The Convention on the Law Applicable to Products Liability

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INTRODUCTION

The choice of law rule that Canadian Courts apply with respect to a claim arising from a tort committed abroad has remained static for about three-quarters of a century.[1] Nevertheless, our age is characterized by an increase in the rapid and convenient movement of persons, goods and ideas. Increased travel brings with it an increase in traffic accidents and claims, and the frequency with which goods are shipped to distant points makes an increase in claims against foreign suppliers of goods inevitable. Considering that the present conflict rules for all torts, including claims arising from traffic accidents and products liability, are based on cases involving false imprisonment [2] and libel,[3] it is not surprising that attempts have been made to find a connecting factor that would better fit the circumstances giving rise to such damage claims. The philosophical basis of tortious liability is now not so much characterized by the connotation of responsibility for criminal or quasi-criminal acts, but by considerations of an appropriate distribution of risks among insurers.[4]

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[1] The rule is based on *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. (Ex.) and *Machado* v. *Fontes*, [1897] 2 Q.B. 231 (C.A.), and has been restated in Dicey and Morris, *Conflict of Laws* 8th ed. (1967), 919-920 as follows:

> An act done in a foreign country is a tort and actionable as such in England only if it is both
> (a) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and
> (b) not justifiable, according to the law of the foreign country where it was done.

The Canadian Courts received these cases as law through the Supreme Court decision in *McLean* v. *Pettigrew*, [1945] S.C.R. 62.

[2] *Phillips* v. *Eyre*, *supra*, f.n.1.

[3] *Machado* v. *Fontes*, *supra*, f.n.1.

[4] With respect to traffic accidents, Professor Baer states in *Conflict of Laws — Torts — A Blind Search for a "Proper" Law*, (1970) 48 Can. Bar Rev. 161, 166 that:

Which law should govern a damage claim? The *lex loci delicti commissi* suggests itself as the most appropriate choice. It is also, in many cases, easily ascertainable (*e.g.* traffic accident cases). But even here, and in numerous other cases, the place where the tort was committed may be fortuitous and thus not commend itself as the connecting factor. These difficulties have led to the invention of the "proper law of the tort" theory which requires the application of the law of that jurisdiction with which the circumstances of the case have the closest connection.[5]

> Our tort laws are primarily concerned with compensating accident victims, and the conflicts that exist in North American tort law centre around the extent to which victims should be protected at the expense of automobile owners as a class through liability insurance. Conflicts exist because some jurisdictions provide more protection than others.

See also the note in (1973) 86 Harv.L.R. 923, 930 on *Torts — Products Liability:*

> The manufacturer is in a better position to know whether the particular form of negligence ascribed to the worker is frequent in the use of a particular machine, to evaluate the costs of such negligence as against the costs of physically preventing it, and to act on this evaluation.

[5] The theory first found judicial favour in a decision of the New York Court of Appeal, *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963). However, a decade later, the very same court was to reverse the *Babcock* ruling in *Neumeier* v. *Kuehner*, 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972).

Anglo-Canadian jurisprudence in *Boys* v. *Chaplin*, [1969] 2 All E.R. 1085 (H.L.); aff'g [1968] 1 All E.R. 283 (C.A.); aff'g [1967] 2 All E.R. 665 (Milmo,J.) was presented with a case whose facts were well suited for a development or a well-reasoned repudiation of this theory but, unfortunately, this opportunity was missed.

The facts were uncomplicated. The plaintiff and defendant, both normally resident in England, were serving with the British forces in Malta when, through the plaintiff's negligence, the defendant was injured in a motor car accident. Maltese law, the *lex loci delicti commissi*, did not permit a compensation for pain and suffering, but English law, the *lex fori*, did. The trial judge followed *Machado* v. *Fontes* (*supra*, f.n.1), applied the *lex fori*, and awarded the plaintiff full damages including a substantial compensation for pain and suffering. The Court of Appeal dismissed the defendant's appeal. Lord Denning based his decision on the "proper law of the tort" because both parties were English servicemen, insured in England by an English company, and because the defendant had his home in England. Lord Upjohn applied the rule based on *Phillips* v. *Eyre* and *Machado* v. *Fontes* (*supra*, f.n.1) and Diplock,C.J. would have allowed the appeal.

The House of Lords in *Chaplin* v. *Boys*, while unanimously dismissing a further appeal by the defendant, was divided in their reasoning. Lord Hodson at page 1094 agreed with Lord Denning's view and said that "even though the occurrence took place in Malta, this was overshadowed by the identify and circumstances of the parties. British subjects temporarily serving in Malta". Lord Guest, like Lord Upjohn before him, applied in effect

It is suggested that the same court may in one case apply the "proper law of the tort", particularly if it happens to be the *lex fori*, and in another case where, on the principles followed in the first case, a foreign law should be applied, apply again the *lex fori*, but on quite different principles, also ostensibly as the "proper law". It matters little how this procedure is supported, whether by criticizing a defense based on a foreign law as unwarranted; or by analysing the policies expressed in the *lex fori* and the foreign law and inquiring into the circumstances in which it is reasonable for the respective states to assert an interest in the application of these policies;[6] or again by saying that, in some cases at least, the

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the *Phillips* and *Machado* rule and so did Lords Donovan and Pearson. Lord Donovan at page 1097, agreeing on this point with Diplock,C.J., expressly repudiated "any such doctrine as 'the proper law of the tort' with all its uncertainties" and said that there was "no need for such a doctrine". Lord Wilberforce, in a much milder fashion, also disagreed with the "proper law of the tort" rule and was thus unwilling to apply Maltese law, but on the ground that (at page 1104) "nothing suggests that the Maltese State has any interest in applying this rule to persons resident outside it". In other words, there was no real conflict of laws. Thus, out of the five judges in the House of Lords, a majority of three applied in effect the *Phillips* and *Machado* rule; one, or perhaps two, were in favour, and two definitely against "the proper law of the tort" rule.

In the Court of Appeal, Diplock,C.J. expressed regret that the Court had been unable to agree on the relevant conflict rule and added, as if he had had a forewarning of the ultimate outcome of the case, *"Lex propria delicti, lex fori, lex loci delicti; quot iudices tot sententiae"* at page 302 of the report (an appropriate criticism of the present conflict rules with respect to torts in England).

The jurisprudence of the United States does not present a more satisfactory picture.

There have been two Canadian cases following *Boys: LaVan* v. *Danyluk* (1970), 75 W.W.R. 500 (B.C. S.C.) and *Gronlund* v. *Hansen* (1969), 68 W.W.R. 329 (B.C. C.A.). Neither answered the question of whether *McLean*, based on *Machado*, following the decision in *Boys* (a clear repudiation by the House of Lords of the rule in *Machado*) was still good law in Canada.

[6] "A court attempting to proceed with an interest analysis schema will often be constrained to indulge in conclusory speculation as to the existence and the nature of state interests": Finkelstein, *Conflict of laws — Ontario guest statute held applicable where Ontario plaintiff sued for loss occasioned by Ontario accident*, (1972) 22 Buffalo L.Rev. 335, 342, a comment on *Neumeier* v. *Kuehner*, 31 N.Y. 2d 121, 286 N.E. 2d 454 (1972). If more than one state interest or legislative purpose of a rule is "discovered", the court is faced with the necessity of attributing primacy of one interest or purpose over the other, the absence of criteria how this is to be done notwithstanding: Reese, *Chief Judge Fuld and Choice of Law*, (1971) 71 Col. Law Review 548, 558. Also, "it is entirely possible for two identically worded statutes to have been enacted for different purposes": *op. cit.*, 559.

court must apply the *lex fori* because, notwithstanding the presence of a foreign element, the purported conflict is a false one.

The application of the *lex fori* based on other than well-defined rules merely increases the uncertainty of the law in this sphere and the cost of litigation. It would not appear that the proponents of the "proper law" theory have sufficiently considered this aspect of the problem. It has, with much justification, been said that "[i]f one lesson emerges from the United States decisions, it is that case-to-case decisions do not add up to a system of justice".[7]

In view of these uncertainties it may be asked whether it would not be desirable to have the judiciary relieved from creating *ad hoc* choice of law rules by the ingenuity of specialists who, not being exposed to the impact of litigation, can more easily arrive at general choice of law rules acceptable to the international community. Until such rules have been created and accepted, it is, notwithstanding other disadvantages, safer, less expensive, and in the long run more equitable, to adhere to the well established and predictable rules of the common and the civil law regardless of their classification by their adversaries as "conceptualistic" or "irrational".

Indeed, the Committee on Private International Law of the Office of Revision of the Civil Code in Quebec rejected the idea of formulating specific conflict rules for traffic accidents and products liability and adopted instead the following general conflict rule:

> Extracontractual civil liability is governed by the law of the domicile (habitual residence) of the plaintiff at the time when the act which caused the damage occurred. However, the defendant may raise a defense based on the lawfulness of the act which caused the damage and the absence of an obligation to repair it according to the law of the place where this act occurred.[8]

However, Lord Pearson said in *Chaplin* v. *Boys* that "[t]here ought to be a general rule so as to limit the flexibility and consequent uncertainty of the choice of the substantive law to be applied".[9]

Professor Castel put it this way:

> Actually, as a result of technical developments, the courts and the legislature should realize that it is no longer possible to have only one general rule of conflict of laws in the field of foreign torts. Traffic accidents,

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[7] *Chaplin* v. *Boys, supra,* f.n.5, 1104 *per* Lord Wilberforce.

[8] Castel and Crépeau, *Views from Canada,* (1971) 18 Am.J.Comp.L. 17, 33 writing about the Quebec equivalent of a law reform commission.

[9] [1969] 2 All E.R. 1085, 1116.

> products liability, defamation, invasion of privacy and other types of wrongful conduct require special conflict rules as the issues they raise are not always of the same nature.[10]

And further:

> There is no reason why in Canada there could not exist side by side a general common law rule, which might well be the double actionability rule, and several specially designed conflict rules to cover traffic accidents, products liability, defamation and other types of wrongful acts.[11]

I agree with Professor Reese that "the broad rules (as, *e.g.*, the place of injury rule in torts) ... have been tried and found wanting" and that "new rules ... are likely to be narrow in scope and large in number".[12] I also agree with Professor Kalenský, who recognizes that:

> ...it would be illusory to expect in the forseeable future the formation of a substantive private international law which would be a comprehensive system applicable to all cases containing a foreign element ... .[13]

Reference should, in this connection, also be made to the preamble of the revised draft resolution of the Twenty-sixth Commission of the International Law Institute on tortious liability in private international law which reads in part as follows:

> *Estimant... que l'étendue et les modalités de la substitution à la loi du lieu du délit d'un autre système juridique doivent faire l'objet d'une étude particulière pour chaque type de délit (accidents de la circulation, accidents du travail, diffamation et violation de la sphère privée par les moyens de communication, concurrence déloyale et autres délits économiques, délits commis en haute mer, dans l'air, dans l'espace, etc.), et que les limites d'une Résolution générale sur la responsabilité délictuelle sont ainsi dépassées ... .*[14]

It was precisely for this latter reason that the Hague Conference on Private International Law decided to attack piecemeal the vast problem of conflict rules relating to tortious liability. So far, two conventions have been concluded, one on the law applicable to traffic accidents,[15] and the other on products liability. We are here concerned with the latter Convention.

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[10] Castel, *Conflict of Laws — Torts — Time for a Change,* (1971) 49 Can. Bar Rev. 632, 636.

[11] *Ibid.*, 637.

[12] Reese, *Dépaçage: A Common Phenomenon in Choice of Law,* (1973) 73 Col. Law Review 58, 59.

[13] Kalensky, *Trends in Private International Law* (1971), 262.

[14] See *infra,* f.n.57.

[15] See, *e.g.*, Castel and Crépeau, *International Developments in choice of law governing torts,* (1971) 19 Am.J.Comp.L. 17; Fischer, *The Convention on the law applicable to traffic accidents,* (1971) C.Y.I.L. 189. The Conference of Commissioners on Uniformity of Legislation in Canada unanimously recom-

THE CONVENTION

The Convention on the law applicable to products liability is the result of the deliberations of Commission One of the Twelfth Session of The Hague Conference on Private International Law. The Commission met during the period October 2 to 21, 1972. Canada was one of the 26 participating countries. The final act of the Twelfth Session, of which the Convention forms Part II, was signed October 21, 1972.

The forerunner of the Convention on which the conference participants based their deliberations was a preliminary document of July 1971 [16] prepared by a Special Commission on which Canada was represented by Professor J.-G. Castel of Osgoode Hall Law School.

The Convention[17] consists of 22 articles of which the first eleven might be the subject of implementation by municipal law. The present study deals, in the main, with these provisions.[18]

The object of the Convention is the uniform determination of the law applicable to the liability of certain suppliers of products for damage caused by a product. The primary question the Convention aims to resolve may shortly be stated as follows: if a product, manufactured in state A, causes damage in state B, under the laws of which state should the liability of the manufacturer be determined? From this question there arise other questions, as for example, the definition of a manufacturer. Is he merely the person who produces or assembles the merchandise or also the person who supplies the component parts? Should repairers be included? Should the growers of agricultural products be included? As far as the kind of damage is concerned, should the Convention

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mended for adoption the uniform Act proposed by Fischer and reprinted *op. cit.*, at page 214. See *1970 Proceedings of the fifty-second annual meeting*, Charlottetown, P.E.I., 38, 215, 263. So far, it was, with insignificant changes, enacted only in the Yukon Territory: *Conflict of Laws (Traffic Accidents) Ordinance*, O.Y.T. 1962, c.3.

[16] Reprinted as appendix to Fischer, *Conflict of laws — Products Liability — Uniformity — Hague Conference*, (1972) 50 Can. Bar Rev. 330, 345; and to DeMent, *International products liability: towards a uniform choice of law rule*, (1972) 5 Cornell Int. L.J. 75, 96; and to Saunders, *An innovative approach to international products liability: The work of The Hague Conference on Private International Law*, (1972) 4 Law & Pol. Int'l Bus. 187.

[17] See *infra*, Appendix A.

[18] A suggested implementing uniform statute is reprinted as Appendix B. The question of legislative jurisdiction is dealt with in the conclusions of this paper.

also regulate economic loss? Should the law of more than one country be applied to the victim's claim, for example, the question of liability under one but the amount of damages under another law? Which, in any event, is the most appropriate law: that of the place where the product was manufactured, where it was offered to the public, where it was supplied to the victim, where it was used or consumed, where the damage occured, where the victim resides, where the action is brought or that which, in the circumstances, is most favourable to the victim? If an answer to these questions is found, should there be an exception in certain circumstances as, for example, where the plaintiff and defendant share a common domicile or citizenship or where the victim is being treated or has been treated for his injuries within the jurisdiction where the product was manufactured? Answers to these questions may be deduced from the Convention although, it must be stressed, its provisions are not exhaustive.[19]

Primary Classification

The statement of the object of the Convention, namely the uniform determination[20] of the law applicable to the liability of persons for damage caused by a product, evokes several questions. In the first place, what is the nature of the liability? Secondly, whose liability is involved? Thirdly, for what kind of product does liability arise? And fourthly, what is the nature of the damage to which liability attaches? The Convention does not tell us what law to apply when answering these questions. The determination of

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[19] Saunders, *supra*, f.n.16, 205 *et seq.* Similarly, the provisions of the Convention on the Law applicable to Traffic Accidents are not exhaustive: Fischer, *The Convention on the law applicable to traffic accidents*, (1971) 9 C.Y.I.L. 189, 197-198.

[20] The Convention in art. 1(3) is intended to apply irrespective of the nature of the proceedings. *Cf.* s.4 of the Austrian *Code of Criminal Procedure* (St.P.O.) dealing with the rights of a *partie civile:*

> §4. Unless the adjudication of the private law claims of the victim of a crime would, because of necessary protraction, make a transfer to the civil courts appear to be inevitable, these claims are, at the instance of the victim, to be adjudicated upon as part of the criminal proceedings.
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> (§4. *Privatrechtliche Ansprüche aus straftbaren Handlungen sind auf Antrag des Beschädigten im Strafverfahren mitzuerledigen, wenn nicht die Notwendigkeit weiterer Ausführung eine Verweisung vor die Zivilgerichte als unerlässlich erscheinen lässt.*)

Cf. Canadian *Crim. Code*, 1972, ss.388(2), 616, 650(4), 653-655, 663(2)(e), and 742.

this law is thus left to general conflict rules. The questions here posed are preliminary questions and are thus to be determined under the *lex fori.* No other law is yet involved.[21]

The question whether the Convention applies at all depends on the application of four factors.

1. Unlike the Convention on the law applicable to traffic accidents,[22] the Convention on products liability is not confined to questions of tortious liability. The Conference voted against the inclusion of the words "civil non-contractual liability",[23] probably because, as one delegate put it, "certain countries neither knew nor cared whether or not products liability was contractual",[24] or perhaps because, as another delegate said:

> ...the typical case of products liability was one in which the plaintiff would join a retailer as well as the manufacturer of a defective product as defendants... the plaintiff [has] the choice of suing the retailer in contract and in tort... one law should be applicable to the plaintiff's action in such case... If contractual actions were excluded from the Convention ... the plaintiff might have to prove two foreign laws ... .[25]

And "[w]hether an action for damages is delictual or contractual is a matter of classification which can only be decided by the court in the light of its own law".[26] This is the general conflict rule. However, the Convention implicitly assigns this question to the *lex causae* and thus obviates the uncertainty that would arise if the question of a contractual exception clause, pleaded in defence to a tort claim, were to be decided according to the *lex fori.*

2. The persons whose liability is involved are referred to in articles 1 and 3 of the Convention. They are:

(1) manufacturers of a finished product or of a component part;

(2) producers of a natural product;

(3) suppliers of a product;

(4) other persons, including repairers and warehousemen, in the

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[21] This should be a sufficient answer to the vicious circle theory. *Cf.* Lépine, *Examen critique du système de la loi applicable en matière d'accidents de la circulation routière selon la Convention de la Haye de Droit international privé, 1968,* (1969) 47 Can. Bar Rev. 509, 522.

[22] Art. 1: "The present Convention shall determine the law applicable to civil non-contractual liability arising from traffic accidents...".

[23] *Procès-verbal* No.11, October 16 1972, item 123.

[24] *Ibid.,* item 122 (Mr Rognlien of Norway). See, however, the *Carlill* case, *infra,* f.n.40.

[25] *Procès-verbal* No.3, October 4 1972, item 81 (Mr Aranne of Israel).

[26] Kahn-Freund, *Delictual Liability and the Conflict of Laws,* 124 Recueil de Cours 1, 130.

commercial chain of preparation or distribution of a product;[27] and

(5) the servants and agents of the persons enumerated under (1) to (4).[28]

It does not make any difference whether those enumerated above are natural persons or corporations. The Convention includes legal persons (*personnes morales*) [29] and excludes partnerships.[30]

The enumeration is exhaustive.[31] However, to a person who transfers to the victim the property in the product or the right to use it, the Convention does not apply.[32] The Convention applies therefore only where the plaintiff, who will normally be the victim, acquired the product from the defendant through one or more third parties. To the suit against his immediate contractant the Convention does not apply.[33] Thus it does not apply to the relationship between the buyer of a car and the dealer from whom he bought it.[34] It does apply, however, to the relationship between the buyer and the manufacturer who supplied the dealer. Similarly, the Convention does not apply to the relationship between donor and donee or to the parties to a rental agreement, but does

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[27] Article 3, para. 1, nos. 1 to 4.

[28] Article 3, last paragraph.

[29] Article 2(c). See also article 8(7).

[30] *Procès-verbal* No.12, October 18 1972, items 97 and 103: the formula "the word 'person' shall refer to a legal entity as well as to a natural person" was rejected. The exclusion of partnerships and limited partnerships (*offene Handelsgesellschaft, Kommanditgesellschaft,* Austrian *Commercial Code,* ss.105 ff. and 165 ff., the latter being the equivalent of the partnership *en commandite* referred to in art. 1871 of the *Civil Code*) was specifically mentioned by Dr Edlbacher of Austria (*ibid.,* item 98), and Professor Loussouarn stressed that *"le terme* 'legal entity' *ne correspond à absolument rien en français"* (items 100-102). In any event, a partnership does not appear to be a legal entity: *Re Thorne and N.B. W.C. Board* (1962), 33 D.L.R. (2d) 167 (N.B. C.A.).

[31] *Procès-verbal* No.4, Oct. 5 1972, item 69.

[32] Article 1(2). The Convention is intended to apply to the action of what has been termed a "remote" consumer or against a "remote" manufacturer: Turner, *The vexing problem of the purely economic loss in products liability: an injury in search of a remedy,* (1972) 4 Seton Hall Law Rev. 145, 154-155. The Convention is not, however, restricted to actions by consumers or against manufacturers: see, *e.g., infra,* f.n.40 and 41 and accompanying text.

[33] This exception was apparently made so as to avoid any conflict with the 1955 Hague Convention on the Law applicable to the International Sale of Goods: Saunders, *supra,* f.n.16, 195.

[34] Where the victim acquired the car from an exclusive dealer, the manufacturer should not be permitted to argue that the car was acquired 'directly' from the manufacturer and that thus the Convention does not apply: Saunders, *supra,* f.n.16, 215-216.

apply to the relationship between the donee[35] or hirer on the one hand and the person or persons who supplied those who transferred the property in, or the right to use, the product. In other words, the Convention is not intended to apply where there is privity between the parties.

An example of the producer of a natural product is the bottler of mineral water.[36] Article 16(2) permits a contracting state not to apply the Convention to raw agricultural products. A qualified objection to the inclusion of these products was made by only one province, and in view of this there appears to be no reason why Canada should make use of this right of reservation.

Commission agents and forwarding agents can be classified as suppliers but also as persons who belong to the commercial chain of the distribution of the product. Persons who "enrich" (*"ennoblissent"*) a product are suppliers.[37] Repairmen are in a special category. The Convention applies to them only if they form part of the commercial chain of the product,[38] and thus, by implication, excludes other repairmen: *inclusio unius, exclusio alterius.* The Conference expressly dealt with this question.[39]

The application of the Convention is not necessarily predicated on the acquisition of a product by the party plaintiff. It applies where the plaintiff was injured in consequence of the consumption of a product given to him by the party who acquired it, as happened in the celebrated case of *M'Alister (or Donoghue)* v. *Stevenson.*[40]

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[35] *Procès-verbal* No.12, item 109: any reference to "persons giving possession for value" would exclude manufacturers who sent free samples of products to potential users. This reference which was included in art. 2(c) of the Draft Convention (*supra,* f.n.16) is absent from the document in its final form.

[36] *Procès-verbal* No.2, Oct. 3 1972, item 29.

[37] *Procès-verbal* No.5, Oct. 6 1972, items 66 and 67.

[38] Article 3(4).

[39] *Procès-verbal* No.5, item 47: *"Les Délégués se prononcent en faveur de l'inclusion des réparateurs dans la mesure où ils font partie de la chaîne commercial du fabricant".*

[40] [1932] A.C. 562 (H.L. Sc.). The action will usually sound in tort or be for a delict or quasi-delict. The tort, most likely, will be negligence. It may be fraud where the defendant knowingly and falsely warranted to the purchaser an article to be safe with the intention that the representation be acted upon by a third party, and the act injured that party: *Langridge* v. *Levy* (1837), 2 M. & W. 519; 150 E.R. 863 (sale of defective gun to the plaintiff's father). Exceptionally, the action may be for a breach of contract: thus under art. 1029 C.C. one may sometimes infer a warranty against defects to persons who acquire a product from the warrantee. See also *Carlill* v. *Carbolic Smoke Ball Co.,* [1883] 1 Q.B. 256 (C.A.), an offer to pay a sum of money to anyone who contracts influenza after having used the defendant's preparation in a prescribed

It also applies where the injury to the plaintiff was consequential upon the use of a chattel by the person to whom it was supplied.[41] In cases such as these, the person directly suffering damage would be the person who suffered bodily injury and not the person who, for example, suffered damage by losing the services of the injured person or by being obligated to pay for medical treatment. This distinction comes into play where the habitual residence of the victim, or perhaps also where the place of the acquisition of the product, is the connecting factor under articles 4 and 5 of the Convention. The residence referred to in article 4 is, in a case referred to here, that of the person who suffered bodily injury.

As mentioned earlier, where the defendant has transferred the property in the product, or the right to use it, to the person suffering damage, the second paragraph of article 1 of the Convention excludes its application to the liability of these persons *inter se.* Under certain circumstances, presently to be mentioned, this exclusion may have to be extended to persons who are not explicitly referred to in the Convention. Section 2 of the *Bills of Lading Act*[42] reads as follows:

> 2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, has and is vested with all such rights of action and is subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

The question arises whether the application of the Convention is excluded between the consignor of goods and a consignee or endorsee mentioned in section 2. Section 2 puts every such consignee or endorsee into the position of a person who had directly, without the interposition of a middleman, acquired the goods from the transferor or consignor, and it would thus appear that the Convention should not apply to their liability *inter se.* This is a matter of construing an implementing statute in the light of the *Bills of Lading Act,* and is best left with the courts.

3. The next question concerns the nature of the product. The

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manner. The defendant was held contractually liable to the plaintiff, who, having done so, nevertheless became an influenza victim. *Cf.* Austrian *Civil Code,* s.860, *Auslobung.*

[41] *Cf. Stennett* v. *Hancock,* [1939] 2 All E.R. 578: pedestrian injured because of a latent defect in the assembly of a motor vehicle component; *Bexiga* v. *Havir Mfg. Corp.,* 290 A. 2d 281 (1972): workman injured because of faulty design of machine.

[42] R.S.C. 1970, c.B-6.

Convention applies to "natural and industrial products, whether raw or manufactured and whether movable or immovable".[43]

Under modern conditions, where industrial products are used in the production and treatment of agricultural products, it would be unreasonable, and in any event difficult, to distinguish between damage caused by one product and the other. The Convention, therefore, applies to both. It does not differentiate between an untreated product as, for example, mineral water, and an agricultural product on which sprays or fertilizers have been used.

The Conference debated at length whether agricultural products should be excluded from the scope of the Convention. The difficulty of doing so was seen to lie in the difficulty of describing when a product had been "treated". Professor Loussouarn of France referred to tinned food and asked, *"où commence et où finit le traitement d'un produit? Une mise en boîte ou une mise en bouteille constitue-t-elle déjà un tel traitement?"*[44] The Conference voted against the exclusion of agricultural products and natural untreated products.[45] Natural gas, electricity and animals, whether alive or not, are thus products within the meaning of the Convention, and the classification by the *lex fori* of a matter being immovable does not take it out of the purview of the Convention.

4. What is the nature of the damage to which liability under the Convention attaches? Damage, as the expression is used in the Convention, includes injury to the person (*dommage aux personnes*)[46] and economic loss suffered in consequence of the defendant's wrongful act or omission. The Conference voted against a proposal that would have limited the application of the Convention to damage arising from physical injury to a person, including actions by dependants in case of death, and to damage to property, thus excluding consequential loss.[47] A word of caution is here

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[43] Article 2(a).

[44] *Procès-verbal* No.2, item 38.

[45] *Ibid.*, item 49.

[46] Art. 2(b).

[47] *Procès-verbal* No.3, items 49 and 59. For the extent of consequential economic loss in English law see, *e.g.*, *Owners of Dredger Liesbosch* v. *Owners of S.S. Edison*, [1933] A.C. 449, 468 (H.L.) *per* Lord Wright. The owners of a dredger lost in consequence of the defendants' negligence were awarded: (1) the market price of a comparable dredger in substitution; (2) costs of adaptation, transport, etc., to the place where it was to be used; and (3) compensation for disturbance and loss in carrying out the dredging contract between the day of the accident and the day a substituted dredger could reasonably have been available at the proper place, including items as over-

perhaps not out of place. The inclusion of economic loss in the definition of damage does not necessarily mean that the plaintiff will, even if he proves the defendant's negligence, recover damages for such loss. The Convention merely determines the law to be applied to the question whether liability attaches, but that law may deny liability therefore. Unless the application of that law is excluded because of the public policy of the forum, damages for economic loss cannot, in such circumstances, be recovered.[48]

The causes of damage have been classified as follows: faulty design, defect in the production of a single article, *absence d'instructions*, and dangers inherent in scientific and technical development.[49] To this there might be added negligence in the bottling or packaging of an article.[50] The very important classification, *absence d'instructions*, of which *Distillers Co. (Biochemicals) Ltd.* v. *Thompson*[51] and *Lambert* v. *Lastoplex Chemicals Co. Ltd.*[52] are examples, found its expression in article 1 which includes in its purview "damage in consequence of a misdescription of the product or of a failure to give adequate notice of its qualities, its characteristics or its methods of use".

There were long discussions on whether damage to a product should be totally included in the purview of the Convention or totally excluded, and the delegates, voting against both proposals, agreed

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head charges, expenses for staff and equipment; they were not, however, awarded damages for special loss due to the plaintiff's impecuniosity. Because of their lack of money they were unable to buy a dredger that was available earlier than the one they rented.

[48] *Cf. infra,* f.n.93 and 114.

[49] Von Caemmerer, "Products liability in Germany", in Ziegel and Foster, *Aspects of Comparative Law: Sales, Consumer Credit and Secured Transactions* (1969), 64, 67-68; Ginsberg, *Torts — Products Liability,* (1972) 4 Seton Hall Law Rev. 397, 401. For examples of defect in a single article and of faulty design, see *supra,* f.n.41.

[50] *Mathews* v. *Coca-Cola Co. of Canada, Ltd.,* [1944] 2 D.L.R. 355 (Ont. C.A.); appeal dismissed, [1944] S.C.R. 385; *McIntyre* v. *Kansas City Coca-Cola Bottling Co.,* 85 F.Supp. 708 (1949).

[51] [1971] A.C. 458 (P.C. from N.S.W. S.C.): failure by the manufacturer of a drug containing thalidomide to warn possible purchasers of the harmful effect on a foetus if the drug were taken by a pregnant woman. This type of case gave rise to prolonged discussions, mainly with respect to the question of the place where the tort or tortious breach of contract was committed. On this, see *infra,* text to f.n.72. On other thalidomide cases see DeMent, *supra,* f.n.16.

[52] (1972), 25 D.L.R. (3d) 121 (S.C. from Ont. C.A.): general warning that the product is inflammable is inadequate where it gives off vapours in such a degree as to be likely to create a risk of fire from a spark or from a pilot light in another part of the area where the product is being used.

that the Convention should apply to damage caused to the product, and consequential economic loss, but only if at the same time damage to another object or injury to a person has been caused.[53] Thus where a car breaks down because of faulty design or a defect in its construction and neither personal injury nor property damage is caused in consequence thereof, the Convention does not apply to a claim based on the manufacturer's breach of duty.

The Connecting Factor

Uulike the law at present applicable in all the provinces of Canada,[54] in the Commonwealth,[55] and in at least one of the states of the Union,[56] the Convention does not refer to the *lex fori* and thus discourages forum shopping. With the implementation of the Convention, the rule of the *lex fori* as a means of determining the connecting factor in interprovincial and international torts would, after having lasted well over a century,[57] come to an end. The *lex fori* will, however, still determine public policy,[58] and, as previously mentioned, the primary classification also requires its application.

Articles 4 to 6 of the Convention refer to three connecting factors[59] to be selected according to a " 'hierarchy' of criteria ... in

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[53] *Procès-verbal* No.3, items 24 to 29. Art. 2(b), refers to "damage to the product itself" if it is "associated with other damage". This "other damage" includes, again, injury to the person.

[54] *McLean* v. *Pettigrew*, [1945] S.C.R. 62; *Gagnon* v. *Lecavalier* (1967), 63 D.L.R. (2d) 12 (Ont. H.C.); and *LaVan* v. *Danyluk* (1970), 75 W.W.R. 500 (B.C. S.C.).

[55] *Boys* v. *Chaplin*, [1967] 2 All E.R. 665 *per* Milmo,J.; [1968] 1 All E.R. 283 (C.A.); and [1969] 2 All E.R. 1085 (H.L.).

[56] *Babcock* v. *Jackson*, 12 N.Y. 2d 473 (1963) and *Kell* v. *Henderson*, 270 N.Y.S. 2d 552 (1966). "*Kell* v. *Henderson* should, as a result of the arbitrary application of the *lex fori*, be considered as a standard or textbook example of 'forum shopping'": Kahn-Freund, *Delictual liability and the conflict of laws*, (1968) 124 Recueil de Cours 1, 74.

[57] For a general survey of the history of the application of the *lex fori*, see the lectures of Professor Kahn-Freund in the Hague Academy of International Law, *supra*, f.n.56, 12 *et seq.* The Twenty-sixth Commission of the International Law Institute had unanimously rejected the application of the *lex fori: Les obligations délictuelles en droit international privé*, (*Rapporteur:* M. Otto Kahn-Freund), (1969) 53 Annuaire de l'Institut de droit international 180, 194: "*M. Lalive ... déclare être favorable au principe de l'unité de la loi applicable, unité qui doit être maintenue autant que possible.*"

[58] See *infra*, text to f.n.114 *et seq.*

[59] The provisions concerning the connecting factor are based on *Document de travail* No.36 of Denmark, the United States, France, Norway and the Netherlands: *Procès-verbal* No.8, October 10 1972, item 33.

more or less 'descending' order",[60] namely the habitual residence of the person directly suffering damage (here shortly referred to as the victim's residence), the place of the injury or damage (*le territoire duquel le fait dommageable s'est produit*), and the principal place of business of the person claimed to be liable (here shortly referred to as the defendant's business). In each case the reference is to the internal law thus excluding *renvoi* and *Weiterverweisung*.

The rigidity of the reference to the three connecting factors is mitigated by the right of the victim to choose as a connecting factor the place of the injury in preference to the principal place of business of the person claimed to be liable and by the right of the latter to choose this connecting factor.

The Convention gives the defendant in article 7 the right to exclude as connecting factors the victim's residence and the place of the injury or damage. This is done by establishing that he could not have foreseen[61] that the product or his own products of the same type would be made available through commercial channels within the jurisdiction where the victim's residence or the place of the injury or damage, as the case may be, are situated. Exclusion of the law of a state where the supplier could not have foreseen that his product would reach the particular market is justified when one considers the difficulty of obtaining insurance against a risk of an occurrence that gives rise to a damage claim under a law unforeseeable by the supplier. Professor Ehrenzweig observes that:

> ... the supplier's broadening liability to both his buyer and third parties is both bearable and needed primarily because it serves the distribution of objectively, and usually subjectively, unavoidable loss and is, therefore, calculable in the process of pricing and insuring.[62]

And further:

> The average consumer cannot realistically be expected to carry the accident or health insurance he needs even under the products liability laws of his home state. On the other hand, insurance for liabilities incurred under the consumer's law can reasonably be carried by the manufacturer who expects distribution of his product in the consumer's state.[63]

The Convention designates in article 5 the victim's habitual residence as the connecting factor if at least one of two requirements is fulfilled and the defendant has not, or could not, have the right given

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[60] DeMent, *supra*, f.n.16, 88.

[61] The delegates voted against the exclusion of foreseeability: *Procès-verbal* No.8, 1972, item 33, *in fine*.

[62] Ehrenzweig, *Products Liability in the Conflict of Laws — Toward a Theory of Enterprise Liability under 'Foreseeable and Insurable Laws': II*, (1960) 69 Yale L.J. 794, 799.

[63] *Ibid.*, 801.

to him by article 7. One of the requirements is that the victim's residence and the defendant's business are situated within the same jurisdiction and the other is that the victim's residence and the place where he acquired the product are so situated.

Where the product is sent by mail, it could be argued, in accordance with the common law, that the plaintiff acquires it at the point of mailing. If this argument is accepted, a distinction would be created between two plaintiffs habitually residing within the same jurisdiction if the product is sent to one by mail from without the jurisdiction and the other obtains it at a local outlet or acquires it by *constitutum possessorium*. It would be difficult to justify such a distinction. In either case the reference to the place of acquisition should be read as a reference to the place where the plaintiff obtains physical control over the product.

The place of the injury is the connecting factor if either, under article 6, the plaintiff is permitted to choose it or if, under article 4, at least one of three requirements is fulfilled and, in any event, the defendant's right under article 7 is not exercised. One requirement is that the place of the injury and the victim's residence are situated within the same jurisdiction, another that the place of injury and the defendant's business are also situated in the same jurisdiction, and the third that the place of injury and the place where the product is acquired by the person directly suffering damage are so situated.

Where neither the victim's residence nor the place of the injury constitute, under the Convention, the connecting factor, article 6 designates as such the defendant's principal place of business.

From the foregoing it follows that the Convention refers to the internal laws of three jurisdictions. A fourth is introducted by article 9[64] notwithstanding that, as one delegate put it, "[*o*]*n sombre alors dans une complexité extrême*".[65] Article 9 is permissive. It allows the court to apply the rules of conduct and safety (*les règles de sécurité*) prevailing in the jurisdiction where the product was introduced into the market. This clause was adopted by a minority vote of nine in favour, seven against and four abstentions.[66] Although the Canadian delegation voted against the adoption of the clause, Canada will not, in view of article 16 of the Convention, be permitted to reserve the right not to apply the clause. Examples of the rules of conduct and safety would be the regulations authorized by the *Explosives Act*,[67]

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[64] This article is based on the first alternative of Doc. trav. No.43 of the United Kingdom delegation.

[65] *Procès-verbal* No.9, October 11 1972, item 33 (M. Bellet of France).

[66] *Ibid.*, item 34.

[67] R.S.C. 1970, c.E-15, s.4.

the prohibitions contained in the Act,[68] those contained in the *Pest Control Products Act*,[69] or in the *Plant Quarantine Act*.[70]

The Convention on the law applicable to traffic accidents permits a direct action against the person liable if such action is authorized either by the law governing the insurance policy or by any other law that applies under that Convention. The Conference voted against considering direct actions against insurance companies.[71]

From the discussions at the Conference it appears that the delegates were fully aware of the difficulty in the classification of the place of injury as one of the connecting factors. Four alternatives were canvassed. The first was the place where the act that gave rise to the injury or damage was done or, where the action is based on an omission, the place where the act should have been done. The second alternative was the place of the first impact, the third where it made itself felt for the first time, and the fourth where the injury or damage was finally suffered to its full extent. The first and last alternatives were discarded, and the editors were advised to phrase the clause so that a judge could choose between the place *"du premier impact dommageable"* and the place *"de la première manifestation du préjudice"*.[72] The Convention speaks, in articles 4 and 6,

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[68] See, *e.g.*, s.5:

5. (1) Except as provided by the regulations, no person shall have in his possession, import, store, use, make or manufacture, whether wholly or in part, sell or offer for sale, any explosive that is not an authorized explosive.

(2) Subject to any exemption made by regulation,

(a) no person shall make or manufacture explosives either wholly or in part except in a licensed factory;

(b) no person shall sell any explosive designated by the Governor in Council for the purpose of this section unless he is the owner or occupant of a licensed factory, licensed magazine or registered premises; and

(c) no person shall carry on, except in a licensed factory, any of the following processes, namely:

(i) of dividing into its component parts, or otherwise breaking up or unmaking, any explosive,

(ii) of making fit for use any damaged explosive, or

(iii) of remaking, altering or repairing any explosive.

(3) Paragraph (2) (*c*) does not apply to the process of thawing explosives containing nitroglycerine, if a proper apparatus or thawing-house is used in accordance with regulations or any provincial law.

(4) No person shall store any explosive in a magazine that is not a licensed magazine.

[69] R.S.C. 1970, c.P-10, s.4.

[70] R.S.C. 1970, c.P-13, para. 4(a) and (f) and s.10.

[71] *Procès-verbal* No.10, October 13 1972, item 64.

[72] *Procès-verbal* No.10, items 82 - 90. Article 10 of the draft Convention on the law applicable to contractual and non-contractual obligations prepared in

merely of "the State of the place of the injury (*le territoire duquel le fait dommageable s'est produit*)". As far as the common law relating to the tort of negligence is concerned, this wording, if adopted by the domestic law, would probably not correspond to the intention the Conference wished to express.

At common law, at least as applied in the courts of Ontario and Nova Scotia for the purpose of granting service out of the jurisdiction, a tort is committed within the jurisdiction only if the breach of duty occurred within the jurisdiction.[73] In *Beck* v. *Willard Chocolate Co., Ltd.*[74] the plaintiff was injured by a piece of jagged copperplate concealed in a chocolate bar. The bar was manufactured outside the jurisdiction but the injury was suffered within the jurisdiction. A motion for service of the writ outside the jurisdiction was denied on the ground that the action was "for tort committed or wrong done within the jurisdiction", the court holding that "the

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1972 for the member states of the European Economic Council and reported in (1973) 62 Revue critique de droit international privé 211 states:

Les obligations non contractuelles dérivant d'un fait dommageable sont régies par la loi du pays où ce fait s'est produit.

Toutefois, lorsque, d'une part, il n'existe pas de lien significatif entre la situation résultant du fait dommageable et le pays où s'est produit ce fait et que, d'autre part, cette situation présente une connexion prépondérante avec un autre pays, il fait application de la loi de ce pays.

Cette connexion doit se fonder normalement sur un élément de rattachement commun à la victime et à l'auteur du dommage et, si la responsabilité d'un tiers pour l'auteur est mise en cause, commun à la victime et à ce tiers.

En cas de pluralité de victimes la loi applicable est déterminée séparément à l'égard de chacune d'entre elles.

[73] Service out of the jurisdiction was, however, allowed in *Moran* v. *Pyle National (Canada) Ltd.* (1972), 25 D.L.R. (3d) 718 (Sask. Q.B.). The claim was based on negligence, and while conceding at pages 726-727 that plaintiffs are free to sue a negligent defendant in his home jurisdiction where the tort was committed, the court at page 727 came to the conclusion that, if this were insisted on, plaintiffs with modest financial means would in effect be denied justice. In the *Distillers* case, *supra*, f.n.51, service out of the jurisdiction was granted. The decision was upheld by the Privy Council. The defendant, an English company, was held to have committed a tort in failing to give warning of the danger of the product within New South Wales where the product was purchased and where the damage was suffered. *Obiter* it was denied by Lord Pearson on page 467 that it could be held that the tort was committed where the last ingredient of the cause of action was completed. In this particular instance, the breach of duty and the harm it produced happened in the same place. It does not appear to be satisfactory to say that "the tort should ... be regarded as having been committed in the country with which it is most closely connected", a suggestion made by Scott, *The place of the tort*, (1971) New Law Journal 693, 695.

[74] [1924] 2 D.L.R. 1140 (N.S. S.C.).

wrong done ... contemplates a tortious act or omission as distinguished from its consequences".[75]

Paul v. *Chandler & Fisher Ltd.*[76] was an action for damages brought by the widow of a patient in an Ontario hospital. The patient's death had been caused by the use of catgut manufactured by the defendant company in Manitoba. The catgut brought on tetanus from which the plaintiff's husband died. Service of the writ out of the jurisdiction was refused on the ground that "[i]f the defendants were guilty of negligence, whether in the manufacture of a dangerous article or in the sale of it, the negligent act which constituted the tort was wholly within Manitoba."[77] In the more recent case of *Abbott-Smith* v. *Governors of University of Toronto*[78] the court reached a similar decision. The plaintiff claimed that the defendant manufactured an antipolio vaccine outside the jurisdiction but did so negligently and that the plaintiff, having been inoculated within the jurisdiction, suffered damage in consequence of this negligence. The court, while admitting that "the tort of negligence is not committed until the damage is sustained",[79] nevertheless came to the conclusion that:

> ...it smacks of artificiality or technicality to consider that where an intended defendant is not alleged to have *done* anything within the jurisdiction, the fact that what he did outside the jurisdiction should be regarded as the commission of a tort or the doing of a wrong within the jurisdiction.[80]

On the other hand, where the tort consisted in the transmission of defamatory statements or of music in breach of copyright from without the jurisdiction but received within the jurisdiction, the courts have held that the tort was committed within the jurisdiction.[81] Professor J.-G. Castel has criticized the case law that estab-

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[75] *Ibid.*, 1143 *per* Mellish,J.
[76] [1924] 2 D.L.R. 479 (Ont. S.C.).
[77] *Ibid.*, 482 *per* Orde,J.
[78] (1964), 45 D.L.R. (2d) 672 (N.S. S.C.).
[79] *Ibid.*, 680 *per* Ilsley,C.J.
[80] *Ibid.*, 687 *per* Ilsley,C.J.
[81] *Cf. Jenner* v. *Sun Oil Co., Ltd.*, [1952] 2 D.L.R. 526 (Ont. H.C.), where defamation broadcast from a radio station in the United States was received in Ontario. *Composers, Authors and Publishers Association of Canada Ltd.* v. *International Good Music, Inc.* (1963), 37 D.L.R. (2d) 1 (S.C. from Ex. Ct): plaintiff's copyright infringed by a television transmission from the United States but received in Canada. *Original Blouse Co. Ltd.* v. *Bruck Mills Ltd.* (1963), 42 D.L.R. (2d) 174 (B.C. S.C.): intentionally false representations about the defendant's goods made in a letter mailed in Montreal but received in Vancouver, the plaintiff acting on these representations and suffering damage in Vancouver.

lished the place of the obnoxious act done, instead of the place of the injury suffered, as the *locus delicti commissi.*[82]

It is not clear whether Canadian courts will equate "the place of the injury" (the expression used in the Convention) with a "wrong done within" a certain jurisdiction[83] (the expression used in the Rules of Practice relating to service out of the jurisdiction). Assuming that this possibility cannot be excluded, the adoption of the Convention as part of our internal law by merely repeating its wording, that is by referring to "the place of the injury", would frustrate the intentions of the framers of the Convention and could expose Canada, upon its ratification, to the charge of having committed an international tort. The framers of the Convention expected the place of the injury, and not the place of the breach of the duty, to be considered the *locus delicti commissi.* However, if the ratio of *Beck, Paul* and *Abbott-Smith*[84] were applied, "the place of the injury" would be the place where the breach of duty occurred. It would not at all be helpful to expect a Canadian court to interpret implementing legislation with reference to rules by which international conventions are being interpreted in international law. If this were done, the court would consult the *travaux préparatoires* and find that the framers of the Convention intended the place of the injury to be the place where the breach of duty first took effect.[85] Unfortunately, however, where implementing legislation is concerned, these rules have no application. If authority for this proposition were required, I would refer to *R.* v. *Sikyea,*[86] where counsel failed to persuade the court to apply these rules to the Migratory Birds Convention, a treaty concluded between the United Kingdom, on behalf of Canada, and the United States. The Convention, reproduced in the Schedule to the *Migratory Birds Convention Act,*[87] was, by section 2 of the Act, "sanctioned, ratified and confirmed". The court refused to interpret the Convention with reference to international law rules and held as follows:

> We were invited by counsel for the respondent to apply to the Migratory Birds Convention those rules which have been laid down for the interpretation of treaties in international law and we have been referred to many authorities on how these treaties should be interpreted. We are not,

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[82] *Canadian private international law rules in the field of civil responsibility,* (1958) 18 R. du B. 465.

[83] See *supra,* f.n.72.

[84] *Supra,* f.n.74, 76 and 78.

[85] *Supra,* text to f.n.72.

[86] (1964) 43 D.L.R. (2d) 150 (N.W.T. C.A.).

[87] Now R.S.C. 1970, c.M-12.

> however, concerned with interpreting the Convention but only the legislation by which it is implemented. To that statute the ordinary rules of interpretation are applicable and the authorities referred to have no application.[88]

From this it follows that a statute implementing the Convention on Products Liability would have to define the place of injury as the place where the injury was suffered or the damage was sustained and could not, by omitting this definition, leave it to the courts to glean this definition from the preparatory material.

The connecting factor designates which jurisdiction's laws are to be applied under the Convention. Most of these laws will be provincial laws. There is, however, a possibility that some may be federal. The *Railway Act*,[89] for instance, imposes civil liability, in addition to criminal liability, for any breach of duty imposed by the Act or regulations supplementing it. Section 336, for example, reads as follows:

> 336. Any company that, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to this or the Special Act, or to the orders, regulations or directions of the Goveruor in Council, or of the Minister, or of the Commission, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, is, in addition to being liable to any penalty elsewhere provided, liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages are not subject to any special limitation except as expressly provided for by this or any other Act.

The *Railway Act* also indicates certain defences and the limitation of actions.[90] Article 12 of the Convention provides that where, as is the case in Canada:

> ...a State comprises several territorial units each of which has its own rules of law in respect of products liability, each territorial unit shall be considered as a State for the purposes of selecting the applicable law under this Convention.

If the Convention is to be applied within Canada, an implementing statute should make it clear beyond doubt that the laws of a province comprise not only provincial laws properly so called but all laws in force in the province, Acts of Parliament included.

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[88] *Supra*, f.n.86, 162 *per* Johnson,J.A.

[89] R.S.C. 1970, c.R-2.

[90] Ss. 341 and 342.

Intertemporal Conflicts of Laws

The Convention does not regulate intertemporal conflicts of laws, but it is felt that on a proper determination of the connecting factor few, if any, such conflicts will arise.

From what was said with respect to the classification of the connecting factor, the point in time to which reference should be made where, under article 4 or 6 of the Convention, the place of the injury is the connecting factor, is the day on which there occurred the *"premier impact dommageable"* or *"la première manifestation du préjudice"*.[91]

Article 5 refers to the habitual residence of the person who directly suffered damage, and it would thus appear that, where the connecting factor is determined under this article, the same point in time should be referred to as under article 4. It is submitted that it would not be appropriate to refer to the day of the breach of duty which gave rise to the action because on that day no person may have suffered damage.

While, under article 5, the principal place of business should, in my submission, be determined as it existed on the day the deleterious effects made themselves first felt, it is also submitted that where, under article 6, the principal place of the defendant's business is the connecting factor, this should be determined with reference to the day the product left the defendant's plant, or, if the defendant retained control over the product beyond that day, with reference to the day the control ceased. The same day, it is further submitted, should be the reference point under article 7 which gives the defendant the option to have the law of the state of the principal place of his business applied when he could not reasonably have foreseen that the product (or products of the same type) would be made available in that state through commercial channels. If between the day the product left the defendant's control and the day the damage occurred he moved to a jurisdiction the laws of which are adverse to him, it would not be just to apply these more severe laws because at the time of dispatch he could not have foreseen the application of these laws and should not, therefore, be expected to govern himself in accordance with them or be held liable under them.

Secondary Classification

When the applicable law has been found by the determination of the connecting factor and, if necessary, its classification, the question of the extent of its application arises.

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[91] *Supra*, f.n.72 and accompanying text.

Article 8 introduces the nine points to which the law determined under the Convention is to be applied with the words "[t]he law applicable under this Convention shall determine, in particular...", thus permitting the court to apply it to other questions not enumerated in the article. The nine points are as follows:

1. the basis and extent of liability;
2. the grounds for exemption from liability, any limitation of liability and any division of liability;
3. the kinds of damage for which compensation may be due;
4. the form of compensation and its extent;
5. the question whether a right to damages may be assigned or inherited;
6. the persons who may claim damages in their own right;
7. the liability of a principal for the acts of his agent or of an employer for the acts of his employee;
8. the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;
9. rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Points 1, 2, 5, 7 and 9 (and points 4 and 6 in the French version) are identical with points 1, 2, and 4 to 8 of article 8 of the Convention on the law applicable to traffic accidents.[92]

Although the Convention includes damage to property and economic loss in the definition of "damage", recovery of some of these items may be precluded where, under point 1 of article 8, the basis of liability is to be decided under a law that does not permit recovery for these items. This may happen under a law that applies the (now reversed) ruling of the British Columbia Court of Appeal in *Rivtow Marine Ltd.* v. *Washington Iron Works and Walkem Machinery & Equipment Ltd.* where it was held that:

> ...neither a manufacturer of a potentially dangerous or defective article nor other person who is within the proximity of relationship contemplated in *M'Alister (Donoghue)* v. *Stevenson,* [1932] A.C. 562, is liable in tort, as distinct from contract, to an ultimate consumer or user for damage arising in the article itself, or for economic loss resulting from defect in the article, but only for personal injury and damage to other property caused by the article or its use.[93]

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[92] Reprinted in Fischer, *supra,* f.n.19, 209.

[93] [1972] 3 W.W.R. 735, 759 (B.C. C.A.) *per* Tysoe,J.A. For a criticism of this case see Newbury, Note, (1972) 7 U.B.C. L.Rev. 303. On August 27, 1973 the Supreme Court of Canada, in a judgment not yet reported, set aside the judgment of the B.C. Court of Appeal and restored the judgment of the trial judge. The court was unanimous in allowing recovery for economic loss which was not consequent upon physical injury.

For a jurisdiction which still applies the law as stated in the decision of the British Columbia Court of Appeal see *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.,* [1972] 3 All E.R. 557 (C.A.).

The extent of liability to which point 1 refers "was designed to deal with statutes limiting the maximum amount of damages recoverable under certain laws".[94] The application of the *lex causae* may, however, be avoided on the grounds of public policy.[95]

A good example of the application of point 2 is the *LaVan* case.[96]

Point 3 is almost identical with the corresponding provision in the Traffic Accident Convention but deletes the words *"l'existence"* from the phrase *"l'existence et la nature des dommages susceptibles de réparation"*. The English text is only slightly different. No material change is involved, because the sense of the omitted words is included in point 1. Point 3 covers such questions as whether one may recover only special or also general damages and to what extent, for example, *damnum emergens* and *lucrum cessans*.

An example of a kind of damage for which no compensation is awarded is the suffering of a decedent's family in consequence of his death. With respect to this, the *solatium doloris*, it was held that *"[i]l est bien établi en jurisprudence que ces dommages ne peuvent faire l'objet d'une poursuite judiciaire"*.[97]

As far as the quantum of damages mentioned in point 4 is concerned, the British delegate, probably mindful of *Boys* v. *Chaplin*,[98] would have preferred it if this item had been left to be determined by the *lex fori*, but he withdrew his objection.[99]

The question whether a right to damages may be inherited, mentioned in point 5, is, at common law and in the civil law, regulated by the law of the decedent's personal law at the time of his death. The substitution of the *lex causae* for the *loi successorale* is therefore an innovation. The *lex causae* governs also the question of assignability, although this may, as Professor Kahn-Freund points out, amount in certain cases to "mechanical jurisprudence".[100]

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[94] *Procès-verbal* No.9, item 45. This would, for example, refer to the limitation in Swiss law of the liability of an impecunious defendant. See also in *Kilberg* v. *Northeast Airlines, Inc.*, 172 N.E. 2d 526 (1961) (N.Y. C.A.) the reference to a Massachusetts statute limiting damages against common carriers for negligently causing a passenger's death to not less than $2,000 or more than $15,000. On this case see f.n.114 and 115, and accompanying text.

[95] *Cf.* f.n.114 *et seq.*

[96] (1967), 63 D.L.R. (2d) (Ont. H.C.). See also the *Bexiga* case, f.n.41. Normally the injured workman would have been held contributorily negligent, but the injury was of the very kind that called for the installation of a safety device.

[97] *Surprenant (Dame)* v. *Air Canada*, [1973] C.A. 107, 111 *per* Tremblay,C.J.

[98] *Supra*, f.n.55.

[99] *Procès-verbal* No.9, items 44 and 54.

[100] *Cf. supra*, f.n.56, 118.

Point 6 aims at deciding who, apart from the person directly suffering damage, may claim damages as, for example, an employer for the loss of his employee's services.[101]

As far as point 7 is concerned, it is interesting to note that a separate vote was taken in favour of phrasing it in the same way as the corresponding provision in the Convention on the law applicable to traffic accidents.[102] The rendering of *"commettant du fait"* and *"préposé"* as "principal and agent" and "employer and employee" was necessitated by the fact that the civilian *"commettant du fait"* corresponds to "principal" as well as to "employer" and "master", and *"préposé"* to "agent" as well as to "employee" and "servant" at common law.

A modern example of the application (or rather the non-application) of the maxim *respondeat superior* is the recent House of Lords decision in *Morgans* v. *Launchbury*. Lord Wilberforce explained the conditions for the application of the maxim in these words:

> ...respondeat superior is the law saying that the owner ought to pay... The owner ought to pay... because he has authorized the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay... if he has no control over the actor, has not authorized or requested the act, or if the actor is acting wholly for his own purposes.[103]

The inclusion of the burden of proof as point 8 was modified by the words "insofar as the rules of the applicable law in respect thereof pertain to the law of liability". This clause, added as a compromise, was the outcome of a debate initiated by the Danish delegation. Professor Loussouarn, after having declared unacceptable a solution that would permit the question of the burden of proof to be decided by the *lex fori* in case the applicable law was devoid of special rules concerning that burden,[104] merely abstained when the vote on this point was taken.[105] An example of the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability is the application of the maxim *res ipsa loquitur*.[106]

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[101] In *Nykorak* v. *A.-G. of Canada*, [1962] S.C.R. 331; 33 D.L.R. (2d) 373, it was held that the Crown has a right of action *per quod servitium amisit* for expenses incurred as a result of the negligent injury of a member of the armed forces regardless of his rank.

[102] *Procès-verbal* No.9, item 61.

[103] [1973] A.C. 127, 135 (H.L.).

[104] *Ibid.*, item 65.

[105] *Ibid.*, item 77.

[106] See, *e.g.*, *Jackson* v. *Millar* (1973), 1 O.R. 399 (C.A.).

The importance of the modification of the applicability of the *lex causae* to the burden of proof by the addition of the words "insofar as the rules of the applicable law in respect thereof pertain to the law of liability" will be better appreciated by reference to a short example. Let us suppose that under the *lex fori* that law will be applied where no other is proven,[107] and the statute implementing the Convention points to the laws of state X which are less advantageous to the plaintiff than the *lex fori*, and the laws of state X require the plaintiff to provide, as one of the elements of his case, proof of the law to be applied.[108] In these circumstances, it will be

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[107] *Key* v. *Key*, [1930] 3 D.L.R. 327 (Ont. C.A.), whose headnote reads as follows: "[t]he general law of a foreign state is presumed to be the same as that of the domestic jurisdiction, and the onus of proving that it is different is upon those who so contend." In this case the court applied Ontario law as the forum law because the foreign (New York) law, while pleaded, was not proven. With respect to the law of a sister province, the Supreme Court used to take judicial notice thereof: *Logan* v. *Lee* (1908), 39 S.C.R. 311, but this is no longer the case. Where the law of another province is relied on without having been pleaded, "it would be unfair for ... [the Supreme] Court to take *suo motu* judiciary notice of the statutory or other laws of another province, ignored in the pleadings, when the Quebec courts [*i.e.* the trial and intermediate appeal courts] did not consider them, and, forsooth, were prohibited from considering them as applying to the case": *Canadian National Steamships Company Ltd.* v. *Watson*, [1939] S.C.R. 11, 18 *per* Cannon,J. This decision can hardly be called an "absurdity". *Cf.* Wengler, *Der Mythos von der lex fori*, (1969) *Ius privatum gentium* 299, 315:

> In a state with a plurality of jurisdictions the mere existence of a common appellate court, not limited to the application of one local law, makes evident the absurdity of a rule that would, where the application of another local law of the same state cannot be proved, compel the appellate court to apply as subsidiary law the *lex fori* of the lower court from whose judgment the appeal happens to have been brought.
>
> *(Im Mehrrechtsstaat lässt allein schon die Existenz eines nicht auf die Anwendung eines einzelnen Teilrechtes beschränkten Obergerichts die Absurdität einer Regelung evident werden, wonach das Obergericht als subsidiäres Recht die lex fori des jeweiligen untergerichts anzuwenden hätte, sofern nicht die Anwendbarkeit eines anderen inländischen Teilrechts erwiesen werden kann.)*
>
> For the position in the United States see Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to invoke or prove the Applicable Foreign Law*, (1973) 59 Cornell L.R. 1.

[108] *Walton* v. *Arabian American Oil Co.*, 233 F. 2d 541 (C.C.A. 2d, 1956). Professor Schwind, in the draft of a P.I.L. statute for Austria, (1971) 12 ZfRV 161, 164, would require the court to ascertain the foreign law *ex officio:*

> 3. Ascertaining the foreign law
>
> (1) The court shall acquire knowledge of the foreign law *ex officio.*
>
> (2) In so doing, the court is not restricted by the evidence supplied by the parties; it has to institute, *ex officio*, all inquiries it deems

incumbent upon the defendant to show that "the rules of the applicable law... [that] pertain to the law of liability" are more advantageous to him. If the defendant fails to provide this proof, the case will be decided under the *lex fori*, and the defendant cannot expect the dismissal of the claim on the ground that, under the applicable law, the plaintiff had to prove it but failed to do so.

The debate on whether rules of prescription and limitation should be decided under the *lex fori* because they are procedural, or under the *lex causae* because they are substantive, led to a compromise. Matters of prescription and limitation are, under point 9 of article 8, to be decided under the *lex causae*, but, under point 1 of article 16, any state may reserve the right not to apply this provision. As far as Canada is concerned, Professor Crépeau explained that:

> ... *en Common law canadien on distingue la prescription et la déchéance, l'une touchant à la procédure, l'autre au fond. En droit civil canadien on distingue également la prescription et la déchéance mais, dans les deux cas, sur le plan de la qualification, il s'agirait d'une question de fond.*[109]

Allard v. *Charbonneau*[110] may serve as an example for the classification at common law of a limitation rule as procedural and *Catellier* v. *Bélanger*[111] for the classification, according to the civil law, as substantive. In the *Allard* case the Ontario Court of Appeal allowed an appeal from a judgment for damages. The accident had occurred in Quebec, and under Quebec law the limitation period was two

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necessary and may use the co-operation of the parties, the evidence of experts and, where necessary, the assistance of administrative officials of this country [Austria].

(3) Where the law to be applied cannot at all be ascertained, the most nearly related law is to be applied, and if it cannot be ascertained, the domestic law [of Austria].

(3. Ermittlung fremden Rechts

(1) Das Gericht hat sich die Kenntnis fremden Rechts von Amts wegen zu verschaffen.

(2) Bei dessen Ermittlung ist das Gericht auf die von den Parteien angebotenen Beweise nicht beschränkt; es hat alle ihm nötig scheinenden Erhebungen von Amts wegen einzuleiten und kann sich der Mitwirkung der Parteien bedienen, Sachverständige zuziehen und, soweit erforderlich, die Hilfe der inländischen Verwaltungsbehörden in Anspruch nehmen.

(3) Sind die anzuwendenden Rechtsnormen überhaupt nicht feststellbar, so sind die einschlägigen nächstverwandten anzuwenden; sind solche nicht zu ermitteln, das inländische Recht.)

On United States federal law in this respect, see Saunders, *supra*, f.n.16, 217.

[109] Eleventh Session, Commission No. II, P.V. No. 9, corr. 4, Oct. 19 1968.

[110] [1953] 2 D.L.R. 442 (Ont. C.A.).

[111] [1924] S.C.R. 436 (from Que.).

years. In Ontario, however, it was one year, and the action was brought more than one year but less than two years after the date of the accident. The court applied the *lex fori* to the question of limitation and dismissed the action. In the *Catellier* case Mignault,J. said with respect to prescription that:

> ... *cette prescription est une véritable déchéance et la loi déniant l'action, les tribunaux peuvent, et j'ajoute doivent, suppléer d'office le moyen résultant de la prescription.*[112]

The Convention on the law applicable to traffic accidents does not permit a state to reserve the right not to apply the provision relating to prescription and limitation, and the Conference of Commissioners on Uniformity of Legislation in Canada had no reservation regarding the inclusion of this provision into a uniform act.[113] There should not, therefore, arise any difficulty in accepting this provision as far as the Convention under review is concerned.

Public Policy

Article 10 of the Convention authorizes a court to refuse the application of the *lex causae* "where such application would be manifestly incompatible with public policy (*'ordre public'*)". This principle has been applied where the *lex causae* limited the defendant's liability and where the place of injury that determined the application of that law was considered to be fortuitous. Thus in *Kilberg* v. *Northeast Airlines, Inc.* Desmond,J.C. said:

> Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment... There is available... a way of accomplishing this conformably to our State's public policy and without doing violence to the accepted pattern of conflict of law rules.[114]

The learned Chief Justice held that the $15,000 limit imposed by a Massachusetts death statute was inapplicable, and "in view of [New York's] strong public policy as to death action damages [he treated] the measure of damages ... as being a procedural or remedial question controlled by [New York] State policies".[115]

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[112] *Ibid.*, 440.

[113] *Supra*, f.n.15.

[114] *Supra*, f.n.94, 527-528.

[115] 172 N.E. 2d 526, 529 (N.Y. C.A.). *Cf.*, however, *Pearson* v. *Northeast Airlines, Inc.*, 307 F. 2d 131 (C.C.A. 2d, 1962) where it was held that the full faith and credit clause of the United States Constitution required the federal district court of New York to apply the $15,000 wrongful death damage limitation of a Massachusetts statute in a New York administratrix's wrongful death action against a Massachusetts corporation for death occurring in Massa-

In this connection reference may also be made to the dictum of Lord Denning who in *Boys* v. *Chaplin* awarded damages under the *lex fori* rather than under the *lex loci* on the ground that the plaintiff "gets justice here in that he gets fair compensation [w]hereas the [foreign] law ... gives him less than fair compensation".[116]

In Canada the *ordre public* clause does not appear to have been invoked so as to exclude the application of the laws of a sister province, notwithstanding the absence of a full faith and credit clause in the *B.N.A. Act*. Can a foreign law that would usually be classified as being incompatible with the forum's public policy be saved from being so classified on the ground that it is similar to the law of a sister province? While the question seems to be academic, I would hesitate to give a categorical positive answer, as Professor Wengler does.[117]

The Convention is silent on several matters as, for example, the application of the forum law to primary classification or the manner in which intertemporal conflicts are to be resolved. Underlying this omission is the expectation that the courts will, wherever the Convention is silent, apply general conflict rules. The *ordre public* clause appears therefore to have been included out of abundant caution.[118]

CONCLUSIONS

What advantage would there be in incorporating the rules contained in the Convention into our domestic law?

The Convention excludes, as was mentioned previously, the application of the *lex fori* and thus discourages forum shopping. It is argued that the Convention provides more equitable solutions to

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chusetts. The limitations, contained in the laws of some of the states of the Union, on the amount of damages which may be claimed in the case of a fatal airplane accident have been classified as "a particularly annoying type of conflict" and "a daily menace to the general public": Nadelmann, *Conflict of Laws: International and Interstate* (1972), 138.

[116] [1968] 1 All E.R. 283, 289 (C.A.). A complementary rule is contained in the judgment of the Supreme Court of Austria (April 9 1970) holding that the application of a foreign law that permits the award of damages in excess of those to be adjudged under the internal laws of Austria is not contrary to the *ordre public* of Austria: JBl. 1971, 93; *A.B.G.B.* (ed. Kapfer) 29th ed. (1972), 38.

[117] *Supra*, f.n.107, 311.

[118] *Cf.* the objections by Messrs Yasseen and Valladão to the inclusion of an *ordre public* clause (a general provision in the conflict of laws) in a document dedicated to specific questions: *supra*, f.n.57, 192-193.

conflicts problems than the existing rule or rules and that legislation based on the Convention would ensure uniformity and predictability of the law. This in turn would enable insurers to base their practice on statutory rules and, it is hoped, to enable them to offer better terms to customers in the export trade. This would ultimately profit the consumer. Whether the insurance companies will be sufficiently alert to their interest in this particular field remains to be seen.

An alternative to the conflict rules contained in the Convention would be those developed by our own courts. While these rules, as far as they relate to tortious liability, are the same for Quebec and for the rest of Canada,[119] the incorporation of the proposed conflict rules into a new Civil Code [120] would sever this common link based on the common law and established by *O'Connor* v. *Wray* [121] and *McLean* v. *Pettigrew* [122] as far as Quebec is concerned. To "introduce a distinction [between Quebec and common law conflict rules] ... might be attended with inconvenient results",[123] it is true, but, on the other hand:

> *... pourquoi, au nom de quelle règle ou de quel principe, la Cour suprême du Canada, saisie d'un litige de droit privé, provenant de la province de Québec, estime-t-elle devoir trouver la règle de droit applicable en l'espèce dans un système juridique étranger en l'occurrence, dans le droit international privé anglais* [?][124]

It would thus appear that there is little hope for the development of uniform conflict rules by our courts, and legislation uniform throughout the country would therefore appear to be an acceptable solution. The fact that only one of the twelve Canadian jurisdictions has adopted the uniform Act based on the Convention on the law applicable to traffic accidents [125] is not very promising. If court decisions and provincial legislation cannot be relied on to provide us with the requisite rules, perhaps Parliament can fill the gap.

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[119] *O'Connor* v. *Wray,* [1930] S.C.R. 231 (from Que.); *McLean* v. *Pettigrew,* [1945] S.C.R. 62 (from Que.). For a criticism of these and related cases see, *e.g.,* Crépeau, *infra,* f.n.124, 27.

[120] Castel and Crépeau, *Views from Canada,* (1971) 18 Am.J.Comp.L. 17, 33, writing about the Quebec equivalent of a law reform commission.

[121] *Supra,* f.n.119.

[122] *Supra,* f.n.119.

[123] *O'Connor* v. *Wray, supra,* f.n.119, 249 *per* Newcombe,J.

[124] Crépeau, *De la responsabilité civile extracontractuelle en droit international privé québecois,* (1961) 39 Can. Bar. Rev. 3, 27.

[125] The French Parliament authorized ratification by Act No.71-1036 of December 24 1971: *supra,* f.n.72, 98, a report on *Garantie mutuelle des fonctionnaires* v. *Bres* (April 27 1972), Cour d'appel de Nîmes.

It is not clear, however, whether to do so would be within its powers. It is submitted that, on the strength of head 91(2) of the *British North America Act, 1867*, this question can be answered in the affirmative but probably only if these rules are made part of a statute which "in pith and substance" regulates trade and commerce.

Our jurisprudence carefully distinguishes between the regulation of trade and commerce, a matter coming within the class of subjects in relation to which Parliament has, under head 91(2), exclusive jurisdiction, and the regulation of contracts of sale. Kerwin,C.J. said in *Reference re The Farm Products Marketing Act* that:

> ... the concept of trade and commerce, the regulation of which is confided to Parliament, is entirely separate and distinct from the regulation of mere sale and purchase agreements. Once an article enters into the flow of interprovincial or external trade, the subject-matter *and all its attendant circumstances* cease to be a mere matter of local concern.[126]

The Convention likewise distinguishes, by implication, claims arising from contracts for the sale of goods and international, including interprovincial and interstate, commerce. This distinction is implied by article 1 which excludes expressly from the application of the Convention claims against the person from whom the victim acquired the noxious product. The Convention does not therefore regulate claims arising out of the sale of goods. Apart from this negative aspect, it appears from the whole tenor of the Convention that it aims at regulating only claims arising out of trade between two or more different jurisdictions. Incidentally, it may also relate to matters within one and the same jurisdiction where, for example, the product which caused the injury was acquired by the plaintiff in the jurisdiction or in which the injury occurred, or in which the victim has his habitual residence or his place of business. In a situation of this kind no conflict of laws would arise and no regulation aiming at solving it would be necessary. "[T]ransactions in any ... natural product which are completed within the province... have no connection with interprovincial or export trade"[127] and are therefore beyond the powers of Parliament. In *Attorney-General for Manitoba* v. *Manitoba Egg & Poultry Association*[128] Laskin,J. summarized from *Reference re The Farm Products Marketing Act*[129] the meaning for constitutional purposes of intraprovincial, as distinguished from extraprovincial, including external, trade and commerce. He said:

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[126] [1957] S.C.R. 198, 205. Italics added.
[127] *Re Natural Products Marketing Act, 1934*, [1937] 1 D.L.R. 691, 692 (P.C.).
[128] [1971] S.C.R. 689 (from Man.).
[129] [1957] S.C.R. 198.

> What emerges from the various reasons of the court is that... regulation of the marketing, or the processing and marketing, of products in a province for *consumption therein* is within provincial competence... [but] regulation of the marketing of provincial produce *intended for export or sought to be purchased for export* is beyond that competence... [R]egulation of production or manufacture must be distinguished from regulation of transactions in the product and it cannot be said that the former is so wholly within provincial regulatory competence as in all cases to cover production or manufacture for export; and ... even in respect of the latter it cannot be categorically stated that ultimate extra-provincial destination will foreclose provincial regulation of intermediate steps in the marketing process.[130]

Parliament has certainly the power to regulate interprovincial and international trade, and:

> ...legislation necessarily incidental to the undoubted powers of the Dominion in respect of the Regulations of Trade and Commerce is competent although such legislation may trench upon subjects reserved to the Provinces by s.92.[131]

Parliament would thus have legislative jurisdiction if the implementation of the Convention were made "an integral part of a scheme for the regulation of international or interprovincial trade".[132]

Article 7 of the Convention may be helpful in deciding whether a claim is made in respect of a matter that relates to interprovincial or external trade and commerce. This article permits the defendant to avoid the application of any law but that of his principal place of business if "he could not reasonably have foreseen that the product... would be made available... through commercial channels" in a jurisdiction other than his own. This indicates that the application of the law of any such jurisdiction is predicated on the supplier's intention that the product be exported from his own jurisdiction or, at least, sought to be purchased for such export. Does the making of rules which presuppose such an intention and which are designed to resolve conflicts of laws arising out of acts, omissions or transactions subsequent to, or connected with, or influencing the manufacture, packaging, or bottling of a product and its shipping beyond the borders of the province come within the trade and commerce power of Parliament? It is not certain whether an implementing statute which is not part of a scheme for the general regulation of international or interprovincial trade can, in itself, be classified as regulating such trade. This uncertainty

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[130] [1971] S.C.R. 689, 713. Italics added.

[131] *Re Natural Products Marketing Act, 1934, supra,* f.n.127, 414.

[132] *Caloil Inc.* v. *A.-G. of Canada* (1971), 20 D.L.R. (3d) 472, 477 (S.C. from Ex. Ct.). *per* Pigeon,J.

can only be resolved by the courts.[133] If there is federal legislative jurisdiction, it would be worthwhile to consider whether the Federal Court — Trial Division should not be given concurrent original jurisdiction, analogous to section 23 of the *Federal Court Act*, in all cases where the statute implementing the Convention is to be applied. The fact that an implementing statute would deal with damage caused by the instrumentality of a product that has entered into the flow of interprovincial or international trade would militate in favour of federal legislative jurisdiction. On the other hand, the *ratio* of the case presently to be mentioned would support provincial jurisdiction.

In *Northern Helicopters Ltd.* v. *Vancouver Soaring Association*[134] Berger,J. held that provincial legislation is to be applied to the apportionment of fault for a mid-air collision in the absence of federal legislation dealing with this matter. While an accident of this kind is a matter within the legislative jurisdiction of Parliament over aeronautics, the apportionment of fault was held to be a matter relating to property and civil rights. If the same reasoning can be applied to the implementation of the Convention here under review, dealing as it does with the regulation of the choice of law applicable to liability for damage caused by a product that has entered the flow of interprovincial or international trade, it would follow that, unless Parliament occupies the field in the exercise of its trade and commerce power, implementation is a matter within provincial legislative jurisdiction.

Insofar as the *Northern Helicopters* case deals with the question of legislative jurisdiction in relation to tortious liability and distinguishes this question from that of the jurisdiction in relation to the activity that gave rise to that liability, it is of greater assistance in resolving the question of legislative jurisdiction to implement the Convention here under consideration than cases which aim at regulating the activity itself. If the appellate courts accept the reasoning of the trial court, then the implementation of the Convention must be left to the provincial legislatures.

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[133] Jackett,C.J. says at p. 3 of his working paper on the reasons for judgment in *John A. MacDonald, Railquip Enterprises Ltd.* v. *Vapor Canada Limited*, [1972] F.C. 1156 (C.A.), filed under No. A - 85 - 72: "In my experience, there is no statutory provision concerning which the jurisprudence is so confusing. It is possible to find cases to support many quite contrary views as to the ambit of section 91(2)."

[134] (1973), 31 D.L.R. (3d) 321, 329 (B.C. S.C.).

APPENDIX A

Convention on the law applicable to products liability

The States signatory to the present Convention.

Desiring to establish common provisions on the law applicable, in international cases, to products liability,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions —

Article 1

This Convention shall determine the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product, including damage in consequence of a misdescription of the product or of a failure to give adequate notice of its qualities, its characteristics or its method of use.

Where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable, the Convention shall not apply to their liability *inter se.*

This Convention shall apply irrespective of the nature of the proceedings.

Article 2

For the purposes of this Convention —

a. the word 'product' shall include natural and industrial products, whether raw or manufactured and whether movable or immovable;

b. the word 'damage' shall mean injury to the person or damage to property as well as economic loss; however, damage to the product itself and the consequential economic loss shall be excluded unless associated with other damage;

c. the word 'person' shall refer to a legal person as well as to a natural person.

Article 3

This Convention shall apply to the liability of the following persons —

1. manufacturers of a finished product or of a component part;
2. producers of a natural product;
3. suppliers of a product;
4. other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above.

Article 4

The applicable law shall be the internal law of the State of the place of injury, if that State is also —

a. the place of the habitual residence of the person directly suffering damage, or

b. the principal place of business of the person claimed to be liable, or

c. the place where the product was acquired by the person directly suffering damage.

Article 5

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also —

a. the principal place of business of the person claimed to be liable, or

b. the place where the product was acquired by the person directly suffering damage.

Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

Article 7

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

Article 8

The law applicable under this Convention shall determine, in particular —

1. the basis and extent of liability;

2. the grounds for exemption from liability, any limitation of liability and any division of liability;

3. the kinds of damage for which compensation may be due;

4. the form of compensation and its extent;

5. the question whether a right to damages may be assigned or inherited;

6. the persons who may claim damages in their own right;

7. the liability of a principal for the acts of his agent or of an employer for the acts of his employee;

8. the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;

9. rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Article 9

The application of Articles 4, 5 and 6 shall not preclude consideration being given to the rules of conduct and safety prevailing in the State where the product was introduced into the market.

Article 10

The application of a law declared applicable under this Convention may be refused only where such application would be manifestly incompatible with public policy ('ordre public').

Article 11

The application of the preceding Articles shall be independent of any requirement of reciprocity. The Convention shall be applied even if the applicable law is not that of a Contracting State.

Article 12

Where a State comprises several territorial units each of which has its own rules of law in respect of products liability, each territorial unit shall be considered as a State for the purposes of selecting the applicable law under this Convention.

Article 13

A State within which different territorial units have their own rules of law in respect of products liability shall not be bound to apply this Convention where a State with a unified system of law would not be bound to apply the law of another State by virtue of Articles 4 and 5 of this Convention.

Article 14

If a Contracting State has two or more territorial units which have their own rules of law in respect of products liability, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial units to which the Convention applies.

Article 15

This Convention shall not prevail over other Conventions in special fields to which the Contracting States are or may become Parties and which contain provisions concerning products liability.

Article 16

Any Contracting State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right —

1. not to apply the provisions of Article 8, subparagraph 9;

2. not to apply this Convention to raw agricultural products.

No other reservations shall be permitted.

Any Contracting State may also when notifying an extension of the Convention in accordance with Article 19, make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

Article 17

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 18

Any State which has become a Member of the Hagne Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to this Convention after it has entered into force in accordance with Article 20.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 19

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 20

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in the second paragraph of Article 17.

Thereafter the Convention shall enter into force

— for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance or approval;

— for each acceding State, on the first day of the third calendar month after the deposit of its instrument of accession;

— for a territory to which the Convention has been extended in conformity with Article 19, on the first day of the third calendar month after the notification referred to in that Article.

Article 21

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 20, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 22

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference and the States which have acceded in accordance with Article 18, of the following —

1. the signatures and ratifications, acceptances and approvals referred to in Article 17;

2. the date on which this Convention enters into force in accordance with Article 20;

3. the accession referred to in Article 18 and the dates on which they take effect;

4. the extensions referred to in Article 19 and the dates on which they take effect;

5. the reservations, withdrawals of reservations and declarations referred to in Articles 14, 16 and 19;

6. the denunciations referred to in Article 21.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the ... day of ... 19.., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.

APPENDIX B

An Act respecting the laws applicable to products liability

1. This Act may be cited as *Conflict of Laws (Products Liability) Act.*

2. (1) In this Act,

(a) "damage" means injury to the person, including death, damage to property, whether moveable or immoveable, and economic loss;

(b) "product" means a product supplied by a supplier, whether a natural product, treated or untreated, or an industrial product;

(c) "state" includes a province of Canada and a territorial entity of a state if this entity has its own legal system in respect of products liability; and

(d) "supplier" means

(i) the producer of a natural product,

(ii) the manufacturer of a finished product or of a component part thereof,

(iii) the supplier of a product,

(iv) any other person, including a repairer and a warehouseman, in the commercial chain of the preparation or distribution of a product, and

(v) the servants and agents of the persons enumerated under subparagraphs (i) to (iv).

(2) For the purposes of this Act, it is immaterial whether the damage was caused by the breach of duty imposed by law, including a misdescription of the product or a failure to give adequate notice of its qualities, its characteristics or its method of use, or whether the damage was caused by the breach of a duty imposed by contract or by a statute that imposes civil liability for its breach.

(3) A reference to the victim's residence shall be read as a reference to the habitual residence of the person directly suffering damage.

(4) A reference to the supplier's business place shall be read as a reference to the principal place of business of the supplier claimed to be liable.

(5) A reference to the place where the damage was suffered shall be read as a reference to the place where the effects of the act or omission that caused the damage made themselves first felt.

(6) A reference to the laws of a state shall be read as a reference to the laws in force in the state excluding the conflict rules.

3. (1) Subject to this section and to section 7, this Act determines the law applicable to the liability of a supplier for damage caused by a product or to a product.

(2) This Act does not apply to the liability of a supplier toward the person suffering damage to whom, without the interposition of an agent, he transferred the property in, or the right to use, the product.

(3) This Act does not apply to damage to a product and the consequential economic loss unless other damage was also caused.

(4) This Act does not apply unless the product has entered into the flow of interprovincial or international trade.

(5) Where the victim is a Canadian resident and acquired the product within Canada, this Act does not apply if, under its rules, a law other than that of Canada or one of its provinces were applicable.

4. (1) Subject to this section and to section 7, the law applicable under section 3 is the law of the state of the victim's residence if within this state this victim acquired the product or if the supplier's business place is situated therein.

(2) If subsection (1) does not apply, the law applicable under section 3 is, subject to subsection (3) and to section 7, the law of the state of the place where the damage was suffered if either the claimant bases his claim upon this law or if within this state there is situated

(a) the victim's residence;

(b) the place where this victim acquired the product; or

(c) the supplier's business place.

Alternative to "If subsection (1) does not apply...": If the victim did not acquire the product within the state of the victim's residence and if the supplier's business place is not situated within this state...

(3) The law applicable under section 3 is, subject to section 7, the law of the state of the supplier's business place if neither subsection (1) nor subsection (2) applies or if the supplier establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available through commercial channels in the state of the victim's residence or the place where the damage was suffered, as the case may be.

Alternative to subsection (3):

(3) The law applicable under section 3 is, subject to section 7, the law of the state of the supplier's business place if either

(a) the victim did not acquire the product within the state of the victim's residence;

(b) the supplier's business place is not situated within the state referred to in paragraph (a);

(c) the claimant does not base his claim on the law of the state of the place where the damage was suffered;

(d) the victim's residence is not situated within the state referred to in paragraph (c);

(e) the place where the victim acquired the product is not situated within the state referred to in paragraph (c); and

(f) the supplier's business place is not situated within the state referred to in paragraph (c);

or if

(g) the supplier establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available through commercial channels in the

state of the victim's residence or the place where the damage was suffered, as the case may be.

5. The law applicable under section 3 determines, in particular,

(a) the existence of liability and its extent;

(b) the grounds for exemption of liability, any limitation of liability, and any division of liability;

(c) the kinds of damage for which damages may be claimed;

(d) the amount of damages;

(e) the question whether a right to damages may be assigned or inherited;

(f) the persons who have suffered damage and who may claim damages in their own right;

(g) the liability of a principal or master [commettant du fait] for the acts of his agent or servant [préposé];

(h) the burden of proof where the rules of the applicable law in respect thereof pertain to the law of liability; and

(i) rules of prescription and limitation including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of that period.

6. The application of the law determined under section 4 does not preclude the application of more stringent rules of conduct and safety contained in the laws of the state where the product was introduced into the market.

7. No law that would be applicable under this Act applies if its application is manifestly contrary to public policy.

8. This Act shall come into force on a day to be fixed by proclamation.