of Law in Tort & Delict* (Working Paper No. 87) (London: Her Majesty's Stationary Office, 1984) [hereinafter *Working Paper*].

⁹⁸ *Ibid.* at 79.

⁹⁹ *Ibid.* at 266.

problems regarding ascertaining and proving foreign law, which might arise under a different rule, could be met by a presumption that foreign law is the same as the forum unless proven differently. Finally, and perhaps most importantly, the *lex fori* rule would discourage uniformity of result and would be a great incentive to forum shoppers.

(b) *Lex fori as the Basic Rule Subject to Displacement*

This approach would have the obvious advantage of addressing some of the shortcomings of rigid application of the *lex fori* rule. It was rejected, however, for two reasons. First, “unless the rules of displacement were mandatory and very specific....[t]here would seem to be a clear tendency for courts...to apply the *lex fori* if possible”.¹⁰⁰ Second, it was determined that, fundamentally, the *lex fori* “has little, if any, *prima facie* claim to application”.¹⁰¹

(c) *Rule Selecting Approaches*

Consideration of these approaches was intended to reflect developments in American choice of law methodologies. It is interesting to note that the Commissions were careful to differentiate these proposals from the method contained in the *Second Restatement*.¹⁰²

(i) *Governmental Interest Analysis*

This approach was criticized because, in the view of the Commissions, “[u]nless there is a public interest involved, a rule of domestic law merely reflects one view of the right balance between claimant and wrongdoer”.¹⁰³ This criticism is, however, suspect, since one can readily appreciate that in the broadest sense, legal regimes are indeed concerned with the balance to be struck and enforced between private parties as part of their system of law and governance. Perhaps on a more sound note, the Commissions also concluded that governmental interest analysis (or the closely related method of comparative impairment) is difficult to apply in practice and may lead to extreme uncertainty.¹⁰⁴ This is especially true in instances where the law at issue is judge-made and not merely a question of application of a statute.

¹⁰⁰ *Ibid.* at 98.

¹⁰¹ *Ibid.*

¹⁰² The Commission appeared to think that the approach of the *Second Restatement* could be characterized as “a basic proper law rule with a series of presumptions” (*ibid.* at 158). As noted in section II.A.5 above, one may question whether the approach of the *Second Restatement* is capable of being so readily described.

¹⁰³ *Working Paper, ibid.* at 102.

¹⁰⁴ *Ibid.* at 103 & n.346. See also F.K. Juenger, “Conflict of Laws: A Critique of Interest Analysis” (1984) 32 Am. J. Comp. L. 1.

(ii) *Principles of Preference*

The Commission preferred this approach to governmental interest or comparative impairment because it sought to formulate a principled basis upon which choice of law determination could be made. Nonetheless, the approach was rejected because it relied in the first instance on a determination of governmental policy. Moreover, it was noted that the number of particular principles in the area of tort would likely be large, and that while this might be a workable approach in the context of gradual development, it was less suitable to a wholesale reconsideration of this topic.

(iii) *Choice-Influencing Considerations*

This approach was also rejected because it relied, at least in part, on recognition of the importance of determining governmental interest (in that one of Leflar's principles was advancement of the forum's governmental interest). Second, the Commissions rejected the 'better-law' consideration which had attracted attention to this approach. Finally, the Commission stated that this approach to choice of law "is inherently unacceptably subjective and uncertain".¹⁰⁵

The Commissions then went on to consider options based on the *lex loci delicti*. The strength of this approach rested not on its universal appropriateness, but rather on its appeal as a *prima facie* rule subject to certain exceptions. The Commissions noted that the *lex loci delicti* is usually objectively ascertainable, that it is usually connected to at least one of the parties, that it usually corresponds with the legal system the wrongdoer would expect to have applied, and that it would "promote uniformity and discourage forum shopping".¹⁰⁶ The Commissions did however recognize that there may be difficulty in determining the *lex loci delicti* in certain cases with multi-state elements where the conduct giving rise to the harm and the harm itself occurred in different jurisdictions (e.g. negligent service of an automobile which resulted in an accident in another jurisdiction). The response was to develop certain specific rules in this regard, to be supplemented by a general "most significant elements" test. Ultimately, two models were put forth by the Commissions, with the intention of soliciting comment before the final report was completed. These models were as follows:

Model 1. The application, subject to an exception, of the law of the country where the tort or delict occurred.

General rule

The applicable law is that of the country where the tort or delict occurred.

Definition, for multi-state cases, of the country where the tort or delict occurred

¹⁰⁵ *Working Paper, ibid.* at 112.

¹⁰⁶ *Ibid.* at 112-14.

(i) personal injury and damage to property:

the country where the person was when he was injured or the property was when it was damaged;

(ii) death:

the country where the deceased was when he was fatally injured;

(iii) defamation:

the country of publication;

(iv) other cases:

the country in which the most significant elements in the train of events occurred.

Rule of displacement

The law of the country where the tort or delict occurred may be disappplied, and the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection applied instead, but only if the occurrence and the parties had an insignificant connection with the country where the tort or delict occurred and a substantial connection with the other country.

Model 2: The proper lawGeneral rule

The applicable law is that of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection.

Presumptions

In the case of the following types of tort or delict, the country with which the occurrence and the parties had the closest and most real connection is presumed to be, unless the contrary is shown:

(i) personal injury and damage to property:

the country where the person was when he was injured or the property was when it was damaged;

(ii) death:

the country where the deceased was when he was fatally injured;

(iii) defamation:

the country of publication.

A presumption may be departed from only if the occurrence and the parties had an insignificant connection with the country indicated by the presumption and a substantial connection with another country.¹⁰⁷

¹⁰⁷ *Ibid.* at 164-65.

6. *The Recommended Approach*

Ultimately it was Model 1 that was accepted by the Law Commissions, with some modifications. Their proposal for statutory reform stated as follows:¹⁰⁸

2. (1) Subject to subsection (4) below, the applicable law in relation to any proceedings to which this Act applies shall, in so far as they are brought in respect of:

- (a) personal injury caused to an individual; or
- (b) the death of an individual resulting from personal injury, be the law of the country or territory where that individual was when he sustained the injury.

(2) Subject to subsection (4) below, the applicable law in relation to any proceedings to which this Act applies shall, in so far as they are brought in respect of any damage of property, be the law of the country or territory where that property was when it was damaged.

(3) Subject to subsection (4) below, the applicable law in relation to any proceedings to which this Act applies shall, in so far as they are brought in respect of anything not mentioned in subsection (1) and (2) above, be:

- (a) the law of the country or territory where the most significant elements of the events constituting the subject-matter of the proceedings took place; or
- (b) if such a country or territory is not identifiable, the law of the country or territory with which the subject-matter of the proceedings has the most real and substantial connection.

(4) Where apart from this subsection the law of a particular country or territory would, by virtue of subsection (1), (2) or (3)(a) above, be the applicable law in relation to any proceedings to which this Act applies but it appears from a comparison of:

- (a) the significance, in all circumstances, of the factors which connect the subject-matter of the proceedings with that country or territory (including any not mentioned in subsections (1) to (3) above); and
- (b) the significance, in those circumstances, of any factors constituting a real and substantial connection between the subject-matter of the proceedings and another country or territory, that it would be substantially more appropriate for the questions to which those proceedings give rise to be determined according to the law of that other country or territory, then the law of that other country or territory shall be the applicable law in relation to those proceedings.

(5) For the purposes of subsections (3)(b) and (4) above the factors that may be taken into account as connecting the subject-matter of any proceedings with a country or territory shall include, in particular, factors relating to the parties to the proceedings, to any of the events constituting, or connected with, the subject-matter of the proceedings or to any of the circumstances or consequences of those events.

(6) References in this section to the law of a country or territory shall not include references to the rules of private international law applicable by the courts of that country or territory.

¹⁰⁸ For a criticism of the proposal for statutory reform, see Carter, *supra* note 80.

It should also be noted that the Law Reform Commissions specifically rejected the use of *dépeçage* in their final report. They stated:

The Consultation Paper provisionally concluded that our reformed choice of law rules should not provide for the choice of the applicable law to be made separately for different substantive issues in tort and delict: in other words, we would not make provision for *depeçage*. We believe that this is correct. Hence, all tortious issues should be governed by the same choice of law rule. Although *depeçage* may appear attractive, and was envisaged by Lord Wilberforce in *Boys v. Chaplin*, the criticisms made of it in the Consultation Paper, in particular uncertainty in application, remained unanswered on consultation. The flexibility that *depeçage* would provide will, in any event, be a feature of our reformed choice of law rules. Furthermore, once the most appropriate law has been ascertained in respect of a wrong it is desirable that it should govern all the substantive issues. This is in accordance with the parties' expectations, and it also prevents a party from accepting certain consequences but not others of the applicable law. [Footnotes omitted]¹⁰⁹

Obviously there are many factors which suggest that this was a good approach, and others which may raise cause for concern. I shall return to this issue in the next section of this paper. Presently I shall simply note it appears that the use of the "flexible exception" is such that it fails to respect the potential discipline of the more sophisticated American approaches and instead serves to operate as a "special case" release valve whereby "justice" may be dispensed on an *ad hoc* basis.¹¹⁰ In discussing the flexible exception the Law Commissions stated in their final report:

While the great majority of cases will be decided by application of the law of the place of the wrong, in some cases this law will be inappropriate. It is a feature of the hardest cases that principles of justice conflict. In *Boys v. Chaplin*, two such principles conflicted: the principle that a person should not be held liable to a greater extent than he is liable by the law of the country where he acted, and the principle that justice is done to a person if his own law is applied. The proper law exception which is incorporated into our proposals provides the flexibility to do justice in hard cases. [Footnotes omitted]¹¹¹

C. Canadian Developments

Canadian choice of law methodologies for tort can only be understood in relation to British developments. Numerous analyses have surveyed this area from the Canadian perspective,¹¹² and I do not intend to provide a full review here. Rather, I shall briefly examine important historic developments and then focus on three

¹⁰⁹ *Report*, *supra* note 83 at 27.

¹¹⁰ A similar view is displayed by Fawcett, *supra* note 90 at 659, where he discusses the *Boys v. Chaplin* flexible exception and states, "[I]t is important to understand the strongly conservative attitude of English judges which holds in check the development of any *ad hoc* approach of the kind developed in America."

¹¹¹ *Report*, *supra* note 83 at 10.

¹¹² See e.g. J. Swan, "Annual Survey of Canadian Law: Conflict of Laws: Part I" (1981) 13 *Ottawa L. Rev.* 123; and Blom, *supra* note 3.

recent Canadian cases at the provincial appellate level which provide fodder for critical analysis.

1. *McLean v. Pettigrew*

The starting point for examination is the 1945 Supreme Court of Canada decision in *McLean v. Pettigrew*.¹¹³ In that case an automobile accident occurred in the province of Ontario. The plaintiff (a resident of Quebec) was a gratuitous passenger in the vehicle being driven by the defendant (also a resident of Quebec). According to the laws of Quebec the passenger would have been able to recover against the defendant, but according to the laws of Ontario recovery was precluded. The Supreme Court of Canada applied the rule in *Phillips v. Eyre* as it had been modified at the time in Britain by *Machado v. Fontes*. It therefore concluded that recovery was possible because the act was wrongful according to the laws of the forum (Quebec) and it was "not justified" according to the law of Ontario because there was a violation of the *Highway Traffic Act*.

One might suggest that the reasoning applied in *McLean* and particularly the adoption of the *Machado* gloss may be seen as a desirable way to proceed. The same result is achieved using the *McLean* reasoning as was achieved in *Babcock v. Jackson*. In both cases the law of the place of the wrong (which would not have allowed recovery) did not preclude recovery between the parties who both had come from the forum jurisdiction (which, of course, did allow recovery). This result is achieved because the definition of "not justifiable" in the second branch of the rule is taken to be very broad. It may be considered even broader than the "tortiousness of the tort" because it also embraces criminal responsibility. Simply stated, the effect of the *Phillips* rule as used in *McLean* is to allow the forum's law to govern the common and problematic issues such as inter-spousal or guest immunity. Is this a desirable solution?

The answer is no. Although one might suggest that the result achieved in *McLean* was a proper one, we must consider it in the context of its particular fact pattern. In that case both parties were from Quebec and it seems quite reasonable to prevent the Ontario guest passenger law from regulating the liability between the parties *inter se* in a suit brought in Quebec. A different conclusion is likely to be reached if we consider a set of circumstances where at least one of the parties is from the jurisdiction where the tort occurred (such as *Grimes v. Cloutier* below¹¹⁴). In these circumstances there is a much stronger claim to apply the rule granting immunity.

Thus the problem with the *McLean* rule is not so much that it can never achieve a fair result, but that it will do so only in certain circumstances. One might attempt to broaden or narrow the deference which is granted to foreign laws such as guest passenger statutes by altering the definition of "not justifiable" in the second branch of the *Phillips* test, but this is obviously an imprecise and unsatisfactory method of

¹¹³ *Supra* note 4.

¹¹⁴ *Grimes*, *supra* note 5. See also *Lieff*, *supra* note 68.

addressing the variety of concerns in multi-state problems. Moreover, since *any* alteration of the rule will only achieve satisfactory results in a limited variety of fact patterns, it cannot serve as a sufficient comprehensive rule. In the words of Professor Hancock, the *Phillips* rule attempts “to resolve too many problems with a few words.... [and it] consequently point[s] to sound results in some cases and unsound results in others.”¹¹⁵

As noted above, the *Machado* gloss on the rule in *Phillips* is no longer the law in Britain. Nonetheless, as a result of *McLean v. Pettigrew*, this rather questionable modification has been entrenched in Canadian conflicts law and its legacy has plagued the courts for several decades. As Cumming, J.A. noted in *Tolofson v. Jensen*:

It is evident that there has been significant criticism of the decision in *McLean* in both the case law and academic commentary. However, to date, there has been no decision of the Supreme Court of Canada which has changed the state of the law.¹¹⁶

2. *Grimes v. Cloutier*

Of central concern to this paper is the impasse which has arisen through the attempts of various courts to address the inadequacies of the *McLean* decision. To elucidate this point I shall focus on two decisions in particular. The first is the 1989 decision of the Ontario Court of Appeal in *Grimes v. Cloutier*¹¹⁷ and the second is the above-noted decision of the British Columbia Court of Appeal in *Tolofson v. Jensen*.

In *Grimes* an accident occurred in Quebec between a vehicle driven by the plaintiff (a resident of Ontario) and a vehicle driven and owned by the two defendants (both residents of Quebec). The defendant driver was convicted of careless driving under the Quebec *Highway Code*. The plaintiff recovered limited damages from the Quebec insurance scheme and sought to supplement her recovery with a suit in Ontario. The Ontario Court of Appeal rejected her claim and in so doing was forced to avoid the application of *McLean*. Morden J.A. stated:

The obvious distinction between this case and *McLean v. Pettigrew* is that in the present case the two defendants live in the jurisdiction of the place where the tort occurred (where there is no civil liability), the “foreign jurisdiction”, whereas in *McLean v. Pettigrew* neither party lived in the “foreign” jurisdiction where the accident took place and which exempted the defendant from liability.¹¹⁸

The court therefore denied the plaintiff recovery on the basis that the second branch of the rule in *Phillips* — double-actionability in the civil sense — had not

¹¹⁵ Hancock, *supra* note 10 at 197.

¹¹⁶ *Supra* note 6 at 755. It should be acknowledged that the author served as a law clerk to Hinkson, Cumming and Goldie J.J.A. of the British Columbia Court of Appeal for the 1991-92 term.

¹¹⁷ *Supra* note 5.

¹¹⁸ *Ibid.* at 652.

been proven.¹¹⁹ It is also important to note that the court then went on to adopt the modified version of the rule in *Phillips* as established in Britain by *Boys v. Chaplin*. Morden J.A. stated:

If it is desirable to state, by way of suggestion, the rules which I am applying in a more comprehensive form, or to expand their context, I would refer to Rule 205 in Dicey & Morris, *The Conflict of Laws*, 11th ed. (1987), at pp. 1365-66:

Rule 205(1) As a general rule, an act done in a foreign country is a tort and actionable as such in England [Ontario]; only if it is both

(a) actionable as a tort according to English [Ontario] law, or in other words is an act which, if done in England [Ontario], would be a tort; and

(b) actionable according to the law of the foreign country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.¹²⁰

It is important to note that since the decision in *Grimes*, this rule has been accepted in Ontario as the authoritative choice of law rule for tort¹²¹ and it has been applied in some subsequent cases without the court considering itself compelled to distinguish *McLean*. While one cannot criticize the Ontario courts for attempting to alter the rather unfortunate choice of law rules which were established by *McLean*, one may question whether adoption of the modified *Boys v. Chaplin* rule as set out by Dicey & Morris is in fact the best solution. This point was noted explicitly in *Grimes* where Morden J.A. stated:

I do not intend to suggest that, as a matter of policy, the rules in *Phillips v. Eyre*, including the qualification (which are substantially reproduced in Rule 205 above), necessarily afford the most desirable basis for resolving choice of law issues in tort cases. They, and in this regard I refer to both of them, have been substantially criticized: see Hancock, *op cit.*, particularly at pp. 180-204.

I incline to the view that the most effective method of reforming the law on this subject would be by legislative action. This would enable the matter to be reconsidered from the ground up and the relevant rules, principles and factors to be laid out in such a manner that the concerns of justice could be considered in an orderly manner and the predictability of results would be enhanced as much as possible.¹²²

¹¹⁹ Notwithstanding this distinction, it would seem that it was the relationship of the parties to the *resulting liability* that was significant.

¹²⁰ *Supra* note 5 at 660.

¹²¹ See *Prefontaine Estate v. Frizzle* (1990), 71 O.R. (2d) 385, 65 D.L.R. (4th) 275 (C.A.); *Anderson v. Forcier*, [1990] I.L.R. 1-2611; *Furlong v. Station Mont Tremblant Lodge Inc.* (1991), 4 O.R. (3d) 693, 83 D.L.R. (4th) 750 (Gen. Div.).

¹²² *Supra* note 5 at 661.

3. Tolofson v. Jensen

This shortcoming of the decision in *Grimes* was, at least indirectly, seized upon by the British Columbia Court of Appeal in *Tolofson v. Jensen*. In that case a father and son ordinarily resident in British Columbia were driving on a trip in Saskatchewan when they were involved in a collision with a driver from Saskatchewan. Upon the plaintiff son reaching the age of majority, a suit was commenced in British Columbia against the drivers of both vehicles. According to the law of Saskatchewan the plaintiff son would likely have been denied recovery because of a limitation period and a law which required a gratuitous passenger to show wilful or wanton misconduct. Importantly, however, there was evidence to suggest that the accident would have been “not justifiable” under the *Machado* gloss because there was an alleged violation of Saskatchewan motor vehicle law.

After a review of the history of choice of law rules for tort in Canada and an examination of the Ontario developments related to *Grimes*, Cumming J.A. declined to follow the modified version of *Phillips* as established in *Boys v. Chaplin*. He stated:

The facts in the present appeal fit somewhere between those in *McLean* and *Grimes* because one defendant is from the jurisdiction of the forum, whereas the other is from the loci delicti.¹²³

Mr. Justice Cumming added:

As *McLean* is the law in British Columbia, the facts of the present appeal do not establish sufficient grounds for distinguishing that decision of the Supreme Court of Canada.¹²⁴

He concluded:

Applying the rule in *McLean*, I would conclude that the wrong is of such a character that it would have been actionable in the forum, and it is not justifiable according to the motor vehicle law of Saskatchewan.¹²⁵

It is very important to note that Cumming J.A. did not attempt to discredit the Ontario developments in general, nor did he expressly approve of the reasoning in *McLean*. Rather, he was careful to state:

In making this determination, I do not wish to suggest that I disapprove of the reasoning of the Ontario Court of Appeal in *Grimes*.

....

Finally, I would not wish to suggest that the decision of the Supreme Court of Canada in *McLean* may never be distinguished in British Columbia courts in respect of cases relating to the choice of law rules for tort. I would limit the present conclusion as to the binding nature of that decision to the facts of this case; other cases may lead to a different

¹²³ *Tolofson*, *supra* note 6 at 758.

¹²⁴ *Ibid.* at 759.

¹²⁵ *Ibid.* at 760.

result. In addition, it obviously remains open to the legislature or the Supreme Court of Canada to alter the choice of law rules for any or all tort cases if such is deemed appropriate.¹²⁶

I would submit that the effect of *Tolofson v. Jensen* is further to call into question the validity of the choice of law rules as established in *McLean* while at the same time providing an opportunity for further reflection on the desirability of adopting the *Boys v. Chaplin* strategy as has been done by the Ontario courts. Indeed, had the British Columbia Court of Appeal been more willing to embrace the *Boys v. Chaplin/Grimes v. Cloutier* position, one might suggest that this issue would have been resolved in Canada, for better or worse.

4. Gagnon v. Gagnon

Finally, it is important to note that a recent decision of the Ontario Court of Appeal has introduced an additional degree of uncertainty in this area of law. In *Gagnon v. Gagnon*¹²⁷ an automobile accident occurred in the province of Quebec and suit was brought in Ontario by the Ontario plaintiff to supplement damages received under the Ontario no-fault scheme (which was reimbursed by the Quebec scheme). Although supplemental damages could be recovered under Ontario law for personal injury, they could not be recovered according to the law of Quebec. The defendant in the action, another resident of Ontario, was the driver of the car in which the plaintiff was a passenger. He cross-claimed against the driver of the other vehicle who was a resident of Quebec. Thus the facts presented to the court were very much the same as in *Tolofson*: (1) an accident occurred in the non-forum jurisdiction; (2) the plaintiff was from the forum jurisdiction; and (3) one of the defendants was from the forum jurisdiction while the other was from the jurisdiction where the tort occurred. Tarnopolsky J.A. stated:

The narrow question in this appeal, then, is whether the fact that the defendant to a crossclaim resides in the place of the wrong, although all parties to the main action reside in the forum, renders the case distinguishable from *McLean v. Pettigrew*, as interpreted in *Grimes v. Cloutier*?¹²⁸

If the *Machado* gloss as adopted in *McLean* were applied, the act would likely have been “not justifiable” according to the law of Quebec and additional damages could have been recovered. If the strict rule of double actionability in the civil sense as adopted in *Grimes* were applied, then further recovery would be barred.

In deciding the case the Ontario Court of Appeal rejected the view that the facts were sufficiently similar to *McLean* such that it would be bound to apply the *Machado* gloss on the rule in *Phillips* to the case as a whole. Rather, it approached the dispute with respect to the two defendants separately. Thus the Ontario Court

¹²⁶ *Ibid.*

¹²⁷ *Gagnon v. Gagnon* (sub nom. *Lucas v. Gagnon*) (1992), [1993] 11 O.R. (3d) 422, 99 D.L.R. (4th) 125 [hereinafter *Gagnon* cited to O.R.].

¹²⁸ *Ibid.* at 431.

decided that the liability between the plaintiff and the defendant from the forum jurisdiction should be governed by the decision in *McLean* as the facts were identical in respect of these parties. However, with respect to the relationship between the Quebec defendant and the other parties, it held that the case was more similar to the facts in *Grimes v. Cloutier*, and therefore the general rule of double actionability in the civil sense with the flexible exception should be applied.¹²⁹ Tarnopolsky J.A. stated:

In this case, since...[the Quebec defendant] is not a resident of Ontario and the accident occurred in Quebec, it is the facts and law of *Grimes v. Cloutier* which apply to any claim against him, even if it is *McLean v. Pettigrew* which applies to the claim against the...[Ontario defendant]. As a result, in the action by the [plaintiff] against the...[Ontario defendant], it is Ontario law which applies....Neither the [plaintiff] nor the [Ontario defendant] can recover against the...[Quebec defendant].¹³⁰

Although one may argue that this decision led to a fair result on the facts of the case, the decision has two important shortcomings. First, it appears to have introduced even greater complexity into this already intractable area of law. Second, and perhaps more importantly, it endorses both the *McLean* and the *Grimes* methodologies, of which neither appears to be very satisfactory. This was in fact noted by Tarnopolsky J.A. at the end of his decision where he stated:

It is not contended that the result suggested here, when combined with the decisions of *McLean v. Pettigrew*, *Grimes v. Cloutier* and *Prefontaine v. Frizzle*, would improve the state of the law. The result flows entirely from an application of the rule in *McLean v. Pettigrew*. As stated in most of the previous cases, the anomalies produced by that decision and subsequent attempts to cope with it would best be remedied by legislation.¹³¹

5. *Necessity of Reform*

Given the foregoing it appears that a fundamental reconsideration of this area of law is necessitated. As noted earlier, the Supreme Court of Canada will soon address this issue. No doubt a variety of solutions will be considered. It seems reasonable to believe that the Court will reflect on criticisms which have been made

¹²⁹ Carthy J.A. specifically recognized that the result contradicted the decision of the British Columbia Court of Appeal in *Tolofson*. It is interesting to note that in *Tolofson* the British Columbia Court of Appeal relied on the Ontario decision of *Going v. Reid Brothers Motor Sales Ltd.* (1982), 35 O.R. (2d) 201, 136 D.L.R. (3d) 254 (H.C.), which held that under the same set of factual circumstances, the entire dispute between the parties should be governed by the rule in *McLean*. In *Gagnon*, *supra* note 127, Carthy J.A. stated at 441, "I would overrule *Going v. Reid* to the extent that it applied the test in *McLean v. Pettigrew* to facts which were different than those in *McLean*" and added at 443, "I have indicated my views on the merits of this appeal and the result in *Going v. Reid*. It must be left that I simply disagree with the British Columbia Court of Appeal to the extent that it has relied on these authorities."

¹³⁰ *Gagnon*, *ibid.* at 438-39.

¹³¹ *Ibid.* at 439.

against the Canadian position and perhaps look to British and American developments to inform the discussion. While I do not dispute the usefulness of such an enterprise, I feel that it is important to consider *carefully* the approaches used and advocated in each of these countries in order that a reasoned result emerge. Recourse must not be had to a generic "American approach" without a critical appreciation of what that suggests. Moreover, Canadian courts should not reflexively adopt the present British position without critical analysis because, as *Machado* has shown, this may be a nearsighted approach.

III. ANALYSIS

Various proposals have been suggested for reform of choice of law methodologies in Canada. Most of these draw support from similar approaches taken in either the United States or Britain. Until now there appears to have been no consensus as to which path development should follow in Canada because many concerns remain with the experience of both Britain and the United States. In this section, I shall discuss some of the strengths and shortcomings of the various methodologies set out earlier in this paper and assess what effect these might have on Canadian jurisprudence. It is important to bear in mind that although certain general observations may be made, no absolute conclusions can be drawn for the various methodologies discussed. Rather, any evaluation must give due regard to the strengths and weaknesses of each methodology as it is applied to a specific legal order. Thus it is not necessary to determine whether particular American or British approaches to this issue are "better", but rather only to what extent they assist in evaluation of this issue from the Canadian perspective. Finally, in the last part of this paper I shall set forth a proposed methodology which I believe would best address Canadian requirements for choice-of-law determination for tort.

For the foreign observer, it is fair to say that the difficulty of extracting any particular methodology from American judicial decisions is exceeded only by the general complexity of this area of law. Although it is not of particular importance for present purposes whether the courts of Missouri adopt one or another particular methodology (or a combination of methodologies), it is significant to note that it is difficult to determine precisely *what* methodology a court is using in any particular case. This is important because it makes it more difficult to point to American choice of law experience as illustrative of a preferable approach to these issues. Although the most significant developments in choice of law theory may take place in academic commentary, the overriding concern of such commentary should be the extent to which the approach advocated may assist with the actual operation of the legal system.

Moreover, one may also fairly say that it is not merely the limits of understanding as a foreign observer that make American choice of law methodology so intractable. In addition to these concerns, the ever-increasing complexity of American methodologies does not bode well for its practical and theoretical application in a comprehensive sense in Canada. Whatever the logic of such a complex theory as the

functional approach, "it plumbs deeper than all but a few judges and lawyers are prepared to dig or follow".¹³²

A. Rules or Approach

The foregoing discussion clearly indicates that significant problems have been encountered by each nation in the application of particular choice of law "rules". In the United States the inadequacies of this method have been apparent ever since Cook, Hand and others attacked the vested rights approach.¹³³ In Britain strict rules have also proven unable to satisfy the needs of the choice of law system. Although courts have sought to craft modified rules,¹³⁴ or use tools such as *renvoi* and characterization to achieve the requisite degree of flexibility, it has become apparent in recent years that a change in the choice of law methodology for tort itself must be made. Similar inadequacies have also manifested themselves in Canadian choice of law developments. It is particularly disconcerting that given the weaknesses present in the British methodology, Canada has continued to follow the lead, reserving as its only unique condition that it proceed a pace behind.

Having recognized the limitations inherent in any rule-oriented approach, it is nonetheless important to note that a radical elimination of all rules would not likely serve the Canadian choice of law system well. Indeed, the switch to choice of law approaches in the United States appears to have precipitated significant criticism because of its somewhat unpredictable nature and, as noted, there appears to be at least a limited movement to return to a degree of rule implementation.¹³⁵ Rather, a combination of *prima facie* rules with some sort of principled, disciplined and specified flexible exception would likely prove most beneficial. As Lord Wilberforce stated in *Boys*, "There must remain great virtue in a general well-understood rule covering the majority of normal cases provided that it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present."¹³⁶

B. Rule Selecting or Jurisdiction Selecting

A related but slightly different issue is whether choice of law determination should be done on a rule selecting method (as has been done in the U.S.) or on a jurisdiction selecting method (as in Canada and Britain). An attractive feature of the various American rule-selecting approaches is that they consider the substantive law

¹³² W. Reese & M. Rosenberg, *Cases and Materials on Conflict of Laws*, 7th ed. (Mineola, N.Y.: Foundation Press, 1978) at 475.

¹³³ See section II.A.1 above.

¹³⁴ Such as the gloss in *Machado*, section II.B.3 above.

¹³⁵ See section II.A.11 above.

¹³⁶ *Supra* note 2 at 1103.

which will be applied in a particular case. Strict jurisdiction selecting methodologies¹³⁷ on the other hand “blindly select a jurisdiction whose domestic law will determine the outcome of the dispute”.¹³⁸ Again, as Professor von Mehren has stated,

In sum, the inevitable consequence of approaching the choice-of-law problem exclusively in terms of jurisdiction-selecting analyses is a looseness and incoherence of theory and practice. A facade of order and principle prevails, but the reality that it conceals is far more complex than theory admits or suggests. Consequently, theories such as those adumbrated by Story and Beale have little explanatory or directive force. They serve as *ex post facto* rationalizations for results often reached on other grounds, thus failing to discipline and criticize theory and practice.¹³⁹

It is therefore reasonable to conclude that a strict jurisdiction selecting methodology is less preferable to one which embraces at least some aspect of rule selection. Strict jurisdiction selecting methods may lead to the application of a particular law that yields unjust and undesirable results.¹⁴⁰ Of course one might suggest that such concerns are already considered by judges using the jurisdiction selecting method, but in this case these concerns are extraneous to the “legitimate” considerations which the analysis purports to entertain. As Maslechko notes,

If the courts, behind the language of the traditional rules, are really carrying on a principles analysis, then their decisions will likely suffer from the defects of both approaches.... A more principled analysis ought to take place in open court so that, if defects in the analysis exist, they can be debated and solutions to them can be found.¹⁴¹

C. *Governmental Interest Analysis*

Perhaps the most important and widely acknowledged of the American developments is that of interest analysis. A useful evaluation of the appropriateness of adopting interest analysis to another legal order has been performed by J.J. Fawcett in his article, “Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?”.¹⁴² Although the concerns of an English observer differ in certain ways from the Canadian perspective, numerous relevant issues are addressed. Several factors suggest that interest analysis may serve a useful role in the Canadian context. First, Fawcett notes that there “is something odd about applying the law of State X, when that State is not concerned that its law should be applied”.¹⁴³ Second, interest analysis obviously introduces a degree of flexibility which the more mechanical jurisdiction selecting approaches lack. Third, Fawcett

¹³⁷ One may question whether the *McLean* rule should even really be considered a jurisdiction selecting method, for its only option is to apply the law of the forum or to deny recovery altogether.

¹³⁸ *Working Paper*, *supra* note 97 at 99.

¹³⁹ von Mehren, *supra* note 17 at 932-33.

¹⁴⁰ See Cavers, *supra* note 21.

¹⁴¹ Maslechko, *supra* note 3 at 83.

¹⁴² *Supra* note 87.

¹⁴³ *Ibid.* at 151.

notes that interest analysis is most suited to jurisdictions where lawyers and judges are accustomed to “us[ing] a teleological technique when engaging in statutory interpretation”.¹⁴⁴ While Fawcett notes that English lawyers are strictly limited in the use of legislative history, preambles, etc., Canadian lawyers do not face this problem to the same degree.

Fawcett also notes several negative aspects of interest analysis which might present themselves in Canada. The most significant of these concerns is probably the difficulty one encounters in determining whether a state’s “interest” is furthered by having its law applied. Generally it is argued that this increased complexity and uncertainty would result, in practice, in undue reliance upon the law of the forum. Other specific problems Fawcett addresses include:

- 1) difficulty determining what to do when a real conflict is found;
- 2) lack of experience in interpreting foreign law, especially in a unitary state such as England;
- 3) lack of constitutional case law addressing the underlying purpose of legislation (as in England); and
- 4) lack of clear purpose of any kind behind historic common law rules.

Obviously some of these criticisms are not as significant in the context of Canadian constitutional federalism as they are in Britain’s law. Moreover, it is interesting to note that many of the problems become insignificant if interest analysis is not used as the *exclusive* means of choice of law determination. As I shall argue below, a *prima facie lex loci delicti* test might be supplemented by interest analysis considerations in certain instances. For example, its application could be subject to various restrictions including the existence of a false conflict, an interested state, statutory purpose (as opposed to old case law), etc. The main point I am making is that the legitimate criticisms of interest analysis do not render it *completely* unhelpful in the Canadian context.

As the American experience has shown, the greatest contribution of Currie’s governmental interest analysis has been its elucidation of the false conflict situation.¹⁴⁵ Given a situation in which the courts are clearly able to ascertain the policy and interest underlying particular legal rules, it makes eminent sense to have only the interested state’s law apply. It appears, however, that the instances in which the facts of a case will elucidate a clearly false conflict may be limited indeed. Thus has been born the more ethereal and difficult developments in recent American debate regarding the resolution of true conflict situations through methods such as comparative impairment, principles of preference, choice influencing considerations, or the functional approach. One may reasonably suggest that to reject the basic usefulness of Currie’s elucidation of the false conflict simply because one is not fully satisfied with subsequent methods of resolving true conflicts would be tantamount to throwing out the baby with the bath water.

¹⁴⁴ *Ibid.* at 155.

¹⁴⁵ See e.g. *Babcock*, *supra* note 32.

D. *Multi-State Concerns*

In all multi-state problems it is important that choice of law methodologies take into account consideration of effective functioning of the multi-state system. This is true whether the multi-state problem arises in respect of sister jurisdictions or sovereign nations. It seems reasonable to suggest that such concerns take on even greater import in respect of sister jurisdictions in a federal system because there is often a great deal of interrelationship between the people and jurisdictions, and moreover, the jurisdictions themselves are usually subject to some form of higher order (national) positive law or constitutional structure which is best served or respected by consideration of the entire system. Although it is perhaps true that achieving proper results in particular cases will often serve this end, this may not be a sophisticated enough response and it seems clear that some explicit recognition of the importance of this issue should be made in choice of law determinations.

An example of where concerns of the multi-state system may come into play is through the application of interest analysis as discussed above. For example, although it may seem somewhat counter-intuitive, multi-state concerns may militate against deference to the policy of sister states. This is because interest analysis may fail to respect fully the benefit derived from having *different* systems of law which can serve as "laboratories of democracy". For example, in a common case such as guest passenger statutes, courts might employ government interest analysis to determine whether one or another state's interest is less comparatively impaired by protecting the plaintiff or the defendant in multi-state collisions. It is conceivable that if courts were to favour one position consistently, this could negatively impact the other legislative scheme in question. It is doubtful, however, whether the court would ever give thought to the value of preserving different regimes of substantive law *for the sake of difference itself* unless concerns of the multi-state system are particularly discussed.

One might argue that in Canada there are fewer jurisdictions within the federal system and that there is a greater degree of legal homogeneity overall than in the United States. Even if this is true however, it still suggests at least a partial reason why any choice of law methodology should give some regard to concerns of the multi-state system.

E. *Approach of the Second Restatement*

It would appear that the greatest shortcoming of the *Second Restatement* is its unclarity. Although the *Second Restatement* appears to be premised upon a "most significant relationship" test, I have noted that commentators suggest it is broad enough to encompass a variety of different policy-based approaches.¹⁴⁶ As Professor von Mehren has noted, "the *Restatement* does not significantly refine and discipline theory and analysis", but rather is a reflection of a variety of developments in this area during the years preceding its drafting. Without seeking to be too critical of the

¹⁴⁶ See von Mehren, *supra* note 17 at 964.

approach of the *Second Restatement*, one need only look to its consideration in Britain to realize that it is unable to sufficiently discipline thinking in a foreign context. Indeed, one might suggest that this is precisely the reason that the exception in *Boys v. Chaplin* has remained so elusive, and the reason why British and Canadian appreciation of the American rule selecting approaches is somewhat unclear and continues to reflect *ad hoc* determination of what result is just in a “hard case”.¹⁴⁷

Notwithstanding this criticism, the “most significant relationship” test in the *Second Restatement* clearly presents a pertinent consideration to anyone attempting to fashion a proposed choice of law methodology. Because of the number of possible circumstances in which a choice of law determination may have to be made, it is difficult or impossible to define criteria in advance which will effectively ensure that the most significantly related law will govern a dispute. The most significant relationship test recognizes this. It acknowledges the importance of the connection between the factual circumstances of the case, the perceived interests of the parties, and a “common sense” appreciation of which law should govern a multi-state dispute. Although it may not itself be a *sufficient* test by which to make choice of law determinations in tort, its strengths must certainly be considered.

F. *Specific Rules*

As noted earlier, the *Second Restatement* does contain a number of particular rules for certain choice of law determinations. Moreover, to the extent that *per se* rules are not contained in the *Restatement*, there is a tendency for some courts and commentators to favour their creation.

While I do not wish to take exception to the creation of such rules, it would seem that it will take a good deal of time before a sound body of jurisprudence could develop in this regard. Moreover, there will undoubtedly always be cases which must be addressed through a more general approach, and it is important that such cases be dealt with in an appropriate manner. Therefore, although I favour the specific rule approach to the extent that it works efficiently, one must recognize that there is an inherent limit to its usefulness. Not only are there a great many situations which would require different rules, but the introduction of such a strict approach brings with it a concomitant reduction in flexibility. Thus, although there is clearly room for the use of *per se* rules in certain instances, the debate will likely oscillate between the certainty provided by rules and the flexibility provided by other methods.

G. *Lex loci delicti as the Standard Rule*

Although there has been a significant retreat from a simple *lex loci delicti* rule, it has not been universally disregarded in the United States. Indeed, some states such

¹⁴⁷ See e.g. Bates, *supra* note 3 at 414-15: “In the United States, the predominant tort choice of law rule is know [sic] as the ‘proper law of the tort’. This means the law of the jurisdiction with which the parties and the act in question have the most significant connection. The weakness of this rule is its unpredictability and uncertainty.”

as Virginia have continued to apply the traditional *lex loci delicti* test. In *McMillan v. McMillan*¹⁴⁸ the Supreme Court of Virginia stated,

[w]e do not think that the uniformity, predictability, and ease of application of the Virginia rule should be abandoned in exchange for a concept which is so susceptible to inconstancy, particularly when, as here, the issue involves the substantive existence of a cause of action in tort.¹⁴⁹

Similarly, one may note that most of the specific rules provided for choice of law in tort by the *Second Restatement* adopt a *lex loci delicti* position.¹⁵⁰

As a general rule, I am in accord with the position of the English and Scottish Law Commissions that the *lex loci delicti* should *prima facie* be the law applicable in multi-state tort cases in Canada. The Commissions stated:

[The *lex loci delicti*] has a number of merits. It is built upon part of our existing law and accords with the law throughout much of the rest of Europe. It would promote uniformity and discourage forum shopping. To the extent that the parties have any expectations at all, a general rule based on the applicability of the *lex loci delicti* probably accords with them. Where, as will often happen, one of the parties is connected to the place of the wrong, as where he is habitually resident there, it is right that he should be able to rely on his local law. As for the person who acts in a country with which he has no lasting connection, he can expect that if he commits a wrong he will be liable to the extent that the law in question stipulates. Similarly, if he has a wrong committed against him, he can expect to have no more preferential treatment than if the wrong had been committed against someone habitually resident there.¹⁵¹

This approach clearly will not satisfy in all instances. For example, the above-quoted passage does not consider cases in which a tort is committed in state X between two visiting parties from state Y. Second, it does not eliminate the somewhat difficult problem of determining where a tort occurs in multi-state cases. This issue is, however, addressed through the establishment of certain pre-determined locations (e.g. the place where the injury occurred in cases of personal injury) and is supplemented by a "most significant elements" test. This approach appears to be a desirable one.

One final point is worth making regarding the use of the *lex loci delicti* as the *prima facie* test for choice of law determinations for tort in Canada. That is that the adoption of this test should not be taken to be, even in a limited sense, a return to the vested rights approach adopted in the *First Restatement*. In the words of Professor von Mehren, "from the perspective of the source of authority"¹⁵² the forum's law always applies. The choice of which particular law or legal rule will be applied to resolve the dispute in question is, however, an entirely different matter.

¹⁴⁸ *McMillan v. McMillan*, 253 S.E.2d 662 (1979).

¹⁴⁹ *Ibid.* at 664.

¹⁵⁰ See Schwartz, *supra* note 3 at 182.

¹⁵¹ *Report*, *supra* note 83 at 10.

¹⁵² von Mehren, *supra* note 17 at 930.

H. *Dépeçage*

As noted earlier, recognition of the role of *dépeçage* can be found in the decision in *Boys v. Chaplin*, but it is clear that subsequent consideration of the case in respect of this issue has been somewhat weak. The Law Reform Commissions did examine this issue, but ultimately rejected adopting *dépeçage* in their proposal primarily because of concerns of uncertainty in application.¹⁵³ There is indeed a valid concern that the use of *dépeçage* will undermine the search for certainty, predictability, and uniformity of result for two reasons. First, applying a combination of legal rules from several jurisdictions may create concerns of complexity and incompatibility. Second, where *dépeçage* is coupled with a “flexible exception” as it is in *Boys*, concerns of unpredictability may become even more prominent.

Notwithstanding these concerns, I have not sought to reject the use of *dépeçage* in the context of my proposed methodology set out below. As Maslechko notes, “It must be conceded that *dépeçage* is a necessary result of any system of conflicts analysis, which proceeds on the basis of a rule-selecting rather than a jurisdiction-selecting approach. What must be determined, however, is the seriousness of the problem, the likelihood of it arising in practice and what steps can be taken to avoid it.”¹⁵⁴

The first response to critics of *dépeçage* is to note that in some form it has already been taking place in many instances, but in a manner that is somewhat deceptive. For example, discrimination between “substance” and “procedure”, which clearly represents an unsatisfactory distinction,¹⁵⁵ can be used to achieve the same result. This approach was indeed considered by Lord Hodson in *Boys*. The disadvantage of proceeding along such lines is that there is no need for a judge who seeks to apply a combination of legal rules from more than one legal system to contemplate fully and discuss the merits of this approach as a matter of conflict methodology.

Second, I wish to take issue with the Law Commissions’ conclusion that the “flexibility that *dépeçage* would provide will, in any event, be a feature of our reformed choice of law rules”.¹⁵⁶ There is nothing to suggest that the degree of flexibility which may result from combining substantive legal rules from different legal systems can be equalled by a “flexible” choice of one legal system to govern the entire dispute. Rather, the combination of legal rules will, by definition, exceed the number of legal systems which could apply. Although one may argue that this increased flexibility is undesirable (which is another argument altogether), one cannot say that *dépeçage* does not provide a greater degree of flexibility.

Third, I wish to make a point relating *dépeçage* to concerns of the multi-state system. Although some may argue that application of a combination of legal rules will fail to properly serve the interests of any jurisdiction, I do not consider this a

¹⁵³ Report, *supra* note 83 at 27.

¹⁵⁴ Maslechko, *supra* note 3 at 71.

¹⁵⁵ Lord Wilberforce recognizes the trouble with solving cases on this basis in *Boys v. Chaplin*, *supra* note 2 at 1104-05.

¹⁵⁶ Report, *supra* note 83 at 27.

significant objection. As Maslechko notes, "cases involving foreign facts are different from wholly domestic cases and the concerns about a local legal system's internal integrity may have no place, or at least, may demand less concern in a multistate case than in a completely domestic case."¹⁵⁷

Fourth, it is necessary to discuss what I consider to be the strongest criticism of the application of *dépeçage*. That is, the concern of excess flexibility. Once again, not surprisingly, the factors which make a particular concept attractive in terms of justice and fairness are somewhat in tension with concerns of predictability and certainty of outcome. I do not intend to suggest that there is any easy answer to determine to what extent each should play a role for all cases. Rather, I will simply suggest that in light of the above comments, the concerns created by increased flexibility may be overstated. Moreover, to the extent that they are not overstated, one should recall that the best method to battle uncertainty without the introduction of rigid arbitrariness is to address to the competing considerations and employ them in a principled methodology which recognizes and weighs the competing concerns.

Finally, I would note that where a flexible exception to a general choice of law rule is used, *dépeçage* may actually serve to *lessen* concerns of uncertainty and unpredictability. The reason is that the flexible exception will be less formidable if the court is able to apply it only in respect of the issue which warrants exception, rather than opting for a wholesale displacement of the laws which would otherwise govern the entire dispute. Invocation of the flexible exception will likely prove less disruptive given the option of *dépeçage* than it would if the court were forced to choose between complete application of the laws of one jurisdiction or another. It simply gives the jurist a greater degree of dexterity than would otherwise exist presuming a flexible exception is contemplated.

IV. A PROPOSED CANADIAN METHODOLOGY

Not surprisingly, after having completed this examination I have come to the conclusion that neither the present British nor American approach to choice of law determination for tort provides a simple and transportable solution for Canada. Given that significant debate is occurring in each country at the present time regarding its own approach to these problems, one would be naive to suggest that any particular approach could simply and effectively be replicated in Canada.

That said, one cannot forget that the presently inadequate state of law in Canada must give way to *some* proposed solution. Moreover, as a result of *Grimes v. Cloutier*, *Tolofson v. Jensen*, and *Gagnon v. Gagnon*, it appears that a decision will be made in Canada in rather short order. Thus, at risk of adding yet another wet log to the smouldering fire, I shall attempt to set out a particular choice of law methodology for Canada which I believe best respects the lessons of choice of law determination in Canada, Britain and the United States, and which properly balances the many competing concerns in this area, such as predictability vs. flexibility, individual justice vs. respect for governmental interest, etc. No doubt this proposal

¹⁵⁷ Maslechko, *supra* note 3 at 72.

would fail to receive support from all different perspectives. That is inevitable given the divergent views which presently exist. The more important goal, however, is to achieve a workable compromise between the competing perspectives which does not simply aggregate and adumbrate the various methodological positions, but rather which seeks to provide a basis upon which practitioners and jurists with limited time, resources and expertise can properly counsel and resolve multi-state tort problems. Finally, it should be noted that no prescriptive method of choice of law determination can itself provide sound jurisprudence in this area. At best, an effort such as the present one can start jurists off on the right foot. So long as the march is not hobbled from the start and does not founder because of internal contradictions, a prescriptive methodology must be deemed to be successful.

A. The Proposal

I therefore propose that choice of law methodology for tort in Canada be replaced with the following:

I. When presented with a tort which involves multi-state elements the court, as a general rule, should apply the law of the place of the wrong which shall be determined as follows:

(i) personal injury and damage to property:

the country where the person was when she or he was injured or the property was when it was damaged;

(ii) death:

the country where the deceased was when she or he was fatally injured;

(iii) in all other cases the court should consider the jurisdiction where the most significant elements of the tort occurred, having regard to both quantitative and qualitative factual considerations.

II. An exception to the general rule *may* be invoked if, for all purposes or with respect to a particular issue,

(i) the law of the place of the wrong is not the law with which the parties have the most real and substantial connection; AND/OR

(ii) application of another law would clearly give greater effect to the governmental interests involved in the case;

in which case the law which better satisfies these concerns may be applied, BUT;

III. In deciding whether the exception to the general rule should be applied, the court should endeavour to determine whether the advantages of certainty,

predictability, uniformity of result and concerns of an effective multi-state system are outweighed by the advantages resulting from application of a law other than that of the place of the wrong. Additionally, when deciding whether a particular issue should be decided through the use of *dépeçage*, consideration should be given to whether concerns of complexity, incompatibility of legal rules and unpredictability outweigh the advantages of the use of *dépeçage*.

B. Comments

At this point it is necessary to comment upon the proposal I have put forth. I do not, however, intend to discuss each element of the proposal, as it obviously reflects many of the arguments I have made earlier. One will also readily note that my proposed methodology reflects, at least in part, the position of the Law Commissions in their final report. Significant differences do however remain and it is necessary that I comment on them.

Both proposals set out the *lex loci delicti* as the *prima facie* applicable law and set out certain *prima facie* determinations of the place of the tort. In addition, both acknowledge that in any particular case where the place of the wrong is unclear, the laws of the jurisdiction where “the most significant elements” of the tort occur should apply. The present proposal is somewhat different in that it stipulates that both qualitative and quantitative factors should be considered by the court in this determination so that the matter is not determined by a simple counting of contacts. It also seeks to have the court determine where the tort occurs *before* it may have recourse to the flexible exception. The Law Commissions’ proposals allows a court to invoke directly the flexible exception where it considers the *loci delicti* to be unidentifiable. It would appear to me that in the interest of developing precedent and limiting the possibility of excess recourse to the flexible exception, the former alternative is preferable.

The most significant difference between the two proposals is in respect of the flexible exception itself. One will recall that earlier in this paper I have criticized the approach taken by the Commission in this regard.¹⁵⁸ Their *criterion* for invoking the exception appears to be the existence of a jurisdiction with the “most real and substantial connection” whose laws would not otherwise be applied. There does not appear to be any consideration of governmental interest nor is there explicit reference to concerns of the multi-state system. The proposal I am advocating is different in this regard.

First, the present proposal allows a role for governmental interest analysis as a criterion for the application of the flexible exception. The significance of governmental interest analysis has been discussed elsewhere in this paper and I need not discuss it further here. Suffice it to say that the present proposal seeks to respect the value of the governmental interest approach (and especially its contribution of the exposure of false conflicts) but that it seeks to limit the uncertainty for which it has

¹⁵⁸ See section II.B.6 above.

been criticized by limiting its role to application of the flexible exception. That is to suggest that governmental interest will only be resorted to in the cases where it clearly has something positive to offer which outweighs concerns of uncertainty, unpredictability, etc. It is not intended to be the starting point or general method of analysis for all multi-state problems. By failing to recognize the importance of this concept to American methodology, and especially its usefulness in exposing false conflicts, the proposal of the Law Commissions is, in my respectful view, somewhat inadequate.

A similar point should be made with respect to concerns of the multi-state system. Although I certainly do not suggest that this can or should be the most important consideration in a choice of law methodology for tort, it is clear that this is a significant factor upon which the Commissions' proposal falls silent. Because I acknowledge that this may be a very amorphous concept for judges to employ, I have suggested that it be used only as a means to limit the use of the flexible exception, not as a primary factor in and of itself.

Another important distinction between my proposed methodology and that advocated by the Law Commissions is the issue of *dépeçage*. I have earlier set out the reasons why I am in favour of the use of the concept generally. As may be seen from paragraph II, I have advocated the use of *dépeçage* only in respect of use of the flexible exception. I have done this because I feel that the basic rule of *lex loci delicti* will in most instances suffice to govern the entire dispute in question and application of *dépeçage* with respect to the basic rule might unduly undermine certainty and predictability. Therefore, I suggest that where a tort occurs in a particular jurisdiction, all elements of the dispute such as inter-spousal immunity, heads of damage, etc., should be governed by the same legal system *unless* a sufficient case can be made for the application of the flexible exception in respect of that issue. For example, this would mean that it is not enough for a party to argue that heads of damage is simply a different issue from the tortiousness of the tort and should be governed by another law. Rather, they would have to argue successfully that application of a different law would be warranted in respect of a particular issue according to the criteria for use of the flexible exception. In this way both *dépeçage* and the flexible exception are restrained in a principled manner.

Moreover, the criteria which are enunciated in an effort to limit the invocation of *dépeçage* and the flexible exception will likely not be applied with similar force in respect of all issues. Rather, certain issues such as inter-spousal immunity may, under paragraph II, have greater claim to the use of an exception to the general rule as a matter of governmental interest than might heads of damages. Similarly, certain issues may, to a greater extent, bring into play concerns of predictability and certainty, and this will serve to limit application of *dépeçage* and the flexible exception to a greater degree in those instances. This will further serve to ensure that the exception and the use of *dépeçage* do not serve to undermine the basic rule itself.

Of perhaps even greater importance than reaching a conclusion as to whether *dépeçage* is *per se* desirable or undesirable is the need to recognize fully the implications of the concept for choice of law methodology. By specifically broaching

the issue one may hope that judges will reach a principled conclusion which at least may acknowledge (if not reconcile) the competing concerns so often at play in choice of law determination. One may confidently suggest that the greatest enemy of principled choice of law determination is a failure to recognize and give explicit regard to all relevant concerns and that the issue of *dépeçage* is one which can withstand more direct consideration.

The present proposal seeks to give significant guidance to the court in determining whether it should invoke the flexible exception in a particular case. For this reason the flexible exception in paragraph II is phrased only in a permissive sense, and paragraph III provides limiting guidelines. It requires the court to give due regard to the advantages of application of the *lex loci delicti* such as certainty and predictability, and it further requires that the court explicitly consider concerns of the multi-state system and issues of *dépeçage*. Each of these provides a reason why the court may choose not to apply the flexible exception *even where the basis of invocation of the flexible exception noted in section II is met*. There does not appear to be any such guidance in the proposal of the Law Commissions. Indeed, their flexible exception seems to be both extremely open-ended and difficult to comprehend fully. I would respectfully submit that it reflects the rather uncertain appreciation of rule-based American approaches discussed earlier in this paper and that it would provide for great uncertainty in both invocation and application. It may also lead to excessive use of the exception because it can readily be interpreted, in a very subjective manner, to cover a great many situations. I am, of course, not fooled into believing that, by simply suggesting what factors judges should consider when applying the flexible exception, they will be steadily guided by some sort of invisible hand. My aim is indeed much more modest — it is to ensure that judges are at least cognizant of these competing concerns and that they are addressed in a forthright fashion. By ensuring that these issues are at least considered, one has made significant gain.

Finally I should note that of equal importance to the analysis discussed in this paper is the understandability and workability of any proposed methodology. If I may be criticized for a simplistic or inelegant understanding of the Law Commissions' proposal, I trust that I might seek some solace from the fact that many courts would find themselves in the same position because the proposal is indeed difficult to penetrate. Thus I have sought to provide a methodology which is at once sophisticated and clear. It seeks to provide a means by which judges may separate the various concerns which should go into such a determination, while at the same time giving due regard to them all. It is not meant to be an artificial step-by-step method by which the "right" result will emerge, but rather a useful and principled guide for choice of law determinations for tort.

Ultimately, I would consider the proposed solution for Canada successful if it serves to provide the reader with a principled approach serving the ends of justice and fairness, as defined in the broadest sense, in problems of a multi-state nature. I have not sought to provide a *simple* solution, for I consider such an effort to be both

unrealistic and unfruitful. If we are to avoid the mechanical application of the strict jurisdiction selecting approach and all the inadequacies that this entails, we must move forward into somewhat uncharted waters, guided as much as possible by the achievements and difficulties evidenced in other jurisdictions such as Britain and the United States. It is my hope that the present proposal does just that, or at very minimum will stimulate constructive and creative criticism of present approaches to these problems in Canada.

