CONFLICTS OF LAW:
THE "CHOICE OF LAW RULE"
IN TORTS CASES

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BIOGRAPHICAL INFORMATION

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Erin received a B.A. (Hon.) in Philosophy from Queen's University in 1989 and her LL.B., also from Queen's University in 1992. She was called to the Saskatchewan bar in 1993. Erin's areas of practice are in Commercial, Banking, and Bankruptcy and Litigation. She co-authored a paper on "Privileged Communication and Privileged Documents, Special Documents" for the Continuing Legal Education seminar "Judicial Trends in the Discovery Process" held in November 1992. Erin practices with McDougall Ready in Regina.
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I. INTRODUCTION

The conflict of laws, or private international law, as it is sometimes called, is that part of the law of a country that is concerned with the resolution of legal disputes involving one or more foreign elements. Although the bulk of the laws of any country is concerned with the resolution of purely domestic disputes, the increasing extension of personal and business relationships beyond national boundaries has created problems outside the generally accepted scope of domestic law. The conflict of laws has evolved as a separate body of law, existing alongside domestic laws, to deal with the legal problems resulting from situations containing extraterritorial elements.

These opening words of Professor James G. McLeod's text, The Conflict of Laws (1983: Carswell), highlight an area of the law most practicing lawyers view with a mixture of fear and disdain. Problems of conflicts of law are perceived as being of more academic than pragmatic significance in the day-to-day practice of law. However, a recent set of decisions handed down by the Supreme Court of Canada dealing with the "choice of law" rule in torts cases (where those cases concern events taking place wholly within Canada) may have a significant practical effect on the practice of law in this area for many practitioners.

II. THE ISSUES IN THE TOLOFSON AND LUCAS DECISIONS

The appeals in Tolofson v. Jensen, and Lucas (Litigation Guardian of) v. Gagnon, reported concurrently at [1994] 3 S.C.R. 1022, [1995] 1 W.W.R. 609, 120 D.L.R. (4th) 289, dealt with the "choice of law rule": which law should govern in cases involving the interests of more than one jurisdiction, specifically as it concerns automobile accidents involving residents of different provinces. The facts of these cases are relevant for context only.

In Tolofson (supra), the plaintiff, Tolofson, a 12-year-old passenger in a car driven by his father, was seriously injured in a car accident with Jensen. The accident occurred in Saskatchewan; the Tolofsons were residents of and their car was registered in British
Columbia. Jensen was a resident of and his car was registered in Saskatchewan. The Plaintiff brought an action eight years later in British Columbia on the assumption that the action was statute-barred under Saskatchewan law. Further, Saskatchewan law, unlike British Columbia law, did not permit a gratuitous passenger to recover, absent wilful or wanton misconduct of the driver of the car in which he or she was travelling.2 Neither defendant admitted liability. The defendants brought an application by consent to seek a determination as to whether the British Columbia court was a forum non conveniens or alternatively as to whether Saskatchewan law applied.

In Lucas (supra), the Gagnons, who were residents of Ontario, brought an action in Ontario against Lavoie, a resident of Quebec, for injuries suffered in an automobile accident in Quebec, the domestic law of which precluded any tort action. Lavoie had cross-claimed for indemnity against one of the plaintiffs. Several elements of the complex lawsuit had been discontinued before the case came before the Supreme Court, but the cross-claim had not been resolved.

Therefore, both cases raised the question of the choice of law for determining the liability of the defendants where the plaintiffs were residents of the forum of the court, the defendants residents of the place where the tort occurred (the locus delicti), and the law of the jurisdiction where the tort occurred (the lex loci delicti) would negate the claim in tort.

III. THE STATE OF THE LAW PRIOR TO TOLOFSON

La Forest, 1. (on behalf of Gonthier, Cory, McLachlin and Iacobucci, J1., Major and Sopinka, JJ. concurring) provided the decision of the Court. He began with an extensive review of the jurisprudence to date for resolving conflicts of law problems. A thorough and succinct summary of that law can also be found in Professor John Irvine's paper: Choice of Law in Torts: The Death of Phillips v. Eyre, prepared for the seminar on
As suggested by the title of Professor Irvine's paper, the starting point for the law in this area was the English decision in Phillips v Eyre (1870), L.R. 6 Q.B. 1 (Ex. Ch.). The distillation of the "rule" in that case can be found in the following passage of Willes J., at pp.28-29:

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.

Willes, J's judgment was subsequently interpreted by the appeal court in Machado v. Fontes, [1897] 2 Q.B. 231. The Court interpreted the above passage as meaning that an action in respect of an act committed abroad could be brought in England in the same way as if it had taken place in England, so long as it was not justified or excused under the law of the place where it was committed.

These decisions supported what became a general rule of application, that the lex fori, being the law of the forum or jurisdiction in which the action was brought, would play a dominant role in determining most substantive issues, and that all procedural matters would be similarly governed by the lex fori.

Essentially, the existing Canadian law was set forth in the Supreme Court's decision in McLean v. Pettigrew [1945] S.C.R. 62, following the decision in Phillips v. Eyre as interpreted in Machado v. Fontes. In McLean a driver and his gratuitous passenger, both domiciled in Quebec, had a car accident in Ontario, and the passenger sued the driver in Quebec. Under Ontario law, the claim would not have been actionable. It would, however, have been actionable in Quebec had it occurred there. Applying the prevalent English law, the Court found that since the tort was actionable in Quebec, and the driver's
conduct, though not actionable in Ontario, was prohibited under *The Highway Traffic Act*, R.S.O. 1937, c. 288, sA7, of that province, it was not "justifiable" in Ontario. It, therefore, upheld the plaintiffs action under Quebec law.

**IV. THE "RULE" IN TOLOFSON**

La Forest, J. conceded what had been observed by a plethora of judges in the past, that applying the *lex fori* as to liability and assessment in essence constituted an extraterritorial extension of the law of the forum. The fairness and practicality of this application was in question. Furthermore, the application of the *lex fori* would not likely meet the expectations of the parties to the lawsuit as to what law their actions would be governed by at the time the tort was committed. Consequently, the Supreme Court responded to the inadequacies of the law to date and pronounced a profound reversal, overruling both the English authorities, and its own decision in *McLean v. Pettigrew*.

La Forest J: held that the rule of private international law that should generally be applied to torts is the law of the place where the activity occurred - the *lex loci delicti*. He stated, at pp. 1049-1050:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. ... [A]s Willes J. pointed out in *Phillips v. Eyre*, supra, at p. 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

The Court concluded that the former British rule, adopted in *McLean v. Pettigrew*, that a court should apply its law (*lex fori*) when adjudicating on wrongs committed in another jurisdiction, subject to the wrong's being "unjustifiable" in that jurisdiction, could no longer be accepted. This would involve a court's defining the nature and consequences of
an act done in another jurisdiction, which, barring some principled justification, flies against the territoriality principle. In practice, the courts of different jurisdictions would follow different rules in respect of the same wrong and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Given the constant mobility between the provinces as well as similar legal regimes, forum shopping in a federal state like Canada would be too convenient and compelling.

It should be noted that La Forest J. did not go so far as to make the rule of applying *lex loci delicti* absolute. He was prepared to admit that there may be exceptions but that they would need to be very carefully defined. For example, he recognized the ability of the parties by agreement to choose to be governed by the *lex fori* and a discretion to depart from the absolute rule in international litigation in circumstances where the *lex loci delicti* rule would work an injustice. Major J., for himself and Sopinka J., concurring in the result, indicated he would not foreclose a similar exception in interprovincial litigation.

The new "rule" in Tolofson, as La Forest J. himself observed, has a number of advantages. It is certain, easy to apply and predictable, and meets normal expectations in that people ordinarily expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with the power to deal with these activities. If other "states" routinely applied their laws to activities taking place elsewhere, confusion would be the result. The rule of applying *lex loci delicti* ensures order, and in La Forest's words, "order is a precondition to justice".

V. THE ISSUE OF LIMITATION PERIODS

The facts of Tolofson also raised an important subsidiary issue: assuming that the applicable substantive law to be applied is the *lex loci delicti*, is any limitation period established pursuant to that law inapplicable as being procedural law and so not binding on the court hearing the case, or is it similarly substantive, and applicable?
The determination of whether a statute of limitation was procedural or substantive was crucial because, while the substantive rights of the parties to an action may be governed by foreign law, all matters of procedure are governed exclusively by the law of the forum. The reason for the distinction is that the forum court cannot be expected to apply every procedural rule of the foreign state whose substantive law it wishes to apply. The forum's procedural rules exist for the convenience and the efficient administration of the court and the forum's judges understand them. They are part of the forum court's "machinery", and cannot be supplanted.

The old common law rule had held that statutes of limitation are always procedural. The Supreme Court used Tolofson to challenge and overturn that principle as well. La Forest J. held that limitation periods are substantive because they create an accrued right in the defendant to plead a time bar. He stated, at p. 1073:

The extent to which limitation statutes should go in protecting individuals against stale claims obviously involves policy considerations unrelated to the manner in which a court must carry out its functions, and the particular balance may vary from place to place. To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster.

Therefore, the statutes of limitation in the forum where the tort was committed will govern between the parties. This is not to say that procedural rules of the forum court may not affect the operation of a statute of limitation of the lex loci delicti. Thus, whether or not a litigant must plead a statute of limitation if he or she wishes to rely on it is undoubtedly a matter of procedure for the forum. As well, limitation periods included in the various rules of court, such as those for the filings of pleadings are similarly procedural matters. Finally, La Forest J. conceded that a substantive limitation defence may be waived either by failure to plead it, if this is required, or by agreement.
The Supreme Court concluded by finding that in Tolofson the proper choice of law to be applied was that of Saskatchewan, and that the Saskatchewan limitation period was substantive, and thus, effective. In Lucas, it held that Quebec law applied to the action, and as such the cross-claim for indemnity could not be maintained.

VI. LOSS PREVENTION APPLICATIONS

The affirmation of the *lex loci delicti* rule, and the finding that statutes of limitation are substantive in nature, and thus those of the *lex loci delicti* will apply, has broad loss prevention ramifications. Practitioners who are retained to commence an action for a tort committed outside the Province of Saskatchewan must be aware that the action may not be governed by the same limitation periods with which he or she is familiar. Therefore, a prudent and necessary "first step" is to retain an agent in the jurisdiction of the tort to advise as to the relevant limitation and notice periods. Although not specifically addressed by the Supreme Court in Tolofson, it is reasonable to assume that a notice period, such as that found in section 321(4) of The Urban Municipalities Act, 1984, or section 85(3) of The Highways and Transportation Act would also be considered substantive, and thus such notice periods in the *locus delicti* would also apply.

For preliminary assistance in this regard, attached is an Appendix outlining some of the general limitation periods in various Canadian jurisdictions. The contents are by no means exhaustive but merely serve to illustrate the divergence of limitations legislation in force in other jurisdictions, and to highlight the imperative of retaining local counsel as soon as one is retained by a client to guide one through the limitation period minefield.

One interesting provision is found in section 15 of The Limitation Act of British Columbia. That section allows for the application of the limitation law of the foreign jurisdiction, even if procedural, "if a more just result is produced". One wonders how this section will be interpreted in light of Tolofson, and in particular the finding in Tolofson that a shorter limitation under the *lex loci delicti* than under the laws of the province where the action is heard is not so repugnant to public policy that the court of
the forum should not apply it. The "window" which section 15 appears to leave open in British Columbia may have been effectively closed by the Supreme Court of Canada.

VII. CONCLUSION

The decision in Tolofson is not a panacea to the maze of conflict of laws problems. As pointed out by Professor Irvine, La Forest J. makes exclusive reference to the *lex loci delicti*. However, what the *lex loci delicti* is is not always without question. Is it the place where the acts were done, which are alleged to have constituted the wrong? Or, in cases where proof of damage is of the essence of the tort, is it the place where the cause of action was completed by the infliction of harm? Or is it (in conformity with the modern Canadian law on limitation periods) the place where the plaintiff, if reasonably alert, ought reasonably to have become aware for the first time that a wrong had been done to him? La Forest J. himself recognized this conundrum when he stated that there are situations where an act occurs in one place but the consequences are directly felt elsewhere. 'In such a case he held that it may well be that the consequence would be held to constitute the wrong, and as such, the forum of the consequences would be the relevant *lex loci delicti*.

Despite these areas of debate, the decision in Tolofson is a remarkable improvement to the "choice of law" quandry. It provides certainty, fairness, ease of application and predictability, and allows practitioners to move beyond a debate as to the appropriate substantive law, and on to the process of litigating the merits of the case at hand.
ENDNOTES


2. Both the limitation period and the gratuituous passenger laws of Saskatchewan had since been repealed.


4. Tolofson, p. 1073.

APPENDIX OF GENERAL LIMITATION PERIODS IN TORT

(Compiled from the C.E.D. (West), Title 84: Limitation of Actions)  
[Current to November, 1994]

[The following summary is not comprehensive and does not reflect amendments to legislation enacted after November, 1994. Counsel are advised to contact local counsel in the appropriate jurisdiction regarding the relevant limitation periods.]

ALBERTA

1. Unless otherwise specifically provided for in Part II of The Limitation of Actions Act, the limitation period is two years for the following actions:

   (a) defamation;
   (b) trespass to the person (assault, battery, etc.) including in negligence;
   (c) false imprisonment;
   (d) malicious prosecution;
   (e) seduction;
   (f) trespass or injury to real property or chattels, including in negligence;
   (g) conversion or detention of chattels.

   (section 51)

2. The limitation period for a slander action is two years and begins to run when the slanderous words are spoken (section 51(a). An action for libel in a newspaper or broadcast must be commenced within three months after the libel comes to the attention of the person defamed (Defamation Act, section 13). Notice of a possible action must also be served on the newspaper or broadcaster within the proscribed period after the libel comes to the attention of the person defamed.

3. Any action taken against a municipality arising out of the performance or non-performance of its statutory duties respecting construction, maintenance, or repair of roads must be taken within thirty days from the time the damage was suffered (Municipal Government Act, sections 532(9), (10»).

4. Actions against a medical practitioner for negligence or malpractice must be brought within one year of the injured party discovering, or becoming reasonably able to discover, the facts which form the basis of the action (section 55)

5. An action against an approved hospital with respect to negligence in providing a service in that hospital may be commenced within one year after the cause of action arose, and not afterward (sections 55, 56).
BRITISH COLUMBIA

1. A two-year limitation period applies in *The Limitation Act* to the following actions:

   (a) damages in respect of injury to person or property, including economic loss, but excluding actions based on sexual misconduct toward minors;
   (b) trespass to property;
   (c) defamation;
   (d) false imprisonment;
   (e) malicious prosecution;
   (f) seduction.

2. There is also a two-year limitation period for torts committed under *The Privacy Act*, *The Family Compensation Act* and *The Engineers and Geoscientists Act*.

3. No action may be taken against a municipality arising out of the performance or non-performance of its statutory duties respecting construction, maintenance, or repair of roads unless notice of the claim is given to the municipality concerned within two months of the damage occurring (*The Municipal Act*, section 755).

4. Actions against a medical practitioner for negligence or malpractice must be brought within two years of the injured party discovering, or becoming reasonably able to discover, the facts which form the basis of the action (section 3).

5. No action against a hospital (as defined in *The Hospital Act*) or against a hospital employee acting in the course of his or her employment, based on negligence, may be brought after the expiration of six years from the date on which the right to do so arose (sections 3, 4, 6 & 8).

MANITOBA

1. Under *The Limitation of Actions Act* a two-year limitation period applies to the following actions:

   (a) defamation;
   (b) violation of privacy;
   (c) malicious prosecution;
   (d) seduction;
   (e) false imprisonment;
   (f) trespass to the person;
   (g) trespass or injury to chattels.
2. A six-year limitation period applies to the following actions:
   
   (a) fraudulent misrepresentation;
   (b) trespass or injury to real property;
   (c) conversion or detention of chattels

3. Actions against a medical practitioner for negligence or malpractice must be brought within two years of the injured party discovering, or becoming reasonably able to discover, the facts which form the basis of the action (The Medical Act, section 61).

ONTARIO

1. Under The Limitations Act an action upon the case for words (slander) has a two-year limitation period, an action for assault, battery, wounding or imprisonment must be brought within four years, and a six-year limitation period applies to actions for trespass to goods or land.

2. An action for libel in a newspaper or broadcast must be commenced within three months after the libel comes to the attention of the person defamed, but any such action may include claims for other libels committed by the defendant within one year of the commencement of the action. Notice of a possible action must be served on the newspaper or broadcaster within the proscribed period after the libel comes to the attention of the person defamed. This special limitation can be used by a newspaper only if the name and address of the publisher and owner appear in a prominent location of the newspaper (Libel and Slander Act, sections 5, 6 and 8(1)).

3. Any action taken against a municipality arising out of the performance or non-performance of its statutory duties respecting construction, maintenance, or repair of roads must be taken within three months from the time the damage was suffered (Municipal Act, sections 284, 285).

4. There is a special one-year limitation period under The Ambulance Act which pertains to an action against an ambulance operator or employee of an operator for negligence in providing ambulance services to a patient. The usual two-year limitation period in The Highway Traffic Act applies to general actions for negligence in operating an ambulance on the highway.

5. The Railway Act requires that an action for injury suffered by reason of the construction or operation of a railway must be brought within one year of the damages being suffered, or, in a case of continuing damage, within one year of
the termination of the continuing damage. The Toronto Transit Commission is a street railway which is covered by this limitation, therefore, an action for injuries suffered on at or in a TTC subway station must be brought within one year. The special limitation protection does not apply to interprovincial or extraprovincial railways.

6. Actions against a medical practitioner for negligence or malpractice must be brought within one year of the injured party discovering, or becoming reasonably able to discover, the facts which form the basis of the action (Health Disciplines Act, section 17).

7. An action by a former patient against a public hospital or employee for damages for injury caused by negligence in care must be commenced within two years of the patient ceasing to receive treatment (Public Hospitals Act, section 31).