Multistate Defamation: Should the Place of Publication Rule be Abandoned for Jurisdiction and Choice of Law Purposes?

Jean-Gabriel Castel
Osgoode Hall Law School of York University, castel@fake.osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Part of the Law Commons Article

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol28/iss1/5

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
MULTISTATE DEFAMATION: SHOULD THE PLACE OF PUBLICATION RULE BE ABANDONED FOR JURISDICTION AND CHOICE OF LAW PURPOSES?

By J.-G. Castel

I. INTRODUCTION

Books, newspapers, periodicals, radio, and television programmes can easily be published, distributed, heard or seen simultaneously almost all over the world today. This rapid dissemination of information gives special significance to the rules of defamation which are designed to protect a person's interest in his or her reputation.

The two principle elements of the tort of multistate defamation, namely conduct and publication to a third party, take place within the territory of two or more states. The resulting injury to the reputation of the defamed person and his or her damages may also be incurred in several states. Since these elements are not all to be found in the same state they call for the application of conflict of laws rules to determine whether the court where the action for defamation is brought has personal jurisdiction over the alleged defamer, and once such jurisdiction exists which law it will consult and apply to the various issues involved as the law of


1 The two elements of conduct and publication to a third party include the assembly of the defamatory matter, its printing and distributing, or its broadcasting.
defamation is far from uniform among the states or provinces of North America. For example, the court will be required to decide whether a given communication is defamatory, what constitutes publication of the defamatory matter, where did it take place, what are the circumstances under which publication of such matter is protected by an absolute or qualified privilege, and whether proof of special damages is essential to the plaintiff's recovery.

In the case of a multistate radio or television broadcast of an alleged defamatory matter, the court may have to consult and apply the law of each of the states or provinces where the communication containing the alleged defamatory statement was published, or where the reputation of the victim was injured or where he or she suffered some damage. Otherwise, the plaintiff may have to bring an action in each of these states or provinces. Conflict of laws problems may still arise when the conduct and the publication both occurred within the territory of the state or province where the action is brought but some of the damage occurred elsewhere.

The major question discussed in this article is whether the ordinary rules of the conflict of laws with respect to jurisdiction and choice of law in the field of torts should be applied to multistate defamation with their strong emphasis upon the place of tort which is held to be the place of publication of the alleged defamatory matter, therefore negating defenses that may be available elsewhere. It is argued that rules of jurisdiction and of choice of law address different concerns and that the test of place of publication should not always be used for both purposes. It is also proposed that for choice of law purposes the courts should apply the doctrine of the proper law of the tort.

II. SERVICE EX JURIS BASED ON THE PLACE OF TORT

A. General

Most cases involving multistate defamation deal with the issue of the assumed jurisdiction of the courts based on service *ex juris*.
In the absence of the ordinary bases for personal jurisdiction over the defendant,\(^2\) provincial rules of civil procedure provide that:

[a] party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, ... (g) in respect of a tort committed in Ontario.\(^3\)

However,

(1) [a] party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,  
a) for an order setting aside the service ...; or  
b) for an order staying the proceeding.

(2) Where the court is satisfied that,  
a) service outside of Ontario is not authorized by these rules; ...  
c) Ontario is not a convenient forum for the hearing of the proceeding, the court may make an order under sub-rule (1) or such other order as is just.\(^4\)

Thus, the defendant may ask for an order setting aside the service or staying the proceeding if the service is not authorized by the rules. That is, if the tort was not committed in Ontario, or if it was committed in Ontario, on the ground that this province is not a convenient forum.

The question whether a tort has been committed within the jurisdiction is not always easy to answer. It depends upon the nature of the tort. In the case of defamation — was it committed in the forum or in some other jurisdiction, or in both places? No difficulty arises where all the elements of the tort take place in the same jurisdiction. It is when these elements take place in different jurisdictions, as is often the case with newspaper articles and radio

\(^2\) In general the ordinary bases for personal jurisdiction over the defendant are: service within the jurisdiction based on the presence of the defendant doing business within the jurisdiction; residence within the jurisdiction; submission to the jurisdiction. See J.G. Castel, *Canadian Conflicts of Laws*, 2d ed. (Toronto: Butterworths, 1986) at 187ff.


\(^4\) *Ontario Civil Procedure, ibid.*, Rule 17.06.
and television broadcasts, that the courts must determine which jurisdiction is the place of the tort.

In a leading Canadian case, *Jenner v. Sun Oil Co. Ltd.*, the plaintiff who resided and carried on business in Ontario brought an action against several United States' defendants for damages by reason of defamatory statements made concerning him arising out of radio broadcasts published by the defendants on the National Broadcasting Co. radio network located in the state of New York. The defendants applied to set aside an *ex parte* order for service of notice of the writ of summons *ex juris*. The court based its decision upon Rule 25.1(g) which authorized service *ex juris* in the case of "a tort committed within Ontario" and held that the order should stand as this was a proper case for service *ex juris* and Ontario was the *forum conveniens*. The defendants had argued *inter alia* that the action was not founded on a tort wholly committed in Ontario and that Ontario was not the *forum conveniens*. On the question of the place of tort the court stated:

I have come to the conclusion that there are fundamental and common-sense principles which govern the present case. Radio broadcasts are made for the purpose of being heard. The programme here in question was put on the air for advertising purposes. It is to be presumed that those who broadcast over a radio network in the English language intended that the messages they broadcast will be heard by large numbers of those who receive radio messages in the English language. It is no doubt intended by those who broadcast for advertising purposes that the programmes shall be heard by as many as possible. A radio broadcast is not a unilateral operation. It is the transmission of a message.

Relying upon various authorities that support the view that

---

5 *(1952), [1952] 2 D.L.R. 526 (Ont. H.C.)*.

6 Rule 25(1)(g) of the former Ontario Civil Procedure rules was identical to the present Rule 17.02(g) except that under the former rule service *ex juris* had to be allowed by a court order. This is no longer the case although such service may still be challenged afterwards: see Rule 17.06 of *Ontario Civil Procedure, supra,* note 3. Also, today the originating process is served rather than the notice thereof.


8 *Hebditch v. MacIlwaine* (1894), [1894] 2 Q.B. 54 at 58 and 61, Lord Esher M.R.; *Shearnan v. Findlay* (1883), 32 W.R. 122 (Q.B.Div.). The court rejected *Bree v. Marescaux* (1881), 7 Q.B. 434 (C.A.) a service *ex juris* case for damage within the jurisdiction involving slander uttered abroad. The British Court of Appeal found that the "act done" outside the jurisdiction which was the basis of the action was not made complete within the jurisdiction by the act
Multistate Defamation

publication of a defamatory statement to a third party is the very essence of actionable defamation, the court said:

The same principles apply to defamation by slander. A person may utter all the defamatory words he wishes without incurring any civil liability unless they are heard and understood by a third person. I think it a "startling proposition" to say that one may, while standing south of the border or cruising in an airplane south of the border, through the medium of modern sound amplification, utter defamatory matter which is heard in a Province in Canada north of the border, and not be said to have published a slander in the Province in which it is heard and understood. I cannot see what difference it makes whether the person is made to understand by means of the written word, sound-waves or ether-waves in so far as the matter of proof of publication is concerned. The tort consists in making a third person understand actionable defamatory matter.

The court concluded that it did not matter whether or not the alleged defamatory words were written or uttered beyond the jurisdiction if it was shown that there was a good arguable case "that they were so transmitted as to be published within the jurisdiction in such a manner as to be likely to cause the plaintiff to suffer substantially in his reputation in Ontario." On the question of forum conveniens the court held that it was in Ontario.

Jenner v. Sun Oil Co. was applied in Pindling v. National Broadcasting Corp. which involved a television broadcast allegedly defaming the Prime Minister of the Bahamas. The broadcast had originated in the United States and had been received in Ontario either directly through American television stations or indirectly by being picked up and relayed by some of the defendants' cable and satellite television broadcast operators. The facts resembled those of Jenner except that the plaintiff had no connection with the forum and the principal defendant and the author of the programme could not prevent the satellite television broadcast operators from retransmitting the signals from the United States. The court dismissed a motion by the defendants for an order setting aside the

11 Ibid.
service of the proceedings *ex juris* and also held that Ontario was the *forum conveniens*. The court rejected the defendants' argument that service out of Ontario under Rule 25.1(g) required an intent by the National Broadcasting Corporation to broadcast into Ontario.\(^\text{13}\)

For the purposes of service *ex juris* Canadian and English courts appear to hold that the tort of defamation is committed where the defamatory matter is published and not where it is uttered or printed. Publication takes place where the defamatory statements are heard – where they are communicated. However, the rule is not inflexible since the courts may decline to order service *ex juris* or set it aside if the publication within the jurisdiction is only slight compared with publication elsewhere,\(^\text{14}\) or if the forum is not a convenient one.\(^\text{15}\)

This would seem to indicate that the mere fact that communication to a third party occurs in a particular jurisdiction does not as such make that jurisdiction the place of tort. "There must, in addition, be a substantial connection between the tort and the jurisdiction."\(^\text{16}\)

Should the test of publication be the only relevant one for determining whether or not the tort of defamation was committed within the jurisdiction? In *Petersen v. A.B. Bahco Ventilation et al.*,\(^\text{17}\) a service *ex juris* case involving a claim for damages for fraud and

\(^\text{13}\) See also, *Composers, Authors and Publishers Assn. of Canada Ltd. v. International Good Music Inc.* (1963), 37 D.L.R. (2d) 1 at 7 (S.C.C); *Town of Peace River v. British Columbia Hydro and Power Authority* (1972), 29 D.L.R. (3d) 769 (Alta C.A); *Chinese Cultural Centre of Vancouver v. Holt* (1978), 87 D.L.R. (3d) 774 (B.C.S.C.). In *Hubert and International School of Music v. DeCamillos and Canadian Accordion Institute Ltd.* (1963), 44 W.W.R. 1 (B.C.S.C.) publication took place in three provinces. In *Borowski v. Hurst and Toronto Star* (1984), 32 Man. R. (2d) 207 (Q.B.), the court held that defamation actions against newspapers that are distributed in many provinces and countries need not be brought in the jurisdiction where the owner or publisher resides. Therefore, it did not matter that the defendants had no offices or assets in Manitoba. Compare *Charles v. City News Co.* (1928), 37 O.W.N. 41, where the Master did not find that a libel had been committed in Ontario on the ground that the defendant published and disposed of its newspapers only in the city of Chicago.


\(^\text{15}\) See *Jenner v. Sun Oil Co Ltd.*, supra, note 7.


misrepresentation, the Supreme Court of British Columbia adopted the real and substantial connection test for determining the *situs* of the tort. The court relied on *Moran v. Pyle National (Canada) Ltd.*, a case which arose out of fatal injuries sustained by an electrician in Saskatchewan while removing a spent light bulb manufactured by the defendant. The latter did not carry on business in Saskatchewan and had no property or assets in that province. All of the defendant's manufacturing and assembling activities took place in Ontario with components being manufactured either in Ontario or in the United States. The defendant sold products to distributors, not directly to consumers, and had no agent or sales representative in Saskatchewan.

The Supreme Court of Canada held that the courts of Saskatchewan had jurisdiction to entertain the action on the basis of the commission of a tort within the province. Dickson J., speaking for the court, reviewed in great detail the various theories adopted over the years to ascertain the *situs* of a tort. He rejected resort to any arbitrary set of rules and said:

> Generally speaking, in determining where a tort is committed, it is unnecessary, and unwise to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers'* case [*Distillers Co. (Bio-Chemicals) Ltd. v. Thompson*, [1971] 1 All E.R. 694] and again in the *Cordova* case [*Cordova Land Co. Ltd. v. Victor Bros. Inc.*, [1966] 1 W.L.R. 793], a real and substantial connection test was hinted at. Cheshire, 8th ed. (1970), p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties.

If this test were adopted in the case of defamation for the purposes of jurisdiction, the place of tort would be the state or province *most* substantially affected by the defendant's alleged publication of defamatory matter or its consequences. Had it been

---


applied to Jenner\textsuperscript{20} and Pindling\textsuperscript{21} it would have given jurisdiction to the Ontario court in the former case and not in the latter.

The place of the tort of defamation could also be located where the alleged defamatory matter was assembled or where the plaintiff suffered injury to his or her reputation. Most likely, this would be where publication took place or, in some cases, where the defamed sustained damages. This may not be the place of injury or the place of publication, although, generally speaking, defamation when it takes the form of libel does not require allegation and proof of special damage to establish the cause of action.\textsuperscript{22} None of these tests is free from ambiguity.

It should not matter which basis the court uses to exercise its jurisdiction in order to enable the plaintiff to sue the defendant, provided that the court applies the relevant law to the merits of the case. With respect to jurisdiction, the major concern appears to be easy access to the courts. Furthermore, even if the tort of defamation was not committed within the jurisdiction, it would, in most cases, still be possible to base the jurisdiction of the court on the fact that the damage was sustained there or on other bases.\textsuperscript{23} It would be unfair to the plaintiff to hold that, for the purpose of jurisdiction, the place of the tort is where all the elements of the cause of action have taken place.

Why not give jurisdiction to the court of the place where the defamer acted or where the defamed suffered injury to his or her reputation or where he or she sustained some damage, instead of artificially defining the place of the tort as at one of these places? For the purposes of jurisdiction, a tort may be recognized as having

\textsuperscript{20} Supra, note 5.

\textsuperscript{21} Supra, note 12.

\textsuperscript{22} Libel is actionable \textit{per se}. The law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights. Slander does require allegation and proof of special damage unless it is slander \textit{per se}. Note that in Ontario defamatory words in a radio or television broadcast constitute libel. \textit{Libel and Slander Act}, R.S.O. 1980, c. 237, s. 2. In general see R.E. Brown, \textit{The Law of Defamation in Canada} (Toronto: Carswell, 1987) at 289ff.

\textsuperscript{23} See, for instance, \textit{Ontario Rules of Civil Procedure}, Rule 17.02(h) "in respect of damage sustained in Ontario arising from a tort or breach of contract, wherever committed"; \textit{New Brunswick Rules of Civil Procedure}, Rule 19.01(f).
been committed in several different places whereas for choice of law purposes this would be unworkable. Actually, any connection between the territory over which the court has jurisdiction and the parties or the elements of the tort of defamation should be sufficient to give that particular court jurisdiction to hear the case. The plaintiff would then be in a position to choose the jurisdiction in which to bring his or her action with the safeguard that the defendant could raise the plea of forum non conveniens. This proposal would require a change in the rules of civil procedure.

B. Service ex juris and the Canadian Constitution

Although the territorial jurisdiction of provincial courts is limited by the boundaries of the province in which they sit, thus enabling them to exercise jurisdiction on the basis of service of process within the province with respect to foreign and domestic causes of action, such courts, as noted above, also exercise extra-territorial jurisdiction over non-resident persons through service of the originating process ex juris. This practice is valid under section 92(13) of the Constitution Act with respect to matters falling within the legislative competence of the provinces.

However, some provincial rules for service ex juris appear to go too far by putting no express limits on the power to require non-residents to defend local actions. This may be the case where jurisdiction is based on the place of tort. A province must have a substantial provincial interest to protect in order to subject a non-

resident defendant to its judicial jurisdiction. If the controversy has a sufficient connection with the province for its law to be applied, the provincial courts have jurisdiction over all concerned parties. This view is consistent with the interpretation of the Constitution Act that confers the right on a provincial legislature to act under section 92(14) when it has competence under section 92(13). Is mere publication of defamatory material in the province a sufficient connection to subject non-resident plaintiffs and defendants to its courts?

III. CHOICE OF LAW AND THE PLACE OF TORT

A. The Traditional Canadian Rule

Ontario courts have adopted the English rule enunciated by Willes J. in Phillips v. Eyre, which is as follows:

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

This general rule was approved by the Supreme Court of Canada and provincial courts on a number of occasions. However,

---

29 (1870), 6 L.R.Q.B. 1 (C.A).
30 Ibid. at 28-29.
Canadian courts have not yet adopted the House of Lords' view that "non-justifiable" by the law of the place of tort means civilly actionable by that law only,\textsuperscript{32} thus overruling \textit{Machado v. Fontes}\textsuperscript{39} which had interpreted "non-justifiable" much more broadly. Both branches of the rule relate to choice of law.\textsuperscript{34}

\textbf{B. The Place of Tort}

The second branch of the rule in \textit{Phillips v. Eyre}\textsuperscript{35} requires that the act which forms the basis of the action must not have been justifiable by the law of the place where it was done. Thus, the question of determining where the tort of defamation was committed also arises in the context of choice of law. Should Canadian courts adopt the place of publication of the defamatory matter as the place of tort for choice of law purposes as they have done with respect to jurisdiction? It is contended that rules of jurisdiction and rules of choice of law address different concerns and that the same test should not be used. If, for the convenience of the plaintiff, one must allow him or her a wide choice including resort to the courts where publication took place, the choice of jurisdiction should not automatically attract the application of the law of that jurisdiction to the merits of the case as it would encourage forum shopping. When it comes to choice of law, one must determine which is the most characteristic or substantial element of the tort of defamation and not be governed by the convenience of the parties. The difficulty

\textsuperscript{32} \textit{Boys v. Chaplin} (1971), [1971] A.C. 356 at 377 and 381, Lord Hodson and Lord Wilberforce. See also Lord Guest at 358.

\textsuperscript{33} (1897), [1897] 2 Q.B. 231 (C.A.).


\textsuperscript{35} \textit{Supra}, note 29.
is that each communication is a separate publication that gives rise to a distinct cause of action governed by its own law.\textsuperscript{36}

It is true that in most cases defamation could be regarded as being committed where publication takes place as it is usually there that the defamed person suffered injury to his or her reputation. However, the injury and some of the damage may also take place elsewhere, for instance, where the defamed person resides or works. Therefore, the place of damage may become relevant.\textsuperscript{37} It could also be argued that the word "act" in the second branch of the rule in \textit{Phillips v. Eyre} refers to the assembling and printing of the material and not its publication. However, since characterization of a rule of conflict of laws has to be done in accordance with the \textit{lex fori},\textsuperscript{38} one would have to examine that law to ascertain the essence of the tort of defamation.

Mr. Justice Linden, in his text book on the law of torts\textsuperscript{39} stresses that the prime purpose of defamation law is to protect the good reputation of individuals in our society.\textsuperscript{40} Defamation is the dissemination of information that tarnishes the good name of a person.\textsuperscript{41} The very essence of defamation, be it libel or slander, is publication – the communication of the written or spoken words to

\textsuperscript{36} Many states have adopted a single publication rule in the United States. In Canada this is not the case although successive actions on the ground of separate publication are somewhat restricted. See R.E. Brown, \textit{supra}, note 22 at 280ff.

\textsuperscript{37} See J.G. Castel, \textit{Canadian Conflict of Laws}, 2d ed. (Toronto: Butterworths, 1986) at 613. See, also, \textit{Abbot-Smith v. Governors of University of Toronto} (1964), 45 D.L.R. (2d) 672 (N.S.C.A.), where some support is given by Isley C.J., \textit{obiter}, to the view that the place of the tort for choice of law purposes is where the damage is sustained.

\textsuperscript{38} Castel, \textit{ibid.} at 68. Note that \textit{Machado v. Fontes} (1897), [1897] 2 Q.B. 231 (C.A.) emphasizes the law of the place of publication: the plaintiff brought an action in England to recover damages from the defendant for an alleged libel upon the plaintiff published by the defendant in Brazil. The "act" done was the \textit{publication} of the libel in Brazil.


\textsuperscript{40} \textit{Ibid.} at 627.

\textsuperscript{41} \textit{Ibid.} at 629.
a third person other than the defamed individual. "It is the fact of publication alone which is actionable." 42

Professor J.G. Fleming also states that: "The essence of tortious defamation lies in the communication of the disparaging statement to someone other than the person defamed.... This requirement is known by the name of 'publication'." 43 With respect to choice of law, he declares:

So also in the case of television or radio broadcasting, every reception can be sued for separately so that a plaintiff can select the law most favourable to him in an interstate transmission. In order to discourage such multiple litigation, some statutes prohibit more than one action in respect of a multiple publication without leave of the court and allow evidence in mitigation of any previous recovery of damages. 44

These authors seem to indicate that publication is the essence of the tort of defamation and not conduct, thus eliminating the place of acting as the place of tort. 45

42 Ibid. at 646. Note that Linden J. states that "some element of fault is required. If the defendant intended that someone should hear the defamatory statements, therefore, there will be liability. However, if he did not intend a publication and he could not, by the exercise of reasonable care, have avoided it, he will be exonerated." (Ibid. at 644 and cases cited). Further on he states (ibid. at 647) that fault is relevant with regard to responsibility for publication and he cites J.G. Fleming, The Law of Torts, 6th ed. (Sydney: Law Book Company, 1983) at 513 for the proposition that there is no liability for intentionally defamatory matter published accidentally.


44 Ibid. at 507-10.

45 Note that Professor Joost Blom has argued that:

A strong case can be made for the proposition that the logic (such as it is) of the rule in Phillips v. Eyre is that a defendant should not be liable in tort in the court of the forum if what he did was regarded as lawful by the law of the place where he acted. It would only be consistent with the idea to regard the locus delicti for the purpose of the rule as the place of acting rather than the place of injury.

See Blom, supra, note 18 at 403. As for Professor G.H.L. Fridman, he is of the opinion that:

Where the defendant is ignorant of and unconcerned about the locality of the action or a potential plaintiff, but scatters his defamatory material abroad, it might then be argued that the place of publication is vital. If we are concerned with identifying the essence or main substance of tortious conduct then in some instances, it is suggested, it may be reasonable to investigate whether the allegedly wrongful conduct is generalized in its scope and possible effects or may be considered as
Although the courts in some common law jurisdictions have adopted the test of publication for choice of law purposes, there are no Canadian cases dealing with this problem. In Moran v. Pyle, the Supreme Court alluded to the possibility that the test might be different for choice of law purposes and in Inter-provincial Co-op v. The Queen in Right of Manitoba, Mr. Justice Pigeon, speaking for the majority, seemed to think that the jurisdictional test was not applicable to choice of law. If one were to follow the test of Moran v. Pyle, the place of the tort of defamation would be in the state most substantially affected by the defamer's activity or the consequences of that activity. The place of publication would no longer be the dominant element. Professor J.G. McLeod does not share this view and is of the opinion that although a tentative solution has been reached for jurisdictional purposes in Moran v. Pyle, this solution is not necessarily appropriate for the purpose of defining the connecting factor for choice of law purposes. There must be a sufficient connection between a particular set of facts and

more specific in nature. Negligence vis-à-vis the world at large (or at any rate a class of persons which can be defined in a broad way) has no clear local connection except, possibly, with the place where the alleged negligence occurred. A tort that is aimed at or intended to affect a person or group in a specific locality, and only such locality, may be more properly and closely identified with such locality. In this connection perhaps it may be stressed that what should be considered as most important is the intent or the foresight of the proposed defendant at the time that he originally acted, and in relation to the place where he acted and place, if any, where he intended or foresaw, or should have foreseen, that his acts would or could have effect. If he had in mind at the moment of acting some place other than where he in fact acted, then it might be argued that the legal quality of his act should be judged by such place. If not, then the results should be different.


47 Moran v. Pyle, supra, note 18 at 242-43.

a place to justify the application of the law of that place to the facts in issue.\textsuperscript{49}

In England, the new approach is to look at the sequence of events constituting the tort and to ask where in substance the cause of action arose. The "substance" test is flexible enough to take account of factors such as the nature of the tort alleged to have been committed and its material elements in order to determine the place of commission for choice of law purposes.\textsuperscript{50} It is one step short of adopting the doctrine of the proper law of the tort. The application of the law of the state which each issue is most closely connected, instead of the \textit{lex loci delicti} and the \textit{lex fori}, would reduce the importance attached to the place of tort and, therefore, to the place of publication.\textsuperscript{51}

The \textit{lex loci delicti} and the \textit{lex fori} coincide where the defamation is found to have been committed in the forum. The court will apply its domestic law even though the parties are foreign citizens resident and domiciled abroad.\textsuperscript{52}

It has already been mentioned that in the domestic law of Canada libel is actionable \textit{per se}, whereas this is not always the case with slander which requires the allegation and proof of special damage. Such damage may or may not be an element of tortious liability, especially since defamatory words in a radio or television broadcast constitute libel.\textsuperscript{53} Thus, it could be argued that the \textit{locus} of the libel and slander actionable \textit{per se} is where the defendant wrote or uttered the words complained of and that the locus of slander not actionable \textit{per se} is where the plaintiff suffered the consequential damage. However, since the principal aim of the Canadian law of defamation is to protect the plaintiff's interest in
maintaining an unsullied reputation rather than punishing the defendant, it would be better to ignore the distinction between libel and slander, and, for choice of law purposes, to hold that the place of tort, in the second branch of the rule in Phillips v. Eyre for multistate defamation cases, is where the reputation of the plaintiff has been most injured (i.e., where substantial damage is suffered, and not in every jurisdiction where publication of the defamatory matter took place). The plaintiff's right is invaded where his or her reputation has been most injured.

The application of the law of the place where the defamation did the most harm would simplify the application of Phillips v. Eyre and achieve some certainty and predictability. It is also the place most closely connected with the publication of the defamatory matter. The application of the law of that place is most likely to further the interests protected by the law of defamation.

C. The Proper Law of the Tort

It is contended that Canadian courts should not necessarily apply the law of the place of publication as that of the place of tort for choice of law purposes but the proper law of tort, defined as the system of law with which each issue involved in the alleged tort has the most substantial connection.

In Phillips v. Eyre, Willes J. said that the foreign tort rule was only applicable "as a general rule." This left the door open for a flexible interpretation which was adopted in England by the House of Lords in Boys v. Chaplin. Their Lordships added the following exception to the general rule of double actionability by the lex fori and the lex loci delicti: "A particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the

54 Linden, supra, note 39 at 627.
55 (1870), 6 L.R.Q.B. 1 at 28.
occurrence and the parties."\textsuperscript{57} This exception originated in the judgments of Lord Hodson and Lord Wilberforce.\textsuperscript{58} If, as they suggest, both the \textit{lex fori} and the \textit{lex loci delicti} can be displaced in favour of a third system of law, the application of the \textit{lex fori} to torts deemed to be committed locally as a result of the publication rule may be open to question. However, the editors of Dicey and Morris consider the likelihood of this judicial development to be highly speculative, especially in Canada, since neither \textit{Boys v. Chaplin} nor its \textit{ratio decidendi} has yet been adopted by Canadian high courts.\textsuperscript{59} Publication within the jurisdiction should not affect the application of the doctrine of the proper law of the tort as long as legally relevant foreign elements are present.

The exception to the double actionability rule is modelled on section 145 of the United States \textit{Restatement of the Law of Conflict of Laws, Second:}

\begin{quote}
The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship with the occurrence and the parties under the principles stated in s. 6.\textsuperscript{60}
\end{quote}

Section 6 lists choice of law principles:

Choice of Law Principles
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
   (a) the needs of the interstate and international systems,
   (b) the relevant policies of the forum,
   (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
   (d) the protection of justified expectations,
   (e) the basic policies underlying the particular field of law,
   (f) certainty, predictability and uniformity of result, and
   (g) ease in the determination and application of the law to be applied.

\textsuperscript{57} Dicey, \textit{supra}, note 34, Rule 205 at 1365-66.
\textsuperscript{59} Dicey, \textit{supra}, note 34, Rule 205 at 1409.
\textsuperscript{60} \textit{Restatement of the Law of Conflict of Laws, Second} (1971).
As for section 145(2), it adds:

(2) Contacts to be taken into account in applying the principles of s. 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The exception to the rule in Phillips v. Eyre\(^61\) ought to oust either the *lex fori* or the *lex loci delicti* in an appropriate case, for instance, where the parties have no connection with these places. However, with respect to strict liability, the case for displacement of the general rule in Phillips v. Eyre may be weak since it could be argued that the standard of conduct is intimately connected with the place where it occurred.

The *Restatement of the Law of the Conflict of Laws, Second* contains some specific rules with respect to defamation. Thus, section 149 states:

In an action for defamation, the local law of the state where the publication occurs determines the rights and liabilities of the parties, except as stated in s. 150, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in s. 6 to the occurrence and the parties, in which event the local law of the other state will be applied.\(^62\)

Each communication to a person is a separate publication for choice of law purposes. Multistate defamation is dealt with in section 150:

(1) The rights and liabilities that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in s. 6.

(2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the

\(^{61\text{ (1870), 6 L.R.Q.B. 1.}}\)

\(^{62\text{ Supra, note 60.}}\)
(3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person had its principal place of business at the time, if the matter complained of was published in that state.\(^6\)

On a number of occasions, Canadian lower courts have said that they might have been prepared to adopt the proper law of the tort if it were not for the long line of Supreme Court decisions supporting *Phillips v. Eyre*.\(^6\)

Whether the Supreme Court would adopt the proper law of the tort as a general rule or as an exception to the general rule in *Phillips v. Eyre* cannot be answered with any degree of certainty. In *Interprovincial Co-ops v. The Queen*,\(^6\) the

---

\(^6\) See also, Comment e. Multistate communication involving natural person, *supra*, note 59 at 459:

A state, which is not the state of the plaintiff's domicil, may be that of the most significant relationship if it is the state where the defamatory communication caused plaintiff the greatest injury to his reputation. This may be so, for example, in situations where (a) the plaintiff is better known in this state than in the state of his domicil, or (b) the matter claimed to be defamatory related to an activity of the plaintiff that is principally located in this state, or (c) the plaintiff suffered greater special damages in this state than in the state of his domicil, or (d) the place of principal circulation of the matter claimed to be defamatory was in this state. Other contacts that the forum will consider in determining which is the state of most significant relationship with respect to the particular issue include (a) the state or states where the defendant did his act or acts of communication, such as assembling, printing and distributing a magazine or book and (b) the state or states of the defendant's domicil, incorporation or organization and principal place of business.


Supreme Court of Canada declined to review the rule in Phillips v. Eyre.

In England, in the libel case of the Church of Scientology of California v. Commissioner of Metropolitan Police, the Court of Appeal referred to Boys v. Chaplin. They acknowledged the existence of a limited exception to the double actionability rule enunciated by Lord Wilberforce, namely, that the rights and liabilities of the parties with respect to an issue in tort are to be determined by the law of the state which has the most significant relationship to the occurrence and to the parties.

In Sayers v. International Drilling Co. N.V., a case involving a claim for damages for personal injuries, Lord Denning M.R. said:

The issue raises an important question of private international law. On the one hand, the claim by the plaintiff is a claim founded on tort. In considering that claim, we must apply the proper law of tort, that is, the law of the country with which the parties and the acts done have the most significant connection. That is how I put it in Boys v. Chaplin, [1968] 2 Q.B. 1, 20. I think it is confirmed by what Lord Wilberforce said in [1971] A-C. 356, 391-392, in the House of Lords, though he put it with more scholarship and precision than I could hope to do.

However, more recently, in Coupland v. Arabian Gulf Oil, also a claim for damages for personal injuries, Hodgson J., in the Queen's Bench Division, discussed Boys v. Chaplin but applied the general rule and held that the claim was actionable by the lex fori and the lex loci delicti. His decision was confirmed on appeal.

On the question of the proper law, Hodgson J. stated:

It is clear that the ordinary rule of tort is that the law of the place where the action is being brought – the lex fori – is the law to be applied.

To find an exception to that rule, one has to find an issue, which is decided differently by the two jurisprudences, which is capable of being segregated and which can then be decided by application of what, in effect the back door, is the

---

70 Ibid. at 1145-50.
This passage would seem to suggest that there must be a difference between the *lex fori* and the foreign law with respect to the issue of the nature of the act alleged to be tortious or the defences available before the proper law of the tort becomes applicable.

Whether Canadian courts should follow the criteria of the *Restatement of the Law of the Conflict of Laws, Second* or the governmental interest analysis of Professor Currie would not make too much difference, since the doctrine of the proper law of the tort takes into account the relevant policies of the forum and of other interested states.

In the case of defamation, in order to determine which law has the most significant relationship with the occurrence and the parties with respect to a particular issue, the court would examine the law of the following places: where the defendant did the major act of communication (i.e., assembling the material, printing, distribution, broadcasting); the location of the head office; the principal place of business; the residence, domicile and citizenship of the parties; where the alleged defamatory matter was published; and where the greatest injury and damages were caused to the reputation of the plaintiff. The court would also ask whether the policies of these places and of the forum would also be of relevance. Is the forum primarily interested in protecting its citizens and residents? The place of publication would only be one element to be taken into consideration by the court.

Again, turning to the speeches of Lords Hodson and Lord Wilberforce in *Boys v. Chaplin*, one finds that they did not attach

---


72 *Supra*, note 60.


too much importance to the law of the place where the wrong was committed, especially when it resulted from accidental circumstances. Thus, even if one accepts the view that publication determines the place of the tort, following Lord Guest, one could argue that the lex fori should be disregarded when the publication of the alleged defamatory material in the jurisdiction was purely accidental. The ends of justice would be better served by giving effect to the law which, in view of its relationship with the occurrence and the parties, has the greatest concern with each of the specific issues raised in the litigation.

To fix the liability of the parties, who are not residents, according to a locality with which they have only an accidental connection is unjust especially when it deprives the defendant of a valid defence by another relevant law. In these circumstances the application of the proper law of the tort would be justified as an exception to the general rule in Phillips v. Eyre.

Where conduct and publication occurred in the same state or province, this state or province would have a dominant interest in regulating the defendant's conduct and in determining whether the plaintiff should receive compensation for the injury to his reputation unless he or she suffered substantial damage elsewhere. Where the conduct and publication each occurred in a different state or province the domestic law of the state of publication would most likely be applied when the plaintiff has a settled relationship to that state or province because of citizenship, residence, domicile or doing business there. However, if the state or province of publication is different, its law may not be relevant if it bears little relation to the occurrence and the parties.

The application of the proper law of the tort alleviates the difficulties that arise when publication of an aggregate communication deemed to be defamatory took place in two or more states or provinces. Only one law would be relevant instead of applying the law of each of the states or provinces where publication took place. The domestic law of the state or province where the plaintiff has suffered the greatest injury to his or her reputation would be most relevant and probably point to the law of the place of domicile, residence, or business, provided this was also the place of publication. The plaintiff, who has a right of action under the domestic law of the state or province selected, would recover for the
injury the communication has caused (or may be expected to cause) in all the states or provinces in which the communication was published. Whether this should also be the case with respect to special damages of one kind suffered in one state and of another kind in another state is open to debate.\textsuperscript{75}

D. Choice of Law and the Canadian Constitution

Does the application by provincial courts of their own substantive law, as that of the place of publication, to non-resident foreign plaintiffs and defendants violate the Canadian Constitution? Is it possible to use the principle of territoriality as an instrument of constitutional control over provincial choice of laws rules since Canadian provinces lack the power to legislate extraterritorially? There is no doubt that the provisions of the \textit{Constitution Act} can be used to establish minimum provincial standards in the conflict of laws. However, to date, cases have not, strictly speaking, arisen in the context of choice of law. Most of them dealt with the scope of the exclusive powers of the provincial legislatures as the \textit{Constitution Act} limits provincial powers to matters "in the province."\textsuperscript{76} The constitutional propriety of one province applying the substantive law of another province or jurisdiction or its own law to a dispute pursuant to its own choice of law rule appears never to have been questioned. Presumably the forum’s choice of law rule is a valid aspect of "property and civil rights" in the province, and the foreign law is applied in a formal sense as part of the forum’s domestic law.

In a recent article, Professor J. Swan suggested that questions of choice of law should be resolved by governmental interest analysis.\textsuperscript{77} In the United States in \textit{Allstate Insurance Co. v. Hague},\textsuperscript{78} the United States Restatement of the Law of the Conflict of Laws, Second (1971), s. 150, comment d rejects the single law approach.

\textsuperscript{75} The \textit{United States Restatement of the Law of the Conflict of Laws, Second} (1971), s. 150, comment d rejects the single law approach.

\textsuperscript{76} (1867), 30 & 31 Vict., c. 3 as am. (U.K). See, also, P. Hogg, \textit{Constitutional Law of Canada}, 2d ed. (Toronto: Carswell, 1985) at 269-75.


\textsuperscript{78} (1981), 449 U.S. 301 at 312-13.
the Supreme Court used an analysis of interests as a means of testing the constitutionality of a state's choice of law rules: "For a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." In Canada, an analysis based on the respective interests of competing provincial jurisdictions in having their laws applied coincides with the fundamental requirements imposed by the Canadian Constitution Act that the pith and substance of provincial legislation must aim at a valid objective within the province. However, when the competing jurisdictions are foreign the government interest analysis becomes unmanageable.

In Smith v. Smith, the Manitoba Court of Appeal stated that: "The right of the province to legislate in respect of civil rights is confined to persons resident in the province." Can it be said that the application of its substantive law of defamation by a province to non-residents, based on publication within the province, destroys or interferes with their extraprovincial civil rights? It has been held that the courts of a particular province cannot apply the substantive statutory or common law lex fori to a legal situation that is not sufficiently connected with that province. Thus, publication within the province may not provide such sufficient connection although it is the essence of the tort of defamation. The place of publication standing alone is not the same as the situs of a movable

---

79 (1867), 30 & 31 Vict., c. 3 as am. (U.K.), and see Interprovincial Cooperatives v. The Queen (1976), [1976] 1 S.C.R. 477; The Queen v. Thomas Equipment (1979), [1979] 2 S.C.R. 529 which deal with the regulation of extraprovincial activity.

80 See J.G. Castel, supra, note 73 at 1-15 to 1-24.

81 (1953), [1953] 3 D.L.R. 682 at 690. Here, the Manitoba Wives' and Children Maintenance Act was held not to apply to persons resident in another province.

82 See discussion in P. Hogg, supra, note 76 at 281-82.

83 Re Upper Churchill Water Rights (1984), [1984] 1 S.C.R. 297 reviewing previous cases (impairment of extraprovincial rights may be accomplished validly by a provincial legislature as an incidental effect of a statute that is in relation to a matter territorially within the province and within a head of provincial legislative power: Hogg, supra, note 76 at 271).
or an immovable which justifies the application of the local law of that situs to non-resident foreign parties in litigation pertaining to that movable or immovable.

IV. CONCLUSION

If the occasion arises in multistate defamation cases, it is suggested that Canadian appellate courts, especially the Supreme Court of Canada, adopt the proper law of the tort either as a general principle or as an exception to the general rule in *Phillips v. Eyre*. Thus, whether the tort is committed within or outside of the jurisdiction, the courts would apply one proper law instead of applying the *lex fori* or the law of each of the jurisdictions where publication took place. If the courts are not prepared to do so, they should reject the place of publication as the test for the determination of the *lex loci delicti*. For choice of law purposes, the tort of defamation should be deemed to be committed where the plaintiff suffered the *most* injury to his or her reputation, that is, where substantial damage occurred. Only one law would be relevant. For jurisdiction purposes, the plaintiff should be given a wide choice depending upon the circumstances and provided that the court hearing the case applies the proper law and not its own law as a matter of principle.