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## DAMAGES: A CATALYST FOR JURISDICTIONAL DISPUTES IN AVIATION ACCIDENTS

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**A**VIATION ACCIDENTS that occur in Canada often raise interesting jurisdictional disputes involving potentially enormous financial ramifications for the parties affected by the accident. From our experience, courts in both Canada and the United States appear content to assume jurisdiction over a case even when the link between the litigants and the jurisdiction is slight. The convenience of the parties involved is, to a large extent, irrelevant to this issue. Frequently, the injured party's decision as to where to commence a lawsuit is governed by the size of potential damages that might be awarded in a particular jurisdiction. In this Article, the authors attempt to address why a Canadian plaintiff might, whenever possible, choose to seek redress in the courts of the United States rather than the courts of Canada.

Let us consider a typical fact pattern arising from an aviation accident causing personal injuries. A resident of one Canadian province is injured in an accident occurring in a jurisdiction in which he is not a resident. The resident alleges that maintenance performed or products manufactured in any number of American jurisdictions (by companies residing in numerous jurisdictions) caused the accident. That is to say, allegations of negligence or products liability may link the aviation accident in Canada to several states in the United States. In these circumstances, the initial decision to be made by the injured party generally concerns the jurisdiction in which to commence the lawsuit and the law to be applied in the action.<sup>1</sup> Most impor-

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<sup>1</sup> We have been consulted by American counsel on several of these cases to advise on the laws of Canada.

tantly, as will be discussed in this Article, damages in American courts are substantially higher. Generally, therefore, plaintiffs want their cases to be heard in the United States while defendants want these cases heard in Canada.

There are procedural differences between actions tried in these two countries. In addition to a difference in damages, for example, in Canada there is no constitutionally enshrined right to a trial by jury, such as exists in the United States. The vast majority of products liability-related trials in Canada proceed before a judge alone. Under many of the jurisdictions in Canada, each party has a right to attempt to try the matter before a jury. At the same time, the opposing party has the right to apply to the court to have the trial by jury set aside. Under the British Columbia Supreme Court Rules, Rule 39(27)(a), (b), the court has the power to strike out a jury notice:

- (a) within 7 days for an order that the trial or part of it be heard by the court without a jury on the ground that
  - (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation which cannot be made conveniently with a jury, or
  - (ii) the issues are of an intricate or complex character, or
- (b) at any time for an order that the trial be heard by the court without a jury on the ground that it relates to one of the matters referred to in subrule (25).<sup>2</sup>

British Columbian courts commonly strike out a jury notice where there is a complex products liability claim. The courts reason that complex products liability trials are often lengthy, with complex technical evidence and vast quantities of documents.

Another significant difference in products liability trials in Canada is that strict liability is not applied to manufacturers in products liability cases. In order for a plaintiff to succeed, the court must find that there was negligence on the part of the manufacturer. When the concept of "no strict liability" is combined with a judge hearing the evidence without a jury and with the nature of the evidence in products liability trials, it is more difficult for a plaintiff to succeed in Canada than in the United States where the concept of strict liability and jury trials exist.

However, at the heart of most battles between plaintiffs and defendants as to the proper forum or law to be applied in such cases is the availability of, or limits upon, the various types of

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<sup>2</sup> B.C. Sup. Ct. R. 39 (27)(a)(b) (Can.).

damages available to plaintiffs in different jurisdictions. In the United States, plaintiffs (and their attorneys) can realistically conceive of jury awards which would exceed, literally, by millions of dollars that which might follow from litigating an identical action in Canada. These differences in quantum arise, to a large extent, from differing approaches to calculating non-pecuniary damages and punitive damages.

The purpose of this Article is to provide a description of the Canadian approach to damage awards, which can be used by American readers as a comparison to their system. We have pointed to some of the American jurisprudence, but have not attempted in any way to be comprehensive in our review of the American authorities. It is our opinion that the differences in damage awards can be explained by contrasting the rationale applied to damage awards by courts in the two countries.

## I. NON-PECUNIARY LOSS

### A. THE CANADIAN APPROACH

Canada is made up of ten provinces and two northern territories. Each of these jurisdictions has a trial court upon which federally appointed judges sit. In addition, each jurisdiction has a court of appeal, once again composed of federally appointed judges, to which litigants dissatisfied with trial judgments have a right of appeal. The laws in the various provinces and territories of Canada do not vary substantially. The differences are not considered significant for the purposes of this Article.

Above the twelve courts of appeal is the Supreme Court of Canada. In civil matters, there is no absolute right of appeal to this Court. A litigant must persuade a panel of three justices of the Supreme Court that it should be entitled to "leave" to appeal. In order to obtain leave a litigant must persuade the Court that the issue of law upon which the court of appeal is alleged to have erred is one of public importance or is of such nature or significance as to warrant decision by it.<sup>3</sup> Judgments of the Supreme Court of Canada are binding in *all* courts in Canada.

A judicial cap on damages for non-pecuniary damages in injury cases has been established by the Supreme Court of Canada.<sup>4</sup> By 1978, Canadian trial courts and courts of appeal were,

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<sup>3</sup> Supreme Court Act, R.S.C., ch. 5-26, § 40(1) (1985) (Can.).

<sup>4</sup> There is a major difference between Canada and certain jurisdictions in the United States in claims where a death has occurred. Most death statutes in Canada do not provide for any damages other than pecuniary loss, except for some

for the first time, awarding plaintiffs damages of more than \$1 million (Can.) for personal injuries.<sup>5</sup> In 1978, the Supreme Court of Canada heard three cases, emanating from three provinces, all of which involved catastrophic personal injury, in order to "establish the correct principles of law applicable in assessing damages in the context of traumatic cases."<sup>6</sup> These three cases, *Andrews v. Grand & Toy Alberta Ltd.*;<sup>7</sup> *Arnold v. Teno*;<sup>8</sup> and *Thornton v. Board of School Trustees*,<sup>9</sup> have become known as "the Trilogy," and have since remained the cornerstone for damage assessment in Canadian courts.<sup>10</sup>

The injuries suffered by the plaintiffs in these cases were both severe and permanently debilitating. All three plaintiffs were youthful at the time of their injuries. None was expected to make a functional recovery.

The Supreme Court of Canada held that each of the plaintiffs was entitled to \$100,000 (Can.) in non-pecuniary damages for pain and suffering and loss of amenities of life. The Court stated that "this should be regarded as an upper limit of non-pecuniary loss in cases of this nature."<sup>11</sup>

The rationale underlying the Court's judgment is found chiefly in the reasoning of Justice Dickson (unanimously concurred with) in *Andrews*. He reasoned:

Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions, but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money

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relatively small out-of-pocket expenses. There are no non-pecuniary damages in death claims in Canada.

<sup>5</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (Can.).

<sup>6</sup> *Id.* at 229.

<sup>7</sup> *Id.*

<sup>8</sup> [1978] 2 S.C.R. 287 (Can.).

<sup>9</sup> [1978] 2 S.C.R. 267 (Can.).

<sup>10</sup> *Lee v. Swan*, No. CA018438 (B.C.C.A. Feb. 13, 1996); *Romanick v. Konrad*, 121 D.L.R. 4th 261 (B.C.C.A. 1995); *Skinner v. Royal Victoria Hosp.*, No. 15953186, 1994 Ont. C.J. LEXIS 2638 (Ont. Ct. Gen. Div. Sept. 14, 1994).

<sup>11</sup> *Andrews*, 2 S.C.R. at 265.

can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.<sup>12</sup>

In these circumstances, the Court addressed three possible theoretical approaches, posited by an English commentator, to quantification of non-pecuniary loss.<sup>13</sup> The first was a “conceptual” approach, where each faculty was dealt with as a proprietary asset with an objective value. The Court rejected this approach as “unsubtle.”<sup>14</sup> The second was a “personal” approach, which values the injury in terms of the loss of human happiness by the particular victim.<sup>15</sup> The third was a “functional” approach, which accepted the personal premise of the second, but, instead of attempting to set a value on lost happiness, it attempted to assess the compensation required to provide the injured person “with reasonable solace for his misfortune.”<sup>16</sup>

The Court accepted the “functional” approach, largely upon the basis that it accepted the fact that what had been lost was incapable of being replaced in any direct way.<sup>17</sup> Having so concluded, the Court wrote, “If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities.”<sup>18</sup>

In these circumstances, the Court held that \$100,000 (Can.) provided a rough upper parameter on these awards, outlining as well that “the figures must be viewed flexibly in future cases in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic conditions.”<sup>19</sup>

In the years that have followed, courts have “slavishly” viewed the present value of \$100,000 (Can.) as a “ceiling” for non-pecuniary loss. With inflation, this “ceiling” had risen to \$250,280 (Can.), measured in September 1995 dollars.<sup>20</sup> The Trilogy also

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<sup>12</sup> *Id.* at 260-61.

<sup>13</sup> *Id.* at 261-62.

<sup>14</sup> *Id.* at 261.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 261-62.

<sup>17</sup> *Id.* at 262.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 263.

<sup>20</sup> *Muir v. Alberta*, [1996] 4 W.W.R. 177 (Alta. Q.B.).

sets a standard against which less catastrophic injuries can be measured.

While the Supreme Court of Canada left the door open for awards exceeding the “ceiling” in the proper case, we have been unable to find any cases in recent years in which this has occurred. This is not surprising, given Justice Dickson’s comment in *Andrews* that “[i]t is difficult to conceive of a person of his age losing more than Andrews has lost.”<sup>21</sup>

Interestingly, these cases of catastrophic injuries are one of the rare occasions in Canada where the trial judge can direct a jury on the amount of damages that would be appropriate to award.

### B. UNITED STATES APPROACH

While the authors are not as familiar with American jurisprudence on damages as they are with Canadian case law, a brief review of the authorities makes clear that:

- a. United States courts will, in appropriate circumstances, award much higher damages for non-pecuniary loss than will their counterparts in Canada;<sup>22</sup> and
- b. There are no judicially imposed “caps” upon non-pecuniary loss in the United States.

In *Consorti v. Armstrong World Industries*, the United States Court of Appeals for the Second Circuit addressed non-pecuniary loss in the context of asbestos-related injury.<sup>23</sup>

The plaintiff, John Consorti, worked from 1960 to 1992 for various family-owned insulation businesses. While working in these businesses (at least through the mid-1970s), Consorti was exposed to asbestos products, including some produced by the defendant, Owens-Corning Fiberglass Corp. In 1991, Mr. Consorti began to suffer from back problems. In February 1992, he was diagnosed with pluvial mesothelioma, a terminal form of cancer of the lining of the lung. The trial of this matter was brought in June 1993 as a result of fears that Mr. Consorti had only months to live. On July 22, 1993, a jury returned a verdict of over \$13 million (U.S.), including \$8 million (U.S.) for past pain and suffering and \$4 million (U.S.) for future pain and suffering.<sup>24</sup>

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<sup>21</sup> *Andrews*, 2 S.C.R. at 263.

<sup>22</sup> *Consorti v. Armstrong World Indus.*, 72 F.3d 1003 (2d Cir. 1995).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1005-06.

The court of appeals set aside the \$12 million (U.S.) award for pain and suffering, ordering a new trial unless the plaintiff agreed to accept an award of \$3.5 million (U.S.).<sup>25</sup> In reducing the award for non-pecuniary loss, the court attempted to bring the non-pecuniary damages in line with a series of recent awards made to other sufferers of mesotheloma.<sup>26</sup> Even with the reduction, the award is approximately fourteen times the maximum amount that a similar plaintiff could have been awarded in Canada.

It is interesting, however, to note that the court in *Consorti*, like the Supreme Court of Canada in the Trilogy, recognized the subjective nature of awards for non-pecuniary loss. It held:

While the law seeks by reasonable compensation to make a plaintiff whole, we must recognize that compensation for suffering can be accomplished only in a symbolic and arbitrary fashion. There are at least two serious shortcomings to the endeavor. First, money awards do not make one whole; they do not alleviate pain. Second, there is no rational scale that justifies the award of any particular amount, as opposed to some very different amount, in compensation for a particular quantum of pain.<sup>27</sup>

The court in *Consorti* recognized that “measuring pain and suffering in dollars is inescapably subjective.”<sup>28</sup>

United States courts appear to be applying a “personal” approach to non-pecuniary quantification, as opposed to the “functional” approach mandated in Canada. Rather than providing a sum for “solace,” made in conjunction with a pecuniary award, United States courts appear to be striving to compensate individuals for pain and suffering. This provides some explanation as to why such an astronomical difference exists between non-pecuniary awards in Canada and the United States.

Although it is clear that there is significant U.S. appellate scrutiny over jury awards for non-pecuniary loss, it appears unlikely, in the absence of legislative intervention, that the chasm between non-pecuniary damages in Canada and those in the United States will narrow significantly. There is no indication that, at least in Canada, a philosophical change in this regard is imminent.

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<sup>25</sup> *Id.* at 1015-16.

<sup>26</sup> *Id.* at 1009.

<sup>27</sup> *Id.* (quoting *Gibbs v. United States*, 599 F.2d 36, 39 (2d Cir. 1979)).

<sup>28</sup> *Id.* at 1014.

## II. PUNITIVE DAMAGES

## A. THE CANADIAN APPROACH

Punitive damages may be appropriate to punish the wrongdoer, to prevent the wrongdoer's unjust enrichment, or to set an example that will deter others. The type of conduct required involves wrongful acts that were outrageous or reprehensible and offensive to ordinary standards of decent conduct in the community. This includes conduct which is malicious, vindictive, harsh, or which indicates a contempt for the plaintiff's rights.

Canadian courts have generally shown great reluctance in awarding punitive damages. Indeed, punitive damages, in the context of products liability actions, are very much the exception as opposed to the rule.

The Supreme Court of Canada recently visited the issue of punitive damages in *Vorvis v. Insurance Corp.*<sup>29</sup> The plaintiff was a solicitor in the defendant's legal department who was dismissed for alleged incompetence after approximately seven and one-half years of employment. In the action for wrongful dismissal, the plaintiff included a claim for punitive damages.<sup>30</sup> One issue to be addressed was whether punitive damages were available at all for breach of contract.

The Court found that while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract, although it held that Mr. Vorvis was not, on the facts, so entitled.<sup>31</sup> The Court made clear that, regardless of whether a case is founded in tort or contract, an award of punitive damages "should always receive the most careful consideration and the discretion to award them should be most cautiously exercised."<sup>32</sup>

The Court held as follows with respect to the availability of punitive damages:

When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves, however

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<sup>29</sup> [1989] 1 S.C.R. 1085 (Can.).

<sup>30</sup> *Id.* at 1090.

<sup>31</sup> *Id.* at 1107.

<sup>32</sup> *Id.* at 1104-05.

strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law.<sup>33</sup>

It further adopted the following (which had found approval in the RESTATEMENT (SECOND) OF CONTRACTS): "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."<sup>34</sup> Finally, the Court added: "Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature."<sup>35</sup>

In fact, in Canada, punitive sanctions are, to a large extent, left to the government to implement and prosecute. As is apparent from both this and the previous section relating to non-pecuniary damages, Canadian courts are generally willing to award damages to a plaintiff for objectively calculable losses and little more. Canadian judicial philosophy appears to reflect a belief that the spectrum of compensating damages is itself usually sufficient to achieve a general deterrence against ongoing wrongful behavior.

#### B. UNITED STATES APPROACH

Once again, the authors are not as intimately aware of United States jurisprudence on punitive damages as they are of Canadian law on the issue. It is clear to the authors, however, that courts in the United States believe that they have the latitude to award punitive damages in far more cases than their Canadian counterparts.<sup>36</sup> Reflecting this sentiment is the fact that a number of states have felt it necessary to pass legislation either:

- a. Placing caps on awards of punitive damages;
- b. Providing for payment of sums to state agencies rather than to plaintiffs; and/or
- c. Mandating bifurcated trials with separate proceedings for punitive damages determinations.<sup>37</sup>

Because punitive damage awards are so rare in Canada, no such legislation has been necessary. Canadians view with amazement cases such as the recent decision of the United States Supreme

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<sup>33</sup> *Id.* at 1105-06.

<sup>34</sup> *Id.* at 1106 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981)).

<sup>35</sup> *Id.* at 1107-08.

<sup>36</sup> See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996).

<sup>37</sup> *Id.* at 1618 (Ginsberg, J., dissenting).

Court in *BMW of North America, Inc. v. Gore*.<sup>38</sup> Dr. Gore purchased a new BMW automobile from a dealer in Birmingham, Alabama. After driving the car for approximately nine months, Dr. Gore took the vehicle to an independent detailer to make it look "snazzier than it would normally appear."<sup>39</sup> The detailer detected evidence that the vehicle had been repainted. Dr. Gore had not had any paint work done.<sup>40</sup>

BMW had indeed repainted portions of the vehicle at its vehicle preparation center in Georgia. At trial, BMW acknowledged a nationwide policy (adopted in 1983): If the cost of repairing damage to vehicles prior to sale did not exceed three percent of the suggested retail price, the repair was made and the vehicle sold as new without advising the dealer that repairs had been made.<sup>41</sup> This accorded with legislation in several states.

At trial, Dr. Gore presented evidence that the practice of BMW devalued his vehicle by approximately ten percent, or \$4000 (U.S.). To support his claim for punitive damages, evidence was introduced that BMW had, since 1983, sold 983 refinished cars as new, including fourteen in Alabama. Using the actual damage estimate of \$4000 per vehicle, Dr. Gore sought \$4 million (U.S.) in punitive damages.<sup>42</sup> The jury awarded Dr. Gore \$4000 (U.S.) in compensatory damages, and \$6 million (U.S.) in punitive damages against BMW. BMW appealed.<sup>43</sup>

The Alabama Supreme Court ruled in favor of BMW on a critical point. The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. It reduced the award of punitive damages to \$2 million (U.S.). BMW appealed to the United States Supreme Court.<sup>44</sup>

The United States Supreme Court held, by a 5-to-4 margin, that the \$2 million (U.S.) award of punitive damages, being 500 times greater than the actual harm, "raise(d) a suspicious judicial eyebrow."<sup>45</sup> The award was held to be grossly excessive, ex-

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<sup>38</sup> *Id.* at 1589.

<sup>39</sup> *Id.* at 1593.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1593-94.

<sup>44</sup> *Id.* at 1594.

<sup>45</sup> *Id.* at 1603 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting)).

ceeding the constitutional limit, and was remanded back to the state of Alabama for future proceedings.<sup>46</sup>

American philosophy in relation to punitive damages is clear from this judgment, and the decisions referred to therein. Punitive damages may be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition.<sup>47</sup> These interests reflect scepticism on the part of United States courts (which is not apparent in Canada) that the payment of compensatory damages alone is not a sufficient deterrent to unlawful conduct. In addition, plaintiffs are given, through the mechanism of punitive damages, latitude to *personally* attempt to generally deter such conduct—the potential “reward” for which would be receipt of a sum of money that could conceivably exceed compensatory damages.

To Canadians, punitive damages in the millions of dollars are absolutely unknown. In addition, it is highly unlikely that a case such as *BMW* would attract a plea for punitive damages, let alone win an award for damages at a trial.

In the authors' opinion, the case would have proceeded in a very different manner had it been commenced in the province of British Columbia in Canada. That province has a small claims court limit of \$10,000 (Can.). It is likely, given the fact that the plaintiff's evidence established compensatory damages of \$4000 (Can.), that the claim would have been commenced in small claims court. No costs are awarded in that court, so it is quite likely that the plaintiff would have represented himself before the court. The case would have been heard by a single judge, and the trial would likely have taken no more than a half a day.

An award of \$4000 (Can.) plus interest would, in all probability, have been made. There would have been a right of appeal to the British Columbia Supreme Court, but, given the quantum involved, it is unlikely that such an appeal would have been launched.

In Canada, there is no movement afoot to expand the availability of punitive damages. In the United States, as noted by Justice Scalia in a dissenting opinion in *BMW*, there does appear to be some “concern about punitive damages that ‘run wild.’”<sup>48</sup> This concern has manifested itself to the extent that, to use the

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<sup>46</sup> *Id.* at 1591.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1610 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

words of Justice Scalia, "the measure of civil punishment poses a question of constitutional dimension to be answered by this Court."<sup>49</sup> Similarly, legislatures in the United States have seen fit to attempt to limit punitive damages.<sup>50</sup>

Although the two countries appear to be moving somewhat closer in relation to punitive damages, the gap is still a large one. This gap is so significant that it will probably take dramatic legislation in the United States to completely bridge the gap. We have no reason to believe that this is likely to occur in the near future.

### III. CONCLUSION

Access to jury trials and philosophical differences between Canadian and American courts relating to quantification of non-pecuniary damages, and availability of punitive damages will continue to drive jurisdictional disputes between plaintiffs and defendants involved in some aviation accidents. There is no evidence that these differences will soon be resolved.

Courts in both Canada and the United States speak of the necessity for certainty and predictability in relation to damages to allow potential litigants to reasonably assess the cost of doing business. The differences in approach between the two countries, however, serve to undermine this certainty. Canadian companies, in particular, may, in conjunction with accidents which occur in Canada, face lawsuits in foreign jurisdictions, claiming damages especially higher than they may ever have expected. This being the case, it is not surprising that parties fight vigorously to have actions tried in the forum of their choice.

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<sup>49</sup> *Id.* at 1611.

<sup>50</sup> *See supra* note 37 and accompanying text.