

HOMING DEVICES IN CHOICE OF TORT LAW: AUSTRALIAN, BRITISH, AND CANADIAN APPROACHES

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Abstract Since 1994, Canada, the United Kingdom and Australia have adopted new choice of law rules for cross-border torts that, in different ways, centre on the application of the law of the place where the tort occurred (the *lex loci delicti*). All three countries abandoned some species of the rule in *Phillips v Eyre*, which required some reference to the law of the forum (the *lex fori*) as well as the *lex loci delicti*. However, predictions were made that, where possible, courts in these countries would continue to show a strong inclination to apply the *lex fori* in cross-border tort cases—and would use a range of homing devices to do so. A comprehensive survey and analysis of the cases that have been decided under the Australian, British and Canadian *lex loci delicti* regimes suggests that courts in these countries do betray a homing instinct, but one that has actually been tightly restrained by appeal courts. Where application of the *lex fori* was formally allowed by use of a ‘flexible exception’ in Canada and the United Kingdom, this has been contained by courts of first appeal. Indeed, only the continuing characterization of the assessment of damages as a procedural question in Canada and the United Kingdom, seems to remain as a significant homing device for courts in these countries.

I. INTRODUCTION

In the last decade or so, Australia, Canada, and the United Kingdom have adopted choice of law rules that have questions of tort (or delict) governed principally by the law of the place where the tort occurred (the *lex loci delicti*). All three countries are multi-jurisdictional States, and adopted the *lex loci delicti* rule for both intranational and international cross-border torts. In doing so they all abandoned some species of the rule in *Phillips v Eyre*,¹ which

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¹ (1870) LR 6 QB 1. In this article, ‘the rule in *Phillips v Eyre*’ is taken to refer to the family of choice of law rules (including the double actionability rule) that trace their origin to the decision in *Phillips v Eyre* itself. Each species of the rule, consistent with the structure of *Phillips v Eyre*, makes some reference to both the *lex fori* and the *lex loci delicti* in dealing with cross-border tort cases.

required a local court to refer, in one way or another, to both the law of the forum (the *lex fori*) and the *lex loci delicti* when deciding claims involving cross-border torts.

The rule in *Phillips v Eyre* was the product of almost 130 years of judicial indecision. Especially in the shape it took in England, the rule cobbled together most of the significant suggestions that had been made from the 19th century for the best choice of law rule in tort, with only vague means of prioritizing them. *Phillips v Eyre* itself blended the older rules resting on application of the *lex loci delicti* with the Privy Council's adoption of the *lex fori* in *The Halley*.² A century later in *Boys v Chaplin*,³ Lord Wilberforce changed *Phillips v Eyre*'s requirement that the claim not be justifiable in the place of the tort with a requirement that it be actionable there. His Lordship also supplemented the rule with theories of a proper law of the tort⁴ and governmental interest analysis⁵ to carve out an exception that allowed, in some cases, just the *lex fori* or just the *lex loci delicti*⁶ to govern a cross-border tort claim.

In his support for maintaining the rule in *Phillips v Eyre*, Mr PB Carter lauded 'the simple policy-based structure' of the most recent iteration of the rule in England, which absorbed aspects of territorial sovereignty in its *lex loci delicti* side, alongside 'a generally accepted underlying feeling' that the *lex fori* should apply broadly to questions of individual wrongdoing.⁷ In truth, the latter is not a 'policy' rationale for the rule but, instead, merely restates the essential forum control inherent in all species of *Phillips v Eyre*. The evolution of the rule in England⁸ and Scotland⁹ made the *lex fori*, together with the *lex loci delicti*, the governing law under a double-barrelled choice of law rule. In the Canadian version of *Phillips v Eyre* the governing law was principally the *lex fori*,¹⁰ but opportunities emerged in the late 1980s for the English double-actionability approach to be applied as an alternative.¹¹ In Australia the ambiguities in the rule as stated by the country's High Court were more pronounced, but some States still opted for the *lex fori* as the governing law and others took the 'double actionability' approach of the English courts.¹²

² *Liverpool, Brazil and River Plate Steam Navigation Co Ltd v Benham, 'The Halley'* (1868) LR 2 PC 193. ³ [1971] AC 356, 391.

⁴ JC Morris 'The Proper Law of a Tort' (1951) 64 Harvard Law Review 881.

⁵ B Currie *Selected Essays on the Conflict of Laws* (Duke University Press Durham NC 1963) 177–87.

⁶ *Red Sea Insurance Co v Bouyges SA* [1995] 1 AC 190.

⁷ PB Carter 'Choice of Law in Tort: The Role of the *Lex Fori*' [1995] CLJ 38, 40–1. See also A Reed 'The Private International Law (Miscellaneous Provisions) Act 1995 and the Need for Escape Devices' (1996) 15 Civil Justice Quarterly 305, 306.

⁸ *Coupland v Arabian Gulf Oil Co* [1983] 3 All ER 226; *Armagas Ltd v Mundogas SA* [1986] AC 717, 740–1, 752–3.

⁹ *M'Elroy v M'Allister* 1949 SC 110.

¹⁰ *McLean v Pettigrew* [1945] SCR 62, 78.

¹¹ *Grimes v Cloutier* (1989) 61 DLR (4th) 505; *Prefontaine Estate v Frizzle* (1990) 65 DLR (4th) 275

¹² See M Davies 'Exactly What is the Australian Choice of Law Rule in Torts Cases?' (1996) 70 Australian Law Journal 711; G Lindell '*Regie Nationale des Usines Renault SA v Zhang*' (2002) 3 Melbourne Journal of International Law 362, 367–8.

Even in Victoria, where *Phillips v Eyre* was understood as leaving the *lex loci delicti* alone as the governing law, the claim would only be justiciable if it were actionable under the *lex fori*.¹³

The adoption of a *lex loci delicti* rule, especially in Australia and Canada, was directed by the belief in a substructure of territorialism beneath the private international law. This had renewed impetus in the more emphatic recognition of other jurisdictions' territorial rights, driven by federal and international cooperation and the ease of cross-border movement and communication. The displacement of *Phillips v Eyre* was therefore intended to free choice of law from the anomalous degree of forum control that Commonwealth courts had maintained in cross-border tort claims.¹⁴ Still, Mr Carter voiced some scepticism as to how successfully the *lex fori* could be dislodged from choice of law in tort. Although the claim has never been quantified, adjudication could easily have given an impression that courts have a powerful 'homing instinct' when dealing with tort claims.¹⁵ On the introduction of the *lex loci delicti* rule, it was therefore thought that judges would find escape routes that would enable them to apply the *lex fori*. Indeed, commentators nominated at least five possible 'homing devices' that they thought courts might adopt. These are:

1. The characterization of the question as a non-tort claim, governed by the *lex fori* under the non-tort choice of law rule.¹⁶
2. The identification of the forum as the place of the tort; the claim being governed by the *lex fori* as the *lex loci delicti*.¹⁷
3. The characterization of the issue in dispute as a procedural question, governed by the *lex fori* as such.¹⁸
4. The use of a flexible exception in favour of the *lex fori* as the governing law.¹⁹
5. The appeal to public policy as a justification for not applying the *lex loci delicti*, and applying the *lex fori* by default.²⁰

¹³ *Wilson v Natrass* (1995) 21 MVR 41, 51.

¹⁴ J Blaikie 'Choice of Law in Delict and Tort: Reform at Last!' (1997) 1 Edinburgh Law Review 361, 365–6; BJ Rodger 'Ascertaining the Statutory *Lex Loci Delicti*: Certain Difficulties under the Private International Law (Miscellaneous Provisions) Act 1995' (1998) 47 ICLQ 205, 205; J Walker 'Choice of Law in Tort: The Supreme Court of Canada Enters the Fray' (1995) 111 LQR 397, 398.

¹⁵ PB Carter 'Choice of Law in Tort and Delict' (1991) 107 LQR 405, 409; Carter (n 7) 41; PB Carter 'The Private International Law (Miscellaneous Provisions) Act 1995' (1996) 112 LQR 190, 193; P Kincaid '*Jensen v Tolofson* and the Revolution in Tort Choice of Law' (1995) 74 Canadian Bar Review 537, 553.

¹⁶ PB Carter, 'The Private International Law (Miscellaneous Provisions) Act 1995' (1996) 112 LQR 190, 193; Reed (n 7) 320–1.

¹⁷ Carter (n 16) 193–4.

¹⁸ CGJ Morse 'Torts in Private International Law: A New Statutory Framework' (1996) 45 ICLQ 888, 895; Reed (n 7) 321–1; Rodger (n 14) 205.

¹⁹ Carter (n 16) 194; cf Reed (n 7) 313.

²⁰ *ibid* 314–20.

In the course of adjudication under the *lex loci delicti* rule, a sixth 'homing device' also emerged: the doctrine of *renvoi*, by which the forum court applies the *lex fori* on a remission under the *locus delicti*'s choice of law rules. This had not been predicted, mainly because of a statutory ban in the United Kingdom on *renvoi* in tort cases.²¹ Even so, only someone with considerable powers of clairvoyance would have foreseen a judicial attempt to use it.

The purpose of this article is to consider whether, and how, courts in Australia, Canada and the United Kingdom have taken the opportunity to use these homing devices to apply the *lex fori* in cross-border tort cases, or whether a more explicit statement of a territorial substructure to the new *lex loci delicti* rules has also controlled any homing instincts the courts might have. Furthermore, a comparison of the approaches taken in the three countries enhances this analysis. Despite the influence that developments in the choice of law rules in each of these countries have had on the others' choice of law rules, there are differences in the degree of formal dominance each country gives to the *lex loci delicti*. A comparative approach therefore also illuminates how effectively each of the new regimes deters judicial escapes to the *lex fori*. Accordingly, in the next section of the article, I map the different choice of law regimes in Australia, Canada and the United Kingdom for cross-border tort claims. I then consider whether and how the six homing devices have been used by the courts since the change to a *lex loci delicti* regime. That enables, finally, a consideration of how well the differently shaped choice of law rules give effect to the basic purposes that the new *lex loci delicti* rules are meant to realize.

II. THREE *LEX LOCI DELICTI* REGIMES

Even though Australia was the last to settle conclusively on a *lex loci delicti* rule for cross-border torts, the first attempt at abandoning the rule in *Phillips v Eyre* in these countries was made by the High Court of Australia in 1988. A majority in *Breavington v Godleman*²² held that liability for interstate torts was to be determined by the law of the State (or Territory) where the tort occurred.²³ However, that majority disagreed as to whether this rule was dictated by constitutional considerations or simply by a need to reform the common law, and the cleavage was enough to allow a different majority in the High Court to return to the rule in *Phillips v Eyre* in 1991.²⁴ *Breavington* was nevertheless one reason mustered by the Supreme Court of Canada in *Tolofson*

²¹ cf A Briggs 'In Praise and Defence of *Renvoi*' (1998) 87 ICLQ 877.

²² (1988) 169 CLR 41.

²³ Followed in *Byrnes v Groote Eylandt Mining Corporation* (1990) 19 NSWLR 13, 23, 32–3, and *Stevens v Head* (1991) 14 MVR 327, 330.

²⁴ *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.

*v Jensen*²⁵ for adopting a *lex loci delicti* rule in relation to both inter-provincial and international torts.²⁶

A. Canada

Tolofson was decided in 1994, and involved two appeals from different Provinces over the law to be applied for inter-provincial motor accidents. In developing underlying principles for dealing with the appeals, La Forest J, who gave the Supreme Court's judgment, eschewed the policy or 'interest' issues that had had significant play in the English adjudication since *Boys v Chaplin*. Territorialism dictated the 'structure' in which the choice of law problem had to be interpreted,²⁷ an assumption that was bound to deliver a more rigid choice of law rule. His Lordship held that 'each State has jurisdiction to make and apply law within its territorial limit', and that '[a]bsent a breach of some overriding norm, other States as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another State chooses to do within those limits.'²⁸ For torts, it was 'axiomatic . . . that, at least as a general rule, the law to be applied . . . is the law of the place where the activity occurred, ie the *lex loci delicti*.'²⁹

In *Tolofson* some consideration was given to the possibility of an exception to the *lex loci delicti* rule. La Forest J recognized that, in international tort cases, 'injustice' might be caused by applying the *lex loci delicti*, and allowed a 'discretion' to apply the relevant Canadian law in those circumstances.³⁰ Whether this really amounted to a flexible exception akin to that adopted in England in *Boys v Chaplin*—or an exception based on the *lex loci delicti*'s offensiveness to the public policy of the forum—was a question for another day and another court. For inter-provincial tort cases, the majority, through La Forest J, refused to recognize any exception to the *lex loci delicti* rule, citing the need to maintain certainty in the selection of the governing law.³¹ Here, Sopinka and Major JJ preferred that inter-provincial tort cases be subject to a similar exception to that allowed for international cases.³²

The appeal in *Tolofson* itself was from British Columbia over a motor accident in Saskatchewan. The plaintiff wished to avoid Saskatchewan's one-year limitation period for claims stemming from motor accidents, as that had expired before proceedings were commenced. If characterized as procedural, the question of the application of the limitation period would be governed by the *lex fori*, and by British Columbia law the proceedings were in time. However, La Forest J also thought that the traditional characterization of statutes of limitation as procedural required correction. Holding that a narrow approach should be taken to procedure, his Lordship ruled that 'the purpose of

²⁵ [1994] 3 SCR 1022.

²⁸ *ibid.*

³¹ *ibid* 1061–2.

²⁶ *ibid* 1051–2, 1063–5.

²⁹ *ibid* 1050.

²⁷ *ibid* 1047.

³⁰ *ibid* 1054.

³² *ibid* 1078.

substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both parties*.³³ If there were any doubt about how to characterize a question, it made sense to resolve that doubt in favour of a substantive characterization.³⁴ The plain result was that statutes of limitation were to be treated as substantive, and in tort cases governed by the *lex loci delicti*.³⁵

B. Australia

From the time of *Breavington*, the Australian High Court consistently voiced the need, compelled by the country's federal constitutional structure, to distinguish between the choice of law rules for interstate and international torts.³⁶ Inevitably, this made it segregate questions of interstate and foreign torts in a way that the Canadian Supreme Court didn't. As a result, the settlement of Australia's choice of law rules for tort came in two stages. Interstate torts were addressed in *John Pfeiffer Pty Limited v Rogerson*,³⁷ an appeal from the Australian Capital Territory that involved a workplace accident in New South Wales. The High Court decided *Pfeiffer* in mid-2000. Liability was not an issue—the only difference between the laws of the ACT and NSW was that a NSW statute capped the damages that could be recovered for a workplace injury. Australian cross-border tort litigation through the 1990s had already been prominent in raising the question of whether issues in dispute should be characterized as substantive or procedural. In 1991, in *McKain v RW Miller & Co (SA) Pty Ltd*,³⁸ a majority in the High Court had held that an interstate statute of limitation was procedural.³⁹ Then, in 1993, in *Stevens v Head*,⁴⁰ a majority decided that an interstate cap on damages was procedural law and, so, inapplicable as it was not part of the *lex fori*.⁴¹ *Pfeiffer* dealt with a question almost identical to *Stevens*, so the Court's unanimous decision that a cap on the recovery of damages was substantive implicitly overruled *Stevens*. The *Pfeiffer* Court's *obiter dictum* that statutes of limitation were also substantive had the same consequence for *McKain*.⁴² That meant that the NSW statute would apply if the law of NSW were the *lex causae*, forcing a conclusive decision on the choice of law rule for interstate torts.⁴³

As in Canada, territorialism was the structural imperative that the High Court adopted for developing a choice of law rule. In *Pfeiffer*, though, this

³³ *ibid* 1071–2. Emphasis in the original.

³⁴ *ibid* 1068–9.

³⁵ *ibid* 1071–3.

³⁶ *Breavington v Godleman* (1988) 169 CLR 41, 77–8, 84–5, 114; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 18, 39.

³⁷ (2000) 203 CLR 503.

³⁸ (1991) 174 CLR 1.

³⁹ *ibid* 44.

⁴⁰ (1993) 176 CLR 433.

⁴¹ *ibid* 460.

⁴² (2000) 203 CLR 503, 544, 554, 570–5.

⁴³ cf G Davis 'John Pfeiffer Pty Ltd v Rogerson: Choice of Law in Tort at the Dawning of the 21st Century' (2000) 24 Melbourne University Law Review 982, 986.

emerged from constitutional considerations rather than public international law.⁴⁴ This helped Gleeson CJ and Gaudron, McHugh, Gummow and Hayne JJ to suggest not only that *Phillips v Eyre* be interred,⁴⁵ but that the *lex loci delicti* be adopted as the governing law for an interstate tort.⁴⁶ A flexible exception to this rule was rejected on the ground of the uncertainty it would breed,⁴⁷ and a discretion not to apply the *lex loci delicti* because it was contrary to the public policy of the State was rejected on the ground that it was constitutionally prohibited.⁴⁸

The second stage in the reform of Australia's choice of law rules dealt with foreign torts. After *Pfeiffer*, the NSW Supreme Court betrayed a powerful parochialism by continuing to follow *McKain* and *Stevens* to allow application of the *lex fori* in international tort cases,⁴⁹ even though both *McKain* and *Stevens* were interstate cases and had—in *Pfeiffer*—been overruled. *Regie National des Usines Renault SA v Zhang*⁵⁰ was one of these, and went on appeal to the High Court. This was an application to set aside service of a NSW writ in France on the ground of *forum non conveniens*. The claim related to injuries that a NSW resident received in an accident in a Renault sedan in New Caledonia, and rested on an allegation of negligent design or manufacture. The car was built in France and it was assumed that, if a tort had occurred, it took place in France.⁵¹ In arguing the question of *forum non conveniens*, one of the most significant factors disputed by the parties was the law that would govern the claim.

The appeal in *Renault* was decided in March 2002. Gleeson CJ and Gaudron, McHugh, Gummow and Hayne JJ again accepted the defendant companies' submission 'that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the *lex loci delicti* should be extended to foreign torts, despite the absence of the significant factor of federal considerations'.⁵²

⁴⁴ (2000) 203 CLR 503, 533–4. See also 536–7, 551. That obliged States to surrender any attempt to apply their own policies to events that occurred in another State: *ibid* 533–4, 541. In addition the Court was influenced by factors like the legislative requirements for the exercise of federal jurisdiction, people's expectations to be subject to the law of the State they happen to be in, certainty and predictability, and the deterrence of forum shopping: *ibid* 532, 536, 538–40, 552–3, 560.

⁴⁵ *ibid* 542.

⁴⁶ *ibid* 544.

⁴⁷ *ibid* 538.

⁴⁸ *ibid* 533–4. Kirby J (559, 562–3) concurred in the adoption of this choice of law regime. Callinan J (576) dissented on the choice of law point; expressing some preference for *Phillips v Eyre* and even allowing a public policy exception to the rule to the extent that it required actionability in the place of the tort.

⁴⁹ *Oz-US Film Productions Pty Limited v Heath* [2001] NSWSC 298, [93], [105]–[110]; *Zhang v Regie des Usines Renault SA* [2000] NSWCA 188, [50]–[52].

⁵⁰ (2002) 210 CLR 491.

⁵¹ Whether that meant the metropole or New Caledonia made no real difference. Kirby J suggested (539) that New Caledonia was the *locus delicti*.

⁵² (2002) 210 CLR 491, 520.

Territoriality, though dislodged from the constitutional considerations that drove the decision in *Pfeiffer*, again suggested that the *lex loci delicti* should govern the claim.⁵³ Furthermore, continuing the identical treatment of interstate and international torts, the joint majority appeared to reject any flexible exception to the *lex loci delicti*. The only exception to the *lex loci delicti* that was allowed for international torts in *Renault* was one based on public policy grounds,⁵⁴ an exception that was held to be constitutionally forbidden for interstate torts in *Pfeiffer*. Since *Renault*, the High Court has maintained its strict *lex loci delicti* regime by refusing to create a special choice of law rule for torts that occur on the high seas.⁵⁵

C. United Kingdom

Unlike Canada and Australia, the shift to the *lex loci delicti* rule in the United Kingdom came by statute: Part III of the Private International Law (Miscellaneous Provisions) Act 1995 ('the 1995 Act'). The inspiration for this reform was the joint report of the English and Scottish Law Commissions on choice of law for tort and delict.⁵⁶ The Act passed in 1995 actually departed from the Commissions' proposals in a number of respects, and it has been suggested that their report is of limited use in helping to interpret the 1995 Act.⁵⁷ However, the primary operation of the *lex loci delicti* lies at the heart of both the Commissions' proposals and the 1995 Act and, to that extent, the Commissions' policy justifications for its position have been co-opted by the United Kingdom reforms. Interestingly, the Commissions' preference for a *lex loci delicti* rule did not rest on a primary structural consideration like territoriality, but on second order implications such as giving better effect to parties' expectations about the law governing their actions, the discouragement of forum shopping, and approximation with the law in other European countries.⁵⁸ The Commissions also thought that application of the *lex loci delicti* could in some cases be 'inappropriate', although the only policy that suggested this was 'the principle that justice is done to a person if his own law is applied'.⁵⁹ Leaving the details to one side, these informed the structure of the Commissions' proposal of a *lex loci delicti* rule with a flexible exception for all cross-border tort claims. That structure was perpetuated in the 1995 Act, although Parliament excluded defamation claims from the reforms to placate the print and broadcasting media.⁶⁰

⁵³ cf P St J Smart 'Foreign Torts and the High Court of Australia' (2002) 118 LQR 512, 515.

⁵⁴ (2002) 210 CLR 491, 516–17, 520, 528–9.

⁵⁵ *Blunden v Commonwealth of Australia* (2003) 203 ALR 189.

⁵⁶ Law Com No 193 (1990); Scot Law Com No 129 (1990).

⁵⁷ A Briggs 'Choice of Law in Tort and Delict' [1995] LMCLQ 519, 520.

⁵⁸ Law Com No 193 (1990); Scot Law Com No 129 (1990) 10 (para 3.2).

⁵⁹ *ibid* at 10 (para 3.3).

⁶⁰ *Blaikie* (n 14) 366; *Briggs* (n 57) 520; *Carter* (n 16) 194; *Morse* (n 18) 891–2.

The central provision of the 1995 Act, section 11, provides the general rule that ‘the applicable law is the law of the country in which the events constituting the tort or delict in question occur’. If elements of a personal injuries claim occur in more than one country then the governing law is the law of the place where the injury was sustained.⁶¹ For a claim for damage to property, this will be the law of the place where the property was when damaged.⁶² In all other cases where elements of the alleged tort or delict occur over a number of jurisdictions, the governing law is ‘the law of the country in which the most significant element . . . occurred’.⁶³ Section 11’s general rule is then subject to an exception under section 12. In comparing the significance of the factors that, in effect, identify the *lex loci delicti* with that of factors connecting the tort or delict to some other place, the law of that other place will apply if ‘substantially more appropriate . . . for determining the issues arising in the case’.⁶⁴ This is a statutory flexible exception.

While the 1995 Act was meant to abolish the rule in *Phillips v Eyre*,⁶⁵ the common law choice of law rules remain on foot in the United Kingdom in at least four respects. First, as has been noted, they continue to apply to defamation claims.⁶⁶ Secondly, there are concepts in the 1995 Act that copy, or develop, common law concepts. Thus, the pre-existing common law could possibly be useful for identifying when it is appropriate to invoke the Section 12 exception.⁶⁷ Thirdly, the 1995 Act defines its scope by reference to the pre-existing common law rules. Because the Act only applies to tort claims that would have previously been governed by the rule in *Phillips v Eyre*, it is first necessary to know whether a claim would have been characterized as one subject to *Phillips v Eyre* before the application of the Act can be assumed.⁶⁸ Fourthly, the common law rules relating to the distinction between substance and procedure, which have been highly significant in cross-border tort claims, are retained *in toto*.⁶⁹

A continuing role for the common law in the United Kingdom means that, again unlike Canada and Australia where common law adjudication has imposed uniform choice of law regimes on all constituent parts of the federations, the choice of law rules may differ between the member-jurisdictions of the kingdom. There is significant doubt as to whether Scots law has absorbed the flexible exception of *Boys v Chaplin* in its form of the rule in *Phillips v*

⁶¹ Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 11(2)(a).

⁶² *ibid* s 11(2)(b).

⁶³ *ibid* s 11(2)(c).

⁶⁴ *ibid* s 12(1).

⁶⁵ *ibid* s 10.

⁶⁶ *ibid* s 13.

⁶⁷ P Rogerson ‘Choice of Law in Tort: A Missed Opportunity?’ (1995) 44 ICLQ 650, 658. It appears that it is impermissible to use the pre-existing common law to identify where, under s 11 of the Act, a tort is deemed to occur: *Protea Leasing Limited v Royal Air Cambodge Company Limited* [2002] EWHC 2731 (Comm), at [78] [80]; *Morin v Bonhams & Brooks* [2004] 1 All ER (Comm) 880, 888.

⁶⁸ Briggs (n 57) 526.

⁶⁹ Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 14(3)(b).

Eyre.⁷⁰ This may well give more opportunity for application of the *lex fori* alone in defamation cases in England and Wales and, probably, Northern Ireland, than in Scotland. In addition, the traditional characterization of statutes of limitation as procedural has been abrogated by statute in England and Wales and in Scotland, but not in Northern Ireland.⁷¹ Accordingly, there is a high probability that, in a Northern Irish court, a claim in tort will be subject to the local limitation period. Elsewhere in the United Kingdom, this will only be possible where the *lex fori* is selected as the *lex causae* by reason of the section 12 or *Boys v Chaplin* flexible exception.

It is also apparent that Australian and Canadian developments have not persuaded United Kingdom courts to drop the rule in *Phillips v Eyre* by common law adjudication.⁷² That the preservation of the common law rules for defamation claims in the 1995 Act is made as an exclusion from the Act's *lex loci delicti* regime may well suggest a statutory constraint on this.⁷³ In 1994 in *Red Sea Insurance Co v Bouyges SA*⁷⁴—an appeal to the Privy Council from Hong Kong but one commonly claimed to represent the position of English law—Lord Slynn of Hadley cited *Breavington v Godleman* without comment or analysis. His Lordship also did not mention that the Australian High Court had, at the time of *Red Sea Insurance*, departed from *Breavington*.⁷⁵ However, while recognizing the clarity and certainty that an exclusive *lex loci delicti* rule might bring, Lord Slynn discounted its adoption as 'often inappropriate in modern conditions of travel, and as having difficulties of its own'.⁷⁶ And, in *Kuwait Airways Corp v Iraqi Airways Co (No 3)*,⁷⁷ Lord Hope of Craighead referred to both *Breavington* and *Pfeiffer* but noted the limited application of *Pfeiffer* to interstate torts. His Lordship also believed that, for foreign torts, Australian law still held to *Phillips v Eyre*.⁷⁸ At that time, this was incorrect: the Australian High Court had decided *Renault* two months before the speeches in *Kuwait Airways (No 3)* were delivered. But, regardless of the selective use of precedent in these decisions, it is apparent that the basic common law choice of law rules are unlikely to be reformed judicially in the United Kingdom. English approaches to the characterization of substance and procedure were briefly challenged by the Australian judicial developments,⁷⁹ but *Tolofson v Jensen* has only been cited in one United Kingdom case.⁸⁰

⁷⁰ AE Anton with P Beaumont *Private International Law* (2nd edn Green Edinburgh 1990) 404–5. Cf *James Burrough Distillers plc v Speymalt Whiskey Distributors Ltd* 1989 SLT 561, 563–4, where there is no mention of *Boys v Chaplin*'s adjustments to the rule in *Phillips v Eyre*.

⁷¹ Foreign Limitation Periods Act 1984 (UK) ss 1(1), 7(4); Prescription and Limitation (Scotland) Act 1984 (UK) s 23A.

⁷² For a criticism of the judicial activism inherent in the Australian changes, see A Amankwah, 'Judicial Legislation: A New Phase?' (2000) 7 *James Cook University Law Review* 254, 258.

⁷³ See especially Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 13(1). This was the view taken of the Act's preservation of traditional concepts of procedural law in *Harding v Wealands* [2006] UKHL 32, [51].

⁷⁴ [1995] 1 AC 190.

⁷⁵ *ibid* 199, 202.

⁷⁶ *ibid* 199.

⁷⁷ [2002] 2 AC 883.

⁷⁸ *ibid* 932.

⁷⁹ *Harding v Wealands* [2005] 1 All ER 415.

⁸⁰ *ibid* 444; *Harding v Wealands* [2006] UKHL 32, [36], [68]–[69], [83].

D. Immediate Effect of Reform

The different means by which the law was changed in Australia, Canada, and the United Kingdom have affected the number of cases reported under the three countries' *lex loci delicti* regimes. The 1995 Act only applies to events that occurred after 1 May 1996, and there are still fewer than 20 reported decisions in the United Kingdom in that category. Even in the last few years, English courts have had to apply the common law rule in *Phillips v Eyre* to novel cases.⁸¹ The number of reported decisions in the United Kingdom could also be affected by the smaller number of jurisdictions within the kingdom, the European jurisdiction conventions, and local principles of *forum conveniens* that are more likely to place tort litigation in the *locus delicti*. This probably reduces the number of cross-border tort claims United Kingdom courts are likely to hear.

In contrast, the adoption of the *lex loci delicti* rule by common law adjudication in Canada and Australia meant that the new rule applied to all events—whenever occurring—and to all proceedings that had not yet reached judgment. The injustice of this was conceded by the Canadian courts, which dismissed many claims because, after *Tolofson*, they met short inter-provincial statutes of limitations that, at the time proceedings commenced, no one had realized were applicable.⁸² Australian courts met the same problem after *Pfeiffer* and *Renault*, but had some opportunity to use powers under interstate and foreign statutes allowing the extension of limitation periods.⁸³ These opportunities not having arisen in the Canadian cases, appeal courts in Manitoba,⁸⁴ British Columbia,⁸⁵ and Ontario⁸⁶ were asked to hold that *Tolofson* only changed the law prospectively. The retrospective effect of a change in the law wrought by common law decision was recognized as resting on the fiction that the court was only stating what the law had always been, but which had not been properly understood. Still, the appeal courts in all three Provinces refused to make what would, in the Commonwealth, be a long leap

⁸¹ *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2000] 2 All ER (Comm) 360; [2002] 3 All ER 209, 215, 248. See also *Milne v Moores* [1999] ScotCS 305; *Pearce v Ove Orup Partnership Ltd* [2000] Ch 403, 443; *Al Sabah v Grupo Torras SA* [2000] EWCA Civ 273; *Ennstone Building Products Limited v Stanger Limited* [2002] 2 All ER (Comm) 479; *Base Metal Trading Ltd v Shamurin* [2005] 1 All ER (Comm) 17.

⁸² *Guardian of Stoeterau v Crowsnest Air Ltd* (1995) 5 BCLR (3d) 251, [6]–[7]; *Perron v R.JR MacDonald* (1996) 81 BCAC 303, [6]; *Stewart v Stewart* (1997) 145 DLR (4th) 228, 234–6; *Dnistransky v Horner* [1998] 3 WWR 37; *Noël v Robichaud* (1997) 193 NBR (2d) 10; *Brill v Korpaach Estate* (1997) 148 DLR (4th) 467; *Gallant v Diocese of Labrador City-Schefferville* (2001) 200 DLR (4th) 643, 650.

⁸³ *Dunn v Comalco Aluminium Limited* [2002] TasSC 14, [14]; *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231, [185], [196], but cf *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 221 ALR 213. Cf *Bakker v Adrichem* [1997] 5 WWR 151, 157–8; *Perron v R.JR. MacDonald* (1996) 81 BCAC 303, [5].

⁸⁴ *Dnistransky v Horner* [1998] 3 WWR 37.

⁸⁵ *Stewart v Stewart* (1997) 145 DLR (4th) 228, 234–6.

⁸⁶ *Somers v Fournier* (2002) 214 DLR (4th) 611, 626.

to recognize prospective overruling.⁸⁷ Australian cases show that the decision in *Pfeiffer* immediately affected the reasonableness of offers to settle proceedings that were already on foot.⁸⁸ Trial judges reconvened hearings for submissions on the assessment of damages,⁸⁹ and were asked to waive requirements of the *locus delicti* to give notices or file reports before writs could have been served⁹⁰ or allow pleadings to be amended.⁹¹ At least one judgment in a foreign tort case was deferred until the High Court delivered its decision in *Renault*.⁹² The result in one Canadian case changed between judgment at trial and judgment on appeal.⁹³

As a consequence of the immediate changes brought about by *Tolofson*, *Pfeiffer* and *Renault*, and despite Canada and Australia being less populous than the United Kingdom, there are already reports of more than 80 Canadian and 70 Australian decisions. This probably makes it easier to discern trends in adjudication under the new choice of law rules in Canada and Australia, although significant Court of Appeal decisions in England also make it evident what homing devices are likely to be relied upon there.

III. HOMING DEVICES

A. Characterization of the Question

The development of modern species of wrongs that do not originate in the common law of tort gives opportunities for characterizing claims that harm has been done to a claimant as something other than tortious, and potentially governed by some law other than the *lex loci delicti*. There is also potential with proceedings that raise questions of tort and contract or tort and property that allow the absorption of issues of a tortious character under the *lex causae* selected by the choice of law rules for contract or property. In both cases, there is some chance that the process of characterization will be used instrumentally or—to adopt Mr Carter’s words⁹⁴—‘in more devious and unpredictable ways’ to ensure a characterization of the claim that gives the local law as the *lex causae*. To assess a judge’s characterization of claims that lie in the penumbra of tort law as mere manipulation is naturally open to contest, but there is little evidence that it is happening. First, the process of characterizing a claim as non-tortious is more likely to be used as a homing device where, in cases

⁸⁷ See also *R v Kovacevic* 2000 BCCA 161, [24]; *Beadovin v Conley* [2000] 11 WWR 436, 462–3. The House of Lords reiterated a usual refusal to recognize prospective overruling in *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41.

⁸⁸ *El-Syoufi v Alcazar* [2001] ACTSC 1.

⁸⁹ *Simonfi v Fimmel* [2000] ACTSC 54, [4]; *Fawcett v Oliver* [2000] ACTSC 70, [1].

⁹⁰ *Hardham v Flood* [2001] ACTSC 21, [11]; *Hooper v Robinson* [2002] QDC 80, [21].

⁹¹ *Dyer v Dyno Nobel Asia Pacific Limited* [2003] NSWSC 213, [4].

⁹² *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690, 692.

⁹³ *Perron v RJR MacDonald* (1996) 81 BCAC 303, [6].

⁹⁴ Carter (n 16) 193.

before the shift to the *lex loci delicti* rule, there was at least a tendency to treat claims of a similar kind as tortious. For example, although there might be a small argument that insurers' rights of subrogation to assert a plaintiff's claim in tort might be characterized as tortious, English and Canadian courts have consistently treated them as contractual.⁹⁵ This is despite the legal conclusion that the claim in tort itself is governed by the *lex loci delicti*.⁹⁶ But this represents no change in the way that courts tended to characterize rights of subrogation before the 1995 Act or *Tolofson*,⁹⁷ and it would be difficult to argue that the characterization of this question is being used as a homing device.

The only other claims in which courts have pondered whether they should be characterized as tortious or non-tortious have related to corporations. The Canadian courts have tended to treat the choice of law rule for corporations questions as *sui generis*, and not governed by the usual rule for actions in tort.⁹⁸ In *Pearson v Boliden Ltd*,⁹⁹ the British Columbia courts had to address a class action for misrepresentation in a prospectus. This required the definition of sub-classes of plaintiffs who were not resident in British Columbia. The claims of members of a sub-class had to rest on common issues that were not shared by all members of the plaintiff class,¹⁰⁰ and this effectively meant that those issues had to be defined by the same *lex causae*. In *Pearson* the questions arose under Provincial securities legislation and, while the Provincial legislation is largely uniform throughout Canada, the laws of two Provinces differed from the rest in two relevant respects. The New Brunswick legislation did not provide a statutory cause of action for misrepresentation in a prospectus, and therefore common law remedies alone were available. The Alberta legislation had a shorter limitation period of one year for statutory misrepresentation claims, and if applicable probably time-barred the claims of a sub-class of plaintiffs to whom Alberta law applied.¹⁰¹ Further, there was the possibility that, for some purchasers, the law of places outside Canada might be the *lex causae*. In the Supreme Court of British Columbia, Burnyeat J took the view, at one level, that the actions under the securities legislation were not tortious,¹⁰² but referred to the judgment in *Tolofson* and 'the *lex loci delicti*' for each sub-class.¹⁰³ The Court of Appeal was nevertheless not attracted by

⁹⁵ Canada: *Drews v Insurance Corporation of British Columbia* [1] 55 BCLR (3d) 281, [28]; *Wawanesa Mutual Insurance Co v Lindblom* (2001) 200 DLR (4th) 123, 128; *Kingsway General Insurance Co v Canada Life Insurance Co* (2001) 149 OAC 303; *Guardian of Matt v Barber* (2002) 216 DLR (4th) 574, 582; cf. *Yeung v Au* 2004 BCSC 1648, [34]–[35]. England: *West Tankers Inc v Ras Riunione Adriatica Di Sicurta SpA* [2005] EWHC 454 (Comm).

⁹⁶ *Kingsway General Insurance Co v Canada Life Insurance Co* (2001) 149 OAC 303, [12]; *West Tankers Inc v Ras Riunione Adriatica Di Sicurta SpA* [2005] EWHC 454 (Comm), [28]–[31].

⁹⁷ L. Collins (ed) *Dicey and Morris on the Conflict of Laws* (12th edn Sweet & Maxwell London 1993) 1522; J-G Castel *Canadian Conflict of Laws* (3rd edn Butterworths Toronto 1994) 591–2.

⁹⁸ *Voyage Company Industries Inc v Craster* (1998-08-11) BCSC C976871, [12].

⁹⁹ (2002) 222 DLR (4th) 453.

¹⁰⁰ Class Proceedings Act 1996 (BC) s 6(1).

¹⁰² *ibid* 481.

¹⁰¹ (2002) 222 DLR (4th) 453, 462.

¹⁰³ *ibid* 473, 481, 483, 487, 490–2.

the use of *Tolofson* as even a guide for the law applicable to the *Pearson* claims, and it thought that a closer analogue could be found in statutory consumer protection claims.¹⁰⁴ Accordingly, *Tolofson* was irrelevant.¹⁰⁵ Instead, the governing law was identified by reference to constitutional principles that gave territorial operation to the law of the Province in which the shares were distributed.¹⁰⁶

The *Pearson* corporation's claims were closer in character to tort claims than would be, say, claims relating to internal company management,¹⁰⁷ but this characterization could not be regarded as a surreptitious means of applying the *lex fori*. This is suggested by the second signpost for use of characterization as a homing device: that the consequence of characterizing the claim as non-tortious must be the application of the *lex fori*. The British Columbia Court of Appeal's approach to the *Pearson* claims showed no preference for the *lex fori*. The greater likelihood was actually that the law of Ontario would govern most claims.¹⁰⁸ The classification of insurers' rights of subrogation as contractual certainly has led, in most cases, to English and Canadian courts applying the *lex fori* as the proper law of the contract, but with no unwillingness to apply a foreign proper law when the terms of the contract directed that choice.¹⁰⁹

B. Characterization of the Connection

Like the rule in *Phillips v Eyre*, a *lex loci delicti* rule begs the question: If there was a tort, where did it take place?¹¹⁰ An alternative use of characterization to secure an escape to the *lex fori* is possible where the claim is accepted as one in tort, but where the court finds that the tort occurred in the forum. In this case, the *lex loci delicti* is the *lex fori*. There is little opportunity to use this in litigation over physical torts, where the place where the alleged tortfeasor's acts caused injury or damage is usually not open to question.¹¹¹ Thus, the courts have consistently accepted that, in personal injuries litigation arising out of motor accidents, the place of the tort is where the accident occurred.¹¹²

¹⁰⁴ *ibid* 490.

¹⁰⁵ *ibid* 492–3.

¹⁰⁶ *ibid* 491–2.

¹⁰⁷ *eg* *Voyage Company Industries Inc v Craster* (1998-08-11) BCSC C976871.

¹⁰⁸ (2002) 222 DLR (4th) 453, 485. See also *Voyage*, where the British Columbia Supreme Court considered that the questions of company management were to be governed by the law of Yukon.

¹⁰⁹ *eg* *Guardian of Matt v Barber* (2002) 216 DLR (4th) 574, where the Ontario Court applied Florida law.

¹¹⁰ *Tolofson v Jensen* [1994] 3 SCR 1022, 1050; *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503, 538–9, 563; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 519, 539.

¹¹¹ *cf* *Georges v Basilique de Sainte-Anne-de Beaupre* (2004-08-31) OSC 03-CV-258, [28]–[29].

¹¹² *Australia: Reid v AGCO Australia Ltd* [2000] VSC 363, [4]; *Simonfi v Fimmel* [2000] ACTSC 54; *Fawcett v Oliver* [2000] ACTSC 70, [16]; *Thompson v Evanoss* [2000] ACTSC 73, [28]; *El-Syoufi v Alcazar* [2000] ACTSC 109, [1], [20]; *Moon v Moon* [2001] FCA 1712, [1];

The same holds for accidents on board ships that are in port: the *locus* is the littoral jurisdiction.¹¹³ In claims arising from aircraft crashes, the *locus delicti* has been the place where the aircraft fell to.¹¹⁴ Canadian and Australian courts have tended to put the *locus* in product liability and defective installation cases at the place where the damage first became manifest.¹¹⁵ In some of these cases this was the forum,¹¹⁶ although this was possible before the *lex loci delicti*

Moon v Moon [2001] ACTSC 17, [114]; *Bellotti v Stair* [2002] QDC 161, [3]; *El-Syoufi v Alcazar* [2001] ACTSC 1; *Kalsbeck v Williams* [2001] ACTSC 5, [1]; *Hardham v Flood* [2001] ACTSC 21; *Labuda v Langford* [2001] ACTSC 108, [38]; *Janetski v Janetski* [2001] VSC 328, [27]; *Hooper v Robinson* [2002] QDC 80, [21]; *FAI Allianz Insurance Ltd v Lang* [2004] NSWCA 413, [23]. Canada: *Bakker v Adrichem* (1997) 30 BCLR (3d) 199, [8]; *Stewart v Stewart Estate* (1996) 195 NBR (2d) 36, [29]; *Ross v Ford Motor Co* [1998] NWTR 175; *Stewart v Stewart* (1997) 145 DLR (4th) 228; *Hrynenko v Hrynenko* (B ; *Dnistransky v Horner* [1998] 3 WWR 37; *Leonard v Houle* (D , 646; *Hanlan v Sernesky* (1997) 35 OR (3d) 603; *Moxham v Canada (TD)* [1998] 3 FC 441; *Rivas v Damacio* (226 AR 287, [29]; *Estate of Throness* 1998 ABQB 1132, [72]; *Dreows v Insurance Corporation of British Columbia* (1998) 55 BCLR (3d) 281, [28]; *Hrynenko v Hrynenko* (1998) 168 DLR (4th) 437; *Wong v Wei* (1999) 65 BCLR (3d) 222; *Wawanesa Mutual Insurance Co v Lindblom* (2001) 200 DLR (4th) 123, 135; *Gill v Gill* 2000 BCSC 870; *Manitoba (Workers' Compensation Board) v Kraynyk* [2] 9 WWR 424, 431; *Doiron v Hogan* 2001 NBCA 97, [24]; *Kingsway General Insurance Co v Canada Life Insurance Co* (2001) 149 OAC 303, [12]; *Day v Guarantee Co of North America* 2002 NSSC 12, [14], [18]; *Fortune v Reynolds* 2002 NSSC 288, [10]; *Castillo v Castillo* (2002) 313 AR 189, [11]; *Subramaniam v Shetler* (2002) 61 OR (3d) 136, [11]; *Wong v Lee* (2002) 211 DLR (4th) 69; *Somers v Fournier* (2002) 214 DLR (4th) 611; *Guardian of Matt v Barber* (2002) 216 DLR (4th) 574, 582; *Britton v O'Callaghan* (2002) 219 DLR (4th) 300, 305; *Roy c Boucher* (2002-09-30) QCCA 500-09-009731-001; *Bezan v Vander Hooft* (2003) 333 AR 215; *Insurance Corporation of British Columbia v Unifund Assurance Company* 2003 SCC 40, [25]; *Brown v Flaharty* (2004-12-02) ONSC 30895, [3]; *Castillo v Castillo* (2004) 244 DLR (4th) 603, 605, 609; *Holomego v Brady* (2004-12-16) ONSC 01-CV-203882CM, [1]; *Bezan v Vander Hooft* (2004) 346 AR 272, [11]; *Soriano (Litigation Guardian) v Palacios* (2004-05-19) ONSC 01-CV-220331CM3, [4]; *Roy v North American Leisure Group Inc* 2004 CanLII 3078 (ONCA), [2]; *Yeung v Au* 2004 BCSC 1648, [31]; *Soriano v Palacios* (2005-06-03) ONCA C42225, [14]. United Kingdom: *Edmunds v Simmonds* [2001] 1 WLR 1003, 1005; *Hulse v Chambers* [2002] 1 All ER (Comm) 812, 813; *Harding v Wealands* [2005] 1 All ER 415; *Banks v CGU Insurance Plc* [2004] ScotSC 241, [1]; *Harding v Wealands* [2006] UKHL 32.

¹¹³ *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690, 730-3, 736; *Booth v Phillips* [2004] EWHC 1437 (Admty), [57].

¹¹⁴ Australia: *Hatfield v Agrack (NT) Pty Ltd* (2001) 162 FLR 97, [29]. Canada: *Guardian of Stoeterau v Crowsnest Air Ltd* (1995) 5 BCLR (3d) 251, [7]; *Gal v Northern Mountain Helicopters Inc* (1998) 54 BCLR (3d) 87, [29]; *Herman v Alberta (Public Trustee)* (2002) 308 AR 320, [1]. United Kingdom: *Bristow Helicopters Ltd v Sikorsky Aircraft Corporation* [2004] 2 Lloyd's Rep 150, 153, 156.

¹¹⁵ *Shane v JCB Belgium NV* (2003-11-14) ONSC 02-CV-19871, [1], [22], [51]; *British Columbia v Imperial Tobacco Canada Ltd* (2004) 239 DLR (4th) 412, 431, 434-5, 462, 489; *Davey v Medtel Pty Limited (No 3)* [2004] FCA 807, [19]-[20]; cf *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Nicholls v Brisbane Slipways and Engineering Pty Ltd* [2003] QSC 193, [8]-[10].

¹¹⁶ *Shane v JCB Belgium NV* (2003-11-14) ONSC 02-CV-19871. The ascription of the *locus* in *Nicholls v Brisbane Slipways and Engineering Pty Ltd* [2003] QSC 193, [8]-[10] to the forum, Queensland, where defective installation occurred, rather than Western Australia, where the injury was sustained, is consistent with the method of the Australian High Court in *Renault*, where the joint majority considered that the *locus* was where the defective manufacture took place (France) rather than where the injury occurred (New Caledonia). In neither case were the laws of the different places different.

regimes were adopted.¹¹⁷ Torts based on damage to property have been located at the place where the property was at the time it was damaged.¹¹⁸ These are also consistent with the terms of the 1995 Act, which specifies that the law of the place of the injury, or of the place where the property was when the damage occurred, is to be the applicable law when elements of a tort occur in a number of countries.¹¹⁹

According to La Forest J, when different elements of the one wrong fall in different jurisdictions, there can be a muting of the effect of principles of territorialism. As a consequence, other considerations might come into play in ascribing a *locus* to the events,¹²⁰ although this is more likely if the tort is not of a physical kind.

Initially, the suspicion was that commercial torts would give courts most opportunity to confer decisive weight on those elements of the tort that were more closely connected with the forum.¹²¹ There is again no evidence that this has happened and, to date, the cases in which uncertainties have arisen in attempting to determine a *locus* for a tort have involved torts of communication (especially defamation) and torts on the high seas. In choice of law cases, torts of communication like deceit, negligent misstatement and defamation have been located in the place where the communication was received.¹²² The new *lex loci delicti* regimes have done little to upset this,¹²³ although the most significant act of reliance on the communication (but still in a place where it was received) has also been regarded as important for pinning a location on a negligent misstatement.¹²⁴ The conservatism of Australian approaches in defamation claims is exemplified by the High Court's obiter dicta in *Dow Jones & Company Inc v Gutnick*¹²⁵ that 'ordinarily, defamation is to be

¹¹⁷ The principles used were those of *Moran v Pyle National (Canada) Ltd* [1975] 1 SCR 393 and *Distillers Co (Bio-Chemicals) Ltd v Thompson* [1971] AC 458.

¹¹⁸ *Integral Energy & Environmental Engineering Limited v Schenker of Canada Limited* (2001) 206 DLR (4th) 265, 269; *Shane v JCB Belgium NV* (2003-11-14) ONSC 02-CV-19871.

¹¹⁹ Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 11(2)(a)-(b).

¹²⁰ *Tolofson v Jensen* [1994] 3 SCR 1022, 1050. See also *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503, 560.

¹²¹ See *OT Africa Line Limited v Magic Sportswear Corporation* [2005] 1 Lloyd's Rep 252, 256-7, where legal proceedings alleged to have amounted to procuring a breach of contract were held to have occurred in Ontario, where the proceedings were issued. See also *Equitas Ltd v Wave City Shipping Company Ltd* [2005] EWHC 923 (Comm), [18]-[20].

¹²² L Collins (ed) *Dicey and Morris on the Conflict of Laws* (13th edn Sweet & Maxwell London 2000) 1547-8, 1567; P North and J Fawcett *Cheshire and North's Private International Law* (13th edn Butterworths London 1999) 659; P Nygh and M Davies *Conflict of Laws in Australia* (7th edn Butterworths Sydney 2002) 423; cf Castel (n 97) 651.

¹²³ *Barclay's Bank Plc v Inc Incorporated* [2000] 6 WWR 511, 523, 523-4; *Morin v Bonhams & Brooks Ltd* [2004] 1 All ER (Comm) 880, 888; *Kvaerner US Inc v AMEC E & C Services Limited* 2004 BCSC 635, [26]; *Cresbury Screen Entertainment Ltd v Canadian Imperial Bank of Commerce* 2004 BCSC 349, [28], [55], [56]; *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 638, [273].

¹²⁴ *Morin v Bonhams & Brooks Ltd* [2004] 1 All ER (Comm) 880, 888. This parallels the principles of *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 569.

¹²⁵ (2002) 210 CLR 575.

located at the place where the damage to reputation occurs' and this is where the material becomes available in a comprehensible form. In *Gutnick*, this led the Court to conclude that, because an alleged internet defamation was downloaded in Victoria, the *locus* of the alleged tort was likely to be the forum State.¹²⁶ It is overstating the effect of *Gutnick* to suggest that this was an attempt to enhance forum control over the claim. For a start, the decision broke no new ground for identifying the *locus* of an alleged defamation.¹²⁷ Furthermore, the recognition that the defamation occurs where the injury to reputation is suffered requires claims based on injuries suffered extraterritorially to be governed by as many foreign laws as the plaintiff has foreign reputations.¹²⁸ National defamations in Australia (which cross State borders) were being treated this way before *Gutnick* was decided and, given the ban on treating the assessment of damages as a procedural issue for the *lex fori*, has led the one court in the one case to assess the one communication in light of widely different rules of liability and quantum.¹²⁹ This fragmented method of dealing with defamations might, for that reason, need reforming, but it cannot be criticized as parochialism. The same rule has been applied in Canada.¹³⁰ An exception, though, was triggered by the Alberta Court of Queen's Bench in *University of Calgary v Colorado School of Mines*,¹³¹ where the question was the Alberta Court's jurisdiction over claims for a defamation that was supposed to have occurred in Alberta and Colorado. Kent J held that the plaintiff University's reputation was most significant in Alberta. He doubted that any defamation had occurred in Colorado, but even if one had, the 'more significant wrong' took place in Alberta.¹³² On that basis, Kent J was prepared to exercise jurisdiction. The *University of Calgary* case is compatible with the traditional *Gutnick* principles of the *locus* of a defamation. However, it was misapplied in *Direct Energy Marketing Ltd v Hillson*,¹³³ where there was a question as to whether the Alberta Court of Queen's Bench should decline a jurisdiction it had in a defamation claim on the ground of *forum non conveniens*. The governing law was one factor to take into account, so Kenny J had

¹²⁶ *ibid* 606–7, 640, 649.

¹²⁷ The scholarly criticism of *Gutnick* has largely concerned the different issue that the old rule is just inappropriate for online defamations: eg A Briggs 'The Duke of Brunswick and Defamation by Internet' (2003) 119 LQR 210; R Garnett '*Dow Jones & Company v Gutnick*: An Adequate Response to Transnational Internet Defamation?' (2003) 4 Melbourne Journal of International Law 196, 212–16; M Richardson and R Garnett 'Perils of Publicity on the Internet: Broader Implications of *Dow Jones v Gutnick*' (2004) 13 Griffith Law Review 74, 90–1.

¹²⁸ (2002) 210 CLR 575, 606, 639–40.

¹²⁹ *Randwick Labor Club Limited v Amalgamated Television Services Pty Ltd* [2000] NSWSC 906, [190]; *Meriton Apartments Pty Ltd v SBS Corporation* [2002] NSWSC 915, [12]; *Jackson v TCN Channel 9 Pty Ltd* [2002] NSWSC 1229, [91]; *Hewitt v ATP Tour Inc* [2004] SASC 286, [73]–[77].

¹³⁰ *Caribbean Clear Beverages Corporation Limited v Coopers & Lybrand Vancouver Limited* (1998-07-03) BCSC C965097, [2].

¹³¹ (1995) 179 AR 81.

¹³² *ibid* [11].

¹³³ [1999] 12 WWR 408.

to decide whether the *locus delicti* was Alberta (where there was no defence to the claim) or Saskatchewan (where there was an argument that the statements were privileged). On her reading of the *University of Calgary* case, Kenny J held that the defamation occurred where the plaintiff's reputation was 'most injured'¹³⁴ and, as the plaintiff was an Alberta corporation, the defamation occurred in Alberta as the *locus delicti*. This was not the reasoning in *University of Calgary*, and it confuses the Canadian principles of jurisdiction with those for finding the *locus* of a defamation. However, Kenny J's approach would lead to a single *lex causae* in litigation on the one trans-provincial communication. *Hillson* is arguably a case where a homing device was used, even if accidentally. If adopted generally, this would have significantly different consequences to the more traditional *Gutnick* approach of recognizing multiple, simultaneously applicable laws in cross-border defamations. However, there is no evidence that Kenny J's approach has been adopted by any other Canadian court.

The *locus* of a maritime tort was recognized as an unresolved question that was inherited by the new *lex loci delicti* regimes. Appeal courts in England and Ontario have assumed that the *locus* of torts on board ships on the high seas is the place where the ships were registered.¹³⁵ That expedient is not available, though, where the registration is with a 'pluri-legislative' nation, as in the Australian *Voyager* litigation. This originated in a collision in 1964 between the aircraft carrier HMAS Melbourne and the destroyer HMAS Voyager on the high seas off New South Wales. In one of the *Voyager* cases, the High Court decided that there was no special choice of law rule for torts on the high seas,¹³⁶ compelling a search for a *locus* to be ascribed to the tort artificially. However, the proceedings in the *Voyager* cases that needed this search for a *locus* were not commenced in the ACT, NSW and Victorian courts until the 1990s,¹³⁷ immediately raising the question of the applicable statute of limitations. The NSW statute allowed an extension of the limitation period. The Victorian statute did so as well, though in more limited circumstances. However, the law of the ACT also possibly applied to the claims and, even though its 1985 statute of limitation allowed extensions of limitation periods,¹³⁸ there was a question as to whether the relevant law was the English statute of 1624¹³⁹ which applied in the ACT before 1985. In the NSW cases, the Court of Appeal held that, even if the statute of 1624 applied, its limitation

¹³⁴ *ibid* 422.

¹³⁵ *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, 963, 965; *Roy v North American Leisure Group Inc* (2004) 246 DLR (4th) 306, 307.

¹³⁶ *Blunden v Commonwealth of Australia* (2003) 203 ALR 189, 200, 213, 215.

¹³⁷ *Commonwealth of Australia v Stankowski*; *Commonwealth of Australia v May* [2002] NSWCA 348; *Burk v Commonwealth of Australia* [2002] VSC 453. *Blunden v Commonwealth of Australia* (2003) 203 ALR 189, 200, 213, 215 invoked federal jurisdiction, which meant there was less of a need to refer to choice of law rules.

¹³⁸ Limitation Act 1985 (ACT).

¹³⁹ 21 Jas I c 16.

period could still be extended under the ACT's 1985 Act, and so allowed the application to extend the limitation period to be dealt with under both NSW and ACT law.¹⁴⁰ The *locus* of the tort therefore did not have to be determined, although the Court conceded that it was arguable that it could have been the ACT.¹⁴¹ In the Supreme Court of Victoria, Bongiorno J held that the *locus* of the tort was the ACT¹⁴²—at first blush a surprising conclusion, given that the Territory is landlocked. This was achieved by putting the allegations on dry land, suggesting that the negligence that led to the collision at sea originated in operational decisions made by the Naval Board in Canberra, and that it was through the Naval Board that the plaintiff was claiming that the federal Government was liable to him.¹⁴³

The result seems to be that judges have, by and large, resisted the temptation to manipulate the connections that a cross-border tort has with different jurisdictions to fix the forum as a preferred *locus* for the tort. As mentioned, *Hillson* could be an exception, although it is more likely that it involves a misapplication of Canadian principles of jurisdiction to the choice of defamation law. It is more significant that, despite the practical attraction of ascribing a communication tort to one *locus*, courts have instead persisted with the theory that there are as many torts as there are places where the communication is received. And certainly, the maritime cases show no evidence of the use of a homing device. The *Voyager* litigation shows a marked willingness to identify a *locus* other than the forum. It was actually put to the Court in the Victorian *Voyager* case that, where a collision occurred on the high seas, there is no private law *locus*, and so the *lex fori* should be applied by default.¹⁴⁴ Bongiorno J explicitly rejected the idea that, after *Pfeiffer* and *Renault*, any principle by which the plaintiff could choose the governing law by his selection of forum would be 'remarkable indeed', and the *lex loci delicti* should be applied.¹⁴⁵

C. Procedure

The classification of an issue as procedural, and not substantive, law necessarily leads to its being determined by the *lex fori*. Even in a case with foreign elements, a claimant who invokes the jurisdiction of a court can be reasonably expected to take its procedures as he finds them. However, it also follows that the broader that 'procedure' is defined, the greater the opportunities for a

¹⁴⁰ *Commonwealth of Australia v Stankowski; Commonwealth of Australia v May* [2002] NSWCA 348, [33].

¹⁴¹ *ibid* [29].

¹⁴² *Burk v Commonwealth of Australia* [2002] VSC 453, [40].

¹⁴³ *ibid* [35]–[39].

¹⁴⁴ *ibid* [22].

¹⁴⁵ *ibid* [24]. Unfortunately, the attempt to impugn the Naval Board's decisions in the *Voyager* litigation brings us no closer to identifying the *locus* where all acts of alleged negligence occur on the high seas.

claimant to escape to the *lex fori*. The 1995 Act potentially gave all of these opportunities,¹⁴⁶ but common law adjudication in England appears, at this point, to be eliminating them. *Tolofson* narrowed the scope of procedure in Canada on a piecemeal basis, but *Pfeiffer* closed almost all opportunities for the stealthy use of procedural law as a means of applying the *lex fori* in Australia. There might have been only a small retreat from this position.

The 1995 Act, by section 14(3)(b), maintains the common law principles for characterizing substantive and procedural questions. Soon after the passage of the Act, Professor Morse suggested that its retention of the traditional lines between the substance of a claim and procedure would have the most significant repercussions for the assessment of damages.¹⁴⁷ The case-law has borne this out, although the Canadian and Australian cases also commonly raise the question of limitation periods. These two issues had served as the battleground for choice of law in interstate tort cases in Australia in the early 1990s. The result of this litigation was that, in the early 1990s, the Australian High Court held in *McKain v RW Miller & Co (SA) Pty Ltd*¹⁴⁸ that the usual form of statutes of limitation, and in *Stevens v Head*¹⁴⁹ that a cap on damages that could be recovered, were both procedural, and were both governed by the *lex fori*.

Legislation enacted in the 1980s ensured that foreign statutes of limitation would be treated as substantive law in England and Wales, and in Scotland.¹⁵⁰ Likewise, in Canada La Forest J concluded that 'all statutes of limitations destroy substantive rights'.¹⁵¹ *McKain* itself was abrogated in all Australian States and Territories by legislation that required a sister State's statute of limitation to be characterized as substantive. In some States, the legislation also treats the New Zealand Limitation Act 1950 as substantive.¹⁵² A more comprehensive change to the characterization of substantive and procedural law, however, came in *Pfeiffer*.

As the judgments in *Pfeiffer* could only deal with the choice of law question if the NSW cap on damages were characterized as substantive law, the nature of the distinction between substance and procedure was an equally prominent question in the case. The joint majority noted that the case-law on substance and procedure showed that the question was addressed ad hoc: there was no 'unifying principle'.¹⁵³ This had also been a theme of the dissenting

¹⁴⁶ cf Reed (n 7) 312, where the impact that any Australian adoption of the 1995 Act would have had on *Stevens v Head* (1993) 176 CLR 433 is probably misconceived.

¹⁴⁷ Morse (n 18) 895.

¹⁴⁸ (1991) 174 CLR 1.

¹⁴⁹ (1993) 176 CLR 433.

¹⁵⁰ Foreign Limitation Periods Act 1985 (UK) s 1(1)(a); Prescription and Limitation (Scotland) Act 1984 (UK) s 23A.

¹⁵¹ [1994] 3 SCR 1022, 1070; Walker (n 14) 398.

¹⁵² R Mortensen *Private International Law* (Butterworths Sydney 2000) 100. See eg Choice of Law (Limitation Periods) Act 1993 (NSW), and comparable legislation in other States and Territories.

¹⁵³ (2000) 203 CLR 503, 542–3.

judgments in *McKain* and *Stevens*,¹⁵⁴ which provided their Honours with an a priori definition of procedural laws as those ‘which are directed to governing or regulating the mode or conduct of court proceedings’.¹⁵⁵ Callinan J developed this principle to conclude that procedure comprises only ‘laws and rules relating to procedures such as the initiation, preparation and prosecution of the case, the recovery processes following any judgment and the rules of evidence’.¹⁵⁶ Any other laws are substantive.¹⁵⁷ Kirby J adopted La Forest J’s approach in *Tolofson*.¹⁵⁸ It is unlikely that these slight differences in formulation would lead to any difference in outcome. And while the Australian High Court, like its Canadian counterpart, has not explicitly linked its approach to procedural laws to the underlying structures of territorialism that generated the *lex loci delicti* rule in tort, the ruling in *Pfeiffer* that ‘all questions about the kinds of damage, or amount of damages that may be recovered’ are substantive does help further to rationalize the substance and procedure distinction with territorial sovereignty. As will be seen, it avoids a basic incoherence in approaches that characterize the assessment of damages as procedural.

The only other potential difference between the choice of law regimes for interstate and international torts that was suggested in *Renault* was in relation to the characterization of procedural laws. While endorsing the narrow approach to procedure taken in *Pfeiffer*, the joint majority in *Renault* noted its implications for the treatment of ‘all questions about the kinds of damage, or amount of damages that may be recovered’.¹⁵⁹ Here, their Honours backtracked, saying: ‘We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort.’¹⁶⁰ However, it is difficult to avoid the conclusion that the making of a distinction for damages in international cases, without redrawing the a priori definition of procedural law or making the same distinction for statutes of limitation, is unprincipled. And, as will be seen, it is also conceptually incoherent in a *lex loci delicti* regime to segregate questions concerning heads of damages (treated as substantive) and the assessment of damages (treated as procedural). This nod to parochialism is hard to reconcile with the basic structure of territorialism that has informed the change in Australia’s choice of law rules for tort.¹⁶¹

The Canadian and Australian cases since *Tolofson*, *Pfeiffer* and *Renault* have, without exception, treated statutes of limitation as substantive law and applicable when part of the *lex loci delicti*. This has been so for both intra-

¹⁵⁴ (1991) 174 CLR 1, 22–7, 53, 62; (1993) 176 CLR 433, 445, 469–70.

¹⁵⁵ (2000) 203 CLR 503, 543.

¹⁵⁶ *ibid* 574.

¹⁵⁸ *ibid* 554.

¹⁶⁰ (2002) 210 CLR 491, 520.

¹⁶¹ The opportunity to treat damages as a question of procedure in a foreign tort case was nevertheless not taken in *Neilson v Overseas Projects Corporation of Victoria* (2005) 221 ALR 213.

¹⁵⁷ *ibid*.

¹⁵⁹ *ibid* 544.

national¹⁶² and international¹⁶³ statutes of limitation. Where the foreign statute has allowed an extension of the limitation period, courts also seem willing to assume the power to grant an extension where appropriate under the *lex loci delicti*. This opportunity has only yet arisen in Australia.¹⁶⁴ The courts have therefore almost closed any opportunity to escape to the forum's statute of limitation. However, the United Kingdom legislation does not apply in Northern Ireland and, despite a statute in 1984 making foreign statutes of limitation substantive in Scotland,¹⁶⁵ the Court of Session has entertained arguments that they are procedural.¹⁶⁶

¹⁶² Canada: *Guardian of Stoeterau v Crowsnest Air Ltd* (1995) 5 BCLR (3d) 251; *Syvetsen v Toope* (1995) 5 BCLR (3d) 174, [42]; *Perron v RJR MacDonald* (1996-10-07) BCCA CA016982, [6]; *Bakker v Adrichem* [1997] 5 WWR 151, 157-8; *Stewart v Stewart Estate* (1996) 195 NBR (2d) 36, [44]; *Stewart v Stewart* (1997) 145 DLR (4th) 228, 229, 235; *Harrington v Dow Corning Corp* (1997) 29 BCLR (3d) 88, [14]; *Hrynenko v Hrynenko* (1997) 37 BCLR (3d) 35; *Dnistransky v Horner* (1997-11-06) MBCA A197-30-03304; *Noël v Robichaud* (1997) 193 NBR (2d) 10; *Brill v Korpaach Estate* (1997) 148 DLR (4th) 467; *KC v College of Physical Therapists of Alberta* (1998) 157 DLR (4th) 31, 36-37; *Attorney-General of Canada v Nalleweg* (1998) 165 DLR (4th) 606, 616; *Hrynenko v Hrynenko* (1998) 168 DLR (4th) 437; *Scandsea Canada Ltd v Emberley's Transport Ltd* (1999) 178 NSR (2d) 134, [12]; *Holgate v Swimmer* (1999) 46 OR (3d) 599; *Banque Nationale de Paris (Canada) v Opiola* [2000] 6 WWR 502, 507-508; *MGL v SJL 2000 BCPC* 138; *Girsberger v Kresz* (2000) 47 OR (3d) 145, [41]; *Paulus v Banque Nationale de Paris (Canada)* [2001] 6 WWR 95, 102; *Pearson v Boliden Limited* (2002) 222 DLR (4th) 453, 473-4, 485, 490-1; *Gallant v Diocese of Labrador City-Schefferville* (2001) 200 DLR (4th) 643, 650-1; *Day v Guarantee Co of North America* 2002 NSSC 12, [14], [18]; *Desautels v Katimavik* (2003) 175 OAC 201, [48], [51]; *Caspian Construction Inc v Drake Surveys Ltd* (2004) 184 Man.R. (2d) 284, [19]. Australia: *Brear v James Hardie & Coy Pty Ltd* (2000) 50 NSWLR 388, 396; *Reid v AGCO Australia Ltd* [2000] VSC 363, [4]; *KBRV Resort Operations Pty Ltd v Chilcott* (2001) 51 NSWLR 516, 518; *Henry v Commonwealth* [2001] NSWSC 971, [3]; *Morris v Kriziac* [2001] ACTSC 117, [4]; *McKenzie v Commonwealth* [2001] VSC 361, [54]-[57]; *Burk v Commonwealth* [2002] VSC 453, [19]; *Commonwealth v Starkowski* [2002] NSWCA 348, [28]-[29]; *Dunn v Comalco Aluminium Limited* [2002] TasSC 14, [1]; *Bradford v Commonwealth* [2002] FCA 1489, [20]; *Wright v Central Coast Area Health Service* [2002] NSWSC 800, [13]; *Agtrack (NT) Pty Ltd v Hatfield* (2004) 7 VR 63, 90, 92, 95-6, 101; *Pulido v RS Distribution Pty Ltd* (2003) 177 FLR 401, 408; *Air Link Pty Limited v Paterson (No 2)* (2003) 58 NSWLR 388, 398, 434; *Blunden v Commonwealth of Australia* (2003) 203 ALR 189, 212; *Cultivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 638, [273]; *Neilson v Overseas Projects Corporation of Victoria* (2005) 221 ALR 213, 215, 258-9, 267, 275.

¹⁶³ Canada: *Alberta Mortgage and Housing Corporation v Klapstein* [1999] 1 WWR 355, 360; *Deuruneft Deutsche-Russische Mineralöl Handelsgesellschaft mbH v Bullen* (2002) 310 AR 164, [52]; *Castillo v Castillo* (2002) 313 AR 189, [11], [32]; *Somers v Fournier* (2002) 214 DLR (4th) 611, 625-6; *Roy v North American Leisure Group Inc* (2004) 246 DLR (4th) 306, 309; *Castillo v Castillo* (2004) 244 DLR (4th) 603, 609, 610-11. Australia: *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231, [185]; *Griffith v Australian Broadcasting Corporation* [2002] NSWSC 86, [403]; *Dyer v Dyno Nobel Asia Pacific Limited* [2003] NSWSC 213, [24]-[25]; *Dyno Wesfarmers Ltd v Knuckey* [2003] NSWCA 375, [37]; *Fullford v Pearson* [2004] NSWCA 150, [5]; *Darcy v Medtel Pty Limited (No 3)* [2004] FCA 807, [17]-[20].

¹⁶⁴ *Reid v AGCO Australia Ltd* [2000] VSC 363, [6]; *Henry v Commonwealth* [2001] NSWSC 971, [17]; *Morris v Kriziac* [2001] ACTSC 117, [4]; *Dunn v Comalco Aluminium Limited* [2002] TasSC 14, [14]; *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231, [185], [196]; cf *Bradford v Commonwealth* [2002] FCA 1489, [71], [73]; *Wright v Central Coast Area Health Service* [2002] NSWSC 800, [21], [33]; *Pulido v RS Distribution Pty Ltd* (2003) 177 FLR 401, 409-10; *Neilson v Overseas Projects Corporation of Victoria* (2005) 221 ALR 213. Cf *Bakker v Adrichem* [1997] 5 WWR 151, 157-8.

¹⁶⁵ Prescription and Limitation (Scotland) Act 1984 (UK) s 23A.

¹⁶⁶ *Milne v Moores* [1999] ScotCS 305; cf *Barks v CGU Insurance Plc* [2004] ScotCS 241, [3].

The assessment of damages has been another question altogether. In Australia, *Pfeiffer* now stands against all attempts to treat any question of damages as procedural.¹⁶⁷ This has resulted in important changes to the approach of Australian courts, as damages available for injuries sustained in motor accidents differ significantly from State to State,¹⁶⁸ and in defamation claims some States have allowed exemplary damages while others have not.¹⁶⁹ However, as Professor Morse predicted, the assessment of damages emerged as an important means by which Canadian and, for some time, English courts have been able to apply the *lex fori* to cross-border tort claims. In these cases the judges' homing instinct cannot be explained merely by friendliness to the plaintiff's claim. The earlier English decisions did lead to more generous awards than those available under the *lex loci delicti*.¹⁷⁰ However, in the Canadian decisions, the damages awarded under the *lex fori* have been considerably lower than those available under the competing law of an American State.¹⁷¹ In both countries the majority judgment in the Australian High Court's decision in *Stevens v Head* was treated deferentially by the appeal courts, and without any awareness that *Stevens* had already been overruled in Australia in *Pfeiffer*.¹⁷² The first mention of *Pfeiffer* in a case addressing the characterization of damages, though, saw the English courts temporarily change direction, but the traditionally broad concept of procedure restored on appeal.

Important decisions of the English and Ontario Courts of Appeal in 2002 were preceded by a series of cases at first instance in which English and British Columbia courts recognized that the question of what heads of damage are available as a basis of recovering compensation might be substantive, but

See also, for England and Wales, Foreign Limitation Periods Act 1985 (UK) s 7(4). Keene LJ's belief in *Ennstone Building Products Limited v Stanger Limited* [2002] 2 All ER (Comm) 479, 491 that the Scots limitation period was procedural appears to be a misreading of s 1(2) of the Act, which required both the English and the foreign limitation period to be treated as substantive when applying the rule in *Phillips v Eyre*.

¹⁶⁷ *CSR Limited v Thompson* (2003) 59 NSWLR 77, 79–80; *Hobson v Queanbeyan Australian Football Club* [2003] ACTSC 8, [22]; *Routley v Bridgestone Australia Limited* [2004] NSWDDT 4, [20]–[21]; *Hoey v Martin's Stock Haulage (Scone) Pty Ltd* [2003] ACTSC 41, [44].

¹⁶⁸ *Simonfi v Fimmel* [2000] ACTSC 54, [4]; *Fawcett v Oliver* [2000] ACTSC 70, [16]; *Thompson v Evanoss* [2000] ACTSC 73, [28]; *El-Syoufi v Alcazar* [2000] ACTSC 109, [1], [20]; *Kalsbeek v Williams* [2001] ACTSC 5, [1]; *Moon v Moon* [2001] ACTSC 17, [114]; *Bellotti v Stair* [2002] QDC 161, [3]; *Andrews v Traynor* [2003] QSC 292, [3]; *Zardo v Ivancic* (2003) 149 ACTR 1, 2–4; *FAI Allianz Insurance Ltd v Lang* [2004] NSWCA 413, [23]; *Ivancic v Zardo* [2004] ACTCA 11, [4].

¹⁶⁹ *Randwick Labor Club Limited v Amalgamated Television Services Pty Ltd* [2000] NSWSC 906, [190]; *Jackson v TCN Channel 9 Pty Ltd* [2002] NSWSC 1229, [91].

¹⁷⁰ *Edmunds v Simmonds* [2001] 1 WLR 1003; *Hulse v Chambers* [2002] 1 All ER (Comm) 812; *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961.

¹⁷¹ *Wong v Wei* (1999) 65 BCLR (3d) 222; *Somers v Fournier* (2002) 214 DLR (4th) 611.

¹⁷² *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, 970–1; *Somers v Fournier* (2002) 214 DLR (4th) 611, 629. Waller LJ admitted that, in *Roerig*, *Pfeiffer* was not referred to the Court: *Harding v Wealands* [2005] 1 All ER 415, 426–7, 446.

how damages are quantified under those heads are matters of procedure.¹⁷³ In general, it was thought that the weight of judicial authority supported this idea.¹⁷⁴ Whatever the rationale, this approach to the assessment of damages was given the English Court of Appeal's imprimatur in *Roerig v Valiant Trawlers Ltd.*¹⁷⁵ However, in *Harding v Wealands*¹⁷⁶ a majority in the same Court held that restrictions on the recovery of damages were substantive and governed by the *lex loci delicti*¹⁷⁷—having concluded that the characterization of the assessment of damages in *Roerig* was *obiter* and, further, being persuaded by *Pfeiffer*.¹⁷⁸ In *Harding*, the substantive law was that of NSW, which by the Motor Accidents Compensation Act 1999 placed a number of limitations on the usual assessment of damages at common law. For Arden LJ, the key point in *Harding* was that that Act imposed restrictions on the right to recover damages and, so, was substantive.¹⁷⁹ Sir William Aldous, reaching the same conclusion, was more influenced by the treatment of the NSW Act as substantive in Australia, and thought that this conclusion would discourage forum shopping.¹⁸⁰ Waller LJ dissented on this point, still preferring to follow Stevens, as he had in *Roerig*.¹⁸¹ On appeal, the House of Lords unanimously maintained the traditional, and broad, parameters of procedure. Both Lord Hoffmann and Lord Roger of Earlsferry, who gave the leading speeches, preferred the *Stevens v Head* characterization of caps on the recovery of damages, and thought that the 1995 Act had entrenched this approach for English (and presumably other United Kingdom) courts.¹⁸² *Pfeiffer*'s approach to questions of substance and procedure was considered to be influenced by Australian constitutional factors¹⁸³ although the Australian High Court's judgments in *Pfeiffer* do not bear this out.

On this point, the Canadian courts have taken a similar path. In *Somers v Fournier*,¹⁸⁴ the Ontario Court of Appeal decided that the applicable law to a motor accident in New York would be the law of New York. It was neverthe-

¹⁷³ *Wong v Wei* (1999) 65 BCLR (3d) 222; *Edmunds v Symonds* [2001] 1 WLR 1003, 1011; *Hulse v Chambers* [2002] 1 All ER (Comm) 812.

¹⁷⁴ In *Hulse v Chambers* [2002] 1 All ER (Comm) 812, 815–18, Holland J cited *Cope v Doherty* (1858) 4 K & J 367, 384; *Kohnke v Karger* [1951] 2 KB 670; and *Edwards v Simmonds* [2001] 1 WLR 1003 in support. In relation to the Commonwealth authorities, his Lordship recognized that *Livesley v Horst & Co* [1925] 1 DLR 159, 164 was *contra* his position but made no reference to *Stevens v Head* (1993) 176 CLR 433. A more specious reason given in *Hulse v Chambers* was that, in England, the assessment of damages was technically a jury question, even if in practice a judge always answered it: [2002] 1 All ER (Comm) 812, 818.

¹⁷⁵ [2002] 1 All ER 961.

¹⁷⁶ [2005] 1 All ER 415.

¹⁷⁷ *ibid* 435–6, 447.

¹⁷⁸ Arden LJ, 433–4, interpreted *Pfeiffer*'s conclusions on substance and procedure as being directed by Australian constitutional considerations, which was not the case, and underestimated the extent to which *Pfeiffer* settled the characterization question in Australia.

¹⁷⁹ *ibid* 435–6.

¹⁸⁰ *ibid* 447.

¹⁸¹ *ibid* 431–2.

¹⁸² *Harding v Wealands* [2006] UKHL 32, [36], [39]–[41], [48], [51].

¹⁸³ *ibid* [48], [68].

¹⁸⁴ (2002) 214 DLR (4th) 611.

less prepared to peg back the damages recoverable under the law of New York by enforcing Ontario's judicially-crafted cap on non-pecuniary damages. Cronk JA explained that this was 'a device developed in Canada to avoid excessive and unpredictable damages concerning non-pecuniary losses and the corresponding burden on society which follows from such awards.'¹⁸⁵ Those 'policy considerations' suggested that the cap on damages should be treated as procedural law, and be applied to reduce the damages recoverable by the plaintiff. The same Court has, since *Somers v Fournier*, reiterated that all questions relating to the assessment of damages are procedural.¹⁸⁶ This does not include entitlements under Ontario's no-fault compensation scheme, which have been held to be substantive, and not applicable merely because the claim was brought in Ontario.¹⁸⁷

D. Flexible Exception

The rejection of the flexible exception in Australia is broadly criticized,¹⁸⁸ and the reasons for its rejection are obscure. In *Renault*, their Honours noted that choice of law questions were often considered in interlocutory applications and that issues dealt with in arguing that an exception to the *lex loci delicti* should be invoked 'may often be subsumed in the issues presented on a stay application, including one based on public policy grounds.'¹⁸⁹ As Kirby J, who concurred in this decision, pointed out, the flexible exception usually absorbs different issues to those relevant to an exception based on public policy.¹⁹⁰ However, the joint majority in *Renault* had already noted that Lord Wilberforce's flexible exception from *Boys v Chaplin* had been influenced by American interest analysis, which they viewed unfavourably.¹⁹¹ Since then, the scepticism towards a flexible exception has been explained by the uncertainty it adds to choice of tort law.¹⁹²

Since *Boys v Chaplin*,¹⁹³ the English version of the rule in *Phillips v Eyre* has allowed a 'flexible exception' to the dual application of the *lex fori* and *lex loci delicti* in favour of the *lex fori* alone or the *lex loci delicti* alone. Professor

¹⁸⁵ *ibid* 629.

¹⁸⁶ *cf* *Craig v Allstate Insurance Co of Canada* (2002) 214 DLR (4th) 103, 113; *Brown v Flaharty* (2004-12-02) ON SC30895, [9].

¹⁸⁷ *Chomos v Economical Mutual Insurance Co* (2002) 216 DLR (4th) 356, 368-9, 370.

¹⁸⁸ R Anderson 'International Torts in the High Court of Australia' (2002) 10 Torts Law Journal 132, 140-1; Davis (n 43) 1014-15; A Gray 'Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia' (2004) 23 University of Queensland Law Journal 435, 462-3; E James '*John Pfeiffer Pty Ltd v Rogerson*: The Certainty of 'Federal' Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' (2001) 23 Sydney Law Review 145, 146, 163; Lindell (n 12) 372-3.

¹⁸⁹ (2002) 210 CLR 491, 519-20.

¹⁹⁰ *ibid* 535.

¹⁹¹ *ibid* 516.

¹⁹² *Neilson v Overseas Projects Corporation of Victoria* (2005) 221 ALR 213, 236, 255.

¹⁹³ [1971] AC 356.

Briggs has dubbed this ‘double actionability subject to double flexibility’,¹⁹⁴ although an English court has not yet successfully invoked the exception to apply the *lex loci delicti* on its own.¹⁹⁵ The 1995 Act preserves a flexible exception to the primary *lex loci delicti* rule in Section 12. This allows an ‘issue’ to be determined by the law of a country other than the *locus delicti* when circumstances¹⁹⁶ suggest that some other law would be ‘substantially more appropriate’ as the governing law.¹⁹⁷ Section 12 appears to allow *dépeçage*, in that a single issue can be governed by one law, when the ‘cause of action’ or another issue is governed by the *lex loci delicti* or a third law.¹⁹⁸ Furthermore, in requiring the other law to be ‘substantially more appropriate’ for dealing with the issue than is the *lex loci delicti*, Section 12 formally raises the threshold for applying the exception over what was needed by the common law.¹⁹⁹

Even so, under the 1995 Act the English courts have tended to support the application of the Section 12 exception in circumstances close to those in which Lord Wilberforce applied the flexible exception at common law in *Boys v Chaplin*. That is, where both claimant and defendant are English, there is a good chance that Section 12 will be invoked to ensure that English law, and not the *lex loci delicti*, will be adopted as the governing law. This has still only seen Section 12 invoked as a ground for applying the *lex fori* in one case.²⁰⁰ Also like *Boys v Chaplin*, the difference in the damages available under English law and the *lex loci delicti* has meant that the reported cases raise the potential application of English law by reason of both Section 12 and the characterization of the different quantifications of damages as procedural. In *Edmunds v Simmonds*,²⁰¹ Garland J held that Section 12 applied and made English law applicable to a tort that occurred in Spain,²⁰² as the parties were English and the claimant’s damage arose wholly in England. The location of the insurers in Spain was not of ‘overwhelming weight’.²⁰³ In *Hulse v Chambers*²⁰⁴ also, Holland J appeared to be aware that there was an argument

¹⁹⁴ A Briggs ‘*The Halley: Holed, but Still Afloat*’ (1995) 111 LQR 18, 21.

¹⁹⁵ *Red Sea Insurance Co v Bouyges SA* [1995] 1 AC 190 was an appeal to the Privy Council from Hong Kong. An English trial court attempted to invoke *Red Sea Insurance* in *Ennstone Building Products Limited v Stanger Limited* [2002] 2 All ER (Comm) 479, 484, 491 so as to apply Scots law alone, but this was overturned on appeal.

¹⁹⁶ Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 12(2): ‘The factors that may be taken into account . . . include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.’

¹⁹⁷ Private International law (Miscellaneous Provisions) Act 1995 (UK) s 12(1).

¹⁹⁸ *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, 966; *Harding v Wealands* [2005] 1 All ER 415, 425–6.

¹⁹⁹ Cf *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, 967.

²⁰⁰ It was also applied in *Bici v Ministry of Defence* [2004] EWHC 786, [2], by agreement of the parties.

²⁰¹ [2001] 1 WLR 1003; and see Anderson (n 186) 142.

²⁰² [2001] 1 WLR 1003, 1010, 1011.

²⁰³ *ibid* 1011.

²⁰⁴ [2002] 1 All ER (Comm) 812.

that English law could govern a claim involving English claimants and one defendant who was English, and that concerned injuries suffered when holidaying in Greece.²⁰⁵ However, the parties had agreed that Greek law would govern questions of liability, and a concession had been made that Section 12 could not be invoked.²⁰⁶ The Court of Appeal gave *obiter* support to the view that English law would apply to claims involving only English parties in *Roerig v Valiant Trawlers Ltd.*²⁰⁷

The English cases nevertheless show no willingness to apply Section 12 in circumstances beyond the ‘all English litigants’ scenario. If one of the principal parties to the proceedings is foreign, it is doubtful that Section 12 could be easily invoked. This probably underlies the concession in *Hulse v Chambers*²⁰⁸ that Section 12 could not apply, as the Greek insurer was sued as defendant (and not joined as a third party). The flip side to this view of course is that, if all of the litigants are from a single foreign country, then if that country is not the *locus delicti* it has a claim under Section 12 to provide the governing law. Still, compatibly with this view, in *Roerig v Valiant Trawlers Ltd.*²⁰⁹ the Court of Appeal held that Section 12 could not be invoked to apply Dutch law as an exception to the *lex loci delicti*—English law. The fact that the claimants and deceased were Dutch did not make Dutch law ‘substantially more appropriate’, as the defendant was an English company.

Further, Section 12 has been held not to apply, even where all of the parties are English residents, in circumstances where parties also have a relevant, significant connection with the *locus delicti*. In *Harding v Wealands*,²¹⁰ the claimant and the defendant were de facto partners living in London. The defendant was an Australian citizen, and the accident that caused the claimant’s injuries took place in the defendant’s home-state of NSW, in a car registered and insured in NSW, and while the defendant was on a NSW licence. Although at trial Elias J held that Section 12 applied and that English law governed the claim, the Court of Appeal unanimously rejected this view. Waller LJ (with whom Arden LJ and Sir William Aldous agreed)²¹¹ focused on the relative significance of the connections with England and NSW.²¹² The defendant’s nationality, the fact that she was driving her own car (left in NSW) on a NSW licence, and the *locus* of the accident meant that there were significant links with NSW that did not allow the conclusion that it was ‘substantially more appropriate’ to apply English law.²¹³ In this respect, *Harding v Wealands* represents a check on the now-traditional leaning

²⁰⁵ *ibid* 813–14.

²⁰⁶ *ibid* 814–15. Damages were still assessed by reference to English awards, as Holland J found that the assessment of damages was a question of procedure: *ibid* 815–18. The same agreement for application of the *lex fori* was made in *Bici v Ministry of Defence* [2004] EWHC 786, [2].

²⁰⁷ [2002] 1 All ER 961, 967–8.

²⁰⁸ [2002] 1 All ER (Comm) 812.

²⁰⁹ [2002] 1 All ER 961, 967–8.

²¹⁰ [2005] 1 All ER 415.

²¹¹ *ibid* 432, 440. This approach was not challenged in the appeal to the House of Lords.

²¹² *ibid* 423, 424–6.

²¹³ *ibid* 425–6.

towards the *lex fori* for ‘all English litigants’ cases that played out in *Edmunds v Simmonds* and in the *obiter* of *Hulse v Chambers* and *Roerig*.

A similar development, but with more marked extremes, has occurred in Canada. There was no flexible exception to the Canadian version of the rule in *Phillips v Eyre*, and in *Tolofson* La Forest J refused to recognize any exception to the *lex loci delicti* rule for inter-provincial torts. In this respect Sopinka and Major JJ disagreed with the majority in *Tolofson*, preferring that courts be offered some flexibility in interprovincial tort cases.²¹⁴ However, the majority treated inter-provincial torts as a different species to international torts and would only concede an exception to the *lex loci delicti* rule in international cases. Still, La Forest J pitched this exception as something close to a refusal to apply the foreign law on public policy grounds, though not so explicitly as the Australian High Court did later in *Renault*. His Lordship said that:

because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.²¹⁵

The stated need to invoke an exception so as not to cause ‘injustice’ means it is probably better to place the exception to the Canadian *lex loci delicti* rule somewhere in between a public policy exception and the centre of gravity approach of the UK’s Section 12 exception. The earlier cases, nevertheless, showed trial judges adopting a liberal attitude to the exception, and applying the *lex fori* in situations similar to *Boys v Chaplin* or even where connections with the forum were more tenuous. In one case, the exception was even invoked, incorrectly, in relation to an inter-provincial tort.²¹⁶

All of these cases involved motor accidents in American States, and the ‘injustice’ that would have been involved if the American law were applied included the prospect of a significantly more generous method of assessing damages under the American law,²¹⁷ the failure to credit deductibles against the damages awarded,²¹⁸ the likely denial of liability under a State’s guest statute,²¹⁹ or the expiration of the American limitation period for no fault benefits.²²⁰ In some of these it is evident that the ‘injustice’ is a relatively minor difference between the *lex fori* and the *lex loci delicti*, in which the exception is transformed into an excuse to apply the local law. This approach

²¹⁴ [1994] 3 SCR 1022, at 1078.

²¹⁵ *ibid* 1054.

²¹⁶ *Lee v Li* (2001) 53 OR (3d) 727. Under the rule in *Phillips v Eyre*, Australian courts had also invoked the flexible exception in interstate cases, despite the ban on doing so: see *Woodger v Federal Capital Press Pty Ltd* (1992) 107 ACTR 1, 37; *Nalpanidis v Stark* (1995) 65 SASR 454, 472–3.

²¹⁷ *Wong v Wei* (1999) 65 BCLR (3d) 222.

²¹⁸ *cf* *Wong v Lee* (2002) 211 DLR (4th) 69, 76–7.

²¹⁹ *Hanlan v Sernesky* (1997) 35 OR (3d) 603, 605–6; (1998) 38 OR (3d) 479, 480; *Gill v Gill* 2000 BCSC 870, [5], [17]–[19].

²²⁰ *cf* *Somers v Fournier* (2002) 214 DLR (4th) 611, 625.

reached its zenith in *Gill v Gill*,²²¹ in which members of an Ontario family, while *en route* to a new home in British Columbia, were injured in a car accident in Indiana through the father's negligent driving. The insurance policy was issued in Ontario. In the Supreme Court of British Columbia, Morrison J invoked the exception to *Tolofson* and held that the claim was governed by British Columbia law. This is despite the absence of any physical connection with British Columbia at the time of the accident. However, Morrison J thought that there were adequate connections with the Province to justify the exception. The parties were intending to live in British Columbia, they later did live there, and the insurance policy was issued in another Canadian Province with similar laws. Indiana had a guest statute, which her Ladyship thought would cause injustice if applied to the case.²²²

In constructing a rationale for application of the *lex fori* around an intention on the part of the litigants to drive to the forum Province, Morrison J excused application of the primary rule with the thinnest connections yet seen in Commonwealth cases. If an exception were needed in *Gill*, application of Ontario law would have been a more credible alternative. It was in order to stem the tide of forum bias so evident in cases like *Gill* and to restore the strong territorialism of *Tolofson* that, in *Wong v Lee*,²²³ Feldman JA warned against invoking this exception to the *lex loci delicti* rule. The case involved an accident in New York, but all of the parties—driver, passenger, owner and insurers—were resident in Ontario. The trial judge in Ontario applied the *lex fori* to the claim in preference to the law of New York, which only differed from the law of Ontario in not crediting certain deductibles against an award of damages. The Ontario Court of Appeal reversed this decision: Feldman JA (with whom McPherson JA agreed) criticizing the cases that had too easily allowed an exception to the application of the *lex loci delicti*. He held that these decisions had failed to recognize the policy of certainty underlying the *lex loci delicti* rule, and that the rule was only to be broken when it would cause injustice. Feldman JA evidently believed that judges had been too prepared to find injustice, and that it was being used as an excuse to apply the local law.²²⁴ The overriding policy was to give effect to the law of the place where a tort occurred, and in this case that meant the law of New York.²²⁵ Soon after *Wong v Lee* the Ontario Court of Appeal heard *Somers v Fournier*,²²⁶ another case in which Ontario residents were involved in a motor accident in New York. The differences between Ontario and New York law in this case were twofold. In New York, the limitation period for claiming no fault benefits had expired although general damages flowing from the driver's negligence were available. In relation to these, the law of Ontario capped the damages that could be recovered for non-pecuniary losses where the law of

²²¹ 2000 BCSC 870.

²²² *ibid* [16]–[19].

²²⁴ *ibid* 75.

²²⁵ *ibid* 77.

²²³ (2002) 211 DLR (4th) 69.

²²⁶ (2002) 214 DLR (4th) 611.

New York did not. The latter question was dealt with as a matter of procedural law, and was discussed above. However, in relation to the limitation period on no fault benefits, Cronk JA held that the New York law, as the *lex loci delicti*, should be applied. He followed *Wong v Lee*, and added that the *lex loci delicti* rule should apply even when there is a high degree of connection between the litigants and the forum.²²⁷ Furthermore, *Tolofson* itself illustrated that denial of a claim because the *locus delicti*'s limitation period applied was not an injustice that demanded that an exception to the *lex loci delicti* be invoked.²²⁸ Again, the law of New York applied.

Wong v Lee and *Somers v Fournier* should see the strong forum bias of the kind that informed the decision in *Gill* interred—at least in Ontario.²²⁹ There has not been a Canadian case successfully invoking this exception since *Wong* and *Somers* were decided,²³⁰ although it is still early days. If the Ontario Court of Appeal's downgrading of centre of gravity considerations and its strictures on what amounts to an injustice are maintained and adopted in other Provinces, the Canadian *lex loci delicti* regime will edge closer to the Australian, where a public policy exception is all that is allowed and then only in international cases.

E. Public Policy

There is general principle of private international law, recognized in all three countries, that a court can refuse to apply a foreign *lex causae* if application of that law would be contrary to the public policy of the forum.²³¹ The principle has not been invoked in reported cross-border tort cases since *Phillips v Eyre*. In part, the necessary reference to the public policy of the forum by application of the *lex fori* side of the rule reduced the need to invoke the public policy exception in tort cases, but *Phillips v Eyre* alone would not eliminate its possible use. If, for instance, the *lex loci delicti* did not allow recovery of damages for injuries, normal application of double actionability versions of *Phillips v Eyre* would lead to a denial of the claim. Confronted also with a strong legal demand in the forum that there should be compensation for the injury, there may well have been public policy reasons not to accept the result directed by some versions of *Phillips v Eyre*. This is akin to the problem confronted by

²²⁷ *ibid* 624.

²²⁸ *ibid* 625–6; see also *Roy v North American Leisure Group Inc* (2004) 246 DLR (4th) 306, 309–10.

²²⁹ cf *Britton v O'Callaghan* (2002) 219 DLR (4th) 300, 303; *Roy v North American Leisure Group Inc* (2004) 246 DLR (4th) 306, 309–10. See also *Castillo v Castillo* (2002) 313 AR 189, [12], [32]; *Soriano v Palacios* (2005-06-03) ONCA C42225, [14].

²³⁰ The exception was applied at first instance to avoid a short limitation period in *Roy v North American Leisure Group Inc* (2003-12-15) ONSC 01-CV-1778, but the decision was reversed on appeal: (2004) 246 DLR (4th) 306.

²³¹ See PB Carter 'The Role of Public Policy in English Private International Law' (1993) 42 ICLQ 1.

many North American jurisdictions, faced with the possible application of the guest statutes that had proliferated across American States and Canadian Provinces.²³² However, the application of guest statutes tended to be avoided by the recrafting of choice of law rules or, in the case of interest analysis, dispensing with choice of law rules altogether. Also, as used in *Boys v Chaplin*, the flexible exception was another means by which a denial of liability in the *locus delicti* could be avoided without having to make the weighty and unfriendly judgment that the foreign law was morally deficient.

The public policy exception is recognized under all three *lex loci delicti* regimes, although in Australia and, most likely, Canada, only for international torts. In the United Kingdom, the 1995 Act expressly preserves the courts' ability to apply the *lex fori* when the law of another country (including the law of another part of the United Kingdom) 'would conflict with principles of public policy'.²³³ As has been seen, in Canada in *Tolofson La Forest J* recognized that if 'injustice' was caused by applying the *lex loci delicti* in an international case, the Canadian court had a 'discretion' to apply the *lex fori*.²³⁴ In *Wong v Lee*²³⁵ and *Somers v Fournier*,²³⁶ the Ontario Court of Appeal resolved that this was not to be applied like a flexible exception and, as a result, it is possible to treat this as similar to a public policy exception to the choice of law rule. There has been some suggestion in British Columbia that the denial of liability under a guest statute may be contrary to the public policy of the Province, and the fact that Saskatchewan recently maintained a guest statute had no effect on this conclusion.²³⁷ But, historically, the Canadian courts have been much more reluctant than English courts to invoke the public policy exception,²³⁸ and this has been no less the case since *Somers*.

The Australian High Court in *Pfeiffer* seemed to support its old rule that the federal Constitution prohibited a court from refusing to apply the law of another Australian State on the ground of public policy.²³⁹ That necessarily limits the possible application of the public policy exception to international torts, a position that seemed to be endorsed by the majority in *Renault*.²⁴⁰ Australian courts have also traditionally not shown any inclination to invoke the public policy exception.²⁴¹ Certainly, as cast in *Renault*, the kind of foreign laws that would raise public policy concerns were those dealing with the expropriation of property or that would be used in an attempt to enforce a foreign governmental interest.²⁴² This exception has not been used in any

²³² See F Juenger *Choice of Law and Multistate Justice* (Martinus Nijhoff Dordrecht 1993) 106–9, 117–18.

²³³ Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 14(3)(a)(i).

²³⁴ [1994] 3 SCR 1022, 1054.

²³⁵ (2002) 211 DLR (4th) 69.

²³⁶ (2002) 214 DLR (4th) 611.

²³⁷ *Gill v Gill* 2000 BCSC 870, [18].

²³⁸ Castel (n 97) 164–5.

²³⁹ (2000) 203 CLR 503, 533–4. See also *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 577, 587–8.

²⁴⁰ (2002) 210 CLR 491, 519–20, 535.

²⁴¹ *Mortensen* (n 152) 120.

²⁴² 2002) 210 CLR 491, 512, 513.

reported foreign tort litigation involving the *lex loci delicti* regimes in the three countries.

F. Renvoi

The appearance of *renvoi* as a homing device was barely foreseen before the *lex loci delicti* regimes were adopted in Australia, Canada and the United Kingdom. Any opportunity for its use in the United Kingdom was largely closed by the 1995 Act, which directed that the law of the place applicable to a tort claim governed by the Act excluded any choice of law rules applicable in that place. That is so whether the governing law is the *lex loci delicti* or some other law.²⁴³ Accordingly, the possibility of a court in the United Kingdom applying the *lex fori* by accepting a *renvoi* from the *lex loci delicti*'s choice of law rules is only conceivable in the residue of cases to which the double actionability rule still applies. And further, the general view before the *lex loci delicti* regimes were adopted was that the doctrine of *renvoi* had no application in tort cases. The leading English text-writers before 1995 expressed scepticism of its use in tort claims.²⁴⁴ The Canadian and Australian text-writers took the same view before the *Tolofson* and *Pfeiffer-Renault* regimes were adopted.²⁴⁵ This may well explain the paucity of judicial authority in the Commonwealth on *renvoi* in tort litigation,²⁴⁶ with the exception of limited *obiter* in Scots adjudication that expressly discounted its use in multi-state delict cases.²⁴⁷ The necessary reference to the *lex fori* in the *Phillips v Eyre* era may also have obviated the need to use *renvoi* as a homing device.²⁴⁸ It was therefore unexpected, and surprising, that the Australian High Court embraced the doctrine of *renvoi* in foreign tort litigation in *Neilson v Overseas Projects Corporation of Victoria Ltd.*²⁴⁹

The plaintiff in *Neilson* was injured when she fell down the stairs of a flat in the People's Republic of China, where she lived while her husband was employed by the defendant company, which was incorporated in Victoria. The plaintiff was Western Australian, and sued the employer in her home-State for

²⁴³ Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 9(5); eg *Mattos v Macdaniels Limited* [2005] EWHC 1323 (Ch), [48].

²⁴⁴ Collins (n 97) 80–2; P North and J Fawcett *Cheshire and North's Private International Law* (12th edn Butterworths London 1992) 72.

²⁴⁵ In general, by discounting its use in all but named property and matrimonial claims. Canada: JD Falconbridge *Selected Essays on the Conflict of Laws* (2nd edn Canada Law Book Co Toronto 1954) 141–2; Castel (n 97) 115–16. Australia: P Nygh *Conflict of Laws in Australia* (6th edn Butterworths Sydney 1995) 240.

²⁴⁶ R Yezerski 'Renvoi Rejected? The Meaning of 'the *Lex Loci Delicti*' After *Zhang*' (2004) 26(2) Sydney Law Review 273, 282–5; A Lu, 'Ignored No More: *Renvoi* and International Torts in Australia' (2005) 1 Journal of Private International Law 35, 38–9.

²⁴⁷ *McElroy v McAllister* 1949 SC 110, 126.

²⁴⁸ M Keyes 'The Doctrine of *Renvoi* in International Torts: *Mercantile Mutual Insurance v Neilson*' (2005) 13 Torts Law Journal 1, 10.

²⁴⁹ (2005) 221 ALR 213.

breach of contract and negligence. The claim in contract failed,²⁵⁰ but the trial judge, McKechnie J, allowed the claim in negligence. This would have been out of time in China, which imposed a one-year limitation period (subject to court-approved extensions) for delictual claims relating to personal injuries. It was brought just inside the six-year limitation period set in Western Australia. McKechnie J held that, in light of *Pfeiffer-Renault*, the claim was governed by Chinese law.²⁵¹ Nevertheless, he then noted that China's General Principles of Civil Law provided for compensation to be awarded in accordance with the *lex loci delicti* but that '[i]f both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied'.²⁵² So, his Honour held that, owing to the Chinese choice of law rule, he was bound to apply Australian law to the claim.²⁵³

McKechnie J's decision was in effect accepting a *renvoi*. He did not identify it as such, although the Full Court of the Supreme Court did when hearing the first appeal.²⁵⁴ McClure J (with whom Johnson J and Wallwork AJ agreed)²⁵⁵ held that the doctrine of *renvoi* had no application in tort cases,²⁵⁶ and was reinforced in that conclusion by the principles of territoriality,²⁵⁷ certainty²⁵⁸ and predictability²⁵⁹ informing the decisions in *Pfeiffer* and *Renault*. Indeed, these objects of the *Pfeiffer-Renault* regime were, according to her Honour, to identify the place that would provide the *lex causae*, and not to identify the place that would give the rule that would identify the *lex causae*.²⁶⁰ The governing law was therefore domestic Chinese law.²⁶¹

The Full Court's decision in *Neilson* strongly affirmed the basic territorialism of the *Pfeiffer-Renault* regime. That territorialism was probably abandoned by the Australian High Court, which on appeal in *Neilson* held that the Western Australian limitation period applied. The majority of Gleeson CJ and Gummow, Hayne, Callinan, and Heydon JJ reached this conclusion by adopting the doctrine of *renvoi*, and most of these judges accepted the doctrine of double *renvoi*.²⁶² The dissenting Kirby J also would have adopted double *renvoi*—had he been satisfied that the plaintiff had proved that the Chinese choice of law rule required application of the law of Western Australia.²⁶³ Accordingly, the High Court's decision was that the Chinese choice of law rule required the question of limitation to be governed by the law of Western

²⁵⁰ *Neilson v Overseas Projects Corporation of Victoria Ltd* [2002] WASC 231, [106].

²⁵¹ *ibid* [122]–[123].

²⁵² *ibid* [200].

²⁵³ *ibid* [208]. If domestic Chinese law applied, McKechnie J was prepared to exercise the Chinese power to extend the limitation period: *ibid* [191].

²⁵⁴ *Mercantile Mutual Insurance (Australia) Ltd v Neilson* (2004) 28 WAR 206, at 213.

²⁵⁵ *ibid* 222.

²⁵⁶ *ibid* 213.

²⁵⁷ *ibid* 215.

²⁵⁸ *ibid* 215–16.

²⁵⁹ *ibid*.

²⁶⁰ *ibid* 216.

²⁶¹ *ibid* 220.

²⁶² *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 221 ALR 213, 217–18, 239, 281–2. Callinan J seemed to adopt the doctrine of single *renvoi*: *ibid* 278–9.

²⁶³ *ibid* 260.

Australia as the *lex patriae*, and that a Chinese court would ignore any *renvoi* that could arise (from the Chinese perspective) by applying the Western Australian choice of law rule in favour of the *lex loci delicti*. A Chinese court would apply the law of Western Australia, and the Western Australian court should do the same. According to the majority, this naturally flowed from the forum's choice of law rule that required application of the *whole* of the *lex loci delicti*—including the *locus*'s choice of law rules.

That reasoning presents many difficulties, as all of the High Court judges except Gleeson CJ²⁶⁴ believed that the plaintiff had *not* proved that Chinese law required application of the *lex patriae*. For the dissenting McHugh and Kirby JJ, that was enough for the court to be required to apply the domestic Chinese limitation period, which had been proved by adequate evidence, and with no remission to Western Australian law.²⁶⁵ The majority, nevertheless, accepted the English text of the Chinese choice of law rules. Then, without any evidence as to how it would be applied in China, but presuming that it should be interpreted in accordance with Australian principles, they held that the resulting construction of the text inevitably led to the application of domestic Western Australian law.²⁶⁶ That exercise relied on nothing presented by the parties to the court, and produced a state-less choice of law rule that was neither truly Chinese nor Australian. Its artificiality is self-evident.

Some commentary on the earlier stages of *Neilson* suggested that the use of double *renvoi* in foreign tort litigation might also be compatible with principles of territorialism.²⁶⁷ That may be so, although the stronger argument, especially in the circumstances of *Neilson*, is probably that the High Court preferred the personal connections of the 'Chinese' choice of law rule (as constructed by the Australian court) to trump the territorialism of *Pfeiffer* and *Renault*. And that, conveniently, led to the *lex fori*.²⁶⁸ There could be other reasons as well for rejecting the use of double *renvoi*—not the least being that double *renvoi* is only workable if the *locus delicti* has been persuaded *not* to use it. Dr Keyes' argument that *renvoi* might correct the unusual inflexibility of the Australian rule for choice of law in foreign tort litigation has more to recommend it.²⁶⁹ However, it would be preferable to do this openly through a constrained use of a flexible exception than to introduce the complicated means of *renvoi* to choice of tort law.²⁷⁰ The result of *Neilson* is to leave the

²⁶⁴ *ibid* 218–19.

²⁶⁵ *ibid* 223–4, 266. Even if a reference by Chinese law to the *lex patriae* were proved, McHugh J believed that the *renvoi* should be ignored: *ibid* 229.

²⁶⁶ *ibid* 242–3, 275–6, 280.

²⁶⁷ Yezerski (n 246) 289–90.

²⁶⁸ The forum preference is also evident in the fact that the law of Western Australia, the forum, was applied as the national law, even though the defendant was a Victorian company. In *Neilson*, Callinan J openly preferred the use of *renvoi* when it led to the application of the *lex fori*: (2005) 221 ALR 213, 278–9.

²⁶⁹ Keyes (n 248) 14–15.

²⁷⁰ Lu (n 246) 64, 66–7.

choice between the *lex fori* and the *lex loci delicti* to the outcome of litigants' evidential battles over the effect of the *locus delicti*'s choice of law rules, and will make cross-border tort litigation all the less predictable for that.

IV. CONCLUSION

A. The Homing Instinct

The foregoing survey and analysis suggest that courts in Australia, Canada and the United Kingdom do betray a homing instinct, although it is now more tightly restrained. Indeed, characterization (whether of the question or of the connection),²⁷¹ the public policy exception and *renvoi* do not at all seem to be significant means by which courts could escape the *lex loci delicti* and take refuge in the *lex fori*. *Direct Energy Marketing Ltd v Hillson*²⁷² and *Neilson v Overseas Projects of Victoria Corporation Ltd*,²⁷³ at first instance and in the Australian High Court, stand alone in these categories as unorthodox applications of the *lex fori* and possible uses of homing devices. *Hillson* does not appear to have persuaded any other Canadian judge that the location of a multi-provincial defamation should be ascribed to the forum and, despite Briggs' normative arguments favouring the use of *renvoi* in foreign tort litigation,²⁷⁴ its deployment in *Neilson* was doubtful against the backdrop of the positive principles of cross-border tort adjudication in the past. In fact, given how few examples can be mustered of the potential use of these homing devices, they actually tend to reinforce an exceptional degree of compliance with the *lex loci delicti* regimes in Australia, Canada and the United Kingdom. Furthermore, as judgments like that of Bongiorno J in the Victorian *Voyager* case show,²⁷⁵ the directives of *Tolofson*, *Pfeiffer* and *Renault* have made some trial judges conscious of the principles of territorialism that created—and now maintain—the *lex loci delicti* paradigm.

It is apparent that, until *Neilson*, the rigidity of the Australian regime was the most effective means of controlling courts' homing instincts. But it was perhaps too effective. The NSW courts' evident forum bias in international tort cases in the period between *Pfeiffer* and *Renault* has already been noted, but *Renault* seemed to have controlled it effectively. This does not mean that homing instincts have been suppressed entirely. The eccentricity of *Neilson*—the only Australian example of the use of a homing device—might itself show what desperate measures judges are prepared to take to get to the *lex fori*.

²⁷¹ *Shane v JCB Belgium NV* (2003-11-14) ONSC 02-CV-19871 and *Nicholls v Brisbane Slipways and Engineering Pty Ltd* [2003] QSC 193 are possible exceptions, but also use principles that were current before the *lex loci delicti* regimes were adopted.

²⁷² [1999] 12 WWR 408.

²⁷³ [2002] WASC 231; (2005) 221 ALR 213.

²⁷⁴ Briggs (n 21).

²⁷⁵ *Burk v Commonwealth of Australia* [2002] VSC 453, [24].

Indeed, *Neilson* might just show how the rigidity of the *Pfeiffer–Renault* regime could backfire. Without having (as a result of its own decisions) even a constrained and principled exception that allowed appropriate but limited reference to the *lex fori*, the High Court was left with nothing but the wildly unpredictable and complicated use of double *renvoi* as a means of escaping to the *lex fori*. Judicial homing instincts are certainly there. But, even after *Neilson*, it is harder to give them any expression.

Neilson is still the only case in the Commonwealth to have used *renvoi* as a homing device in cross-border tort litigation. Rather, it is in areas where *Tolofson* and the 1995 Act did not address implications of territoriality—such as the characterization of the assessment of damages—or where they allowed explicit exceptions to them—as in the flexible exception—that homing devices have been more common. As a result, the situations in which the *lex fori* is most likely to supplant the *lex loci delicti* are not those where surreptitious means are deployed. A homing instinct might be especially evident in the earlier Canadian use of *Tolofson*'s flexible exception.²⁷⁶ To a lesser extent it might also motivate some English use of the 1995 Act's flexible exception,²⁷⁷ and Canadian²⁷⁸ and English²⁷⁹ approaches to the assessment of damages. However, the use of the flexible exception has also been contained by courts of first appeal that have digested the territorialism of the *lex loci delicti* regimes.²⁸⁰ The Canadian and English courts' insistence that damages be characterized as procedural law will be the only remaining homing device with any significant effect.

B. Damages as Procedure

The conceptual weakness of having damages assessed under the *lex fori* is shown in the reliance that the appeal courts in *Roerig* and *Somers v Fournier* placed on policy considerations as a rationale for the characterization of rules for assessing damages as procedural law. In *Roerig*, Waller LJ gave no indication as to what those policy considerations were, or even as to which genus they might belong. However, from the context of *Roerig* we could expect that these policy considerations could relate closely to the rationale for the award of damages in the first place. Are they to punish, to compensate or to provide

²⁷⁶ *Lee v Li* (2001) 53 OR (3d) 727; *Wong v Wei* (1999) 65 BCLR (3d) 222; *Hanlan v Sernesky* (1997) 35 OR (3d) 603, 605–6; (1998) 38 OR (3d) 479, 480; *Gill v Gill* 2000 BCSC 870, [5], [17]–[19]; cf *Wong v Lee* (2002) 211 DLR (4th) 69, 76–7.

²⁷⁷ *Edmunds v Simmonds* [2001] 1 WLR 1003, 1010, 1011; *Hulse v Chambers* [2002] 1 All ER (Comm) 812, 813–4; *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, 967–8.

²⁷⁸ *Somers v Fournier* (2002) 214 DLR (4th) 611, 629; *Craig v Allstate Insurance Co of Canada* (2002) 214 DLR (4th) 103, 113.

²⁷⁹ *Edmunds v Simmonds* [2001] 1 WLR 1003; *Hulse v Chambers* [2002] 1 All ER (Comm) 812; *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961; *Harding v Wealands* [2006] UKHL 32.

²⁸⁰ *Harding v Wealands* [2005] 1 All ER 415, 425–6, 435–6, 447; *Wong v Lee* (2002) 211 DLR (4th) 69, 75, 77; *Somers v Fournier* (2002) 214 DLR (4th) 611, 624.

a reasonable safety net for the claimant? In *Somers v Fournier*, Cronk JA listed considerations like the predictability of damages awards and the social impact they have, presumably through the insurance premiums that spread the cost of legal risk. Interestingly, all of these factors could as easily explain the nature and content of rules of tortious liability, and the availability or denial of different heads of damage. None of them seem to be rationally or necessarily connected to anything that is commonly called ‘procedure’ in the common law.

Further conceptual incoherence in the segregation of questions relating to a head of damage from those relating to the assessment of damages lies in the assumption that the head of damage is available under the *lex fori* and, as a consequence, the *lex fori* has the capability of assessing damages for that head. The English and Canadian cases have only been able to maintain a semblance of integrity in that, in all of the reported cases, the *lex fori* and the relevant foreign law have had similar grounds of liability. Assessments of damages have merely differed over issues like the comparative generosity of forum and foreign courts,²⁸¹ the deductibility of other sources of compensation,²⁸² caps on damages recoverable under given heads,²⁸³ and the timing of payments of awards.²⁸⁴ However, the assumption that the *lex fori* will always recognize recovery under a head of damage is plainly untenable. The *lex fori*, as those sceptical of the 1995 Act pointed out,²⁸⁵ may not even have an equivalent of the actionable wrong that is available under the *lex loci delicti*. More commonly, the wrong may be recognized as actionable in both places but particular kinds of losses may only be recoverable in one of them. Assume, for example, that in an action for damages for personal injuries the *lex loci delicti* allows recovery of losses incurred by a corporation that depended on the plaintiff for its profitability, but that the *lex fori* denies recovery of that head of damage. If the *lex loci delicti* were the governing law, the forum court should allow those corporate losses to be recovered. But how can damages to recover them then be assessed by reference to the *lex fori*? This was not problematic under the rule in *Phillips v Eyre*, as all versions of the rule required liability under the *lex fori* and, in a case like this, would have denied any right to recover corporate losses following from the injury in the first place.²⁸⁶ It is no answer for the judge to hypothesize how the forum might assess damages for corporate losses were it to recognize the right to recover them, nor, if the

²⁸¹ *Wong v Wei* (1999) 65 BCLR (3d) 222; *Edmunds v Simmonds* [2001] 1 WLR 1003; *Hulse v Chambers* [2002] 1 All ER (Comm) 812.

²⁸² *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961.

²⁸³ *Somers v Fournier* (2002) 214 DLR (4th) 611; *Harding v Wealands* [2006] UKHL 32.

²⁸⁴ *Hulse v Chambers* [2002] 1 All ER (Comm) 812. These were still regarded as procedural in *Harding v Wealands* [2005] 1 All ER 415, 436–7, but cf *BHP Billiton Ltd v Schultz* (2004) 211 ALR 523, 578–9.

²⁸⁵ Briggs (n 57) 522; Rodger (n 14) 210; J Harris ‘Choice of Law in Tort—Blending in with the Landscape of Conflict of Laws?’ (1998) 61 MLR 33.

²⁸⁶ *Mitchell v McCulloch* 1976 SLT 2.

forum did once recognize the right to recover them but had abolished that right by statute, to use the principles for assessing damages for corporate losses that the forum used to have. In neither case is the *lex fori*—as currently stated by the forum’s lawmakers—being applied. The difficulty is that, once the basic choice of law rule for matters of substance is freed of necessary reference to the *lex fori*, the idea that the assessment of damages is procedural and something for the *lex fori* to deal with also necessarily loses any foundation. It is at this point that the rationality of La Forest J’s judgment in *Tolofson* reaches its limit.²⁸⁷ In dealing only with the characterization of statutes of limitation as substantive, La Forest J did narrow the Canadian approach to procedural law. However, in failing to link this explicitly to the need to give fuller effect to the territorial principles underlying the *lex loci delicti* rule, his Lordship left some room for the Provincial courts to maintain the characterization of other questions as procedure as a means of escaping to the *lex fori*. That this has allowed Ontario’s own ‘policy considerations’²⁸⁸ to be elevated above *Tolofson*’s strict principle of territoriality merely reinforces the conceptual difficulty of treating the assessment of damages in this way.

At least in prominently attaching the idea of procedure to the conduct of court proceedings, the Australian High Court in *Pfeiffer* gave an a priori definition of procedural law that is also compatible with the territoriality principle of its *lex loci delicti* choice of law rule. Admittedly the change might have been motivated by the High Court’s own tortuous adjudication in *McKain and Stevens*, and by some lessons it learned from its Canadian counterpart in *Tolofson*. Still, Australian English courts have reached the more principled conclusion that ‘procedure’ in private international law should mean nothing grander than the procedures needed to begin court proceedings, to carry them through trial and any appeals, and then to give effect to the outcome. This would naturally include rules relating to pre-trial mediation, education programmes or examination; the discovery and production of documents;²⁸⁹ the filing of financial statements;²⁹⁰ time periods for filing documents (other than initiating process);²⁹¹ and dismissal for want of prosecution.²⁹² If the *lex loci delicti* specifies that proceedings must be brought in a given court or tribunal in the *locus delicti*, this could also be considered procedural.²⁹³ It

²⁸⁷ cf Kincaid (n 15) 556–7, 562.

²⁸⁸ *Somers v Fournier* (2002) 214 DLR (4th) 611, 629.

²⁸⁹ cf *BHP Billiton Ltd v Utting* [2005] NSWSC 260, [8]–[9], [24]; *BI (Contracting) Pty Limited* [2005] NSWSC 592, [17]–[20].

²⁹⁰ *Flockhart v Flockhart* [2002] 4 WWR 669, 678.

²⁹¹ *KC v College of Physical Therapists of Alberta* (1998) 157 DLR (4th) 31, 36.

²⁹² cf *Alberta Mortgage and Housing Corporation v Kalpstein* [1999] 1 WWR 355, 361.

²⁹³ For instance, in *Guardian of Stoeterau v Crowsnest Air Ltd* (1995) 5 BCLR (3d) 251, [19]–[23], it was held a claim under the Saskatchewan Fatal Accidents Act 1965 could be brought in the Supreme Court of British Columbia, even though the Act, section 3(2), stated that ‘The action shall be brought in the [Saskatchewan] Court of Queen’s Bench’. As a procedural law, it could be ignored by the British Columbia Court. In *Pfeiffer* (2000) 203 CLR 503, 548–9, Kirby J called this particular issue ‘procedural enforceability’ and suggested that the *lex loci delicti*’s

would seem quite possible to characterize these requirements as concerning ‘the initiation . . . of the case’—to use Callinan J’s language from *Pfeiffer*.²⁹⁴

C. Fortuitousness

Adjudication and comment on the *lex loci delicti* regimes occasionally imply that an exception should be made for the *lex fori* because the place where the alleged wrong occurred is ‘fortuitous’.²⁹⁵ The joint majority in *Pfeiffer*, for example, noted that ‘even if the place of the tort can be located in a single jurisdiction, it will often enough be entirely fortuitous where the tort occurred.’²⁹⁶ They then posed a rhetorical question:²⁹⁷

Why . . . should the rights of Victorian residents injured when the car in which they are driven (by another Victorian) differ according to whether, if a driver falls asleep and the car runs off the road near the Victorian border, it does so south of Wodonga [in Victoria] or north of Albury [nearby in NSW]?

The answer, which the High Court itself effectively gave, is that the representative Parliaments responsible for the different States have decided that injuries suffered inside their borders are to be compensated in different amounts, and by different means. Even so, it will be a rare case in which an assessment that the *locus* is ‘fortuitous’ is accurate, and it certainly is not in the High Court’s Albury–Wodonga example. True, most cross-border tort litigation, being brought for alleged negligence, will effectively claim the fortuitous character of the wrong. It is fortuitous that the driver fell asleep. But this is also the case when the claim has no extraterritorial element.

It is a very different thing to suggest that it was merely accidental that the claimant was in the place of the wrong when the wrong was done. Significantly, the Victorian driver does not find himself north of Albury by happenstance, unless—in a bizarre case—he was an automaton when he drove across the border, or fell asleep and crashed right on the border. In the usual case, he will have crossed the border intentionally or, if reluctantly, at least with knowledge of the crossing. And the result is that his presence in the *locus*

nomination of a specific tribunal to deal with the claim might mean that the forum either has no power to deal with it, or is best not to. This approach would also curb application of the *lex fori*. But in many cases the specification in the *lex loci delicti* of a tribunal to deal with the claim could be sensibly drawn as relating to the conduct of proceedings and, thus, as procedural. *Stoeterau* would therefore appear to be compatible with a narrow approach to procedure. However, in *Voyage Company Industries v Craster* (1998-08-11) BCSC C976871, [12]–[13], Harvey J did take the view that it was best that the British Columbia Court not deal with claims for oppression that had been expressly invested by the Yukon Business Corporations Act in the Supreme Court of Yukon.

²⁹⁴ *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503, 574.

²⁹⁵ See *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, 967; *Pulido v RS Distributions Pty Ltd* (2003) 177 FLR 401, 407; James (n 186) 158.

²⁹⁶ (2000) 203 CLR 503, 539.

²⁹⁷ *ibid* 539.

is almost always deliberate. The Victorian driver may not realize that the law in NSW does not compensate for losses that can be recovered at home, or that he cannot recover by the same means. Still, he is also unlikely to know how the law in Victoria compensates for losses. He does usually appreciate, though, that the law in the new State could be different. In this respect, the claimant's deliberate presence in the *locus delicti* normally draws an awareness of its legal distinctiveness along with it. This is precisely the same legal consciousness that underlies the 'psychology' of the *lex loci delicti* rule for choice of tort law, which influenced the United Kingdom commissions' recommendations for a *lex loci delicti* regime.²⁹⁸ As Australian and Canadian judges have also emphasized when explaining the principle of territorialism, it gives effect to people's normal expectations that the law that would apply to them was the law of the place where they were at the time.²⁹⁹ Indeed, most would be surprised to be told that some other place's law could be applied instead.³⁰⁰ The extended efforts of appeal courts since the introduction of the *lex loci delicti* regimes in trying to contain trial judges' homing instincts have therefore also performed the important role of vindicating the expectations that litigants held prior to the dispute. However, if this psychology which has informed the *lex loci delicti* regimes in all three countries has any weight, it also means that the fortuitousness of the *locus* is a poor excuse for applying the *lex fori*. Judges would be better to stop appealing to it.

²⁹⁸ Law Com No 193 (1990); Scot Law Com No 129 (1990) 10 (para 3.2).

²⁹⁹ *Tolofson v Jensen* [1994] 3 SCR 1022, 1050–1; *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503, 540; *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 537. See also PB Carter 'Torts in English Private International Law' (1982) 52 BYIL 9, 10.

³⁰⁰ This was Mason CJ's observation in *Breavington v Godleman* (1988) 169 CLR 41, 78.